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GROVE CITY COLLEGE

Grove City College was founded in 1876 in Grove City, Pennsylvania. The College is dedicated to providing high quality liberal arts and professional education in a Christian environment at an affordable cost. Nationally accredited and globally acclaimed, Grove City College educates students through the advancement of free enterprise, civil and religious liberty, representative government, arts and letters, and science and technology. True to its founding, the College strives to develop young leaders in areas of intellect, morality, spirituality, and society through intellectual inquiry, extensive study of the humanities, and the ethical absolutes of the Ten Commandments, and Christ's moral teachings. The College advocates independence in higher education and actively demonstrates that conviction by exemplifying the American ideals of individual liberty and responsibility.

Since its inception, Grove City College has consistently been ranked among the best colleges and universities in the nation. Recent accolades include: The Princeton Review's "America's Best Value Colleges," Young America's Foundation "Top Conservative College," and U.S. News & World Report's "America's Best Colleges."

GROVE CITY COLLEGE JOURNAL OF LAW & PUBLIC POLICY

The *Grove City College Journal of Law & Public Policy* was organized in the fall of 2009 and is devoted to the academic discussion of law and public policy and the pursuit of scholarly research. Organized by co-founders James Van Eerden '12, Kevin Hoffman '11, and Steven Irwin '12, the *Journal* was originally sponsored by the Grove City College Law Society. The unique, close-knit nature of the College's community allows the *Journal* to feature the work of undergraduates, faculty, and alumni, together in one publication.

Nearly entirely student-managed, the *Journal* serves as an educational tool for undergraduate students to gain invaluable experience that will be helpful in graduate school and their future careers. The participation of alumni and faculty editors and the inclusion of alumni and faculty submissions add credence to the publication and allow for natural mentoring to take place. The *Journal* continues to impact educational communities around the country and can now be found in the law libraries of Akron University, Regent University, Duquesne University, the University of Pittsburgh, and Pennsylvania State University. The *Journal* has been featured by the Heritage Foundation and continues to be supported by a myriad of law schools, law firms, and think tanks around the nation.

EDITOR'S PREFACE

Dear Reader,

We are pleased to bring you the eighth edition of the *Grove City College Journal of Law and Public Policy*. As many of you know, due to the tireless efforts of students, faculty, and alumni, the Journal printed its first edition in the spring of 2010. Now, we further these efforts, as we continue to expand the influence of Grove City by distributing a scholarly publication and as we uphold the Journal's values of scholarship.

Last academic year, the Journal staff was faced with a few setbacks that ultimately led to the delayed publication of the seventh edition. We apologize greatly for any inconveniences this may have caused. I assure you that since, the Journal staff has taken several steps with faculty and alumni to ensure that the proper framework exists to avoid any similar setbacks in the future. We very much appreciate your patience and continued support as we continue to move forward.

In the Journal, we have published esteemed authors from students of Princeton University, Patrick Henry College, Duquesne University School of Law, and Harvard Law School as well as legal professionals. In addition to publishing good works, we continue to increase the reach of the Journal by getting into law libraries at institutions such as University of Pittsburgh School of Law and Duquesne University School of Law, and online through our website and HeinOnline.

Enclosed in this Journal are articles covering a variety of topics that are theoretical and applicable in nature. Some deal with topics that are timely, including Electoral College, while others address the seemingly age-old debate between federalism and antifederalism. We hope you will find these articles to be stimulating and that they encourage discussion.

This year, the Journal staff has worked tirelessly to overcome numerous challenges and to further the development of the Journal. We are extraordinarily grateful for the guidance and help that the faculty and administration have shown

us. We offer a special gratitude to the Editorial Board and to alumni who have also aided in the production of this Journal.

The Journal could not have produced this eighth edition without your continued support and patience. We thank you immensely for the encouragement and interest you have shown the Journal these past seven years, and look forward together for the future of the Journal.

Christine Mikhael '17
Editor-in-Chief

FOREWORD

Dear Reader,

Welcome to Volume 8 of the *Grove City College Journal of Law and Public Policy*. As the new advisor to the Journal, and the pre-law advisor at GCC, I have the privilege of working with an excellent group of students who work hard to publish one of the few undergraduate peer-reviewed journals in the country.

In this edition, and going forward into future editions, I have encouraged the editors to consider broadly the *Public Policy* side of the *Journal of Law and Public Policy*. As you read this edition's articles, you will see several articles that address the public policy side of a legal case, or focus almost exclusively on policy issues.

For example, the first essay deals with yet another free speech controversy, this time, on the seemingly innocuous yet actually quite knotty issue of personalized license plates in Texas, that has substantial policy implications. The second essay asks whether it is possible, within the legal framework of Roe and Casey, to create a public policy prohibition on sex-selective abortions, a practice that gives horrifying new meaning to the idea of a war on women. The third essay addresses the Takings Clause and the nature of economic freedom through the lens of Texas state regulations on craft breweries. The fourth essay distinguishes Justice Marshall's understanding of Judicial Review in *Marbury v Madison* with Justice Warren's understanding of Judicial Supremacy in *Cooper v Aaron*, and argues that the latter risks shifting the government from a republic to an oligarchy. The fifth essay is a timely piece on the importance of the Electoral College that suggests that opposition to the Electoral College on the theory that it is undemocratic misses the legitimate concerns of the Founders about the wisdom of absolute democracy and the importance of their insistence on federalism.

We hope you will enjoy reading these essays,

Caleb A. Verbois

Assistant Professor of Political Science at Grove City College

SAVE OUR GIRLS:
AN ANALYSIS OF METHODS TO PRECLUDE SEX-SELECTIVE ABORTION IN THE UNITED STATES

Alex Brown

ABSTRACT: *The abortion debate usually focuses on the competing interests of women having the right to chart their life's course by choosing when to bear children versus the state's interest in protecting fetal life. Often overlooked are abortion decisions based not on a woman's quest for personal autonomy but on immutable fetal characteristics, particularly sex. In this Note, Brown argues that sex selective abortions can be prohibited both inside and outside the Supreme Court of the United States's abortion jurisprudence. He distinguishes the issue of sex selective abortions from the abortion issue as framed by Roe v. Wade and Planned Parenthood of Se. Pa. v. Casey. Sex selective abortion creates a Fourteenth Amendment Equal Protection Clause issue because the practice typically targets female fetuses. This places sex selective abortion at the crossroads of two Fourteenth Amendment clauses: the Equal Protection Clause and the Due Process Clause. Congress could use its enumerated powers, as interpreted by the Supreme Court, to pass legislation proscribing sex selective abortion. Further, he rebuts criticism that current state sex selective abortion prohibitions are merely unenforceable, symbolic statutes. In the United States, where opportunities for women abound, women need not favor bearing sons over daughters. The federal and state governments have the constitutional power and moral obligation to prohibit sex selective abortions.*

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* Alex Brown attended Grove City College from 2010–13, graduating in three years summa cum laude with highest honors in political science. Brown held the position of vice president of the Law Society. Alex then attended Case Western Reserve University School of Law. He served as a contributing editor on the Case Western Reserve Law Review. Alex worked for the civil litigation law clinic during his third year of law school. He graduated cum laude with a litigation and dispute resolution concentration, receiving honors in the concentration. Alex began his current position as a judicial law clerk at the United States District Court for the Western District of Pennsylvania.

INTRODUCTION

The right to an abortion in the United States is, in a legal sense, unquestioned.[1] Public opinion on abortion rights in the United States, however, is split nearly fifty-fifty.[2] Perhaps the reason for such a divide is that when individuals consider the question of abortion, their opinions are guided more by their moral beliefs, rather than the Supreme Court's substantivedueprocess pronouncements. If the issue is re-framed as abortion for the purpose of selecting a child's sex, then public opinion in the United States aligns much more clearly.[3]

Sex-selective abortion, due to its tendency to terminate more female than male fetuses, can be constitutionally prohibited both within and around the current framework of abortion laws in the United States. Furthermore, it should be prohibited by both federal and state governments within the United States because it demeans the equal importance of raising both girls and boys in a society. The following analysis proposes possible ways of distinguishing sex-selective abortion from the existing constitutional reproductive rights framework. It also discusses

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1 *See* Roe v. Wade, 410 U.S. 113 (1973).

2 In a May 2014 Gallup poll, 47% of Americans identified as pro-choice and 46% identified as pro-life. Lydia Saad, *U.S. Still Split on Abortion: 47% Pro-Choice, 46% Pro-Life*, GALLUP (May 22, 2014), http://www.gallup.com/poll/170249/split-abortion-pro-choice-pro-life.aspx?utm_source=position4&utm_medium=related&utm_campaign=tiles (last visited Mar. 15, 2015).

3 Jeff Jacoby, *Choosing to Eliminate Unwanted Daughters*, THE BOSTON GLOBE (Apr. 6, 2008), http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/04/06/choosing_to_eliminate_unwanted_daughters/ (using a 2006 Zogby poll to show 86% of Americans agreeing that sex-selective abortions should be illegal).

enforcing sex selective abortion prohibitions and the role such laws provide to society.

I. Prohibiting Sex-Selective Abortion Despite *Casey* and *Roe*.

Because *Casey* essentially retooled the Supreme Court's decision in *Roe*, proposed solutions to the sex-selective abortion issue must satisfy the holdings in *Casey*: The easiest sex-selective law reform is to pass a statute prohibiting abortion for either the sole reason of the fetus's sex, or if the sex of the fetus is a substantial factor for the woman receiving the abortion. To ensure that a statute fits within *Casey*, the statute must apply only after the fetus achieves viability, while also preserving an exception allowing a woman to receive an abortion if her life or health is endangered.[4] While this proposal would hold up against constitutional scrutiny, its effectiveness in actually preventing a sex-selective abortion are doubtful for two primary reasons.

First, maternal blood tests, such as Acu-Gen Biolab's Acu-Gender test, may determine the sex of a fetus as early as the fifth week of pregnancy.[5] Other scholars state that the detection of cell-free fetal DNA in its mother's bloodstream is possible at

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4 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (explaining that a state may regulate or prohibit abortion after fetal viability except when necessary to preserve the mother's life or health).

5 Ashley A. Bumgarner, *Right to Choose: Sex Selection in the International Context*, 14 Duke J. Gender L. & Pol'y 1289, 1292 (2007) (showing the relationship between sex-selective abortion and sex-selection).

four weeks into the pregnancy, which reveals the sex of the fetus.[6] If the mother learns the sex of her fetus prior to its achievement of viability, the woman can terminate the fetus under *Casey*,[7] making the prohibition of sex-selective abortion less effective, as it would only theoretically prevent abortions of fetuses on the basis of sex after the fetus achieves viability. A prohibition of sex-selective abortion would also be superfluous if a state already prohibited abortions in general after a fetus becomes viable.

Second, questions exist as to whether any sex-selective abortion prohibition is practically enforceable. For instance, a physician may be unaware of a person's exact motivations for seeking an abortion, regardless of any questions a physician may be required to ask when providing an abortion and a woman's answers to such questions.[8] The Arizona sex-selection prohibition[9] requires a prosecutor to prove the specific intent of a defendant, most likely a physician, through evidence that the doctor had actual or direct knowledge[10] that a woman sought an abortion in which the sex of the fetus was a factor.[11] Other motivations for sex-

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6 Kevin. L. Boyd, Comment, *The Inevitable Collision of Sex-Determination by Cell-Free Fetal DNA in Non-Invasive Prenatal Genetic Diagnosis and the Continual Statewide Expansion of Abortion Regulation Based on the Sex of the Child*, 81 UMKC L. REV. 417, 427 (2012) (explaining how revealing the fetus' DNA simultaneously demonstrates the sex of the fetus).

7 *Casey*, 505 U.S. at 870.

8 Krissa Webb, *Gender Mis-Conception: The Prenatal Nondiscrimination Act as a Remix of the Abortion Debate*, 11 GEO. J.L. & PUB. POL'Y 257, 274 (2013) (discussing the potential enforceability of the Prenatal NonDiscrimination Act ("PRENDA"), which applies as well to enforceability of other sex-selection abortion-prohibiting statutes).

9 *Ariz. Rev. Stat. Ann.* § 13-3603.02 (2011).

10 Boyd, *supra* note 6, at 438.

11 *Id.* at 439.

selective abortion statutes also emerge in the academic discussions of their enforceability. One line of thought argues that despite the enforceability issues implicit in sex-selective abortion bans, these statutes likely have a chilling effect on abortion providers.[12] Individuals arguing against sex-selective abortion as a means of chipping away at *Roe* and *Casey* likely find that argument appealing.

II. Distinguishing *Roe* and *Casey* under the Current Constitutional Framework.

The best method a pro-life litigant could use to defend the constitutionality of sex-selective abortion bans is to argue that *Roe* and *Casey* are distinguishable, having no applicability to the issue of sex-selective abortion. For the purposes of this section of this Note, assume that a state proscribed sex-selective abortion throughout a woman's pregnancy. This Note advocates three reasons that *Roe* and *Casey* are distinguishable in the context of sex-selective abortion.

A. A State's Compelling Interest in Preserving the Dignity of Women as a Class is not an Undue Burden.

Proponents of a sex-selection abortion prohibition could propose that it is not an undue burden under *Casey* because the state has a compelling interest in protecting female fetuses to preserve the dignity of women as a class under the Fourteenth

12 *Id.* at 443.

Amendment Equal Protection Clause.[13] By arguing this way, a state could force the courts to consider whether a state's compelling interest of protecting female fetuses (and thus the dignity of women altogether) is an undue burden, especially when argued as an Equal Protection Clause issue.

