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First Amendment Rights: Protecting Commercial Speech

By Lizzy Tan

The First Amendment protects several basic liberties, including freedom of speech. However, not all types of speech are equally protected. Specifically, the extent to which commercial speech should be protected when testing content-based laws, or regulations that are based on the substance of the message being communicated, and content-neutral laws, or restrictions on the time, place, and manner of the message, against strict scrutiny and immediate scrutiny is at issue. In this paper, I will discuss the applications of two levels of judicial review, strict and intermediate scrutiny, in major landmarks of commercial speech case history to propose that intermediate scrutiny, as outlined by the *Central Hudson* test, best prevents citizens' speech from being unnecessarily restricted.

The Supreme Court has defined commercial speech as speech where the speaker is more likely to be engaged in commerce, the intended audience consists of actual or potential consumers, and the content of the message is commercial in character[1]. This form of speech enjoys "diminished protection," which the government can regulate in traditional public forums, such as libraries or parks, to preserve public interest. Commercial speech is neither unprotected speech, like pornography or fighting words, nor consistently protected speech, like political or religious expression. However, the protection of commercial speech, and even the definition of commercial content itself, is informed by the application of judicial review. Both state and federal courts have used strict scrutiny and intermediate scrutiny to decide commercial speech cases. These are the upper two of three tiers of review: rational basis review, intermediate

[1] Legal Information Institute, *Commercial Speech*, CORNELL UNIVERSITY LAW SCHOOL (last visited April 26, 2016), https://www.law.cornell.edu/wex/commercial_speech.

scrutiny, and strict scrutiny. In the context of commercial speech, which is traditionally more regulated than other forms of speech, I will focus on the latter two.

Intermediate scrutiny, the less severe level of scrutiny between the two, demands that the law or regulation in question serves an important government objective and is substantially related to achieving the objective. For example, a state law limiting the time frame during which a paternity suit may be filed to six years or less in order to filter stale or fraudulent claims would not pass intermediate scrutiny, because the stipulated six-year time frame is not a substantial factor in promoting the government objective: the conservation of state resources. A stronger policy that could pass intermediate scrutiny might require proof of DNA testing before a paternity suit may be filed.

Strict scrutiny, the highest level of scrutiny applied by courts to government actions or laws, requires the government to prove that there is a compelling state interest behind the challenged action or law. It is important that the law is necessary to achieve the state interest – that is, it must be narrowly tailored to do so. In 1944, the Supreme Court upheld Executive Order 9066 as constitutional, granting the United States military the power to remove all those of Japanese descent from public areas into internment camps[2]. This case, *Korematsu v. United States,* was also the first application (and a unique example) of the strict scrutiny standard: the Supreme Court deemed that the executive order fulfilled the government's national security objectives after the attack on Pearl Harbor[3].

As mentioned earlier, there are several cases throughout United States legal history that involve commercial content. I consider and will outline several notable landmarks throughout this paper. Cases like *Valentine v. Chrestensen, Bigelow v. Virginia,* and *Perry Education Ass'n*

[2] Korematsu v. United States, 323 U.S. 214 (1944).
[3] *Id.*

v. Perry Local Educators Ass'n suggest the influence of changing national attitudes on legal philosophy, background and context(s) of cases, and other subjective facts on the formation, application, and review of commercial speech laws. The *Reed v. Town of Gilbert* case is an example of how distinguishing different kinds of speech can be arbitrary and unconstitutionally discriminatory in this case. Lastly, the *Central Hudson* test (*Central Hudson Gas & Electric v. Public Service Commission)* provides a more holistic, less severe alternative to tests of strict scrutiny to determine whether commercial speech restrictions are constitutional; this intermediate scrutiny encourages regulations to restrict speech minimally.

While speech regulations on unprotected categories of speech like pornography or fighting words generally pass strict scrutiny, content-based regulation on any other area of speech is deemed unconstitutional unless the government can prove that the policy is necessary to achieve the government interest and is not too broadly or vaguely written. This is supported in *Perry Education Ass'n v. Perry Local Educators Ass'n*, a case in which a teachers union, Perry Local Educators' Association (PLEA), was denied distribution of informational brochures via the school district mailboxes[4]. However, an interesting fact to note is that the respondent teachers' union, PLEA, was a competitor advertising membership to instructors in Perry Township, where Perry Education Association (PEA), the petitioner, was already the union for teachers. Was the preservation of the collective-bargaining agreement a subjective influence on the case, and if so, can the application of strict scrutiny be consistently trusted?

The Supreme Court's decision concluded that the speech of the rival teachers' union, PLEA, was not suppressed because the mail system was not a public forum, or a place that has been set aside for general use by the public for speech-related purposes, through which PLEA could freely advertise, but an exclusive privilege granted to PEA through its collective-

[4] Perry Educ. Ass'n v. Perry Educators' Ass'n, 460 U.S. 37 (1983).

bargaining agreement with the school board[5]. The Court's decision declared that speech in nonpublic forums can be regulated on the "basis of subject matter and speaker identity" and such restrictions can still pass strict scrutiny[6]. This decision endangers citizens' speech rights by setting a precedent that establishes that speech regulations may still pass the most stringent form of scrutiny simply if the forum, not the content, of the speech is in question.

Content-neutral speech restrictions are restrictions that "are justified without reference to the content of the regulated speech.[7]" While content-based regulations are subject to strict scrutiny, content-neutral regulations are deemed constitutional so long as the restriction does not restrict the speech itself, but outlines alternative mediums through which the message may be conveyed. For example, a law requiring permits to parade or demonstrate in public areas fulfills the government interest of maintaining fire code capacity standards and public order; however, if permits are never granted to pro-marriage equality demonstrators, the law would be deemed unconstitutional for restricting a group's expression rather than merely the time, place, and manner through which the group may communicate. The *Ward v. Rock against Racism* decision established that content-neutral laws do not need to be as explicitly defined as content-based laws are – it is only important that the government interest would be achieved less effectively without them[8]. This 1989 case involved members of a New York City rock group whose high-decibel concerts in Central Park received noise complaints from residents in the surrounding neighborhoods. The residents mandated the use of city-provided sound systems and technicians for music groups. In response, Rock against Racism contended that controlling their sound equipment and technicians for their for-profit concerts– the commercial aspect – was part of their

[5] Frequently Asked Questions - Assembly, FIRST AMENDMENT CENTER (Last visited April 5, 2016), http://www.firstamendmentcenter.org/faq/frequently-asked-questions-assembly.
[6] Perry Educ. Ass'n v. Perry Educators' Ass'n, 460 U.S. 37 (1983).
[7] Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).
[8] Ward v. Rock Against Racism 491 U.S. 781 (1989).

First Amendment rights. In the end, the Supreme Court upheld the policy and stated that, regardless of the content in question, the sound ordinance served the government interest in maintaining order[9]. However, the issue is that while the government may enforce content-neutral laws so long as speech itself is not restricted, the government is not required to adopt the least intrusive restriction. Ultimately, content-neutral speech regulations may not protect citizens' speech from being overly restricted.

Valentine v. Chrestensen (1942), historically considered the first case concerning commercial speech, highlights the conflict that arises when considering the constitutionality of content-based regulations, including when commercial content exists with another type of speech that enjoys greater First Amendment protection. The 1942 Chrestensen case took place at a time when support for New Deal-era extensive regulation was high, in response to the Great Depression of the previous decade. The 1930s-70s exemplified the era of cooperative federalism, during which the power of the federal government was greatly expanded and extensive regulation became more common. President Franklin D. Roosevelt's New Deal also included reforms and new regulations in fiscal policy, the banking industry, securities, relief, and public works. As such, cultural attitudes may be an overlooked influence when evaluating speech restrictions, and challenges the utility of such a high level of review as strict scrutiny.

Respondent T.J. Chrestensen, violated a New York City municipal ordinance against "commercial advertising matter" (Section 318 of the Sanitary Code) by passing out handbills advertising his privately owned World War I submarine exhibit[10]. The handbills detailed an admission fee, an advertising qualifier by which content may be deemed commercial. In response, New York City Police Commissioner Lewis Valentine warned Chrestensen to cease

[9] *Id.*
[10] Valentine v. Chrestensen, 316 U.S. 52 (1942).

distributing the illegal handbills, saying that only handbills containing "information or public protest" were permitted[11]. Chrestensen accordingly printed modified handbills, replacing the offending admission fee information with a protest against the City Dock Department's refusal to grant his submarine dockage. These new handbills technically met the ordinance qualifications by featuring both information and public protest without the admission fee, but the Police Department nevertheless prohibited the distribution of the two-sided bill.

When the case was brought before the Supreme Court, the Court ruled that Chrestensen still could not distribute his amended handbills. Chrestensen's publications were considered "purely commercial advertising" by the Court and were therefore not protected by the First Amendment[12]. This ruling contended that the Constitution imposes no restraint on government(s) regarding content-based regulations. While this decision established local and state governments' autonomy to impose commercial speech restrictions, it also raised the question of how "commercial advertising matter" can be consistently distinguished from other kinds of speech - such as the political content in Chrestensen's handbills. As described earlier, content-based regulations must be narrowly tailored in order to pass strict scrutiny. As such, one is left asking, were the handbills wholly considered commercial content, and therefore lawfully subject to the restrictions? Or did the presence of commercial aspects within the expression in its entirety render it "commercial"? These questions highlight the difficulties of identifying commercial speech, and may also reflect broader attitudes toward regulation. Perhaps the national attitude toward restrictions, especially on controversial topics like the recent World War II, is an overlooked influence on legislation and judicial review.

[11] *Id.*
[12] *Id.*

On the other hand, the 2015 Supreme Court case, *Reed v. Town of Gilbert* is a recent illustration of the inconsistencies of applying content-neutral laws. In Gilbert, Arizona, an ordinance restricted the size and timing of "temporary directional signs" and signs for businesses for commercial purposes but exempted political or ideological signs "communicating a message or ideas." [13] In other words, signs for religious and commercial groups' were more strictly limited on size, location, number, and duration than those for political, ideological, and homeowners' associations'. Good News Church, a small church in Gilbert, used signs to advertise service times and locations, which were held in various, temporarily rented spaces. Despite the ideological overtones, Good News Church was subject to the more stringent restrictions. In 2008, Good News Church's pastor, Clyde Reed, filed suit against the town of Gilbert to claim that the Sign Code violated their First Amendment rights. Both the U.S. District Court of the District of Arizona and the Ninth Circuit Court of Appeals ruled against Good News Church, finding the Sign Code constitutional and "content-neutral."[14] However, the case was taken to the Supreme Court where the decision was reversed last June. The Court found the Sign Code unconstitutional and lacking in legitimate "compelling interest," such as de-cluttering roadsides, that allowed for such discrimination against a particular kind of content[15]. While limiting certain types of signs and speech (especially unpopular kinds) may promote the government's objectives, the lack of restrictions on other kinds of signs and speech may negate the intended results of restrictions like the Sign Code.