If such an argument reached the Supreme Court, its outcome may not be as clear-cut as opponents of sex-selection abortion bans would like. Some scholars argue against pro-choice individuals solely relying on *Roe* to defend their right to an abortion because the Roberts Court is "[l]ess sympathetic to abortion rights arguments than any Court since *Roe*."[14] For instance, in 2007, the Supreme Court held in *Gonzales v. Carhart* that the Partial-Birth Abortion Act of 2003 was constitutional because it placed no substantial obstacle (or undue burden) on late-term, previability abortions.[15] The Court even noted in *Gonzales* that the government has an interest in protecting the integrity and ethics of physicians, as their performance of a late-term abortion procedure known as intact dilation and extraction appeared similar to infanticide.[16]

One reason why the Partial-Birth Abortion Act of 2003 was held constitutional was that alternative means

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13 U.S. CONST. amend. XIV, § 1; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

14 Scott A. Moss and Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U.L. REV. 175, 178 (2008) (suggesting that litigating abortion rights issues in state court, instead of federal court is a better route to protecting gender equality and personal autonomy). After Justice Scalia's death, the Roberts court is likely considered less sympathetic to anti-abortion arguments, although this may change depending on how the next Justice views the issue.

15 Gonzales v. Carhart, 550 U.S. 124, 156 (2007).

16 *Id.* at 157, 139, 158.

of abortion were available before the late-term abortion procedure scrutinized in Gonzales would be necessary.[17] However, the Court's willingness to rule in favor of a pro-life position in Gonzales demonstrates that other pro-life decisions may occur. Perhaps the conflict between the Due Process Clause, Equal Protection Clause, the undue burden test, and a state's compelling interest in protecting the dignity of women may compel courts to hold that sex-selective abortion prohibitions are constitutional.

B. A Complete Sex-Selective Abortion Prohibition is not an Undue Burden.

A second way a litigant may distinguish sex-selective abortion prohibitions from the current Constitutional reproductive rights jurisprudence is arguing that a full prohibition itself is not an undue burden. The Court, in *Casey*, leaves a substantial opening for regulating abortions, stating that "[n]ot all burdens on the right to decide whether to terminate a pregnancy will be undue."[18] The Court defines the undue burden test as a state regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[19] Additionally, state statutes supporting the state's interest in potential life must inform the woman's free choice instead of hindering it.[20]

Defining exactly what an undue burden is or what

17 *Id.* at 164.
18 *Casey*, 505 U.S. at 876.
19 *Id.* at 877.
20 *Id.*

constitutes a substantial obstacle to a woman seeking an abortion is difficult. One possibility is picturing the undue burden test as a balancing test between a woman's right to an abortion versus a state's conflicting interest.[21] If the state's interest is in protecting life, it is highly likely that many judges will value life much higher than any burden affecting the abortion right.[22] As one author states, fetal life "is unmatched in its profundity."[23] Thus, a state's interest in fetal life always outweighed by the woman's interest if the undue burden test is conceived as a balancing test.[24] Under this analysis, if the state asserts its interest in banning sex-selective abortion in order to protect potential female human life developing in the womb, many judges would uphold the state statute as constitutional.

Even if judges do not agree that the undue burden test represents a balancing test between the governmental interest in prohibiting abortion and a woman's interests in reproductive liberty, a pro-life litigant could still address the issue through the undue burden test. The Supreme Court, in *Casey*, neglected to mention whether substantial obstacles to abortion included procedural legal hurdles for women prior to receiving an abortion, restrictions on permissible abortion methods, or substantive prohibitions of abortions done for a particular reason, such as sex-selection.[25] The ambiguity regarding the applicability of the undue burden test casts doubt on whether the test can apply at all to a substantive

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21 Khiara M. Bridges, *"Life" in the Balance: Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285, 1315 (2013).

22 *Id.* at 1317.

23 *Id.* at 1335.

24 *Id.* at 1335–37.

25 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, at 877 (1992).

prohibition on an abortion performed due to the presence of an undesired immutable fetal trait, such as sex.

Analyzing the text of applicable Supreme Court cases demonstrates the restrictions that the undue burden test applies to and supports the argument that sex-selective abortion bans are not undue burdens. In *Stenberg v. Carhart*, the Supreme Court held that a Nebraska statute banning partial-birth abortion imposed an undue burden on a particular type of abortion procedure, which unduly burdened the right to choose an abortion.[26] The statute targeted one method of partial-birth abortion, but because its language was vague, the Court held that its plain language additionally covered a second method of partial-birth abortion that blocked access to pre-viability, late-term abortions.[27] *Stenberg* thus demonstrates a restriction on an abortion method being held unconstitutional under the undue burden test, differing from the sex-selective abortion context, which emphasizes an abortion restriction based on the reason a woman seeks the abortion—a substantive matter.

Gonzales v. Carhart upheld a federal statute prohibiting a particular method of partialbirth abortion because the restriction was not an undue burden upon a woman's overall right to seek an abortion.[28] This is because alternative abortion procedures remained available to women beyond the particular type of partial birth abortion prohibited by the federal statute.[29] *Gonzales* emphasizes restricting the method of abortion, which is, like *Stenberg*,

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26 Stenberg v. Carhart, 530 U.S. 914, 930 (2000).

27 *Id.* at 939–940.

28 Gonzales v. Carhart, 550 U.S. 124, 147 (2007).

29 *Id.* at 164.

different than the rationale behind sex-selective abortion bans, which preclude abortions for the reason of fetal sex, a substantive consideration separate from how an abortion is physically done.

Gonzales additionally aids the argument for sex-selective abortion because it accepts the principle that, pre-viability, a state may not prohibit any woman from aborting a fetus.[30] This statement, while at first appearing hostile to sex-selective abortion bans that cover the pre-viability period of fetal development, actually provides constitutional backing for sex-selective abortion bans because every state with a sex-selective abortion statute does not punish the woman for actually receiving a sex-selective abortion.[31] Substantively, the abortion itself is not prohibited. Even *Casey* alludes to this point when the Court states that restrictions on abortion "must be calculated to inform the woman's free choice, not hinder it."[32]

Sex-selective abortion prohibitions do not hinder women's free choice in seeking an abortion, since the statutes do not punish women for their abortions[33] and because women can receive the abortion by simply lying, which is an expression of a woman's free

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30 *Id.* at 146.

31 ARIZ. REV. STAT. ANN. § 13-3603.02 (2011); KAN. STAT. ANN. § 65-6726 (West 2013); N.C. GEN. STAT. ANN. § 90-21.121 (West 2013); N.D. CENT. CODE ANN. § 14-02.1-04.1 (West 2013); OKLA. STAT. ANN. tit. 63, § 1-731.2(B) (West 2010); 18 PA. STAT. ANN. § 3204(c) (West 1989); S.D. CODIFIED LAWS § 34-23A-64 (2014).

32 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

33 ARIZ. REV. STAT. ANN. § 13-3603.02 (2011); KAN. STAT. ANN. § 65-6726 (West 2013); N.C. GEN. STAT. ANN. § 90-21.121 (West 2013); N.D. CENT. CODE ANN. § 14-02.1-04.1 (West 2013); OKLA. STAT. ANN. tit. 63, § 1-731.2(B) (West 2010); 18 PA. STAT. ANN. § 3204(c) (West 1989); S.D. CODIFIED LAWS § 34-23A-64 (2014).

choice. Additionally, the expressive nature of sex-selective abortion prohibitions inform women about society's expectation that women not use an immutable characteristic as fundamental as sex for the basis of having an abortion.

One final reason sex-selective abortion bans are not undue burdens is because the Supreme Court previously upheld a substantive law as not being an undue burden on the right for women to receive abortions. In *Mazurek v. Armstrong*, the Court upheld the constitutionality of a Montana statute preventing non-physicians from performing abortions because the statute was not an undue burden.[34] This implies that the obstacles referred to in the undue burden test are not substantive in nature, meaning that sex-selective abortion bans, which are substantive, are not obstacles a court could hold a law unconstitutional for under the undue burden test in *Casey*.

C. Roe *and* Casey *are not Applicable to Sex-Selective Abortion Bans.*

A third way of distinguishing the sex-selective abortion issue from the existing Constitutional framework is to argue that neither *Roe* nor *Casey* speak to the issue of sex-selective abortion bans in the United States.[35] One difference between the sex-selection abortion issue and the general abortion right conferred by *Roe* and *Casey* is that the woman's liberty interest in the sex-selective abortion context requires positive pro-

34 Mazurek v. Armstrong, 520 U.S. 968, 974 (1997).

35 Roe v. Wade, 410 U.S. 113 (1973); *Casey*, 505 U.S. at 833.

tection of the law because preventing sex-selective abortion preserves women's reproductive autonomy by promoting the birth of daughters who can benefit from the reproductive liberty provided under *Roe* and *Casey*.[36] Further, sex-selective abortion perpetuates discrimination directly against the female fetus to be terminated and indirectly on all girls in society because the existence of sex-selective abortion shows girls that society values their presence less than boys, causing emotional damage.[37] Individual women discriminating against women as a class through the practice of aborting female fetuses is a crucial distinguishing factor between sex-selective abortion and the focus of *Roe* and *Casey*.[38]

Roe and *Casey*, in contrast, speak to allowing a woman to choose the number of children she plans to birth.[39] Having zero, one, or two or more children in referring to the woman's right to privacy and autonomy, bodily integrity, and maintenance of her health, especially in the context of women assuming more responsibilities than a mere homemaker, is *Roe*'s primary focus.[40] The argument that by limiting sex-selective abortion, one protects the foundation of the right to reproductive privacy—protection of the privacy and autonomy of women—differs considerably from the rationale discussed in *Roe* and *Casey*.[41]

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36 Webb, *supra* note 8, at 272.

37 *Id.*

38 *Id.*

39 *Id.*

40 *See* Roe, 410 U.S. at 153 (1973) ("Maternity, or additional offspring, may force upon the woman a distressful life and future.").

41 Webb, *supra* note 8, at 272.

III. Jurisdictional Hook for a Federal Sex-Selective Abortion Ban.

If the federal government passes a nationwide ban on sex-selective abortion, the ban will have to be tied to an enumerated power of Congress. One such power of Congress is the ability to regulate interstate commerce.[42] Congress may regulate interstate commerce in three categories: (1) channels of interstate commerce; (2) instrumentalities of, and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce.[43]

In the context of sex-selective abortion, categories (2) and (3) are the most likely way a sex-selective abortion ban will properly be tied to the interstate commerce power. Category (2), regarding the instrumentalities of, and persons or things in interstate commerce, is most applicable because it is virtually certain that at least one of the devices a physician uses during a sex-selective abortion will arrive in the physician's office after traveling across various state borders. For instance, Congress forced restaurants to serve African Americans because food served by the restaurants moved through interstate commerce.[44] Though sex-selective abortion bans would focus on the procedure's instruments moving through interstate commerce, rather than food, the logic applies similarly and allows Congress to regulate sex-selective abortion through category (2) of its Commerce Clause powers.

Using category (3), activities that substantially affect

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42 U.S. Const. art. I, § 8, cl. 3.

43 Gonzales v. Raich, 545 U.S. 1, 16–17 (2005).

44 Katzenbach v. McClung, 379 U.S. 294, 298–305 (1964).

interstate commerce, is also a viable alternative for Congress to justify banning sex-selective abortion. Sex-selective abortion itself substantially affects interstate commerce, even though a sex-selective abortion only occurs within the borders of a particular state, because the aggregate effect on interstate commerce by many localized activities may be regulated as stated in *Wickard v. Filburn*.[45] Some of the consequences of sex-selective abortion may include increased illicit activities such as prostitution, kidnapping, and sex trafficking.[46] Though these activities are generally held to be illegal, Congress may nonetheless restrict them through making sex-selective abortion illegal under its power to regulate interstate commerce, even without particularized findings of the effect sex-selective abortion has on interstate commerce.[47] All Congress needs is a rational basis for the restriction, and reducing prostitution, kidnapping, and sex trafficking through prohibiting sexselective abortion meets the rational basis test.[48] Therefore, Congress has the ability to prohibit sex-selective abortion through its enumerated power to regulate interstate commerce.

IV. Enforcing a Sex-Selective Abortion Ban.

The practicality of enforcing sex-selective abortion prohibitions is commonly questioned. One author noted "[if]

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45 Wickard v. Filburn, 317 U.S. 111, 128–29 (1942).

46 Bumgarner, *supra* note 5, at 1301 .

47 Raich, 545 U.S. at 21–22.

48 *Id.* at 22. This Note assumes that banning sex-selective abortion is constitutional. Therefore, within the jurisdictionalhook section of this Note, a rational basis is all Congress needs to effectuate such a ban through its power to regulate interstate commerce.

abortion remains legal in the United States, it will be almost impossible to discern whether a couple chooses not to have a child for purposes of family planning or the sex of the fetus."[49] Though this is a weak distinction, this statement still highlights the difficulty of enforcing a sex-selective abortion prohibition.

Statute and amendment writers have options at their disposal to aid enforcement of a sex-selective abortion ban. One model, for instance, is to incorporate the enforcement mechanisms of PRENDA, which contains a reporting requirement to the authorities for physicians, physicians' assistants, nurses, counselors, or medical or mental health professionals who know of or suspect someone will attempt a sex-selective abortion, into sex-selective abortion prohibitions.[50] To facilitate the reporting requirement, abortion providers must question women about their reasons for choosing to abort under PRENDA.[51] Writers of proposed statutes and amendments precluding sex-selective abortion should note the possibility of modeling their ideas after PRENDA's reporting requirement, with necessary questioning of women who seek an abortion as a possible means of enforcement. However, questioning abortion-seeking women before their abortion begins is not a foolproof means of enforcement.