The conflicting rulings seen in *Reed v. Town of Gilbert* prove that speech cannot be consistently discerned by content-neutral regulations. Both the U.S. District Court of the District

[13] Reed et al. v. Town of Gilbert, Arizona et al., Oyez, https://www.oyez.org/cases/2014/13-502 (last visited Apr 26, 2016).
[14] Reed v. Town of Gilbert, 576 U.S. (2015)
[15] *Id.*

of Arizona and the Ninth Circuit Court of Appeals deemed that the group's messages should be subject to the stringent ordinance restrictions, which they considered constitutional[16]. The Supreme Court, on the other hand, points out that the distinction between the types of signs (political, ideological, and event-promoting) were content-neutral and that the town's ordinance failed intermediate scrutiny. Even if the local government's "compelling interests" are considered, the Sign Code's distinctions were inconclusive and discriminated against only certain kinds of speech.

Intermediate scrutiny targets regulation that impacts the message of free speech by restricting the time, place, and manner by which it occurs – if regulations like the Gilbert Sign Code mandate that the speech cannot take place at all, the regulations fail intermediate scrutiny. Compare this to strict scrutiny, as reviewed in the above content-based case: a higher standard of review that requires more restrictive tailoring to further a compelling, not just important, governmental interest[17].

Thus far, the inconsistencies of applying content-based and content-neutral laws have been examined. As mentioned above, several milestones in commercial speech case history also illuminate other inconsistencies. In *Bigelow v. Virginia*, a case in which a Charlottesville, Virginia newspaper editor was charged with violating a state law banning the encouragements of abortions, the Supreme Court held that the presence of "commercial aspects" in advertising "does not negate all First Amendment guarantees[18]." That is to say, the First Amendment should protect advertisements – "commercial speech" – from state bans or prohibitions if the product is clearly legal in the place it is advertised. However, court precedents prior to the case had largely

[16] *Id.*
[17] *Compelling-State-Interest-Test Law & Legal Definition*, US LEGAL, INC. (last visited April 26, 2016), http://definitions.uslegal.com/c/compelling-state-interest-test/.
[18] Bigelow v. Commonwealth of Virginia, 421 U.S. 809 (1975).

considered advertising merely as commercial speech, granting it little to no First Amendment protection. Perhaps at the time, abortion's recently-decided status as a constitutionally protected fundamental right was the main influence in the Court's decision. *Roe v. Wade* was pending at the time Bigelow's appeal first reached the Supreme Court, and action on his case was deferred until after *Roe v. Wade* was decided. As discussed in the *Valentine v. Chrestensen* case, cultural shifts (in this case, the New Deal Era's promotion of government regulation) may be considered an influence on judicial review. Furthermore, the qualification of commercial content is perhaps also dependent on changing attitudes toward the products or procedures the speech promotes, which further increase the necessity of a less stringent form of judicial review.

The issue of inconsistent discrimination is best addressed by the application of intermediate scrutiny through the *Central Hudson* test, a result of the *Central Hudson Gas & Electric v. Public Service Commission* case. Using the four steps of the test, a court may determine whether commercial speech restrictions violate the First Amendment:

I. Whether the commercial speech concerns a lawful activity and is not misleading;
II. Whether the government interest asserted to justify the regulation is "substantial";
III. Whether the regulation "directly advances" that government interest; and
IV. Whether the regulation is no more extensive than necessary to serve that interest.[19]

As discussed previously, commercial speech is neither wholly unprotected nor protected speech. The *Central Hudson* test can bridge the discrepancy between these two approaches by promoting consumer protection while freeing speech from overly strict regulation. The test focuses on whether the content of the speech is illegal, rather than discerning whether the forum for speech is appropriate, as established in the *Perry Education Ass'n v. Perry Local Educators Ass'n* case. *Central Hudson* still considers the relationship between the regulation and the substantial government interest. Importantly, unlike the *Ward v. Rock against Racism* loophole

[19] Central Hudson Gas & Elec. v. Public Svc. Comm'n, 447 U.S. 557 (1980).

that allowed overbearing restrictions on speech, the *Central Hudson* test evaluates the impact of speech regulations.

By applying the *Central Hudson* test, the Supreme Court has often arrived at decisions that protect commercial speech, such as in *Cincinnati v. Discovery Network, Inc.* (1993). The defendant, a publishing company (Discovery Network, Inc.) that advertised its adult educational services in free magazines, had been granted permission by the city of Cincinnati to place its newspaper racks on public property in 1989. However, the City Commission of Public Works revoked the permit the following year on the grounds that the racks were eyesores and threatened public safety. Similarly to T.J. Chrestensen's advertisements in the *Valentine v. Chrestensen*, the free magazines were considered "commercial handbills" by the city to which First Amendment protection did not apply. Only sixty-two racks (belonging to Discovery Network, Inc. and another publishing company, Harmon Publishing) of the more than 1,500 news racks were removed, and racks containing conventional newspapers were unaffected. By the *Central Hudson* test, the restriction against commercial matter did not achieve the government interest by the least restrictive means. Instead of regulating the size, shape, appearance, or time periods of news racks with commercial advertising, the affected news racks had been removed altogether. The Supreme Court also supported the *Central Hudson* decision by holding that while commercial speech is not as protected as noncommercial speech, it cannot be restricted without adequate, demonstrable clause. In other words, while the government is allowed to restrict commercial speech on public property, it must justify the regulation, especially those that are content-based, by demonstrating a "reasonable fit" between the policy and the stated government interest[20]. Had the content-based permit's constitutionality been decided by applying strict

[20] Cincinnati v. Discovery Network, Inc., U.S. (1993).

scrutiny alone, the Supreme Court may have found the permit requirement neither overly broad nor unnecessary in achieving the government's safety objective.

Another affirmation of the utility of the *Central Hudson* test is *44 Liquormart, Inc. v. Rhode Island*, which unanimously invalidated the state's restrictions on advertising the price of alcohol[21]. In 1956, the company 44 Liquormart Inc., after being fined for an advertisement that technically met the Rhode Island anti-alcohol advertising regulations, filed suit against the Rhode Island Liquor Control. As discussed earlier, a content-based regulation like the prohibition of alcohol price advertisements must directly advance the government interest in order to be considered constitutional. Using the *Central Hudson* test, the Court concluded that the state failed to prove that excluding prices from alcohol advertisements directly furthered interest in reducing alcohol consumption, and that the ban was more extensive than necessary[22]. As in *Cincinnati v. Discovery Network*, the Court suggested that less restrictive regulations could achieve the desired government interest; perhaps, in this case, higher taxes on alcohol or educational campaigns against alcohol abuse.

Currently, the *Central Hudson* test remains a common evaluation method to measure restrictions on commercial speech, by content-neutral laws. By the application of the *Central Hudson* test, the government may protect free speech – including commercial speech – while maintaining restrictions on the negative externalities or illegal products that the speech describes. For example, to achieve a goal to reduce underage tobacco use, the government may focus on measures that do not include the traditional banning of speech related to tobacco or tobacco advertisements, but on actions like stricter enforcement, banning the possession of tobacco for

[21] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).
[22] Cincinnati v. Discovery Network, Inc., U.S. (1993).

minors, anti-smoking educational campaigns, or requiring licenses for retailers. However, one complaint against the *Central Hudson* test is that it is subjective in character, raising the issue that courts (including the Supreme Court) may be influenced by popular will or current legal trends to inconsistently decide whether restrictions on commercial speech were narrowly tailored. However, considering the aforementioned flaws and loopholes in commercial speech regulation, the *Central Hudson* test may be the most consistent means of identifying unnecessarily restrictive regulations on speech.

The restrictions on commercial speech have been expanded several times in the past century, leaving us with disconcerting precedents. It is pertinent to address the extent to which commercial speech should be legally protected, including how such discrimination can be done consistently. The Central Hudson test answers the question of how evaluating commercial speech laws can be more concretely approached. In essence, applying the *Central Hudson* test weighs the interests of the commercial body against those of government regulators, but requires regulation to directly advance the government's interest and not overly restrict speech. Though it can be argued the *Central Hudson* test is too dependent on subjective deliberation, it is in my opinion the best test to allow governments to further important and compelling interests while preventing unnecessary restrictions on free speech. Although discerning consistent tests for commercial speech laws remain contentious, the underlying objective of such regulations should remain aligned with the protection of free speech that the First Amendment offers. In the meantime, harsh stipulations on "commercial advertising matter" may unnecessarily constrain civilians from exercising their constitutional rights.

Zindagi aur Maut: The Death Penalty and Justice in Contemporary Pakistan

By Myra Ali

Introduction

Capital punishment is a quintessential modern international human rights issue and a source of major contemporary discourse. It brings into question both personal and legal ethics, as well as the criminal justice process as a whole. While most issues cannot be boiled down to a black and white framework, the death penalty is one that nations seem to fall along such lines — either pushing to preserve or to abolish the punishment. Within that spectrum, we see a number of different practices and methods of implementing the death penalty. Nations with capital punishment in place today vary greatly; these variations range from what crimes warrant the sentence to how the sentence is carried out. It is within these smaller nuances that we are able to see the broad effects that such a punishment has on societies and cultures that uphold it today. In the postmodern world, we continue to see past institutions remodeled and reshaped, or occasionally removed altogether. Capital punishment is a prime example of this historical trend.

Today many major global human rights institutions advocate for the abolishment of the death penalty, such as Amnesty International, the Office of the United Nations High Commissioner for Human Rights, and Human Rights Watch. While these organizations are not representative of an international consensus on the issue of capital punishment, they signify a major shift in criminal justice reform from the late 20th century onward. Both the United Nations and the European Union have taken the abolition of the death penalty as official stances of their organizations — abolition is a hard and fast prerequisite for admittance into the EU. It is important to recognize that the abolition of the death penalty is by no means a marker of an

equal, just, and/or fair criminal justice system. In the case of the United States, the death penalty is legal in 31 states, amounting to 62 percent of the country. Even so, it could be argued that capital punishment is more or less a moot point in a nation with a police brutality epidemic.[1] While institutional injustices and prejudices have surfaced in the practice of the penalty in the US (roughly 42 percent of the death row population in the US is black, while the total black population of the US is about 14 percent), in retrospect it means less in a country where police can seemingly legally shoot unarmed black bodies.[2] Although the abolition of the death penalty has become an international movement with a considerable backing, it is not indicative nor symbolic of true justice in the criminal or penal codes that adopt its removal.

The history of the death penalty in postcolonial states is particularly complex, and poses a considerable challenge to ensuring a just and fair criminal justice system. In the case of Pakistan, capital punishment has become representative of shifts in political ideology and regime change. The Pakistani penal code has a history of including the death penalty as a form of punishment, as well as implementing a moratorium on executions. Capital punishment has resurfaced as a major legal issue in the country, due to its partial reinstatement in 2014, followed by its full reinstatement earlier in 2015. After the Peshawar attacks in December of 2014, where over 130 children were killed at an army public school, the ban was lifted to allow for the execution of criminals convicted of terrorist activities. Post Zia-ul-Haq's 'shariafication' and legal reforms in the late 70's through the late 80's, the death penalty became more widespread and faced criticism for its liberal use and the marginalization it institutionalized of the impoverished, as well as ethnic and religious minorities.

[1] States With and Without the Death Penalty, Death Penalty Information Center,. (2016), http://www.deathpenaltyinfo.org/states-and-without-death-penalty.
[2] *Id.*

In this paper, I plan to look at the history of the Pakistani penal code post-1947 independence, with a focus on the institution of capital punishment. I will look at the period right after Pakistan's independence, the changes to the punishment during the Zia-ul-Haq years, and finish with the state of the death penalty in the 21st century, including where it stands today. It is important to note that not much critical, scholarly work exists on this subject, and the work that exists did not begin to surface until after the Zia-ul-Haq years, right before Benazir Bhutto became prime minister. The bulk of what has been written is mostly statistics and legal code facts, and really only appears after the turn of the century. Regardless, this is an important topic and deserves valuable scholarly consideration — particularly now, in light of the reinstatement of the sentence. Furthermore, Pakistan has one of the largest death row populations in the world, between 6,000 and 8,000 people, although some postulate even more (note: sentences, not executions).[3]

It is essential to deconstruct this policy and establish a critical evaluation, in order to see that justice is served fairly and properly. I will show that this policy has been used disproportionately to marginalize those that are most vulnerable. As such, I will argue that the death penalty in Pakistan, as it is today, must assume an indefinite moratorium until it can be legally reevaluated and restructured to ensure that it is just in its application.

I. Pakistani Penal Code: Colonial Legacy through 1977

While India and Pakistan gained independence from the British in 1947, their legal structures are another story. The 1860 Indian Penal Code was created during the British Raj by the British Colonial Empire.[4] In 1947, after independence, Pakistan adopted the 1860 Indian

[3] Death Penalty Advocacy, Foundation For Fundamental Rights, http://www.rightsadvocacy.org/death_penalty.html (last visited Dec. 4, 2015).
[4] Pakistan Penal Code (108, 1860),http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html#108.

Penal Code in it's entirety, becoming the Pakistani Penal Code (PPC). The PPC listed capital punishment as a possible legal sentence for a number of crimes:

- Section 121 PPC – "Waging or attempting to wage war or abetting waging of war against Pakistan"
- Section 132 PPC – "Abetment of mutiny, if mutiny is committed by an officer, soldier, sailor or airman in the Army, Navy or Air Force of Pakistan"
- Section 302 PPC – "Murder of another person"
- Section 303 PPC – "Murder committed by a life convict"
- Section 364 PPC – "Kidnapping or abducting in order to murder or subject to grievous bodily harm"
- Section 396 PPC – "Dacoity with murder: if any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, everyone of those persons shall be punished"
- Section 402-B PPC – "Committing or conspiring or attempting to commit or bet the commission of hijacking"
- Section 402-C – "Whoever knowingly harbours any person whom he knows or has reason to be a person who is about to commit or has committed or abetted an offence of hijacking, or knowingly permits any such persons to meet or assemble in any place or premises in his possession or under his control."[5]

It is important to note the distinction between Section 302 PPC ("Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine") and Section 303 PPC ("Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death").[6] Section 303 PPC is exceptional in that it was the only code with a compulsory capital punishment sentence in the original 1947 PPC, all of the other sections list death as a possible sentence.

However, Section 302 PPC is still important, as prior to the turn of the century, this was the offence "for which most people [were] sentenced to death in Pakistan."[7] In English law (which informed the 1860 Indian Penal Code), murder requires malice. Section 302 PPC cases can be divided into four categories (from most common to least common cause for murder in

[5] Pakistan Penal Code (121-402, 1860), http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html#.
[6] Pakistan Penal Code (303, 1860), http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html#*303*.
[7] Bukhari, Maqsooma, Capital Punishment in Pakistan (Image Books 1994).

Pakistan): revenge, honor, wealth or property, provocation/'heat of the moment'.[8] The judicial approach in sentencing extremities varies between each one. In this pre-Qisas and Diyat Ordinance structure of law — restructuring ordinance introduced by the Shariat Appellate Bench of the Supreme Court of Pakistan in 1990 — relating to capital punishment, there is one thing in common between these different murder causes.[9]

The majority of those involved in these cases are underprivileged and from low socioeconomic classes.[10] While the bulk are from villages or provincial areas, those from cities or urban areas are predominantly working class and sit on the lower end of a stratified society. Another factor that reinforces this institutional structure is the lack of an adequate, official legal aid system, which can catalyze the miscarriage of justice for those who are economically disadvantaged.[11] The court does provide an attorney in criminal cases, however, at the provincial level the High Court, who provides the final approval for execution, usually limits this during the trial and sentencing process. This does not apply to the Supreme Court appeals at the national level, which is impossible without adequate funds due to the high cost of legal fees and also where the death penalty can be converted to a lesser sentence.[12]

II. Pakistani Penal Code: Qisas and Diyat Ordinance

From the establishment of the PPC, the death penalty has been an institution built on uneven ground. With the declaration of martial law in July 1977 by Zia-ul-Haq came the 'shariafication' of Pakistani law and society, led by the creation of the Federal Shariat Court (FSC). The FSC had, and still has, the grounds to challenge and change any law in the country

[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Latif Hamdani, Yasser. The Crisis of Legal Aid in Pakistan, http://yasserhamdani.com/index.php.
[12] BUKHARI, MAQSOOMA, CAPITAL PUNISHMENT IN PAKISTAN 39 (Image Books 1994).

other than the Constitution and Muslim Personal Law that may be regnant to Islam.[13] This gives the FSC an immense jurisdiction that includes the entirety of the PCC. Because of the presence of the FSC, while the Qisas and Diyat Ordinance was propagated in 1990, its basic principles had more or less been in practice since 1979. Criminal Law Amendment Ordinance VII of 1990, colloquially called the Qisas and Diyat Ordinance, was introduced in 1990 by then President Ghulam Ishaq Khan, based on the likeness of changes during the Zia-ul-Haq years. The ordinance became an act in 1997, after being reinstated over 20 times (the life of an ordinance, constitutionally-speaking, is four months).[14] As a result, Chapter 16 of the PPC was wholly redone — Sections 229 to 338 of the PPC were rewritten with new provisions and vernacular.

These sections of the PPC related to offences impacting, injuring, and/or harming the human body. The FSC found these sections to be repugnant of Islam because they did not allow for qisas (retaliation) nor diyat (blood money), determined to be an Islamic right, in the case of bodily harm. On these grounds, Sections 388 to 399 were also found repugnant, as they did not account for qisas. The primary difference in criminal law impacted by the Ordinance was the privatization of justice: crimes affecting the human body were no longer violations of the state or society, but rather violations of an individual's body and self; what came with this shift was also a change in burden of proof to be on the defendant. This means that if one's walis (legal heirs) sought not to prosecute, no prosecution would take place (the only exception to Section 302 (a) PPC). In the cases where the deceased/impacted party's family wanted to go forward with legal proceedings, they could legally seek qisas or diyat. Under the Ordinance, parts of the Criminal Procedure Code of 1898 were also impacted, making it so that "legal heirs of a deceased person

[13] *Id.*
[14] *Shah, Waseem Ahmad.* Pros and Cons of Qisas and Diyat Law, *Dawn, Sep. 16, 2013, at http://www.dawn.com/news/1043236.*

were authorised to enter into compromise [seek diyat] with a killed even at last moment before execution of sentence."[15]

Section 323 PPC outlines diyat as such:

> The Court shall, subject to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah and keeping in view the financial position of the convict and the heirs of the victim, fix the value of diyat which shall not be less than the value of thirty thousand six hundred and thirty grams of silver.

The Government of Pakistan sets the rate every July; for the 2014-2015 year the diyat rate was Rs. 1,923,843/-, roughly $18,460.33.[16] Returning back to the last section where it was noted that the majority of those impacted by relevant laws are poor, to an extent of poverty that sometimes they cannot even afford a lawyer. As such, the majority of those charged and convicted of "repugnant" crimes often do not have access to the required diyat amount, and have no option but to face their death sentence.[17]

The Qisas and Diyat Ordinance also expanded the list of offenses that may receive a capital punishment, in addition to the offenses listed in the previous section, to include (this list is reflective of the changes to the Hudood Ordinance of 1979 as passed by the Protection of Women Act of 2006, meaning original passage of the 1990 Ordinance included more offenses):

- Section 301 PPC – "Causing death of person other than the person whose death was intended"
- Section 194 PPC – "Giving or fabricating false evidence with intent to procure conviction of capital offence"
- Section 15 of the Offences Against Property (Enforcement of Hudood) Ordinance – "Haraabah"
- Section 7 of the Anti-Terrorism Act – "A scheduled offence likely to create terror or disrupt sectarian harmony"
- Section 127 of the Railways (Amended) Act – "Sabotage of the railway system"
- Section 354-A PPC – "Assault or use of criminal force to woman and stripping her of her clothes"

[15] *Id.*
[16] *Sani, Aoun.* What Price the Blood, *TNS, July 19, 2014 at http://tns.thenews.com.pk/blood-money-in-qisas-and-diyat-laws/.*
[17] Bukhari, Maqsooma, Capital Punishment in Pakistan 55 (Image Books 1994).

- Section 5 of the Offence of Zina Ordinance (Enforcement of Hudood) – "Zina liable to hadd"
- Section 365-A PPC – "Kidnapping or abducting for extorting property, valuable security, etc."
- Section 13 of the Dangerous Drugs Act – "Importing, exporting into and from Pakistan dangerous drugs"
- Section 14 of the Dangerous Drugs Act – "Importing, exporting inter-provincially or manufacturing drugs"
- Section 9 of the Control of Narcotics Substances Act – "Drug smuggling"
- Section 2 of the High Treason Act – "High treason"
- Section 31 of the Pakistan Army Act – "Mutiny and subordination"
- Section 26 of the Pakistan Army Act – "Giving up military passwords, intentionally using unassigned military passwords"
- Section 24 of the Pakistan Army Act – "Offences in relation to enemy, treachery, mutiny, and cowardice"
- Section 13-A(1) of the Pakistan Arms (Amendment) Ordinance – "Arms trading"
- Section 295-C PPC – "Use of derogatory remarks, etc., in respect of the Holy Prophet"

Under the 1947 PPC/1860 Indian Penal Code, only Section 303 held a mandatory capital punishment sentence. However, this was changed in 1992 with the rewriting of Section 295-C PPC, or the infamous "Blasphemy Law," omitting life imprisonment:

> **Use of derogatory remarks, etc., in respect of the Holy Prophet:**
>
> Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, and shall also be liable to fine.

The introduction of anti-terrorism laws extended this mandatory sentencing, beginning with the Anti-Terrorism Act of 1997. Most of this act was ruled unconstitutional, but amendments have been made to achieve the same goals, albeit more legally substantiated way, as well as the passage of additional anti-terrorism laws. Most recently, in the field of these laws, the Anti-Terrorism Act was amended in 1999, authorizing Anti Terrorism Court (ATC) throughout the country. The ATC is a specialized form of military courts that have played a critical role following the lifting of the moratorium in December of 2014.