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49 Deidre C. Webb, Note, *The Sex-Selection Debate: A Comparative Study of Sex Selection Laws in the United States and the United Kingdom*, 10 S.C. J. INT'L L. & BUS. 163, 200 (2013). Distinguishing between aborting a fetus on the basis of sex versus doing so for family planning purposes (referring to raising a certain number of boys or girls) is illogical because the sex of the fetus is the basis of the abortion.

50 Mary Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232, 265 (2013).

51 *Id.*

Enforcing a sex-selective abortion ban by questioning women regarding the reasons they seek abortions is problematic because they may lie. Despite the efforts of a state or federal government to enact statutes precluding sex-selective abortions and to enforce these prohibitions, individuals will inevitably disguise their true reasons for seeking an abortion. After careful consideration, bearing in mind the likelihood of this statement being true, the question of whether it is appropriate to utilize political capital to pass sex-selective abortion bans and amendments seems to speak for itself as doing so would be a prudent endeavor.

In responding to this issue, explaining the effects of laws is a great starting point. Laws contain two primary roles: (1) instrumental and (2) symbolic.[52] A law's instrumental role involves its enforcement effects, while a law's symbolic role acts through its promulgation or public announcement.[53] Sex-selective abortion bans may serve both purposes in that they symbolize society's moral standards[54] and could serve an instrumental purpose in creating a questioning requirement for individuals seeking an abortion, which may deter some individuals from aborting a fetus due to its sex. Laws which appear primarily symbolic usually contain an instrumental purpose too.[55] Symbolic laws, even if one

52 John F. Galliher and John Ray Cross, *Symbolic Severity in the Land of Easy Virtue: Nevada's High Marihuana Penalty*, 29 SOC. PROBS. 380 (1982).

53 *Id.*

54 *Id.* at 385.

55 Helgi Gunnlaugsson and John F. Galliher, *Prohibition of Beer in Iceland: An International Test of Symbolic Politics*, 20 LAW & SOC'Y REV. 335, 337 (1986).

concludes that they lack any instrumental purpose, are nonetheless useful.

Symbolic laws can "call attention to injustice, confer legitimacy upon civil rights activists, and encourage political mobilization against discrimination."[56] A sex-selective abortion prohibition calls attention to the issue of fetuses being terminated due to an immutable trait—their sex. Sex-selective abortion bans are not the only laws operating in such a manner. Local human rights ordinances are symbolic laws in that they communicate to the community that discriminatory conduct toward anyone is unacceptable. Some argue that their focus is the strength of the message the law delivers, not necessarily whether the law's presence decreases discrimination.[57]

Those who dismiss sex-selective abortion bans as merely symbolic laws must grapple with the underlying reality that their statement is an assumption. It may be more likely that the presence of sex-selective abortion bans dissuade some women from undergoing an abortion. Effectively halting all sex-selective abortions is not possible. But our society is not demanding the repeal of homicide prohibitions just because some killings go unpunished. In a similar vein, opposing sex-selective abortion bans because they will not practically prevent all sex-selective abortions is illogical.

Determining how laws influence each individual's

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56 Christopher E. Smith, *Law and Symbolism*, 1997 DET. C.L. REV. 935, 939 (1997)

57 Robert Salem, *The Strengths and Weaknesses of Local Human Rights Ordinances*, 48 Clev. St. L. Rev. 61, 63 (2000).

decision-making process is a difficult endeavor. But in arguing that the presence of sex-selective abortion prohibitions have no instrumental effect—that they are merely society's toothless statement on a moral issue—one must unequivocally dismiss the possibility that these laws enter the moral and emotional calculus behind the decision to abort. Regardless of whether one considers sex-selective abortion bans symbolic or instrumental, these bans describe society's view on a pervasive problem: selectively aborting female fetuses because of their sex.

Conclusion

The termination of female fetuses is a practice the United States should not endorse. It reduces the social worth of women as a class. As such, the states and federal government have the collective means to enact statutes prohibiting sex-selective abortion both within the nation's reproductive rights framework, as well as to distinguish sex-selective abortion from the existing constitutional framework. Though some may argue that sexselective abortion bans are merely symbolic, it is just as likely that the laws would influence the decision calculus of a woman thinking of aborting a fetus due to its sex.

No girl should lose a chance at a successful life, despite potential difficult circumstances, merely because her sex is perceived to receive less opportunities than males or because of reasons such as family balancing. The opportunities for women to be successful in the United States is enough that female fetuses should not be aborted due to their most fundamental immutable

trait: their sex.

PRIVATE SPEECH ON GOVERNMENT PROPERTY: DOES THE FIRST AMENDMENT APPLY TO SPECIALTY LICENSE PLATES?

Sarah Child

ABSTRACT: *The twenty-first century is an era of personalization, and license plates are no exception. Today, it is common for motorists to choose from more than one hundred varieties of specialty plates, featuring everything from sports teams to educational institutions to Superman. Towing the line between government and private speech, specialty plates have been a frequent source of litigation. Despite the private speech rights implicated on these government IDs, in June of 2015, the Supreme Court in Walker v. Texas Division, Sons of Confederate Veterans, Inc. ruled against nearly every circuit to address the issue and held that specialty plates constitute government speech immune from First Amendment protections. Applying a factors test, the Court analyzed the history of these programs, the public perception of speaker identity, and the editorial control exercised by the government. The implications of a narrow reading of Walker are troubling; indeed, legal professionals have used it to justify viewpoint discrimination in other areas of private subsidized speech as well as trademark law. Nevertheless, these same factors—when broadened to include an analysis of controlling precedent and specific features of the programs themselves—can and have been used to champion private speech.*

INTRODUCTION:

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The twenty-first century is an era of personalization. Monogram gifts are all the rage, displaying individuals' initials on everything from linens[1] to flatware.[2] Corporations like Coca Cola have launched initiatives such as the "Share a Coke" campaign, which features bottles labeled with America's most popular names.[3] Even social media users constantly customize their photos to show allegiance to causes, like after the devastating November 2015 terrorist attacks in France when thousands of Facebookers superimposed a French flag over their profile pictures.[4]

License plates are no exception to this customization frenzy. Since their inception in the late 1980s,[5] specialty plate programs have grown exponentially such that now every state in the nation offers both an ordinary license plate and a selection of customized alternatives[6] that feature state mottos, charities, organizations, causes, sports teams, educational institutions, and more. These programs vary by state, but generally designs are proposed by non-profit groups or the legislature and the plates must receive approval

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1 MONOGRAMMED LINEN SHOP, HTTP://WWW.MONOGRAMMEDLINENSHOP.COM (LAST VISITED DEC. 5, 2015).

2 *Monogrammed Flatware*, BETTER HOMES AND GARDENS, http://www.bhg.com/shop/dining/monogrammed-flatware-s.html (last visited Dec. 5, 2015).

3 Jay Moye, *Share a Coke 2.0: The Hit Campaign is Back, and It's Bigger and Better Than Ever*, THE COCA COLA COMPANY (Apr. 14, 2015), http://www.coca-colacompany.com/stories/share-a-coke-20-the-hit-campaign-is-back-and-its-bigger-and-better-than-ever/.

4 Nisha Chittal, *How Social Media Played a Role in the Aftermath of the Paris Attacks*, MSNBC (Nov. 14, 2015), http://www.msnbc.com/msnbc/how-social-media-played-role-the-aftermath-the-paris-attacks.

5 Mark Vanhoenacker, *Montana Quilters Have Their Own License Plate*, SLATE (June 27, 2012), http://www.slate.com/articles/life/design/2012/06/specialty_license_plates_why_are_there_so_many_.html.

6 *See, e.g.*, *Iowa License Plates*, LICENSE PLATE CENTRAL, http://www.licenseplatecentral.com/usa/iowa (last visited Dec. 28, 2015).

from the state Department of Motor Vehicle (DMV) before they are issued.[7] Consumers then select and purchase them for an additional fee that is allocated to the state and the organization affiliated with the chosen design.[8]

Given the highly polarized society of America,[9] it should come as no surprise that these programs have seen their fair share of litigation as various groups have pushed for the creation of controversial plates. After decades of lower courts seeking to achieve a balance between disseminating potentially offensive messages and protecting free speech, the Supreme Court handed down its decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*[10] in June 2015 and radically changed the way these cases will be handled. In a five-to-four decision, the Court upheld the rejection of a Texas specialty plate featuring a Confederate flag and proclaimed that each specialty plate affixed to an individual's car declares the government's—and not the motorist's—message.[11] As a result, the government may now discriminate based on viewpoint when deciding whether to approve the hundreds of specialty plates offered in these programs.[12]

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7 *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc. 135 S. Ct. 2239, 2244 (2015); Children First Found., Inc. v. Fiala, 790 F.3d 328, 335 (2d Cir.) *vacated and remanded*, 611 F. App'x 741 (2015); Roach v. Stouffer, 560 F.3d 860, 862 (8th Cir. 2009).

8 *Fiala*, 790 F.3d at 335; Az. Life Coal. Inc. v. Stanton, 515 F.3d 956, 965–66 (9th Cir. 2008); *Roach*, 560 F.3d at 863.

9 *Political Polarization in the American Public*, PEW RESEARCH CENTER – U.S. POLITICS & POLICY (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/.

10 135 S. Ct. at 2239.

11 *Id.* at 2243, 2253.

12 *Id.* at 2256.

This Article posits that such a holding ignores the private speech implicated when an individual selects and purchases a specialty plate and imperils citizens' free speech rights. Accordingly, Part I explains the majority and dissenting arguments advanced in *Walker*. Part II proffers that *Walker* oversimplified the government speech doctrine inquiry and advances an analysis that uses the very factors utilized in *Walker* to more effectively address the nuances of hybrid speech. Part III discusses the troubling implications of *Walker* not only in the context of specialty license plates, but in all areas of private subsidized speech, as well as trademark law. Ultimately, this Article contends that lower courts analyzing specialty programs could still render an outcome championing private speech pursuant to the test in *Walker*. *Walker's* factors herein augmented can mitigate the effect of its holding.

I. Overview of *Walker*

The government speech doctrine, which undergirds the Supreme Court's decision in *Walker*,[13] is a new phenomenon; indeed, Justice Stevens described the inquiry as "recently minted" in his 2009 concurring opinion in *Pleasant Grove City v. Summum*.[14] Certainly noteworthy is that the Courts of Appeals—with the exception of the Sixth Circuit[15]—have held that specialty plates constitute private speech or a hybrid of private and government

13 *Walker*, 135 S. Ct. at 2253.

14 555 U.S. 460, 481 (2009) (Stevens, J., concurring).

15 Am. Civil Liberties Union of Tn. v. Bredesen, 441 F.3d 370 (6th Cir. 2006).

speech.[16] This distinction is far from insignificant since it determines the degree to which the government controls the speech. Government speech is not subject to First Amendment limitations[17] because it is "generally entitled to promote a program, espouse a policy, or take a position."[18] Conversely, private speech is protected by the First Amendment, which prohibits all discrimination based on viewpoint.[19]

Summum—which expanded the parameters of the government speech doctrine[20]—is fundamental to the instant analysis because the Supreme Court relied on it exclusively to support its decision in *Walker*.[21] In *Summum*, a religious organization sued the city of Pleasant Grove for rejecting its request to erect a religious monument in a park.[22] The city maintained it had the right to choose the monuments based on criteria including history and esthetics.[23] The Court ultimately found for the city, holding that notwithstanding a park's designation as a traditional public forum, permanent

16 Children First Found., Inc. v. Fiala, 790 F.3d 328, 339 (2d Cir.), *vacated and remanded*, 611 F. App'x 741 (2015) (specialty plates constitute private speech); *Vandergriff*, 759 F.3d at 395 (same); *White*, 547 F.3d at 863 (same); Az. Life Coal. Inc. v. Stanton, 515 F.3d 956, 960 (2008) (same); Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 798 (4th Cir. 2004) (specialty plates constitute hybrid speech).

17 *Summum*, 555 U.S. at 467.

18 Walker v. Tex. Div., Sons of Confederate Veterans, Inc. 135 S. Ct. 2239, 2246 (2015).

19 Rosenberger v. Rector, 515 U.S. 819, 828 (1995).

20 Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits After Summum*, 19 WM. & MARY BILL RTS. J., 1, 4 (2010).

21 *Walker*, 135 S. Ct. at 2253.

22 *Summum*, 555 U.S. at 465–66.

23 *Id.* at 466.

monuments erected therein constitute government speech.[24]

In an opinion authored by Justice Breyer, the *Walker* Court mirrored its analysis in *Summum* and analyzed three factors: the history of the speech, the public perception of speaker identity, and the degree of editorial control exercised by the government.[25] The Court first explained that governments have historically used both monuments and specialty license plates to speak to the public.[26] The Court's examples included state-sponsored plates from the early 1900s depicting state animals, foods, and slogans, as well as Texas-themed plates ranging from the Lone Star emblem in 1919 to the 150-year plate in 1995.[27] The Court next reasoned that both monuments and specialty plates are "closely identified in the public mind with the [State]."[28] Lastly, the Court explained that both the city in *Summum* and Texas controlled the messages by exercising "final approval authority" over the monument and license plate design selections, respectively.[29]

The dissent in *Walker*—authored by Alito, the very justice who wrote the majority opinion in *Summum*[30]—responded to the majority's historical argument by explaining that state-sponsored

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24 *Id.* at 481.

25 *Walker*, 135 S. Ct. at 2243, 2248–49.

26 *Id.* at 2248.

27 *Walker*, 135 S. Ct. at 2248.

28 *Id.* at 2248–49 (discussing Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009)).

29 *Id.* at 2249 (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–61 (2005)).

30 *Summum*, 555 U.S. at 463.

plates[31] featured different messages than the general specialty plates at issue.[32] The former developed in the early 1900s and constituted government speech because they endorsed state programs.[33] General specialty plates did not develop until the late 1990s and from there burgeoned into the selection of 350 offered today.[34] Texas thus "crossed the line" from government to private speech "when . . . the State began to allow private entities to secure plates conveying their own messages."[35]

The dissent responded to the majority's public perception argument that plates indicate government support for the message by extending it to its logical conclusion: Texas espouses the content on all 350 specialty plates.[36] The state's official policy thus includes preferences for golfing over working ("Rather Be Golfing" plate) and the University of Texas over its arch rivals (Notre Dame, Oklahoma State, and Kansas State license plates), among other absurdities.[37]

The dissent responded to the editorial control argument by explaining that the Board's chairman who exercises "final approval

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31 In this Article, license plates developed by the state legislature, endorsing state programs, or featuring state milestones, animals, foods, slogans, sports teams, or educational institutions are referred to as state-sponsored plates.

32 *Walker*, 135 S. Ct. at 2256–57 (Alito, J., dissenting). In this Article, license plates developed by private vendors or non-profit organizations featuring general causes, private organizations, companies, charities, professions, military branches, and other messages that might be reasonably perceived as private are referred to as general specialty plates.

33 *Id.* at 2259.

34 *Id.* (Alito, J., dissenting).

35 *Id.* at 2260.

36 *Id.* at 2255.

37 *Id.*

authority" said that the program encouraged all kinds of private plates—not just those messages supported by the state—to raise money.[38] Even a Texas DMV brochure emphasized the consumer's role in the process and the technical features that usually resulted in rejection by stating: "Q. Who provides the plate design? A. You do, though your design is subject to reflectivity, legibility, and design standards."[39] The program is open to any license plates offered by private donors rather than only those reflective of the city's culture and history like the monuments in *Summum*.[40] As the dissent concluded, the speech is more akin to government blessing private speech than government speech in furtherance of its programs.[41]

II. Developing a Test for Government Speech: Mending *Walker*'s Oversimplification

The Supreme Court's factors test in *Walker* constituted an oversimplification of the "recently minted" government speech doctrine. The three factors it addressed—the historical treatment of the speech, the public perception of the speaker's identity, and the editorial control exercised by the government[42]—are unquestionably critical to the analysis, but are more nuanced than the Court acknowledged. A more comprehensive scrutiny of these factors, the Court's previous decisions, and a wealth of precedents from the circuits is instructive for more adequately dealing with

38 *Id.* at 2260 (emphasis added).

39 *Id.*

40 Pleasant Grove City v. Summum, 555 U.S. 460, 465 (2009).

41 *Walker*, 135 S. Ct. at 2261 (Alito, J., dissenting).

42 *Id.* at 2251 (majority opinion).

the nuances of hybrid speech without the troubling implications of *Walker*. Taking these into account, a lower court might still find that specialty plate programs constitute private speech.

A. The History of Specialty License Plate Programs and the Government Speech Doctrine Favors Private Speech

The *Walker* Court first considered whether the forum was one the government has traditionally used to speak.[43] When this analysis is broadened to include the explosion of customized plates in the late 1990s and the history of the government speech doctrine, this factor favors private speech.

The historical inquiry involves more than just a blanket assertion that the traditional usage of license plates as government IDs denotes government speech.[44] Granted, specialty plates conveying state slogans and emblems have disseminated a government message throughout history[45] because they conceivably promote state interests.[46] Such Texas-specific plates—ranging from the Lone Star emblem featured on the 1919 plate to the 1995 plate celebrating "150 years of Statehood"[47]—favored government speech. Nevertheless, the specialty plate program in *Walker* did not proliferate until the late twentieth century.[48] Thus, courts considering the program's history should not mirror *Walker's* shortsighted analysis of the forum. Moreover, the subject of the

43 *Id.* at 2248.
44 *See id.* at 2249.
45 *Id.* at 2248 (majority opinion).
46 *Id.* at 2260 (Alito, J., dissenting).
47 *Id.* at 2248 (majority opinion).
48 *Id.* at 2257 (Alito, J. dissenting).

plate will likely be dispositive in determining whether its history weighs in favor of private or government speech.[49] Therefore, a plate honoring Nevada's 150th anniversary[50] or urging state citizens to "Protect Florida whales"[51] favors government speech (because it conceivably promotes state interests), while Hawaii's "Choose Life" plate[52] or Ohio's "Superman" plate[53] favors private speech (because it conceivably promotes private interests).

Furthermore, the history of the government speech doctrine is paramount. *Walker* explained that government speech's immunity from First Amendment scrutiny allows it to develop successful programs in areas pertaining to community health such as recycling and vaccinations.[54] Thus, when promoting such initiatives, the government is not required to disseminate the perspective of those opposed to them.[55] As the court in *Summum* reasoned, "it is not

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49 Am. Civil Liberties Union of N.C. v. Tata, 742 F.3d 563, 573 (4th Cir. 2014), *cert. granted, vacated sub nom.* Berger v. Am. Civil Liberties Union of N.C., 83 U.S.L.W. 3076 (U.S. June 29, 2015) (No.14-35) (subjects of 200 specialty plates "range from the controversial . . . to the religious . . . to the seemingly irrelevant to any conceivable North Carolina government interest . . . It defies logic . . . to suggest that all of these plates constitute North Carolina's—and only North Carolina's—message.").

50 *Charitable and Collegiate Plates*, DEPARTMENT OF MOTOR VEHICLES, http://www.dmvnv.com/platescharitable.htm (last visited Nov. 25, 2015).

51 *Specialty License Plate: Protect Florida Whales*, FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, http://www.flhsmv.gov/dmv/specialtytags/environmental/protect_florida_whales.html (last visited Nov. 25, 2015).

52 CHOOSE LIFE AMERICA, HTTP://WWW.CHOOSE-LIFE.ORG (LAST VISITED NOV. 14, 2015).

53 OHIO BUREAU OF MOTOR VEHICLES, http://bmv.ohio.gov/special_interest_plates.stm (last visited Dec. 6, 2015).

54 Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2246 (2015).

55 *Id.*

easy to imagine how government could function if it lacked this freedom."[56] Nevertheless, extrapolating this concept to specialty plate programs is tenuous. Under this reasoning, "[W]hen Texas issues a 'Rather Be Golfing' plate, but not a 'Rather Be Playing Tennis' or 'Rather Be Bowling' plate, it is furthering a state policy to promote golf but not tennis or bowling."[57] Even though state-sponsored plates are indicative of state policy, for every state-related plate there are dozens of non-state related plates in most programs.[58] Under *Walker's* reasoning, all of these subjects—from the Elvis Presley Club in Mississippi,[59] to the Penn State Alumni Association in Connecticut[60]—constitute state policies too.

Thus, this factor usually weighs in favor of private speech because more specialty plates tout generalized messages than state-

56 Pleasant Grove City v. Summum, 555 U.S. 460, 464, 468 (2009).

57 *Walker*, 135 S. Ct. at 2255 (Alito, J., dissenting).

58 *See infra* note 61.

59 *Available License Plates*, DEPARTMENT OF REVENUE STATE OF MISSISSIPPI, http://www.dor.ms.gov/TagsTitles/Pages/License-Plates.aspx (last visited Dec. 6, 2015).

60 *All Special Plates in Connecticut*, DEPARTMENT OF MOTOR VEHICLES, http://www.ct.gov/dmv/cwp/view.asp?a=811&q=276580 (last visited Dec. 6, 2015).

related messages.[61] For instance, Maryland, which offers one of the largest specialty plate programs in America, features approximately 835 generalized messages on its plates out of approximately 896 total messages.[62]

Furthermore, a check on the government speech doctrine is the government's accountability to the electorate.[63] This check is worthless if the people do not realize the government is speaking.[64] The breadth of specialty plates available makes it less likely that the public will perceive them as government speech, eliminating any checks that temper this concept.[65]

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61 *See, e.g.*, MONTANA DEPARTMENT OF JUSTICE, https://dojmt.gov/driving/plate-designs-and-fees/ (last visited Dec. 5, 2015) (146/201 plates are generalized specialty plates; the rest are state-sponsored plates); OHIO BUREAU OF MOTOR VEHICLES, http://bmv.ohio.gov/sp_initial_reserve.stm (last visited Dec. 6, 2015) (115/165); *Personalized and Specialty License Plates*, MISSOURI DEPARTMENT OF REVENUE, http://dor.mo.gov/pdf/SpecialtyPlateChart.pdf (last visited Dec. 5, 2015) (137/184). Even in programs that offer a greater percentage of state-sponsored plates than those already mentioned, generalized plates still constitute more than half of the program's offerings. *See, e.g.*, *Application for Special Plates*, MINNESOTA DEPARTMENT OF PUBLIC SAFETY DRIVER AND VEHICLE SERVICES, https://dps.mn.gov/divisions/dvs/forms-documents/Documents/MV_SpecialPlatesApplication.pdf (last visited Dec. 5, 2015) (more than half of specialty plate offerings are generalized specialty plates); *Choose Plate Category*, MOTOR VEHICLE DIVISION GEORGIA DEPARTMENT OF REVENUE, https://mvd.dor.ga.gov/motor/plates/PlateSelection.aspx (last visited Nov. 27, 2015) (same).

62 DEPARTMENT OF TRANSPORTATION MOTOR VEHICLE ADMINISTRATION, http://www.mva.maryland.gov/vehicles/licenseplates/bayandagricultural.htm (last visited Dec. 6, 2015).

63 Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 315 (2000).

64 Amy Riley Lucas, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 U.C.L.A. L. REV. 1971, 2015–16 (2008).

65 Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 798 (4th Cir. 2004) ("Given the array of specialty plates available in South Carolina, a citizen is less likely to associate the plate messages with the State.").

Therefore, this factor also weighs in favor of private speech because specialty plate programs do not comport with the purposes of the government speech doctrine, and the ambiguity surrounding the message bearer makes them immune from the doctrine's checks.

B. Public Perception of Speaker Identity Favors Private Speech

The second factor *Walker* addressed was public perception of speaker identity. While this factor is critical to the government speech doctrine, *Walker's* analysis was incomplete. This factor should not just recognize license plates' designation as government IDs. It should also consider the Supreme Court's jurisprudence recognizing the private speech rights implicated on specialty plates, a reasonable observer standard, the eligibility requirements of certain plates, the competing messages advanced by specialty plates, and the lower courts' treatment of vanity plates.

1. Supreme Court Jurisprudence Recognizes the Private Speech Rights Implicated on Specialty Plates

This is not the first time the Supreme Court has opined on the rights implicated on license plates, and the Court in *Walker* briefly discussed such precedent. Nevertheless, its hasty mention of *Wooley v. Maynard*[66] and *Perry Education Ass'n v. Perry Local Educators' Ass'n*[67] failed to adequately address the cases' implications: specialty plates involve private speech rights.

Wooley reasoned that automobiles are "readily associated"

66 430 U.S. 705 (1977).
67 460 U.S. 37 (1983).

with their operators and drivers use their "private property" as "mobile billboards" for the state's message.[68] Furthermore, the Court said requiring the display of a state motto on a plate interfered with "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control," thus categorizing license plates within that sphere of intellect.[69]

As the *Walker* Court noted, public perception of speaker identity in this context is influenced by the fact that "TEXAS" is written across the top of license plates, and Texas issues the plates, owns their design, and prescribes their method of disposal.[70] Nonetheless, these are tempered by *Wooley*'s observations that cars are associated with their drivers, drivers use their cars as "mobile billboards," and license plates are within "the sphere of intellect and spirit" protected by the First Amendment.[71] *Wooley* also demonstrates a noteworthy difference between public parks and license plates: messages in parks are advanced on government property while messages on license plates are advanced on private property.[72] The *Walker* majority failed to recognize such disparities.

Similarly, the *Walker* Court failed to distinguish *Perry* and its consequences. The *Perry* Court characterized a school district's internal mail system as a nonpublic forum for private speech because it was a communication tool for private parties and the

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68 *Wooley*, 430 U.S. at 715, 717 n.15.

69 *Id.* at 715 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 643 (1943)).

70 Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2248 (2015).

71 *Wooley*, 430 U.S. at 715, 717 n.15.

72 *See Wooley*, 430 U.S. at 715.

government.[73] *Perry* thus stands for the proposition that platforms private parties use to communicate warrant a forum analysis.

The *Walker* Court admitted that private parties use specialty plates to communicate when it stated, "[w]e have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs."[74] Nevertheless, it dismissed *Perry* because each specialty plate was "stamped with the imprimatur of Texas."[75] By focusing solely on the government speech aspects of license plates, the Court did not recognize its own admission about the private rights implicated.

Moreover, both drivers and the government use specialty plates to communicate—much like the internal mail system in *Perry* that both the teacher's union and government used. Granted, the license plate, as a form of government identification,[76] conveys the state's imprimatur, which is government speech.[77] Nevertheless, the driver also promulgates his own message by selecting a plate. For instance, New Yorkers can choose from among a variety of adventure specialty plates that read, "I love NY fishing," "I love NY hunting," and "I love NY state parks."[78] Thus, although New York's imprimatur reads across the top of the plate, the motorist's message reads across the bottom.[79] This demonstrates that specialty

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73 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 53 (1983).