It is important to note that this ordinance was a Presidential Ordinance (similar to an Executive Order in the US), and not an act of parliamentary legislation — though it did become one officially in 1997. Under Article 89 of the Constitution, the President is given the ability to issue ordinances only when the National Assembly is not in session, and when there are satisfactory and necessary circumstances that render it essential to take an immediate action[18]. . When the Qisas and Diyat Ordinance was issued, the National Assembly was not in session, however, there were no "exceptional circumstances [in the country] to render it 'necessary to take immediate action', except by the order of [the] FSC of course."[19] Qisas and diyat reforms were formed by the executive under Zia-ul-Haq's dictatorship; marginalizing society by excluding the people and their elected representatives from the process.

III. Pakistani Penal Code: Moratorium and Beyond

Before the December 2014 Peshawar school attack, Pakistan had put into place a moratorium on the death penalty in 2008, after the Pakistan Peoples Party (PPP) was elected into power. Following the defeat of the PPP in the 2013 elections, the presidential order that put into place the moratorium expired on June 30, 2013. The currently Pakistan Muslim League-N headed government chose to "'deal with all cases of execution on merit [individually]'."[20] As such, the power to approve or pardon executions fell to the discretion of the president during this time. While the 2008 moratorium expired in 2013, no civilian was executed until the official re-lifting in December 2014 — however, a soldier was executed via a military court process in November 2014. On December 17, 2014, a day after the Peshawar attack, the moratorium was partially lifted for terrorism cases, with executions resuming immediately (including the hanging of those involved with the Peshawar attack). Pakistan officially lifted the capital punishment

[18] Const. Art. 89
[19] Bukhari, Maqsooma, Capital Punishment in Pakistan 51 (Image Books 1994).
[20] Pakistan Ends Moratorium on Executions: Official, *Dawn (July 4, 2013), http://www.dawn.com/news/1022770.*

moratorium in its entirety, placing more than 8,000 people in line on death row (which also removed the bare minimum of a moratorium that was the president's approval) in March 2015. The government did however put a stay on executions during the month of Ramadan in 2015.

Since December 2014, Pakistan has executed 389 people.[21] The majority have been convicted of charges under the guise of terrorism, whose sentences were adjudicated by the ATC, a military court system. A wide definition of "terrorism" has been used by both the military and the police, as the fervor surrounding the War on Terror has continued to grow — hitting a particular emotional nerve with the attack in Peshawar. But these laws are doing less counterterrorism work and more in the scope of undermining justice in the Pakistani criminal system. In the ATC, trials are rushed, defendants are given inadequate time with their representation, and testimonies and confessions have become the product of duress and torture. Over 800 of those on death row have been tried under the crime of 'terrorism;' in Sindh province the number of death penalty cases tried under terrorism has risen to 40%.[22] In contrast, roughly 88 percent of those tried under the pretext of terrorism had no connection to terrorism at all[23]:

> The military courts, where presiding judges and prosecutors come from army ranks, are a controversial addition to Pakistan's deeply flawed and ineffectual judicial system. Like Pakistan's contentious Antiterrorism Courts, they have ostensibly been formed to try terrorism cases, though their jurisdiction is likely to expand over time.[24]

The reinstatement of the death penalty has widened the marginalization of impoverished and minority communities and the overall misuse of the sentence greatly. In the rushed focus to hang all of the terrorists on death row as soon as possible, injustice at the greatest degree is being carried out. There is no greater institutional abuse and error than the execution of an innocent

[21] *Human Rights Commission of Pakistan, Slow march to the gallows: Death Penalty in Pakistan (2007).*
[22] Projects and Research. Justice Project Pakistan, (2013). http://www.jpp.org.pk.
[23] *Id.*
[24] Bhutto, Fatima. Pakistan's Moral Catastrophe, N.Y. Times, Mar. 18, 2015,http://www.nytimes.com/2015/03/18/opinion/fatima-bhutto-pakistan-dont-execute-shafqat-hussain.html?_r=0.

person. In August, Hussain was hanged after spending 10 years on death row. He was imprisoned at the age of 14, detained illegally, and brutally beaten by police. He was tortured into confessing, told "he would never escape police custody or his torturers until he confessed to a crime he did not commit, the murder of a 7-year-old boy."[25] Hussain was held in solitary confinement, electrocuted, and had his fingernails removed. He was convicted and sentenced to death. In the process, Shafqat was not tried as a juvenile or given access to legal representation. Days before his execution he reflected on his life on death row:

> I have been told I am going to be executed seven times. The first time was in 2013.
>
> The first time I was told, I was very worried and perplexed. I felt very frustrated. At one point, I am told I am to die; the next thing I know, there is a stay. And I see a ray of hope. But then again, I am told I am going to die. You become a victim of psychological pressure.
>
> Condemned prisoners have a jailer assigned to come and give them this news. The jailer tells me on the day that the warrant is received at the jail, so I am told seven days in advance of the execution date …
>
> … On the last two days they [measure] my height, my neck and my body for the clothes I am to wear when they hang me …[26]

Not only has the death penalty subjected the most vulnerable communities to marginalization and persecution, but the overturning of the moratorium has hastened their walk to the gallows, quickening injustice. Shafqat's case drew national attention and allowed him the support he needed to file appeals and received multiple stays in his last year. It ultimately did not matter, because he was reissued his warrant for execution in July. He was holding the system up, a backlog that couldn't be afforded. The alternative would have been to reopen his case but in the current political atmosphere, there just seemingly is not any time.

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[25] *Id.*

[26] Shafqat Hussain, Death Row Prisoner Shafqat Hussain Finally Hanged, CNN, Aug.4, 2015, at http://www.cnn.com/2015/08/03/opinions/pakistan-shafqat-hussain-opinion/.

Conclusion

Capital punishment is not an issue unique to Pakistan, but its manifestation and particularities make it unique in the larger history of the death penalty. Founded on the backbones of colonial legal practices and understandings, capital punishment has been a part of Pakistan's legacy. Capital punishment in Pakistan has been shaped by the course and politics of time, evolving with each new act, ordinance, and extra-judiciary system. Instead of deconstructing and fixing individual faults in the sentence, and the criminal justice system at large, each new legislative order or presidential proclamation has continued to build on inherent inequalities. Rather than working toward solutions, capital punishment in Pakistan has only created more problems, and further limited the ways to address them.

In the current political climate, the death penalty has been shaped by the global chanting of counterterrorism, favoring instant results over justice. With hopes to kill off extremism, Pakistan has started killing off whoever happens to cross paths at the wrong place at the wrong time, hoping that amongst those executed some of them happened to be terrorists. Without even addressing the structural complications that came with the Qisas and Diyat Ordinance, Pakistan has rapidly expanded this faulty methodology, expanding the misuse of this punishment. If anything, the rewriting of an entire section of the PPC should have signaled what also needed to be change institutionally — the structure in place to fit the 1860 Indian Penal Code is probably not also structurally-sound for the implementation of a dramatically differently designed justice system. Going from a secular-based penal code to one informed by Islamic jurisprudence and theology is not automatically amicable with simply the addition of the FSC.

In both the cases of shariah implementation and counterterrorism tactics, Pakistan has chosen to give unyielding levels of jurisdiction to court systems outside of the scope of judicial

review. This leads to “anything goes” situations, and in this case, it has resulted in the hasty trials and executions of seemingly any-impoverished-one. Pakistan has chosen to capitalize on their marginalized population for the sake of politics, which has only proven ineffective and useless to actual deterrence or justice. Since the late 70’s, Pakistan has consistently tried to bring political rhetoric, under the guise of Islamic interpretation, into the scope of all things — opting to leave tangible structural issues and injustices in the name of God, rather than making responsible actions and decisions that focus on the justice aspect of the criminal justice system. Until the death penalty can be wholly re-evaluated and re-structured to guarantee fair implementation and equal access to justice across social, ethnic, and class lines, an indefinite moratorium should be instated.

The Liberal Case for Passive Virtue:
A Critique on Active Judicial Supervision of the Commerce Power

By Habib Olapade

Abstract

By analyzing the Rehnquist Court's opinion in *United States v. Morrison*, this essay criticizes the Court's resurrection of internal and external limits on Congress' power to pass legislation under the interstate Commerce Clause. *Morrison* held that Congress lacked the power to create a federal criminal penalty or civil remedy to address intrastate gender violence because of structural limitations within the commerce clause. Two factors were central to the Court's reasoning. The first factor was the proposition that the federal courts, not Congress, were the best-equipped institution to make final, binding determinations regarding whether an activity actually affects interstate commerce. The second factor was the Court's implicit assumption that the survival of federalism in the American constitutional order depended on Congress not regulating policy areas that were traditionally left to state control, such as family law and local police. This piece disputes the Court's ruling in *Morrison* by arguing that Congress, not the judiciary, should bear responsibility for policing the limits of its power under the commerce clause. Unlike the courts, Congress is institutionally designed to provide protection for states' rights and can facilitate a pragmatic allocation of governmental responsibilities between the national and state governments.

In 1906, Roscoe Pound, then dean of the University Of Nebraska-Lincoln School of Law, published an article in the American Bar Foundation Reports: *The Causes of Popular Dissatisfaction with the Administration of Justice*. Pound's piece isolated many of the American legal system's structural attributes that deterred the efficient and equitable dispensation of justice during the late nineteenth and early twentieth century. In particular, one glaring "source of irritation [was] the doctrine of the supremacy of law," or the transformation of "peculiarly sensitive economic, political, and sociological questions" into legal questions, and the commitment of these questions to the courts in the form of private litigation. From the mid-1890s onward, state and federal jurists, the vast majority of whom were trained solely in the law and were ignorant of the complex economic, political, and sociological dimensions of the problems they were attempting to resolve, were increasingly asked to police and circumscribe Congress' ability to regulate complex economic issues pursuant to its Article I § 8 power to "regulate commerce among the several states."[1] Judges regulated the boundaries of Congress' commerce power by using rigid substantive canons of construction, a set of interpretational rules that courts use when construing legal texts because their use is thought to promote desirable policy results. The canons employed in a given instance are a function of which policy outcomes one perceives to be desirable.[2] The early twentieth century American bench applied substantive canons that created a sharp dichotomy between interstate and intrastate economic activities because it strongly believed in dual federalism, which held that the "accretion of power in the political system would be most effectively checked if relations between the national and state

[1] U.S. Const. Art. 1. Sec. 8. Cl. 3.
[2] The seminal law review article on the ability of partisans to manipulate canons for political purposes is Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VANDERBILT L.REV. 395 (1950). For a shorter and more colorful dirge on the subject see Antonin Scalia, *A Matter of Interpretation* Ch. 1.

governments sustained a constant tension."[3] On one hand, federal statutes that directly affected interstate commerce because they regulated distributional activities such as navigation and interstate transportation were seen as within the purview of congressional power.[4] On the other hand, national laws that indirectly affected interstate commerce because they covered intrastate production activities such as manufacturing and agriculture were deemed beyond the scope of the commerce clause.[5]