74 Walker, 135 S. Ct. at 2252.

75 *Id.* at 2252.

76 *Id.* at 2249.

77 *Id.*

78 DEPARTMENT OF MOTOR VEHICLES, http://dmv.ny.gov/custom-plates/nys-i-love-ny-adventure-plates-gallery (last visited Nov. 28, 2015).

79 *See id.*

plates constitute at the very least a hybrid of government and private speech.[80]

State descriptions of these programs also demonstrate that private parties use them to communicate. Indeed, the Texas DMV website urges consumers to "show you [sic] support for a charity, cause, or other organization with an organizational plate. . ."[81] Surely showing one's support for a cause constitutes the communication of a message. Thus, by its own terms, Texas's specialty program facilitates communication by private parties.[82]

Ultimately, *Wooley* and *Perry* strongly suggest that private individuals' free speech rights are implicated when they select their own non-state specific messages.

2. The Reasonable Observer Test Demonstrates That the Public Perceives Specialty License Plates as Private Speech

Public perception also hinges on the reasonable observer test recommended by Justice Souter in *Summum* and adopted by several circuits,[83] which weighs in favor of private speech,

For instance, in *Children First Foundation, Inc. v. Fiala*, the Second Circuit had "little difficulty concluding" that a reasonable

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80 *See* Planned Parenthood of S.C., Inc. v. Rose 361 F.3d 786, 799 (4th Cir. 2004) (mixed speech when speaker identity unclear).

81 *Types of Special License Plates in Texas*, DMV.ORG, http://www.dmv.org/tx-texas/special-license-plates.php (last visited Dec. 6, 2015).

82 *See e.g., Create a Plate: Special Plates*, VIRGINIA DEPARTMENT OF MOTOR VEHICLES, https://www.dmv.virginia.gov/vehicles/#plates.asp (last visited Nov. 14, 2015) ("Virginia offers more than 200 special plates that enable people . . . to identify or promote themselves or their cause.").

83 Pleasant Grove City v. Summum, 555 U.S. 460, 487 (2009) (Souter, J., concurring).

person would know car owners ask for specific specialty plates and choose to put them on their private property.[84] This is because "the connection between the message displayed by the specialty plate and the driver who selects and displays it is far stronger than the connection between the message and the Department's stamp of approval."[85] This is further supported by the breadth of specialty plates offered in specialty plate programs.[86] Texas itself now offers more than 480 varieties.[87] Thus, this factor favors private speech.

3. Specialty Plate Eligibility Requirements Denote Private Speech

Another feature of specialty plate program courts should address when considering public perception is the availability of certain plates for only qualifying individuals.

Numerous programs offer plates for members of the

84 Children First Found., Inc. v. Fiala, 790 F.3d 328, 339 (2d Cir. 2015), *vacated and remanded*, 611 F. App'x 741 (2015).

85 *Id.* at 339.

86 *See, e.g., Create a Plate: Special Plates*, VIRGINIA DEPARTMENT OF MOTOR VEHICLES, https://www.dmv.virginia.gov/vehicles/#plates.asp (last visited Nov. 14, 2015) (more than 200); *Delaware License Plates – Special Tags*, DELAWARE DIVISION OF MOTOR VEHICLES, https://www.dmv.de.gov/services/vehicle_services/tags/tags_all.shtml (last visited Nov. 27, 2015) (117); DEPARTMENT OF TRANSPORTATION MOTOR VEHICLE ADMINISTRATION, http://www.mva.maryland.gov/vehicles/licenseplates/bayandagricultural.htm (last visited Dec. 2, 2015) (896).

87 Transcript of Oral Argument at 45, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015) (No. 14-144).

military,[88] professional trades,[89] or emergency response teams.[90] Such individuals must provide proof of membership in their respective group,[91] a limitations which favors private speech.

4. Competing Messages on Specialty Plates Indicate the Government is Not Speaking

Another consideration imperative to the public perception analysis is the contradictory messages offered in some specialty plate programs. These also favor private speech.

For example, Virginia provides both "Choose Life"[92] and "Pro-Choice"[93] plates which represent both sides of the abortion debate.[94] It is counterintuitive to suggest that the state espouses such

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88 *See, e.g.*, *License Plates*, GEORGIA DEPARTMENT OF VETERANS' SERVICE, https://veterans.georgia.gov/book-page/license-plates (last visited Dec. 29, 2015).

89 *See, e.g.*, *RN License Plates*, MARYLAND NURSES ASSOCIATION, http://www.marylandrn.org/Main-Menu-Category/About-Us/RN-License-Plates (last visited Dec. 29, 2015).

90 *See, e.g.*, *Firefighter Plates*, WYOMING DEPARTMENT OF TRANSPORTATION, http://www.dot.state.wy.us/home/titles_plates_registration/specialty_plates/Firefighter.html (last visited Dec. 29, 2015).

91 *See, e.g.*, *id.*

92 CHOOSE LIFE AMERICA, *supra* note 52.

93 *Special Plates: Plate Information*, VIRGINIA DEPARTMENT OF MOTOR VEHICLES, https://www.dmv.virginia.gov/exec/#vehicle/splates/info.asp?idnm=TWRC (last visited Nov. 14, 2015).

94 Several other states have license plates supporting both pro-choice and pro-life views. *See* CHOOSE LIFE AMERICA, *supra* note 52 (Hawaii offers "Choose Life" plate); *Hawaii License Plates & Placards Information*, DMV.ORG, http://www.dmv.org/hi-hawaii/license-plates.php (last visited Nov. 14, 2015) (Hawaii offers "Planned Parenthood" specialty plate); *Personalized License Plate*, ALASKA DEPARTMENT OF ADMINISTRATION DIVISION OF MOTOR VEHICLES, https://online.dmv.alaska.gov/dos/personalizedplate/personalizedplate/ (last visited Nov. 15, 2015) (Alaska offers "Choose Life" and pro-choice plate).

polar views. Moreover, the context of "Choose Life" license plates demonstrates another weakness of the *Walker* majority's contention. New Jersey and Connecticut both offer "Choose Life" plates to state residents.[95] Nevertheless, New Jersey and Connecticut are the third and ninth most pro-abortion states in America.[96] Reasonable observers in New Jersey and Connecticut will thus assume that the pro-life message on the back of the vehicle represents the views of the driver and not the state.

5. Public Perception of Vanity Plates Favors Private Speech

Finally, a comparison to vanity plates is instructive. Vanity plates—which contain a combination of letters and numbers chosen by the motorist—have traditionally been considered speech protected from viewpoint discrimination.[97] Every lower

95 CHOOSE LIFE AMERICA, *supra* note 52.

96 *AUL's 2016 Life List*, AMERICANS UNITED FOR LIFE, http://www.aul.org/2016-life-list/ (last visited Nov. 10, 2016) (showing results of Americans United for Life's annual survey based on state pro-life legislation).

97 *See* Amy Riley Lucas, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 U.C.L.A. L. Rev 1971, 1999 (2008).

court to consider the issue has conducted a forum analysis[98] which presupposes that private speech is at issue.[99]

Historically, vanity plates have communicated a message about the motorist; in the early 1900s, a low number constituted a status symbol.[100] Today, these alphanumeric combinations are tools of expression. Internationally renowned author Carolina Adams Miller describes them as a personal mission statement.[101]

Despite vanity plates being subject to the DMV's approval authority, the motorist determines the alphanumeric arrangement.[102] Yet, public perception of speaker identity is perhaps the most compelling rationale for vanity plates' classification as private speech.

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98 Byrne v. Rutledge, 623 F.3d 46, 56 (2d Cir. 2010) (vanity plates nonpublic forum allowing "expression on a wide variety of subjects, including one's personal philosophy, beliefs, and values" as well as "statements of self-identity, affiliation, and inspiration."); Lewis v. Wilson, 253 F.3d 1077, 1079 (8th Cir. 2001) (vanity plates demonstrate the personality, character, and views of their owner); Montenegro v. N.H. Div. of Motor Vehicles, 166 N.H. 215, 219–20 (2014) (restriction facially unconstitutional whether vanity license plates constitute a designated public forum or a nonpublic forum); Higgins v. Driver and Motor Vehicle Servs. Branch, 72 P.3d 628, 631, 634 (Or. 2003) (vanity plates—which constitute a nonpublic forum—are not government speech); Matwyuk v. Johnson 22 F.Supp. 3d 812, 823 (W.D. Mich., N. Div. 2014) (vanity plates—which define the identity of the driver, are affixed to private property, and cannot be duplicated—are not government speech).

99 Children First Found., Inc. v. Fiala, 790 F.3d 328, 339 (2d Cir. 2015), *vacated and remanded*, 611 F. App'x 741 (2015) ("a forum analysis is only undertaken once speech is deemed to be private").

100 Roger Grace, *License Plates With Low Numbers Became Political Rewards*, METROPOLITAN NEWS-ENTERPRISE (Nov. 5, 2015), http://www.metnews.com/articles/2015/perspectives110515.htm.

101 Nancy Keats, *What Drives People to Take a Creative License?*, THE WALL STREET J. (July 23, 2011), http://www.wsj.com/articles/SB10001424052702303745304576359910386002034.

102 Byrne v. Rutledge, 623 F.3d 46, 50 (2d Cir. 2010) (motorists use vanity plates to comment on various topics, subject to Commissioner's approval).

If the messages advanced on vanity plates implicate private speech, it follows that the messages on specialty plates (located on the same medium and containing the same characteristics of motorist selection and expression) are also private.[103] Furthermore, at least one lower court has used *Walker*'s three-factor test to find that vanity plates constitute private speech.[104]

Therefore, in examining public perception of speaker identity, courts must fully analyze the implications of *Wooley* and *Perry*, adopt a reasonable observer test, acknowledge the eligibility requirements of certain plates and any contradictory messages offered, and address any similarities to vanity plates. Such an analysis will likely tip this factor in favor of private or hybrid speech.

C. The Degree of Editorial Control Exercised Favors Private Speech

This factor, analyzed by every circuit to address the issue,[105] is also fundamental to the inquiry. However, the Court in *Walker* failed to consider the implications of its own jurisprudence in *Summum* and *Johanns v. Livestock Marketing Association*, as well

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103 Amy Riley Lucas, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 U.C.L.A. L. REV. 1971, 2000 (2008).

104 Mitchell v. Md. Motor Vehicle Admin., No. 713, 2015 WL 7573353, at 1* (Md. Ct. Spec. App., Nov. 25, 2015).

105 Children First Found., Inc. v. Fiala, 790 F.3d 328, 336 (2d Cir.), *vacated and remanded*, 611 F. App'x 741 (2015); Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff, 759 F.3d 388, 394 (5th Cir. 2014), *rev'd sub nom.* Walker v. Tex. Div., Sons of Confederate Veterans, Inc. 135 S. Ct. 2239 (2015); Choose Life Ill., Inc. v. White, 547 F.3d 853, 863 (7th Cir. 2008); Az. Life Coal. Inc. v. Stanton, 515 F.3d 956, 965 (2008); Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 793 (4th Cir. 2004).

as an analysis of the program itself. Thus, "final approval authority" does not denote total government control but depends on the degree of control exercised (including the substantive criteria considered) and the type and purpose of the program. Ultimately, this factor could favor private, hybrid, or government speech.

1. Supreme Court Jurisprudence Recognizes that Editorial Control Involves an Analysis of Context and Degree

This factor presents a challenging inquiry from a license plate standpoint since these programs are typically subject to a more diluted form of final approval authority than that exercised in *Summum*. There, the city exercised a significant degree of care in its monument selection because public parks define a city's identity to its residents and the world.[106] They also have a limited space for accommodating permanent structures and thus only erect monuments serving a government purpose.[107] As a result, criteria relating to the substance of the display (such as esthetics and history) were weighed heavily in the decision.[108]

The *Walker* Court also failed to consider its holding in *Johanns v. Livestock Marketing Association*.[109] Although *Johanns* involved compulsory speech, lower courts have found it pertinent in determining whether speech is government speech.[110] In examining the constitutionality of a federal law requiring beef producers to

106 Pleasant Grove City v. Summum, 555 U.S. 460, 472, 478 (2009).

107 *Id.* at 478.

108 *Summum*, 555 U.S. at 472.

109 Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

110 *See* Az. Life Coal. Inc. v. Stanton, 515 F.3d 956, 965 (2008).

sponsor a promotional beef campaign, the Court explained that the content was the government's message "from beginning to end."[111] This was because the Secretary of Agriculture appointed the committee designing the ads and approved the final wording.[112] Furthermore, Department officials attended campaign meetings where they fleshed out various proposals.[113] Such government supervision and authority over the ultimate message presented an airtight case for government speech.[114]

Accordingly, *Summum* and *Johanns* broaden the editorial control analysis. *Summum* demonstrates that courts should inquire into the substantive criteria the state considers and whether the program is open to any license plates offered by private donors or a specific type of plate reflecting the city's culture and history. Similarly, *Johanns* indicates that courts should analyze each specialty plate program individually to determine what degree of editorial control the government exercises. The classification of all programs in which a government entity has "final approval authority" as fully selective oversimplifies the inquiry, given the stark difference between "final approval authority" in the context of these programs and in the context of government advertisements in *Johanns* and city park monuments in *Summum*. It also differs depending on whether such approval relates to technical or substantive features of the plate.

State law gave Texas "sole control over the design, typeface,

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111 Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560 (2005).

112 *Id.* at 560–61.

113 *Id.* at 561.