The federal judiciary struggled to apply this legal rule in borderline cases where Congress regulated intrastate activities under the pretense that they affected interstate commerce.[6] This led to the creation of many of ad hoc exceptions to the direct-indirect commerce rule, the wholesale abandonment of rigid substantive canons in interstate commerce jurisprudence, and the Supreme Court's recognition of its institutional incapacity to enforce limits on the commerce power in 1937.[7] For the next fifty-eight years, the Court rejected every case in which commerce clause challenged a federal law by taking a more expansive view of interstate commerce and deferring

[3] CRAIG R. DUCAT, MODES OF CONSTITUTIONAL INTERPRETATION 57 (1978).
[4]See *The Daniel Ball* 77 U.S. 557 (1870) (upholding a federal licensing and inspections statute as applied to a steamboat that operated on navigable waters) and *In Re State Freight Tax* 82 U.S. 232 (1838) (extending the reach of the commerce clause to cover instrumentalities and shipments by land as well as water).
[5] See *United States v. Butler* 297 U.S. 1 (1936) (rejecting the ability of Congress to create a supply control agriculture system by directly contracting with farmers to reduce yield amounts and compensating idle famers with proceeds from a food processing tax) and *Carter v. Carter Coal Corporation* 298 U.S. 238 (1936) (rejecting the ability of Congress pursuant to its interstate commerce power to impose local labor regulations in an effort to stabilize the mining industry by controlling labor and prices).
[6] See United States v. E.C. Knight 156 U.S. 1 (1895) (holding that the federal commerce power did not allow Congress to regulate monopolies that were engaged solely in intrastate activity such as manufacturing), Schechter Poultry Corporation v. United States 295 U.S. 495 (1935) (holding that Congress' power to regulate goods that were involved in the flow of commerce terminated once the commodity reached its local destination), *Carter* supra, and Hammer v. Dagenhart 247 U.S. 251 (1918) (preventing the commerce power from prohibiting interstate exchange of goods that are not intrinsically harmful).
[7] See Reid v. Colorado 187 U.S. 137 (1902) (establishing that the commerce power permits Congress to block the interstate movement of harmful goods such as diseased cows), Hoke v. United States 227 U.S. 308 (1913) (holding that Congress can prevent the transportation of women across state lines for immoral purposes, prostitution, or debauchery under the commerce power), Hipolite Egg Corporation v. United States 220 U.S. 45 (1911) (allowing Congress to confiscate adulterated eggs in intrastate transfer as a means of preventing circumvention of its interstate transfer ban), and Swift & Corporation v. United States 196 U.S. 375 (1905) (holding that a federal order to prevent anti-competitive price fixing among cattle stockyards did not violate the commerce power because cattle were often transferred interstate to markets).

to congressional expertise. However in a series of cases that culminated with *United States v. Morrison* in 2000, the Rehnquist Court resurrected the use of restrictive substantive canons of construction in interstate commerce challenges by differentiating between economic and non-economic activity and permitting Congress to regulate only the former. This paper will argue that the Rehnquist Court's economic/non-economic canon is not supported by long-standing judicial precedent and that Congress, not the judiciary, should bear responsibility for policing the limits of its power under the commerce clause because it is institutionally designed to provide protection for states' rights and can facilitate a pragmatic allocation of governmental responsibilities between the national and state governments.

In September of 1994, Christy Brzonkala, a student at Virginia Polytechnic Institute and State University, commonly known as Virginia Tech, was assaulted and repeatedly raped by two members of the college's varsity football team, Antonio Morrison and James Crawford. In the weeks following the rape, Morrison paraded around his dormitory's dining hall claiming that he "liked to get girls drunk and fuck the shit out of them."[8] The attack caused Brzonkala to become severely depressed, and she withdrew from the University shortly thereafter. In December 1995, Brzonkala sued Morrison in the U.S. District Court for the Western District of Virginia and sought a civil remedy under 42 U.S.C. § 13981 which, among other things, provided that "a person who commits a crime motivated by gender…shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages."[9] Morrison's attorney moved to dismiss the complaint on the grounds that § 13981 was an unconstitutional exercise of Congress' power to regulate interstate commerce, to which, the U.S. Solicitor General's Office intervened to defend the statute. After losing at the District Court level and in front of the Fourth Circuit

[8] Certiorari Brief of Petitioner at 602, *United States v. Morrison*, 529 U.S. 598 (2000) (No. 99-5).
[9] 42 U.S.C. § 13981.

Court of Appeals, which heard the case *en banc*, Brzonkala appealed to the U.S. Supreme Court in March 1999.[10] The Court granted certiorari later that year and affirmed the lower court ruling by a 5-4 vote.

Writing for the majority, Chief Justice William Rehnquist began by surveying the Court's post-1937 interstate commerce decisions and pronounced three categories of activity that Congress could regulate under the commerce clause. According to the Chief Justice, Congress could regulate the channels of interstate commerce,[11] persons or things in interstate commerce,[12] and activities that substantially affected interstate commerce.[13] Julie Goldscheid and Seth Waxman, counsel for Brzonkala and the United States respectively, only sought to justify § 13981 under the substantial effects prong by arguing that the aggregated influence of gender-motivated violence markedly impacted interstate commerce because gender motivated crime had several negative albeit attenuated economic effects.[14]

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[10] An en banc hearing is a session in which a case is heard before all the judges of a court. In this case the Fourth Circuit Court of Appeals had twelve judges.

[11] See Heart of Atlanta Motel Incorporated v. United States, 379 U.S. 241 (1964) (holding that the Commerce Clause does not embrace substantive content based restrictions and that Congress may regulate any activity no matter how local it is, if the activity affects interstate commerce in the aggregate) and United States v. Darby, 312 U.S. 100 (1941) (establishing that the commerce power does not just allow Congress to regulate goods that are intrinsically harmful or deleterious and that Congress may take prophylactic measures to prevent the circumvention of an interstate ban on a good).

[12] See Shreveport Rate Cases (Houston East & West Texas Railway Co. v. United States), 234 U.S. 342 (1914) (holding that Congress' commercial regulatory authority over instruments of interstate commerce extends to intrastate matters that have a close and substantial relation to interstate traffic) and Perez v. United States, 402 U.S. 146 (1971) (ruling that Congress need not present any findings that an intrastate activity it regulates pursuant to the interstate commerce power affects interstate commerce).

[13] See National Labor Relation Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937) (holding that Congress may regulate intrastate activity that substantially affects interstate commerce) and Wickard v. Filburn 317 U.S. 111 (1942) (establishing that Congress can regulate localized and individual instances of intrastate economic activity if the aggregate effect of the activity has an impact on interstate commerce).

[14] The petitioners also argued that § 13981 was a valid exercise of Congress' power under § 5 of the 14th Amendment, but this claim failed and will not be examined in this piece because the case law establishing the permissible range for remedial congressional action under the 14th Amendment differs greatly and is analytically distinct from corresponding precedents under the commerce clause. For a brief survey of the some of the more important cases establishing congressional authority under § 5 of the 14th Amendments, see City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that exercises of the 14th Amendment's enforcement power must be proportional to remedying an identifiable set of equal protection or due process violations), Oregon v. Mitchell, 400 U.S. 112 (1970) (ruling that Congress may not set minimum age voter qualifications for state and local elections pursuant to the 14th amendment's enforcement power), The Civil Rights Cases, 109 U.S. 3 (1883) (establishing that

The *Morrison* Court rejected this claim for three reasons. First, Rehnquist argued that regardless of the effects of gender violence on interstate commerce, the commerce power permitted Congress to regulate only economic activity because congressional regulation of non-economic endeavors would allow the federal government to regulate areas traditionally of state concern. For example, aspects of family law such as marriage, divorce, and child custody undoubtedly had substantial aggregate effects on interstate commerce but had traditionally been regulated by the states since the colonial period. The *Morrison* Court, proceeding on the presumption that Congress' power to regulate commerce clearly could not extend to these areas, failed to see how the national legislature could be allowed to regulate local crime but foreclosed from policing family law. This is true, especially given that both activities were seemingly non-economic, traditionally controlled by the states, and purportedly affected interstate commerce. Second, Rehnquist took issue with § 13981 because it lacked a clear jurisdictional statement, or a provision within the statute establishing that the enactment was promulgated pursuant to Congress' power to regulate interstate commerce.[15] To the *Morrison* Court, the absence of such a statement suggested that Congress intended to target intrastate and interstate crimes. Moreover if

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Congress does not have the power to prevent private acts of discrimination under § 5 the of the 14th Amendment), Katzenback v. Morgan, 384 U.S. 641 (1966) (holding that Congress' efforts to redress violations of the equal protection clause pursuant to the 14th Amendment's enforcement power will be evaluated under a tailoring test similar to that employed in *McCulloch v. Maryland*), and Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) (ruling that Congress could not under the 14th amendment's enforcement power enact an anti-age discrimination statute with broad civil and criminal remedies without evidence of widespread and unconstitutional age discrimination by the states).

[15] While emphasis on a jurisdictional statement may seem a tad bit overbearing, there is a long tradition in American legal history that required the placement of 'statements of purpose' in legislative acts. Indeed, many early state constitutions required legislatures to state the purpose of a given law in a preamble. For example, the Pennsylvania Constitution of 1776, one of the more liberal charters drafted during the time, stipulated that "the reasons and motives for making laws [should] be fully and clearly expressed in the preamble." Moreover during the late 1700s and early 1800s, state judges often invalidated statutes because they failed to conform to this requirement. This theme of procedural due process via promulgation is very salient in the western tradition. Thus in Book II of the *Summa Theologiae (Treatise on Law)*, Thomas Aquinas argued that "promulgation is necessary for the law to obtain its force." In contrast, we are also told of the Roman Emperor Nero's nasty practice of posting his edicts high on columns so that they would be harder to read and easier to transgress. See Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989).

Congress did want § 13981 to regulate intrastate crime under the commerce power, it could only do so by asserting that the targeted crime substantially affected commerce. For reasons stated above the Court was not willing to accept this argument. Finally, Rehnquist refused to defer to congressional findings which indicated that gender motivated violence substantially affected interstate commerce.[16] Rather, the Chief Justice boldly asserted that the judiciary, not the legislature, possessed the ultimate authority to decide whether an operation substantially affected interstate commerce. As such, any reasoning Congress employed to justify a regulation of an activity under the commerce power would be subject to judicial scrutiny and could not allow Congress to regulate activity that would clearly be beyond the scope of the commerce power.

This turn was § 13981's death knell. The final House and Senate Reports that were issued after the passage of § 13981 argued that gender-motivated violence affected interstate commerce because it "deterred potential victims from travelling interstate,…[stifled] employment in interstate business…diminish[ed] national productivity, increas[ed] medical costs, and decreas[ed the] supply of and demand for interstate products."[17] Congress' reasoning "would have allowed it to regulate any local activity or crime [such as murder, assault, and battery] as long as the nationwide, aggregated impact of the crime was substantial" and thus clearly ran afoul of the *Morrison* Court's non-economic substantive limit on the commerce power.[18]

The economic-non-economic distinction that figured so prominently in the *Morrison* Court's analysis was a relatively young doctrine. In fact, five years earlier in *United States v. Lopez*, the Rehnquist Court articulated the rule for the first time. In *Lopez*, the Court invalidated a federal criminal statute that purported to regulate interstate commerce by prohibiting the

[16] H. R. Rep. No. 103-395 at 25 (1993). H.R. Conf. Rep. No. 103-711, p.385 (1994).
[17] H.R. Conf. Rep. No. 103-711, at 385 (1994).
[18] 529 U.S. 598 (2000).

possession of firearms in school zones.[19] However, while the *Morrison* Court may have been able to cite *Lopez* as supporting precedent for its decision, there were almost six decades worth of jurisprudence that suggested an opposite result. For example, in *Heart of Atlanta Motel v. United States* (1964)[20], the Court, in affirming Congress' power under the commerce clause to prevent racial discrimination in public accommodations, explicitly rejected the argument that the commerce clause could only be used to police 'commercial activities' as opposed to 'moral or social wrongs.'[21] Rather in *Heart of Atlanta*, the only relevant inquiry was whether racial discrimination in public accommodations substantially affected interstate commerce.[22] Because, Congress had compiled an immense record showing that the effect was severe, the Court concluded that Title II of the Civil Rights Act of 1964, the challenged statute, was rationally related to a legitimate state interest and was therefore valid.[23]

Some conservative legal scholars retort that *Heart of Atlanta* is a unique case because it is really about validating the Civil Rights Act of 1964 and thus should not be seen as controlling precedent.[24] But the Court's refusal to embrace substantive limits on the commerce power

[19] 514 U.S. 549 (1995).
[20] *Heart of Atlanta Motel v. United States.* 379 U.S. 241 (1964)
[21] For further reading on the interaction between the Court's interpretation of the interstate commerce clause as it applies to Congressional efforts to preserve civil rights, see *McClung v. Katzenbach* 379 U.S. 294 (1964) which is often cited as a companion case to *Heart of Atlanta*.
[22] The notion that Congress' motive or purpose for instituting a regulation of interstate commerce and/or a tax was judicially irrelevant had already been deeply established in the Court's jurisprudence in the twenty-first century. See *Champion v. Ames* 188 U.S. 321 (1903) (reaffirming Congress' ability to regulate interstate commerce to the fullest extent possible and rejecting the relevance of Congressional motives in any facial or as applied interstate commerce challenge) and *McCray v. United States* 195 U.S. 27 (1904) (upholding a federal tax on artificially colored oleomargarine as within Congress's constitutionally granted powers despite the fact that tax had the effect of suppressing the oleomargarine industry).
[23] 42 U.S.C. (1964)
[24] Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (Princeton: Princeton University Press, 2004) 280-294. The same problem arises in the context of *The White Primary Cases* and their continued applicability towards the modern state action doctrine. For a brief overview of the cases in this field, see *Nixon v. Herndon* 273 U.S. 536 (holding that a state election law that facially draws a racial distinction and denies members of one race the right to vote is impermissible state action under the 14th amendment) and *Smith v. Allwright* 321 U.S. 649 (1944) (establishing that the state may not skirt the state action doctrine by delegating control of the election process to a private organization and then allowing that organization to deny citizens the right to vote on the basis of race). Compare to *Tashjian v. Republican Party of Connecticut* 479 U.S. 208 (1986) (ruling that the state

predates the Civil Rights Movement. In *United States v. Darby*, a New Deal case from 1937, the Court repudiated the notion that Congress' power to prevent the interstate exchange of a given good was predicated on the good's intrinsic harmfulness.[25] Instead, the Court declared that the commerce power was given to Congress "in unqualified terms." Critics may reply that the Court's refusal to embrace substantive limits in *Darby* was confined to the actual interstate exchange of goods and is analytically distinguishable from cases in which the targeted activity is purely intrastate but affects interstate commerce in the aggregate. The current case law lends a modicum of support to this claim but the logic undergirding this distinction is flimsy at best. A brief thought experiment will demonstrate why this is the case. If Congress, for instance, concludes that the only way to ensure the effectiveness of a purely interstate commercial regulation (say a ban on the sale of marijuana across state lines), is to prevent a non-economic intrastate activity that affects interstate commerce in the aggregate (the smoking of marijuana), then the non-economic/economic distinction in *Morrison* would then prevent it from doing so.

Libertarian readers may delight in embracing this outcome but this logical conclusion obviously is not good law because the Court decided the opposite in *Gonzales v. Raich* (2004)[26], a case in which the Justices sustained a federal criminal statute that targeted intrastate marijuana

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may not infringe on a political party's associational rights by not allowing it to open itself up independent voters in its primaries) and *California Democratic Party v. Jones* 530 U.S. 567 (2000) (holding that party's right to associate includes an inverse right not to associate and that the state may not require political parties to open their primaries to all voters regardless of their partisan affiliation). If the state can force parties to accept voters regardless of race on the grounds that the party is an extension of the state, why may parties essentially discriminate on the basis of viewpoint and exclude voters of an inapposite political ideology? To a lesser degree, the same problem is also present within the context of affirmative action programs and the desire of liberals to resurrect the benign discrimination doctrine. Compare *United Jewish Organizations of Williamsburg v. Carey* 430 U.S. 144 (1977) (ruling that state consideration of race in the context of redistricting immediately after the Civil Rights Movement was not invidious and thus warranted rational basis review as opposed to strict scrutiny) with *Adarand Constructors Incorporated v. Peña* 515 U.S. 200 (1995) (establishing that all race based distinctions by the state are invidious and will be subject to strict scrutiny).

[25] *United States v. Darby*. 312 U.S. 100 (1941).

[26] *Gonzales v. Raich.* 545 U.S. 1 (2004).

users and growers in an effort to clamp down on interstate movement on the substance.[27] One could counter that, unlike the provision in *Raich*, § 13981 was not preventing the circumvention of a broader statutory framework. However, § 40221(a) of the same act created a federal criminal remedy to punish "interstate crimes of abuse including crimes committed against spouses or intimate partners during interstate travel."[28] And it is not unreasonable to presume that Congress might have hoped to add more girth to its interstate ban on gender-motivated violence by attacking intrastate gender violence as well.

Despite the seeming one-sidedness of the Court's prior cases, precedent can be marshalled in support of either outcome.[29] No amount of sophisticated legal argumentation can be marshalled to arrive at a single correct answer because there are policy preferences involved in the issue. Limiting national power and preserving the role of the states in the federal system are the real rationales for establishing indirect-direct, commercial-moral, harmful-unharmful, or non-economic-economic distinctions regarding the limits of the commerce clause. This paper will not attempt to suggest a definitive role for the states vis-à-vis the national government because a conclusive answer has been lacking for the past 226 years. Nevertheless, even if one is committed to the notion of states' rights, they ought to wonder whether the Court is the best institution to assert those rights and police the limits of the commerce power.

From a judicial perspective, the rights of states cannot be conceived of in the same way that individual rights are. Rationales that usually validate judicial protection of individual rights

[27] See *Hipolite Egg Corporation* supra. There are older cases that put this conclusion in doubt as well.
[28] 42 U.S.C. § 40221(a).
[29] As a general rule, the obligation of judges to abide by the rule of stare decisis is particularly weak in constitutional cases because the legislature is unable to overturn the decision of a court except through the amendment process. This idea of assigning relative insignificance or decreased weight to prior decisions in cases involving constitutional issues has a very long tradition in legal philosophy. THOMA HOBBE, LEVIATHAN 172-190 (Hackett ed., 1994) (1668). In Chapter 26, which covered Civil Law, Thomas Hobbes asserted that "any judge, whether subordinate or sovereign, can err in a judgment of equity—i.e. in a judgment about the law of nature. If a judge does err, and then in a similar later case he finds it more consistent with equity to give a contrary judgment, he is obliged to do that. No man's error becomes his own law, nor obliges him to persist in it."

such as the protection of individual dignity or ensuring fairness in the political process for discrete and insular groups are inapplicable to states.[30] If anything, the states are usually the parties that the Court restrains in order to protect the rights of citizens or restore equity in the state's political system.[31] Moreover, states occupy a uniquely advantageous position in an already decentralized national government which allows them to prevent any potential invasion of their rights. Equal representation of states in the Senate, the filibuster, coordination of state delegations in the House, the ability of state legislatures to set the qualifications for voters in federal elections, presidential logrolling with members of Congress, and the presence of lobbying organizations from state governments in the aggregate essentially guarantee that no bill can or will pass Congress if a plurality of states think that it is not in their interests or violates their rights. If a lack of adequate political representation is the main reason the Court feels secure in protecting members of persecuted religious sects,[32] controversial publishers,[33] flag burners,[34] criminal defendants,[35] and racial minorities,[36] then this rationale cannot be cross applied to

[30] See John Hart Ely, Democracy and Distrust (Cambridge: Harvard, 1980).
[31] Within the context of the 1st Amendment alone, see *Everson v. Board of Education* 330 U.S. 1 (1947) (preventing New Jersey from providing taxpayer funded reimbursements to parents of children attending private religious schools by incorporating the establishment clause against the states), *Cantwell v. Connecticut* 310 U.S. 296 (preventing Connecticut from requiring religious solicitors to acquire a state license by incorporating the free exercise clause against the states), *Near v. Minnesota* 283 U.S. 697 (1931) (preventing Minnesota from allowing individuals to obtain permanent injunctions halting the publication of malicious, scandalous and defamatory newspapers by incorporating the freedom of press clause against the states), *De Jonge v. Oregon* 299 U.S. 353 (preventing the state of Oregon from criminalizing the mere assembly of the communist party by incorporating the assembly clause against the states), and *Edwards v. South Carolina* 372 U.S. 229 (1963) (preventing South Carolina from arresting peaceful protesters seeking to voice their concern about the state's position on Civil Rights by incorporating the redress of grievances clause against the states).
[32] West Virginia State Board of Education v. Barnette 319 U.S. 624 (prohibiting the enforcement of a mandatory flag salute regulation promulgated by the board of education because it violated the first amendment rights of students under the free speech clause) and *United States v. Carolene Products Corporation* 304 U.S. 144 (1938) (footnote 4).
[33] New York Times Corporation v. United States [The Pentagon Papers Cases] 403 U.S. 713 (1971) (preventing the federal government from imposing a prior restraint on the publication of leaked national security files because it failed to show that publication would result in a catastrophic result that would be able to justify censorship).
[34] Texas v. Johnson 491 U.S. 397 (1989) (preventing the state from criminalizing flag desecration because that violated the first amendment right to freedom of expression.
[35] Gideon v. Wainwright 372 U.S. 355 (1963) (granting a petitioner's request for a writ of habeas corpus on the grounds that he was not provided counsel during trial for a serious offense).

protect states.[37] It follows that the states should pull and trade in the political arena to protect their regulatory prerogatives from national preemption.