114 *Id.*

color, and alphanumeric pattern for all license plates"[115]— technical features differing from the substantive inquiry engaged in by the committee in *Johanns* and the city in *Summum*. And, the Board in *Walker* often rejects license plates based on reflectivity or readability[116] which further demonstrates its mission of inviting all private messages in order to raise money for the state.[117] Thus, the substance the Board considered and the lower degree of editorial control exercised favor private speech.[118]

2. The Type of Program at Issue Demonstrates the Degree of Editorial Control Exercised

The editorial control analysis also turns on the specialty program itself, which the Supreme Court failed to address in *Walker*. In Texas, there are three ways in which specialty plates may be developed: the legislature can authorize plates with specific messages, individuals or organizations may solicit state-designated private vendors to develop a design, and the Board can create a specialty plate or accept applications from nonprofits for plate sponsorship.[119] These different mechanisms implicate different

115 Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2249 (2015).

116 *Id.* at 2260 (Alito, J., dissenting).

117 *See id.* at 2261.

118 *See* Choose Life Ill., Inc. v. White, 547 F.3d 853, 863 (7th Cir. 2008) (editorial control shared between sponsoring organization and state when organization creates design and state retains modification authority); Roach v. Stouffer, 560 F.3d 860, 867 (8th Cir. 2009) (same); Az. Life Coal. Inc. v. Stanton, 515 F.3d 959, 966 (9th Cir. 2008) (specialty plate private speech because non-profit determined substance and commission determined whether statutory guidelines met).

119 *Walker*, 135 S. Ct. at 2244.

types of speech.

For example, it is axiomatic that a legislature which develops a design and votes on a statute promulgating that design is endorsing the message. This degree of editorial control is characteristic of government speech. Indeed, the only circuit to hold that license plates constitute government speech analyzed a plate developed by the state legislature.[120] Conversely, programs allowing non-profits to create the designs favor private speech, even if such creation was statutorily authorized.[121] Some programs are bifurcated whereby plates are developed by the legislature or a third-party;[122] thus, programs may offer plates that constitute government or private speech depending on the creating body.

This inquiry also may depend on whether the program itself is administratively run or subject to strict statutory rules.[123] Administratively run programs emphasize motorists' ability to express support and raise money for various causes and thus, tend to favor private speech.[124] Conversely, programs subject to stringent statutory rules weigh in favor of government speech or at least a hybrid, because the legislature affirmatively espouses the

120 Am. Civil Liberties Union of Tn. v. Bredesen, 441 F.3d 370, 376 (6th Cir. 2006) (government speech, even when design details delegated to nongovernment party, because "Tennessee set the overall message . . . when it spelled out in the statute that these plates would bear the words 'Choose Life'").

121 *White*, 547 F.3d at 863 (7th Cir. 2008) (specialty plate authorized by statute and designed by non-profit constitutes private speech).

122 Walker v. Tex. Div., Sons of Confederate Veterans, Inc. 135 S. Ct. 2239, 2244 (2015).

123 *Id.* at 2011.

124 *Id.*

plate by voting on a statute.[125] As Professor Eugene Volokh opined, these programs are not "generalized benefit scheme[s] aimed at stimulating a wide range of private speech—such as the post office, the tax exemption for nonprofit groups, copyright law, or a funding program for all student newspapers at a university—but rather the government's own speech endorsing the merits of certain groups."[126] Nevertheless, such programs are not per se government speech because nonselective programs focused on raising funds instead of "praising groups" transform the government's message into a forum disseminating "a wide variety of private speech."[127] Therefore, the selective nature of the program, its purpose to generate funds, and whether it praises certain groups are all relevant. As such, the nonselective nature of *Walker's* program was evidenced by the rejection of only a dozen proposed designs (compared to the 350 available).[128]

Therefore, the editorial control prong involves an analysis of the substantive criteria used and degree of editorial control exercised (as demonstrated by *Summum* and *Johanns*), whether the program was developed by a non-profit or the legislature, and whether the program is administratively run. Programs created by

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125 *Id.* at 2011–12.

126 Eugene Volokhh, *Free Speech and License Plate Designs*, VOLOKH CONSPIRACY, (Apr. 30, 2002, 10:42 AM), http://volokh.com/2002_04_28_volokh_archive.html#76006887.

127 *Id.*

128 Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2249 (2015); Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2012) (editorial control favored private speech because Commissioner only exercised statutory rejection over specialty plate once).

the legislature favor government speech, while administratively run programs developed by non-profits favor private speech.

D. Consequences of the Augmented Factors Test: Offensive Speech is Protected

Based on the factors test, specialty license plates constitute at least a hybrid of private and government speech, if not fully private speech. Thus, the First Amendment is implicated.

Admittedly, this means potentially offensive specialty plates are also protected. Indeed, the Court's decision in *Walker* appeared to be outcome-determinative in that the outlawed specialty plate was a Confederate flag associated with racial discrimination. Nonetheless, the United States has no anti-hate speech policy. A "bedrock principle" of the First Amendment is its protection of all speech, including that which is offensive or even shocking.[129] America is profoundly committed to an open forum for public debate because it constitutes the "essence of self-government."[130] Thus, a modern Nazi march through an American town,[131] the burning of a cross on an African American family's lawn,[132] and scathing anti-gay signs at a fallen soldier's funeral[133] have all been upheld as constitutional speech.

The First Amendment may not become a mechanism for

129 Texas v. Johnson, 491 U.S. 397, 414 (1989); Snyder v. Phelps, 562 U.S. 443, 461 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on issues to ensure that we do not stifle public debate.")

130 Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

131 Nat'l Socialist Party v. Village of Skokie, 432 U.S. 43, 44 (1977).

132 R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992).

133 Snyder v. Phelps, 562 U.S. 443, 443, 461 (2011).

suppressing legitimate forms of public speech[134] because they need "breathing space" to survive.[135] As a result, "vehement, caustic, and sometimes unpleasantly sharp attacks"[136] is tolerated to protect all freedom of expression.

Subsequently, if the Supreme Court is outcome-determinative with respect to controversial speech, negative consequences loom for the future of the First Amendment.

III. *Walker*'s Implications

Simply lifting Walker's factors from the opinion without the more comprehensive analysis proffered has significant implications for specialty plate programs because government speech is not subject to First Amendment protections and consequently, the government may now engage in viewpoint discrimination when deciding which plates to approve. This will result in the exclusion of controversial plates[137] that should be protected by the First Amendment.

Nevertheless, a broad reading of the *Walker* factors could still result in a win for private speech, as Children First Foundation, Inc. acknowledged in its petition for rehearing.[138] It urged the Second

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134 Bose Corp. v. Consumers Union, 466 U.S. 485, 514 (1984).

135 Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

136 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

137 *Walker* explained that plates promoting messages from pro-life groups, the Boy Scouts, the National Rifle Association, or the Washington Redskins may be excluded from these programs. Walker v. Tex. Div., Sons of Confederate Veterans, Inc. 135 S. Ct. 2239, 2262 (2015) (Alito J., dissenting).

138 Appellee's Supplemental Petition for Panel Rehearing and for Rehearing En Banc, Children First Found., Inc., v. Fiala, 790 F.3d 328 (2d Cir. 2015) (No. 04-CV-0927), at *1.

Circuit to consider "the history of New York custom plates, their nature as reflected in state law, the intricacies of the Department's approval procedure, and the Department's degree of selectivity in approving custom plates."[139] If this analysis touches on the history of New York's 1992-commenced "Take Your Pride For a Ride" custom program,[140] considers a fuller public perception scrutiny, and acknowledges the flexibility non-profits had with respect to plate creation and the percentage of plates actually rejected,[141] a legitimate case for private speech could be made.

Since *Walker* chips away at the fundamental protections of the government-speech doctrine, its implications now apply to other instances of government-subsidized private speech. Thus, the "generalized benefit schemes[s] aimed at stimulating a wide variety of private speech," mentioned by Professor Volokh[142] may be subject to viewpoint discrimination. This could impact what kinds of claims organizations providing free legal services could bring on behalf of indigent clients,[143] gatherings public schools may exclude from school property after hours,[144] and programs

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139 *Id.* at 4.

140 *See Fiala*, 790 F.3d at 354.

141 *Id.* at 346 (DMV rejected a "scant" number of specialty plate applications).

142 Eugene Volokhh, *Free Speech and License Plate Designs*, VOLOKH CONSPIRACY, (Apr. 30, 2002, 10:42 AM), http://volokh.com/2002_04_28_volokh_archive.html#76006887.

143 *Velazquez*, 531 U.S. at 537, 542 (statute conditioning federal funds on lawyers not bringing claims challenging current welfare law struck down because program did not advance government message but rather promoted private speech).

144 *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 387 (1993) (unconstitutional to deny church access to premises for film series when district opened school to public for after-hours use).

mandatory university student activity fees can support.[145] If all of these benefit schemes implicating private speech rights are subject to the government's discretion under a strict reading of *Walker*, the government can suppress any speech it does not like.

The consequences of *Walker*'s simplified analysis are not merely speculative; they have been manifested in lower court decisions and ongoing litigation. For example, even though the *Walker* Court declined to comment on vanity plates,[146] the Indiana Supreme Court invoked *Walker* to render them government speech.[147] The court mirrored Walker's simplistic public perception analysis by focusing solely on license plates as government IDs and treated any potential public perception of profane combinations as private speech as "a few exceptions" that did not alter *Walker*'s conclusion.[148] The court even suggested that people prefer vanity plates over bumper stickers because they want state-authorization of their message.[149] This assigned motorist motive was inconsistent with the court's acknowledgement that "some observers may fail to recognize that [vanity plates] are government issued and approved speech . . ."[150] A more comprehensive public perception analysis would have rendered a different outcome as the Court of Special

145 *See* Bd. of Regents, Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 221 (2000) (mandatory student activity fee may finance groups with which student disagrees as long as program maintains viewpoint neutrality).

146 Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2244 (2015).

147 Comm'r of the Indian Bureau of Motor Vehicles v. Vawter, No. 49S00-1407-PL-494 (Ind. 2015), https://assets.documentcloud.org/documents/2515112/no-01nk.pdf.

148 *Id.* at 8.

149 *Id.* at 7.

150 *Id.* at 8.

Appeals in Maryland demonstrated in its November 2015 decision, *Mitchell v. Maryland Motor Vehicle Administration*.[151] This case shows that not all of *Walker's* progeny is doomed, as the court used *Walker's* test to find that vanity plates are private speech.[152]

The *Mitchell* court's historical analysis went into more depth than *Walker*'s treatment of this factor.[153] It explained that Maryland's plates did not historically communicate state speech because they did not feature state slogans.[154] When weighing public perception, the court acknowledged that vanity plates are government IDs, but emphasized the reasonable person test and explained that drivers create a personal message independent of the plate's government identity function.[155] It explained that private speech does not morph into government speech just because it occurs on government property. Indeed, the court characterized Vawter's "few exceptions"[156] of people who do not realize that vanity plates are government speech as "the rule."[157] Finally, the court said the DMV's screening method (which analyzed substance and excluded plates containing obscenities) was not a "rigorous process" constituting a degree of control rendering the plates government speech.[158]

A narrow reading of *Walker* may also impact the salient

151 Mitchell v. Md. Motor Vehicle Admin., No. 713, 2015 WL 7573353, at 1* (Md. Ct. Spec. App. Nov. 25, 2015).

152 *Id.* at 14–16.

153 *Id.* at 13.

154 *Id.* at 13–14.

155 *Id.* at 14, 15 n.26.

156 Comm'r of the Indian Bureau of Motor Vehicles v. Vawter, No. 49S00-1407-PL-494 (Ind. 2015), https://assets.documentcloud.org/documents/2515112/no-01nk.pdf (Ind. 2015).

157 *Mitchell*, 2015 WL 7573353, at *17.

158 *Id.* at 16.

issue of whether trademarks constitute government speech, which moved to the forefront of the nation's attention earlier this year when the Supreme Court granted certiorari in *Lee v. Tam.*[159] In this case, the Federal Circuit sitting en banc held it was unconstitutional to deny trademark registration to the Asian band the Slants under the "disparaging mark" exclusion of the Lanham Act.[160] Indeed, the high Court's decision may hinge on the government speech doctrine, as the majority and dissenting opinions in the appellate court differed on this point.[161] Similarly, the Fourth Circuit Court of Appeals is slated to consider whether to uphold the United States' Patent Office's cancellation of the Washington Redskins' trademark in December.[162] Once again, *Walker*'s analysis may be paramount. The Redskins' opening brief in *Pro-Football, Inc. v. Blackhorse* invoked arguments similar to the dissent in *Walker*, stating,

> The notion that all 2 million currently-registered marks are government speech is astounding . . . No one today thinks registration reflects government approval. But if this Court holds that it does, how will the government explain registrations like MARIJUANA FOR SALE . . . LICENSED

159 Lee v. Tam, 808 F.3d 1321 (Fed. Cir. 2016), *cert. granted*, ____ S. Ct. ____ (U.S. Sep. 29, 2016) (No. 15-1293).

160 *In re Tam*, 808 F.3d 1321, 1328 (Fed. Cir. 2016) (en banc), *cert. granted sub nom. Lee v. Tam*, ____ S. Ct. ____ (U.S. Sep. 29, 2016) (No. 15-1293).

161 *Id.* at 1346; *id.* at 1375 (Lourie, J., dissenting).

162 Ian Shapira, *Timeout Called in Redskins Name Case*, WASH. POST (Oct. 18, 2016), https://www.washingtonpost.com/local/timeout-called-in-redskins-name-case/2016/10/18/b6b30dd0-908a-11e6-9c52-0b10449e33c4_story.html. The Supreme Court denied certiorari in this case. Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439 (E.D. Va. 2015), *cert. denied*, ____ S. Ct. ____ (U.S. Oct. 4, 2016) (No. 15-1874).