This conception of the commerce power is as old as the first opinions that exposited its scope. Indeed in *Gibbons v. Ogden* (1824), the seminal case establishing the broad nature of the commerce power, Chief Justice John Marshall asserted that "effective restraints on [the commerce power] must proceed from the political rather than the judicial processes."[38] This statement indicated Marshall's belief that Congress had plenary power over interstate commercial regulations and, that only popular elections could be deployed to change undesirable laws that were passed under the commerce clause. The Rehnquist Court's decision to ignore Marshall's admonition has led to an undeniable irony in its interstate commerce jurisprudence. When the *Morrison* Court struck down § 13981 ostensibly because it violated states' rights, it did so over the objection of thirty-six states that explicitly argued that the provision did no such thing and was necessary because the states could not control gender-violence by their lonesome. In truth, Antonio Morrison "won the states' rights plea against the states themselves" and the doctrine of residual powers became a vested right in governmental impotence rather than a safe harbor for federalism.[39] One might say in response that this irony is much ado about nothing because the fundamental rights of individuals cannot be contracted away or subjected to popular

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[36] Korematsu v. United States 323 U.S. 241 (1944) (establishing for the first time that government distinctions on the basis of race will be subject to strict scrutiny).

[37] While it is certainly possible that the federal political system could turn against a select group of states and disadvantage them, this has only really occurred once: the imposition of electoral preclearance requirements imposed on most of the Southern states after the passage of the Voting Rights Act of 1965 (VRA). Furthermore the VRA's requirements were instituted for a very compelling reason (i.e. stopping southern state legislatures from avoiding federal efforts to enforce the 15th amendment). See *South Carolina v. Katzenbach* 383 U.S. 301 (1966) (upholding Congress' authority to enact the VRA pursuant to the 15th amendment's enforcement power because 'extraordinary problems require extraordinary solutions').

[38] 22 U.S. 1 (1824).

[39] Jackson, Robert H. The Struggle or Judicial Supremacy; a Study of a Crisis in American Power Politics. New York, New York: A.A. Knopf, 1941.

vote, and the Court's jurisprudence lends some credence to this claim.[40] But, states are not individuals and their rights certainly are not as constant, concrete, or obvious as some would like to suggest.

If American legal history can provide any functional lesson today, it is that the static line between what is truly national and truly local is porous, if not imaginary. The life of the law has not been logic but experience.[41] In 1789, the cultivation of wheat for domestic consumption or a shopkeeper's decision to serve a customer was a purely local affair and might even have been beyond the state's capacity to regulate under a vested property right doctrine, but this is not the case in the 21st century. The national government can exercise control over both activities. In early nineteenth century America, the absence of national control over so many domains of activity may be attributable to the fact that it would have been both impossible and impracticable. Therein, lies the crux of the federative order created by the Constitution. In a federal system, a political entity is given regulatory domain over a realm not because of a blind deference to tradition, but rather because it can police the domain more effectively than its counterpart.[42] The facilitation of better governmental outcomes, not the maintenance of a formalistic division of labor between the states and national government, is the purpose of

[40] Lucas v. The Forty-Fourth General Assembly of the State of Colorado 377 U.S. 173(1964) (invalidating a state approved initiative that imposed a malapportioned districting plan for the state legislature on the grounds that the fundamental right to vote which includes the right to have one's vote bear equal weight with that of other citizens, cannot be subjected to popularly approved abrogation) and *Bailey v. Alabama* 219 U.S. 219 (1911) (invalidating a peonage statute that imposed criminal penalties for breaking an entire labor contract on the grounds that the law was a pretext for imposing economic slavery on workers that wished to quit their jobs). Interestingly, there is also an early line of state corporate law cases from the nineteenth century which denied the ability of the state to contract away essential public functions such as the power to tax to a corporation – see *Mott v. Pennsylvania Railroad* 30 Pennsylvania Statutes 9 (1858) (denying the ability of the state to commit 'political suicide' by contracting away the power to tax in a corporate charter).

[41] See Holmes, Oliver Wendell. The Common Law. Cambridge, Mass.: Belknap Press of Harvard University Press, 2009.

[42] Oliver Wendell Holmes, *The Path of the Law* 10 harvard l.rev 457, 477 (1897). The line that in my opinion best symbolizes this strain of thought is "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."

federalism in contemporary America.[43] And the natural arbiter of what constitutes a normatively desirable governmental outcome is not the Court but the political actors in Congress. One need only look to *Morrison* to see why this is so.

Before Congress passed § 13981 in 1994, it held a series of hearings from 1990 to 1993. During that time span, multiple House and Senate committees, working in conjunction with gender bias commissions from 21 states, heard testimony from physicians, law professors, rape survivors, private businessmen, and state law enforcement personnel. In the educational process, lawmakers discovered that "three out of four American women will be victims of violent crime during their life" and that the nation forks over "5 to 10 billion a year on healthcare and other social costs because of domestic violence."[44] After marshalling its institutional expertise and compiling a 100,000 page legislative record, Congress reached the conclusion that "crimes of violence motivated by gender substantially affect[ed] interstate commerce."[45] Yet, it took the Supreme Court less than four months to invalidate the main remedy that Congress saw fit to combat the evil it targeted. Paradoxically, the Court refused to take account of the massive record that the legislature assembled over three years and struck down the law on the grounds that it was an assault on the right of states. The Court selected this path despite the fact that the states cooperated with Congress in the lawmaking process, approved of the provision in the Senate, and defended the law to the end when it was challenged because they wanted Congress to do what they could not: control local gender violence. The states chose cooperated in the drafting of the bill in part because there had been a plethora of evidence suggesting that despite

[43] For a treatment of a more pragmatic federalism jurisprudence, see Stephen Breyer's discussion of *Printz v. United States* 521 U.S. 898 (1997) (establishing that a federal statute enlisting local law enforcement agents to conduct background checks on gun sales before a federal database could be set up violated the 10th amendment) and *New York v. United States* 505 U.S. 144 (1992) (holding that the take title clause of a federal toxic waste disposal statute violated the 10th amendment because it was not promulgated pursuant to a enumerated power in Article I § 8) in *Active Liberty: Interpreting Our Democratic Constitution*.
[44] *Supra* note 17.
[45] *Ibid*.

state court remedies, local judges and juries were refusing to convict sex offenders because of sexist bias.[46]

Outside the context of governmental infringement on fundamental rights, the ultimate purpose of federalism is not to foreclose the ability of the public to solve pressing issues. Quite the contrary, it is to ensure that an issue is effectively regulated at the correct level of government. Granted, the question of just which level is the correct level is an open ended inquiry, but its resolution requires traits that courts notoriously lack: constant arbitration, the ability to marshal and evaluate evidence outside of a myopically adversarial system,[47] and a reluctance to adopt formalistic and unyielding rules that will govern future scenarios.[48] While it may "emphatically be the province of the judiciary to say what the law is,"[49] within the context of interstate commerce, the Court should get out of the business of saying what Congress may and may not do.

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[46] *Ibid*.

[47] The adversarial system, which is unique to common law countries, allows lawyers to control the case and decide which strategy to pursue and what evidence to present. Since judges and/or juries can only gain a partial or skewed perspective of a controversy because the litigants control what is presented to them, the adversarial system has come under fire, especially from civil law scholars, for not promoting the objective determination of truth in legal proceedings. See Carrie Menkel-Meadow, *The Trouble With The Adversary System In a Post-Modern, Multi-Cultural World* 1 J.INST. FOR STUDY LEGAL ETHICS 49 (1996).

[48] The seminal law review on the duty of the courts to apply workable rules of law in a neutral and impartial manner is Herbert Wechsler's *Toward Neutral Principles of Constitutional Law* 73 HARVARD L.REV. 15 (1959). The most relevant passage is as follows: "I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved." In fairness, there is a vast array of liberal legal scholarship that has rejected this strict legal-process theory and the illusory fairness created by equal application of legal rules to parties that are equal only in a very fictitious sense. The consensus response to Wechsler's emphasis on neutral principles is probably best captured by a quote from Anatole France, a French poet: "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." For more on the imperative of jurists to reject legal formalism/neutrality especially when dealing with 'exceptional cases' that require greater judicial discretion, See BENJAMIN CARDOZO. THE NATURE O□ THE JUDICIAL PROCE□□ (Yale University Press, 1921). (A series of lectures the deceased Supreme Court Justice delivered at Yale Law School in the 1930s). For more on the unsuitability of special legal rules for 'preferred' classes of individuals, see Ch. 10 of Frederick A. Hayek's *The Constitution of Liberty*.

[49] Marbury v. Madison 5 U.S. 137 (1803) (invalidating § 13 of the Judiciary Act of 1789 on the grounds that it violated Article III § 2 of the U.S. Constitution). See also ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR of POLITICS (Indianapolis: Bobbs-Merrill, 1962).

Impacts of Gerrymandering on Political Racial Representation

By Sahara Khan

Abstract

Given that voting districts are redrawn according to the census, it would be naive to ignore the "packing and cracking" of racially divided districts. When exploring the laws and institutions currently permitting racial gerrymandering, the possible consequences of racial gerrymandering on the freedom of representation of minority groups become palpable. By analyzing voting district maps, political theory, and other political documents, this paper concludes that gerrymandering by Republican legislators marginalizes the minority political voice by decreasing the likelihood of Democratic candidates being elected and thus minimizing minority-friendly legislation. As a result, judicial action in the form of minority-influenced districting mandates may be taken in response to the civil injustices of gerrymandering.

Every ten years, state legislatures use census population data to redraw boundaries for voting districts through a process called redistricting.[1] While seemingly innocent, demographic maps, statistical observations, and delegate simulations reveal that both Democratic and Republican- controlled state legislatures use redistricting as an opportunity to abuse their authority and strategically draw district lines to maximize their respective party's voice and suppress that of the other, a process known as gerrymandering.[2] Furthermore, data collected by Ph. D. Wang[3] reveals that Republicans engage in gerrymandering more often than Democrats.[4] And, demographic data suggests black and Hispanic voters (as well as lower socioeconomic status voters) tend to vote for Democratic.[5] [6] As a result, Republican legislatures, such as those of Mississippi, Alabama, and Louisiana, divide minority populations, repressing their political voices.[7] Considering the demographics of the Democratic Party are far more ethnically diverse than that of Republicans, there would be no need for Democrats to racially segregate populations.[8] Despite the Voting Rights Act of 1965 and federal majority-minority mandates (laws requiring electoral districts in which the majority of voters are racial and ethnic

[1] Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 2, 2013), http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html.
[2] Richard Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, ARIZ. ST. L.J. 278-79 (1976).
[3] Ph.D. Sam Wang is a professor of biophysics and neuroscience at Princeton University, where he uses probability and statistics to analyze complex experimental data and has published many papers using these approaches. He is also manages the Princeton Election Consortium, a student blog reporting recent electoral history.
[4] Wang, *supra* note 2.
[5] Zoltan Hajnal & Jeremy D. Horowitz, *Why the Poor Favor the Democrats*, LO ANGELE TIME (Dec. 03 2012), http://articles.latimes.com/2012/dec/03/opinion/la-oe-hajnal-democrats-benefit-minorities-20121203.
[6] Ruy Teixeira, *Why Today's GOP Will Never Win Over Minority Voters*,THINK PROGRE RSS (Apr. 15 2013), http://thinkprogress.org/politics/2013/04/15/1863981/why-todays-gop-will-never-win-over-minority-voters.
[7] Devin McCarthy & Christopher Zieja, *Redistricting Reform in the South*, FAIRVOTE (Feb 12, 2014), http://www.fairvote.org/redistricting-reform-in-the-south.
[8] Jens Manuel Krogstad & Mark Hugo Lopez, *Hispanic Voters in the 2014 Election*, PEW RESEARCH CENTER (Nov. 07 2014), http://www.pewhispanic.org/2014/11/07/hispanic-voters-in-the-2014-election/.

minorities), gerrymandering continues to suppress the freedom of representation for minority voting populations.[9]

Due to the winner-take-all electoral system, in which the candidate who receives the highest number of votes wins the entire district, gerrymandering legislators can disperse or concentrate a group's voting strength through strategies such as "cracking" and "packing"[10]. "Cracking" divides minority populations between districts to dilute their voices among the white majority.[11] In 1875, for example, a high concentration of black residents were "cracked" into several districts by conservative state legislators to minimize black representation in government, areas.[12] In this way, gerrymandering was used alongside fraud and intimidation to oppress the black political voice in the United States.[13] Consequently, black voters composed an insignificant percentage of the voting population in each district. Candidates with progressive views (e.g. supporting racial equality), who were supported largely by minorities, were thus unable to get elected to office due to the winner-take-all system that diluted the power of the minority population. Reinforcing racist attitudes maintained de facto segregation by perpetuating the perception of political inequality at the state level.[14] This posed a threat to political and social racial inequality since the government has the power to influence the attitudes of its citizens.

Nearly a century later, Section Two of the Voting Rights Act of 1965 responded to redistricting injustices by outlawing practices that enhances "the opportunity for discrimination against the minority group," mandating majority-minority districts.[15] Conservative legislators

[9] David Lublin, The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress 6 (Princeton University Press 1997).
[10] Engstrom, *supra* at note 278.
[11] Frank Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, Mississippi L. Rev. 44, 402 (1973).
[12] Evelyn Glenn, Unequal Freedom: How Race and Gender Shaped American Citizenship and Labor 93 (2002).
[13] *Id*. at 97.
[14] *Id*.
[15] McCarthy & Zieja, *supra* note 7.

nonetheless used majority-minority districts to give an advantage to Republican candidates by removing minorities from primarily white districts and "packing" them into a single district, circumventing federal guidelines and minimizing the minority voice.[16] [17] Therefore, even if the majority-minority district were to elect a Democrat, the surrounding districts invariably select conservatives since the packed district drew its minority voters from the surrounding districts.

Despite the historical and political significance of gerrymandering, some scholars argue that its impact is grossly exaggerated and instead blame underrepresentation of blacks in The House of Representatives on cultural factors such as factionalism within the Black community. In addition to the diversity of voices among minorities, they argue that different campaigning methods and appeals prevent minorities from acting effectively.[18] However, a study by Ph.D. Sam Wang proves that acquiring votes is not the problem, rather, the translation of votes into representation does not occur. For instance, while 50.5% of votes for Pennsylvania House Representatives were cast for Democrats in 2012, the party only captured 28% of seats; for North Carolina, Republicans took 49% of the votes but 69% of the House seats.[19] Upon further statistical analysis, the study revealed these disparities to be outside the possibility of chance outcome, as the there was too large a difference between the average and median party vote.[20]

Defenders of gerrymandering furthermore note that white-majority districts have occasionally elected minority candidates; however, Dr. David Lublin[21] suggests this is a "token"

[16] Frank Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, MISSISSIPPI L. REV. 44, 403 (1973).
[17] Lublin, *supra* note 9, at 39.
[18] DAVID CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES of BLACK MAJORITY DISTRICTS 204-205 (1999).
[19] Wang, *supra* note 1.
[20] *Id.*
[21] The recipient of two grants from the National Science Foundation grants and a fellowship from the German Marshall Fund, David Lublin has authored three books, including Minority Rules: Electoral Systems, Decentralization, and Ethnoregional Parties published by Oxford in 2014. He is on the faculty of the Women and

number of representatives, and blames the "packing" of majority-minority districts for legislation less favorable to minorities.[22] And, a study conducted through voter surveys by Elisabeth R. Gerber and Jeffery B. Lewis reveals representatives are most responsive to the preferences of voters in homogenous districts and least responsive to voters of heterogeneous districts.[23] So, as long as white-majority districts are the majority in a state, white constituents have political representation disproportional to that of minorities.[24]

Other scholars defending gerrymandering make inconsistent claims. On one hand, Ph.D. Fuentes-Rhower[25] rejects that representational marginalization results from redistricting by arguing the political climate of a state can influence the rare election of Democrats in gerrymandered districts. On the other hand, he blames the "existing electoral structures" that enable gerrymandering by giving power to state legislatures to redraw districts.[26] By both denying that marginalization occurs and idly blaming marginalization on a lack of regulatory constitutional framework, Fuentes-Rhower presents a contradiction of assumptions.

Overall, it is important to note that scholars denying the impact of racial gerrymandering are not advocating genuine alternatives that encourage equal representation for racial districts: they are deflecting political irresponsibility onto existing political and social structures by claiming its inevitability. And, by proposing redistricting alternatives for eight southern gerrymandered states that would create more fair districts (including Louisiana and Mississippi,

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[22] Lublin, *supra* note 9, at 1366-68.

[23] Elisabeth R. Gerber & Jeffrey B. Lewis, *Beyond the Median: Voter Preferences, District Heterogeneity, and Political Representation*, 112 Journal of Political Economy 1364, 1366-1368 (2004).

[24] *Id.*

[25] Ph.D. Fuentes- Rhower is a Faculty Fellow at the Indiana University Maurer School of Law who focuses on the intersection of race and democratic theory.

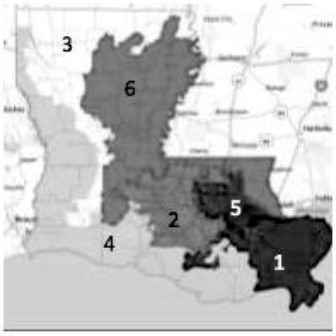
[26] Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, Fair Representation and an Exegesis into the Judicial Role*, Notre Dame L. Rev. 528, 532 (2003).

below), Devin McCarthy[27] and Christopher Zieja[28] demonstrate that gerrymandering is avoidable.

Current Map
Current delegation: 5 R, 1 D

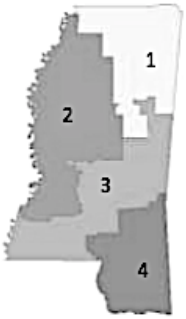
District	Dem Part.
1	26%
2	74%
3	31%
4	38%
5	36%
6	31%

Independent Redistricting (seeking partisan fairness)



District	Dem Part.
1	60%
2	55%
3	47%
4	19%
5	18%
6	24%

Current Map
Current delegation: 3 R, 1 D



District	Dem Part.
1	35%
2	64%
3	37%
4	29%

Independent Redistricting (seeking partisan fairness)

District	Dem Part.
1	52%
2	35%
3	48%
4	24%

Although Independent redistricting seeking partisan fairness seems the best way to guarantee minority representation, even maps displaying Independent redistricting without partisan or racial considerations show more equal representation than current maps.[29] In doing so

[27] McCarthy is a Ph.D. student at Duke University studying Behavior and Identities. He received his B.A. from Georgetown University in 2012, and worked for two years as a policy analyst for FairVote, a nonprofit organization studying and advocating for electoral reform. His research interests include electoral systems, congressional elections, and national and ethnic identities. (https://polisci.duke.edu/people/devin-mccarthy)
[28] Zieja is a graduate from the George Washington University in Urban Studies and international affairs who currently specializes in political organization and writes for Politico about campaign financing and redistricting reform.
[29] McCarthy & Zieja, *supra* note 7.

they emphasize the apathy and willful ignorance of conservative academics, furthermore insisting that gerrymandering is an obvious—and resolvable—problem.[30]

Proposed legislative solutions include compact districts, suggesting odd-shaped districts express an intention and more rectangular districts would indicate neutrality.[31] However, this strategy would systematically advance Republican gerrymanders' interests by outlining voting districts using rural, suburban, and inner-city divisions.[32] Since inner-city populations are often majority-minority and overwhelmingly Democratic suburban populations contain a slight white conservative majority, compact districts would only provide a façade of neutrality "packing" and "cracking" methods.[33] And, despite congressional efforts, state legislatures have circumvented the equalizing intent of federal majority-minority mandates by "packing" minority voters into the minimum number of required districts to minimize their influence in government.[34] In previous gerrymandering cases, both Burger and Warren courts interpreted "fair and effective representation" as a constitutional question, so critics of gerrymandering advocate the Supreme Court's involvement in the re-drawing of voting district lines instead of Congress.[35] [36] While opponents of judicial activism in redistricting reform regard these measures as unnecessary, even some partisan researchers affirm the need for judicial intervention in racial gerrymandering.[37]

Instead of either white-majority or majority-minority districts, courts should encourage minority-influenced districts. In these electoral districts, minorities are a large enough percentage

[30] *Id*. at 20.
[31] Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 23 (1985).
[32] *Id*. at 24.
[33] *Id*. at 24.
[34] Lublin, *supra* note 9, at 36-39.
[35] Martin Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA L. REV. 227, 230 (1985)
[36] Engstrom, *supra* note 2, at 278.
[37] Shapiro, *supra* note 35, at 229-230.

of the population to influence electoral outcomes but do not necessarily constitute a majority.[38] Because they contain just enough minority voters to give candidates supporting minority issues a chance, this strategy would yield fair racial representation by maximizing the number of minority-competitive districts.[39] According to Ph.D. Engstrom[40], calculating the percentage of minorities required to create a minority-influenced district would not be difficult, considering computers can generate district lines using demographic data.[41] Researchers would only have to determine a group's voter strength by extrapolating data from previous elections that indicate polarization (when the candidates favored by one demographic group are not favored by another).[42] Since a polarized district can expect roughly equal voter turnout from both groups affected, computers can generate districts that would yield maximum polarization to avoid giving either group 55% or more of the voting population).[43] This way, the Supreme Court could use statistical analysis to ensure fair representation not just for individuals (as mandated by the Warren court's one-person-one-vote precedent) but also for racial groups without altering precedents set by City of Mobile v. Bolden (1980).[44] [45] In the end, redistricting reform would encourage partisan fairness, enhanced racial representation, and balanced competition, expanding representation to all voting citizens, regardless of racial and ethnic minority status.

[38] *Id*. at 230.
[39] *Id.* at 230-231.
[40] Ph. D. Richard L. Engstrom retired from the University of New Orleans, where he taught since 1971, in May 2006 as University Research Professor Emeritus, and he currently holds a position at the Center for the Study of Race, Ethnicity, and Gender in the Social Sciences at Duke University. He was the Endowed Professor in Africana Studies at UNO from 2003 through 2005. (http://www.uno.edu/cola/political-science/faculty-staff/richard-engstrom.aspx).
[41] Engstrom, *supra* note 2, at 317.
[42] *Id*. at 317.
[43] *Id.*
[44] Mobile v. Bolden, 446 U.S. 55 (1980).
[45] Lowenstein & Steinberg, *supra* note 31, at 24.