> SERIAL KILLER . . . and numerous Confederate flag logos?[163]

Nevertheless, the district court invoked *Walker*'s government speech analysis and ultimately found that trademarks constitute government speech because of the oversimplified historical, public perception, and editorial control arguments advanced in Walker.[164]

These cases demonstrate that the issue of government speech is relevant in more areas than just specialty plates. *Walker*, which has already resulted in progeny relying on a shaky theory of government speech, will have lasting effects on other areas of law. It has also put a chink in the armor of free speech protections, discarding the principle that there is no hate speech exception to the First Amendment. This outcome may be mitigated if courts, like the Maryland Court of Special Appeals, use the *Walker* factors to preserve private speech.

Conclusion

By designating specialty plates as government speech, *Walker* subjected these programs and the private rights of motorists to the whim of the government. This controverts controlling precedent and imperils speech that should be insulated from viewpoint discrimination.

The government's hesitation to embrace a hybrid speech doctrine may ultimately result in the transformation of previously

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163 Opening Brief of Appellant, Pro-Football, Inc. v. Blackhorse, No. 1:14–cv–01043–GBL–IDD, 2015 WL 4096277 (E.D. Va. 2015), *appeal docketed* (4th Cir. Aug. 6, 2015) (No. 15-1874), 2015 WL 6692133, at *24.

164 Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439, 458–59 (E.D. Va. 2015).

designated public forums into platforms for government speech. Subsequently, not even six months after *Walker*, its oversimplified analysis was used to justify viewpoint discrimination in the contexts of vanity license plates and trademarks.

Nevertheless, if courts read *Walker* more expansively pursuant to the historical, public perception, and editorial control factors, private speech rights may still be salvaged. These factors provide a framework by which courts have and can champion private speech, if they are considered against a backdrop of Supreme Court jurisprudence and a fuller analysis of the modern history of specialty plates and the nuances of each state program. Ultimately, *Walker*'s progeny may be saved from its own consequences if courts use its factors to consider the private nature of specialty license plates.

LIVE OAK BREWING CO., LLC, ET AL. V. TABC, ET AL.

Zack Voell

ABSTRACT: *Economic liberty is a cornerstone of every prosperous society and has far-reaching implications for a plethora of other crucial civil liberties as well. Texas state legislators recently prohibited craft brewers from earning revenue from the sale distribution licenses within the state. This note explores this blatant violation of economic liberty in the context of the decision in Live Oak Brewing Co., LLC, et al. v. TABC, et al. which ruled the prohibition as a violation of the Texan constitution.*

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I: Introduction

Thin, one-note beers like Budweiser and Miller Lite that have long dominated the American beer diet are being increasingly displaced by a menagerie of full-bodied draughts called "craft beers" like "Three Chords and the Truth,[1]" "No Veto,[2]" and "Zombie Dust.[3]" The Millennial generation's penchant craft beer is one of the primary causal factors for the rapid, recent growth of America's craft beer industry.[4] In fact, 43% of Millennials have never tasted Budweiser beer.[5] And as of June 2016, craft beer claims $22.3 billion of a $106 billion beer market[6] with a record-setting 917 new breweries opening in the past year.[7]

But craft beer's bright future is overshadowed by a dark cloud of government regulations. The complex maze of certificatory and regulatory processes—some dating back to Prohibition—

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1 The Best of Craft Beer Awards, 2016 BEST OF CRAFT BEER AWARDS (2016). A gold medal Brett beer from Oakshire Brewing in Eugene, Oregon.

2 *Id.* A bronze metal British brown ale from Three Notch'd Brewing in Charlottesville, Virginia.

3 *Id.* An intensely hopped American pale ale from 3 Floyds Brewing Co. in Munster, Indiana.

4 Amy Nordrum, *Craft Beer Breaks Double-Digit Market Share For The First Time In US*, International Business Times, (Mar. 17, 2015), http://www.ibtimes.com/craft-beer-breaks-double-digit-market-share-first-time-us-1849648.

5 Finn B. Knudsen, *The Future of Craft Beer as seen from an Industry Insider*, Rocky Mountain Microbrewing Symposium (2016), http://www.uccs.edu/Documents/rmms/2016%20Presentations/4%20Keynote%20Future%20of%20CraftBeer%20as%20Seen%20From%20Industry%20Insider.pdf.

6 *See*, Bart Watson, *National Beer Sales & Production Data*, Brewers Association (2015)

7 *See*, Abby Cohen, *Brewers Association Mid-Year Metrics Show Continued Growth for Craft*, Brewers Association (2016).

that every would-be brewmaster must navigate before and after opening for business is stunning. One can only imagine the growth possibility for craft beer absent the status quo of alcohol regulation. Texas state legislators recently upgraded their craft brewing laws from knotty to nefarious by overtly outlawing a revenue source key to every craft brewer. Three Texan craft breweries quickly filed suit against the new restriction, and the ensuing court case of *Live Oak Brewing Co., LLC, et al. v. Texas Alcoholic Beverage Commission (TABC)* was adjudicated by District Judge Karin Crump in August 2016.

Part II of this note describes the growth and constitution of the craft beer industry. Part III profiles the elaborate regulatory scheme in which craft beer has emerged and the new laws from the Texas legislature. Part IV and V summarize and analyze the complaint and ruling in *Live Oak* respectively. Part VI considers the positive precedent of *Live Oak* in context of similar standing cases in Texas courts.

II: History of Craft Beer Industry

A home-brewing trend that spread across the U.S. after President Jimmy Carter legalized and tax-exempted home brewing catalyzed American craft beer production in the late 1980s.[8] The early craft beer craze plateaued at the turn of the twenty-first century,[9] but recommenced in 2006.[10] Since then, local artisan

8 Kenneth G. Elzinga, et al., *Craft Beer in the United States: History, Numbers, and Geography*, 10 J. Wine Economics 3, 255 (2015).

9 See, Brewers Ass'n, *Historical U.S. Brewery Count*, (2016).

10 Watson, *Economic Impact Data*, Brewers Ass'n (2016), https://www.brewersassociation.org/statistics/economic-impact-data/.

brewers have occupied neither a small nor a stagnant portion of the American economy.

The 917 new breweries that opened last year pushed the craft beer industry to a record-high 4,656 operational breweries[11] which are both directly and indirectly responsible for over 420,000 jobs.[12] Texas holds the third largest state craft beer market with 189 craft breweries and $3.8 billion of annual economic output.[13] Texas also houses two of the three fastest growing craft breweries in the country: Karbach Brewing Co. in Houston and Austin Beerworks in Austin.[14]

By definition a craft brewery is small,[15] independent[16] and hallmarked by individualistic approaches to brewing and deep community involvement.[17] Craft beers, moreover, are understood to be flavorfully complex draughts brewed in limited quantities and select locations. Irrespective of the fact that craft beer connoisseurs are interminably branded as only pretentious, faddy beer-drinkers, craft breweries collectively are sizable contributors to all of the fifty state economies across America.

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11 Cohen, *supra* note 7.

12 Watson, *supra* note 13.

13 BREWERS ASS'N, *supra* note 12. Only the Californian and Pennsylvanian craft beer markets contribute more each year at $6.9 billion and $4.5 billion respectively.

14 *See*, THE NEW YORKER, *Mapping the Rise of Craft Beer*, (2012), https://projects.newyorker.com/story/beer/.

15 Annual production of 6 million barrels of beer or less. *Id.*

16 *Id.* Less than 25 percent of the craft brewery is owned or controlled (or equivalent economic interest) by an alcoholic beverage industry member that is not itself a craft brewer.

17 *See, Craft Brewer Defined*, BREWERS ASS'N (2016)

III: Alcohol Regulation Background

After the calamitous failure of Federal Prohibition under the eighteenth amendment, states essentially received *carte blanche* to regulate the alcohol industry via the twenty first amendment. Nearly every state adopted a three-tiered production structure which separated brewers, distributors, and retailers. Brewers could only sell to distributors who sold to retailers, and only retailers could sell to consumers.

Through this tiered system, state legislators endeavored to prevent the recurrence of pre-prohibition monopolization in the alcoholic beverage market via the "tied-house system." The tied house system consisted of beverage manufacturers that incentivized bar-owners to exclusively sell the manufacturer's products, and bar-owners quickly became quasi-agents of the manufacturers rather than independent business-owners.[18] Lawmakers coated the reality of a quasi-monopolized alcohol industry with relentless propaganda about how tied houses also bred all manners of vices and created social discord between otherwise peaceful entrepreneurs making corrective legislation urgent.[19] A tiered rather than tied market configuration promised to neatly organize the alcoholic market and compel manufacturers and retailers to contract a distributary middleman.

Within this regulatory scheme, American craft breweries eventually cropped up to compete in a market dominated by

18 Benjamin Grubb, *Exorcising the Ghosts of the Past: An Exploration of Alcoholic Beverage Regulation in Oklahoma*, 37 Okla. City Univ. Law Rev. 297 (2012).

19 *Id.* at 298.

international macro breweries with multi-billion-dollar market capitalizations. These market giants are unsurprisingly masters of the "complex set of overlapping state and federal regulations" that reinforces the three-tiered system.[20] But the undersized, neophyte craft brewers must survive a series of even more arduous certificatory and regulatory procedures before brewing a single batch of wort.

Regulatory compliance costs frequently keep aspiring brewers from opening a brewery.[21] Some market analysts even draw parallels between the regulatory hindrances that face American craft brewers and the notoriously protected Venezuelan and Chinese economies.[22] But Texan legislators not only made craft beer regulation burdensome, but overtly perverse, by outlawing a key revenue source for every craft brewer via Senate Bill 639.

In early 2013, State Senator John Carona[23] (R-16)[24] authored, introduced, and successfully passed SB 639 thereby instituting Section 102.75 (a)(7) of the Texas Alcoholic Beverage Code which prohibits beer manufacturers from "accept[ing] payment in exchange for an agreement setting forth territorial rights."[25] Territorial rights delimit local geographical areas wherein a given

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20 *Granholm v. Heald*, 544 U.S. 460 (2005)

21 Antony Davies, *Consumers Are the Best Regulators*, U.S. NEWS & WORLD REPORT, May 12, 2014, http://www.usnews.com/opinion/economic-intelligence/2014/05/12/many-regulations-stifle-entrepreneurs-and-small-businesses.

22 Matthew Mitchell and Christopher Koopman, *Bottling Up Innovation in Craft Brewing: A Review of the Current Barriers and Challenges*, MERCATUS CENTER (Jun. 4, 2012), https://www.mercatus.org/publication/bottling-innovation-craft-brewing-review-current-barriers-and-challenges.

23 S. 639, 2013 S., 83rd Sess. (Tex. 2013).

24 *John Carona*, Wikipedia

25 See TEX. ALCOHOLIC BEVERAGE CODE, tit. 4, § 102.75 (2013).

distributor can freely sell a brewer's product. Normally brewers and distributors openly negotiate the financial terms of brand licensing contracts like any two parties considering a business agreement would. But SB 639 comprehensively illegalizes this activity.

Craft brewers are not wholly forced to sell their products through an alcohol distributor. Texas law allows self-distribution of no more than 40,000 barrels of beer per year for craft breweries that produce no more than 125,000 barrels per year,[26] and a large majority of Texas' 189 breweries produce less than the 125,000 barrel quota.[27] But brewers occasionally contract distributors before reaching the quota, and any brewer who meets this quota and wishes to produce more beer must transfer distributional rights to a licensed beer distributor.

After SB 639, craft brewers may not receive any compensation for transferring rights to their brand and are essentially forced to give them away.[28] By acquiring distributional rights, beer distributors are free to sell a brewer's products at whatever price they deem appropriate and profit accordingly. A distributor can also sell distributional rights for any given brand to another distributor.[29] These interactions are expressly permitted in other sections of the

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26 Katharine Shilcutt, *Senfronia Thompson Introduces Bill to Reduce Craft Beer Distribution*, HOUSTONIA MAG. (March 17, 2015), https://www.houstoniamag.com/articles/2015/3/17/houston-march-2015.In 2015, State Representative Senfronia Thompson (D-141) introduced HB 3389 which proposed slashing the self-distribution quota from 40,000 barrels per year to 5,000 barrels per year. The bill did not pass.

27 *See, State Craft Beer Statistics*, BREWERS ASSOCIATION (2015)

28 *Supra* note 23

29 *See*, Amy McCarthy, *Peticolas and Other Craft Brewers Are Suing Texas Over Distribution Laws*, DALLAS OBSERVER (2014)

Texas Alcoholic Beverage Code and not changed by SB 639.[30] Now, only brewers—the original owners of these rights—cannot profit.

Irrespective of how *prima facie* ruinous this law seems, it is exponentially more so upon realization brewers must pay to reassume their brand distribution rights. Instead of a brewer or a distributor paying the other for the release or reclamation of distributional rights, brewers must give the rights away and pay to reassume them. Put another way, if the brewer and distributor renegotiate the distribution license so as to terminate it, the brewer must *compensate the distributor* before reassuming their original distributional rights.

IV: Summary of *Live Oak* Complaint and Ruling

Plaintiff attorney Arif Panju vilified SB 639 as a "naked transfer of wealth"[31] that is "stifling the Texas craft beer renaissance"[32] and "depriv[ing] the creators of the product from realizing its full value.[33]" Panju's language is not hyperbolic because brand distribution rights carry incredible value. And the revenue paid to brewers by distributors serves two key purposes.

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30 *Id.*

31 InstituteForJustice, *Live Oak Brewing et al. v. Texas Alcoholic Beverage Commission*, YouTube (Dec. 15, 2014) https://www.youtube.com/watch?v=4EWZCS2H9gM.

32 Reeve Hamilton, *Brewers sue Texas for "stifling the Texas craft beer renaissance*, The Washington Post Dec. 11, 2014, https://www.washingtonpost.com/blogs/govbeat/wp/2014/12/11/brewers-sue-texas-for-stifling-the-texas-craft-beer-renaissance/?utm_term=.1340f1a8829f.

33 *See*, Phaedra Cook, *Judge Says Banning Brewers From Selling Distribution Rights Violates Texas Constitution*, Houston Press, Aug. 29, 2016, http://www.houstonpress.com/restaurants/judge-says-banning-brewers-from-selling-distribution-rights-violates-texas-constitution-8713391.

Revenue from distribution agreements is how distributors compensate brewers for exclusive distributional rights of the brewery brand in perpetuity, and the lucrativeness of rights to an established craft beer brand is not lost on brewers or distributors.[34] Every brewery tries to strengthen their reputation and mindshare by populating their menu with brilliantly flavored, one-off brews that showcase the brewer's proprietary recipes and idiosyncratic brewing techniques. Owning the distribution rights to this type of brewery is valuable.

Quintessential to every brewery business model, moreover, is the reinvestment of revenue from the sale of distribution rights in production maintenance or expansion.[35] By throttling this key source of revenue, SB 639 directly undercuts a key aspect of breweries' basic financial strategies. When interviewed, Peticolas Brewing Co. owner Michael Peticolas corroborated the significance of losing this large chunk of revenue because of the subsequent inability to reinvest, and cited it as a primary harm of SB 639.[36]

Filed on behalf of Live Oak Brewing Co., Peticolas Brewing Co., and Revolver Brewing, the plaintiffs' petition condensed all of the aforementioned information to a two-plank constitutional argument.[37] Under the first plank, the plaintiffs argued that SB 639 violates Article 1, Section 17 of the Texas Constitution through

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34 But apparently it is lost on lawmakers.

35 Claire Ricke and Calily Bien, *Beer battle: Texas craft brewers say law is losing them millions*, KXAN NEWS Aug. 15, 2016, http://kxan.com/2016/08/15/beer-battle-texas-craft-brewers-say-law-is-losing-them-millions/..

36 Evan Faram, *The Man with the Velvet Hammer: Michael Peticolas*, CSTX (Mar. 17, 2015), http://www.thecooleststuffintexas.com/coolest-texans/man-with-the-velvet-hammer-michael-peticolas-of-peticolas-brewing/.

37 Cook, *supra* note 29.

nonconsensual deprivation of property, namely compensation for distribution rights.[38] Section 17 (called the "Takings Clause") protects "the right to be secure in one's property"[39] by ensuring that "no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person."[40]

In the second plank, the plaintiffs argued that SB 639 infringed on the right to earn an honest living thereby violating Article 1, Section 19 of the Texas Constitution.[41] Section 19 guarantees that "no citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land."[42] The plaintiffs argued that the TABC blatantly violated the "honest living" right protected by this "due process" guarantee by "prohibiting the sale of territorial rights by beer producers" without any substantial, legitimate, or rational reason" for doing so.[43] Judge Crump upheld the "honest income" plank but dismissed the Takings Clause argument with prejudice.[44]

V: Analysis of *Live Oak* Ruling

That SB 639 *prima facie* qualifies as governmental

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38 *Live Oak Brewing v Tex Alcoholic Beverage Comm*, No. D-1-GN-14-005151 (98th Dist Ct Tex, 2014).

39 *Id.*

40 *See*, U.S. Const. art. I, § 17.

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42 *Id.* at § 19.

43 Cook, *supra* note 29.

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obstruction of earning an honest living is certain. Both the U.S. Supreme Court[45] and the Texas Supreme Court[46] have resolutely upheld the constitutional right to pursue any form of honest, legal labor "free from unreasonable governmental interference" protected by the Fourteenth Amendment to the federal Constitution and Article 1, Section 19 of the Texas Constitution. Outlawing income squarely qualifies as unreasonable interference. As Justice Phil Johnson wrote, echoing Alexander Hamilton, the courts have a duty to oppose "irrational," "anticompetitive," and "unconstitutional" "legislative encroachments" by virtue of their stance as "bulwarks of a limited Constitution."[47]

Parsing the court's summary judgement against the plaintiffs' Takings Clause plank is of course solidly relegated to speculation, and the benefits of speculation are limited. But an eerily prescient defense of SB 639 given by supporters in the senate gives perspective to Judge Crump's judgement. Two prior Texas cases, moreover, underscore the curiousness of Judge Crump's dismissal of *Live Oak's* Takings Clause claim.

A House Research Organization (HRO) bill analysis report summarized the justification offered by state senators who supported SB 639. They argued that the bill would protect the independence of distributors by reducing breweries' pricing power over distribution rights contracts. (Curiously, absolutely no statistical or anecdotal evidence was ever offered to support the claim that breweries can or are abusing their pricing power.) The senators justified stripping

45 *Greene v. McElroy*, 360 U.S. 474, 492 (1959).

46 *Patel v. Texas Dept. of Licensing*, 464 S.W.3d 369 (2012)

47 *Id.*

distribution rights from brewers by noting that manufacturers and distributors may still "enter into contracts on a number of common interests" like advertising[48] and retail pricing[49] under the bill. Brewers also may still earn profits from other parts of the beer business since the bill "would not prohibit practice that are part of the ordinary functioning of the alcohol beverage industry."[50]

At best, the arguments in the HRO report are a weak attempt to contend that because brewers can still earn *some* profit under the bill, garroting a key source of income—profit earned from the brewer's *own brand*—is passable. And how the Texas senators deduced that brewers somehow possess disproportionate or abusive pricing power is abundantly unclear. Opponents of the bill, per the HRO report, responded that the bill "would effectively coerce manufacturers into giving away an extremely valuable commodity," namely distributional rights.[51]

That SB 639 does not violate the Takings Clause in context of Texas Supreme Court precedent is incredibly unclear. In *Harris County Flood Control District v. Kerr*, the government authorized a private housing developer to develop a plot of land, and the construction caused the flooding of the plaintiffs' neighboring houses.[52] The plaintiffs argued—and the Court's opinion upheld—that this constituted a Takings Claim violation since construction and

48 John Carona, et al., *SB 639 Bill Analysis*, House Research Organization (May 17, 2013), http://www.hro.house.state.tx.us/pdf/ba83R/SB0639.PDF.

49 *Id.*

50 *Id.*

51 *Id.*

52 *Harris County Flood Control Dist. v. Kerr*, 485 SW 3d 1, 58 Tex. Sup. Ct. J. 1085 (Tex. 2015).

the flooding it caused would not have transpired absent government approval.[53] This opinion was not unanimously supported, and the dissenting opinion pointedly attacked the understanding that damage to private property from the private use of adjacent property somehow qualifies as a Takings Clause violation.[54] Clearly *Live Oak* does not involve the "public use" phrase of the Takings Clause, but *Harris County* is telling of the Texas Court's willingly liberal protection of private property.

Edwards Aquifer v. Day involved a Takings Clause violation analogous to *Live Oak* where the plaintiff's complaint was easily upheld because of property interest, a criteria clearly met in *Live Oak*. Texas groundwater legislation passed in 1993 "froze each landowner's water use and water rights roughly in place, with an overall usage cap set by law.[55]" Any additional private use of groundwater was prohibited unless an individual permit was granted.[56] In 2008, the plaintiffs filed for "a permit for the use of 700 acre-feet of water per year" and sought legal recourse when the permit request was denied.[57] The Court did not reject the plaintiff's appeal to pursue their claim after an unfavorable district court ruling, and nodded at a recognition of property interest in groundwater use. The Texas Supreme Court eventually declined to hear this high-

53 *Id.*

54 *Id.*

55 Don Cruse, *Landmark Texas water rights case may lead to future takings claims or legislative fixes: Edwards Aquifer v. Day*, SCOTX Blog (Feb. 24, 2012), http://www.scotxblog.com/case-notes/landmark-texas-water-rights-case-may-lead-to-future-takings-claims-or-legislative-fixes-edwards-aquifer-v-day-feb-24-2012/.

56 *Id.*

57 *Id.*

profile case which robs Texas' groundwater rights laws of much needed clarification and this note of helpful precedent. But the appellate court's decision is not insignificant.

Property interest[58] is a necessary threshold for any constitutional takings claim.[59] Given Texas' murky groundwater laws and rights, arguing for property interest in *Edwards Aquifer* was challenging. Yet the Court recognized it. Proving property interest—and the subsequent violation—in a revenue earned by a craft brewer should be colloquial duck soup by comparison.[60] The enormously low bar for substantiating a Takings Clause violation as per the Court's opinion in *Harris County* is also helpful. But Judge Crump curiously dismissed the Takings Clause claim in *Live Oak* all the same. In upholding the plaintiffs' "honest income" plank, the district court nonetheless fulfilled their constitutional duty to, as Justice Johnson quipped,[61] "tap the breaks" on government power

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58 Property interest refers to the extent of a person's or entity's rights in property. It deals with the percentage of ownership, time period of ownership, right of survivorship, and rights to transfer or encumber property. *See, Property Interest Law & Legal Definition*, USLegal.

59 *Id.* note 43.

60 *See* J. Justin Wilson, *Texas Doubles Down In Fight To Stifle Craft Brewers' Property Rights*, INSTITUTE FOR JUSTICE (Nov. 23, 2016), http://ij.org/press-release/texas-doubles-fight-stifle-craft-brewers-property-rights/.The property interest threshold is uniquely relevant to both *Live Oak* and *Edwards Aquifer* (and strengthens their analogousness) since neither case involves the absolute deprivation of private property as would be seen in a licensing cases like *Patel v. Texas Department of Licensing and Regulation*, but only a partial limitation on profits earned from selling craft beer and the use of groundwater respectively. That the Texas appellate court confirmed the property interest in a case surrounded by thorough legal ambiguity, it is not irrational to wonder why a similar, seemingly cut-and-dry burden in *Live Oak* was dismissed.

61 "Such is life in a constitutional republic, which exalts constitutionalism over majoritarianism precisely in order to tell government 'no.' That's the paramount point, to tap the brakes rather than punch the gas." *Supra* note 38.

rather than allowing the legislature to "punch the gas."[62]

But the lawmakers who supported SB 639 dishonored a crucial responsibility as public servants which transcends revenue and contracts. That responsibility is good policymaking, and parsing this duty is simple. First, as a prior Supreme Court Justice once opined, "the State must specifically identify an 'actual problem' in need of solving," not pursue abstract, even arbitrary ideals.[63] A problem and accompanying proposal must past strict scrutiny, which is to say it must be isolate a compelling public interest and be "narrowly drawn to serve that interest."[64] And "ambiguous proof will not suffice."[65] Absent strict scrutiny, public policy just as easily shapes society in the interest of the people as in what lawmakers think *ought* to be the interest of the people.[66]

Senate Bill 639 claims to bolster competitiveness in the craft beer market without even loosely proving an existing threat to competition nor linking any sort of consumer harm to a marginally less-than-competitive craft beer market. Instead, the bill was grounded in patently vague, thoroughly unsubstantiated ideals like "guarantee[ing] the state's ability to exercise oversight over the alcohol industry" and preventing unproven pricing "pressure from manufacturers" over distributors. This byzantine economic interference is entirely disconnected from the public interest at best

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62 As of Nov. 22, 2016, TABC filed a notice of appeal in *Live Oak*. See, J. Justin Wilson, *Texas Doubles Down In Fight To Stifle Craft Brewers' Property Rights*, INSTITUTE FOR JUSTICE (2016)

63 *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011).

64 *Id.*

65 *Id.*

66 *Id.*

and squarely opposed to it at worst. Instead of mitigating existing harms, Texas state legislators have created economic troubles where none previously were.

In the midst of an intensely flavorless, homogenized "big beer" industry, the entrepreneurial potential and flavorful idiosyncrasies of American craft brewers should be fully unleashed. Not only will state economies, American beer-drinkers, and brewmasters all benefit from economic freedom, but the U.S. Constitution thoroughly protects this type of activity against lawmakers' stymieing proposals. When economic liberty becomes passé, however, brewmasters metaphorically sink or swim not by the quality of their beverages but by their ability to survive convoluted, protectionist regulations. Both the beers and the businesses are soured as a result.

VI: Importance of *Live Oak* Precedent

Live Oak is noteworthy because it offers positive precedent to similar standing suits against the TABC. *Live Oak* is only one instantiation of an intensifying legal war for market freedom waged by Texas breweries against the TABC, but it is nonetheless important. For example, prompted by a ban on Crowlers, Deep Ellum Brewing Company, LLC of Austin, Texas—later joined by Grapevine Craft Brewery of Grapevine, Texas[67]—filed suit against the TABC in late 2015 for its comprehensive ban on breweries' on-site sale of alcohol for off-site consumption. Like many craft breweries, Deep Ellum and Grapevine both heavily invested in Crowlers—a portmanteau

67 Cook, *supra* note 29.

of "growler" and "can"—to offer customers a higher-quality, more convenient means of transporting beer purchased at the brewery. Growlers and Crowlers were both legal beer containers until last year when the TABC unexpectedly banned Crowlers for violating a few vaguely worded sections of the Texas Alcoholic Beverage Code that prohibited various means of on-site "canning" and "repackaging" beer for off-site consumption.

Deep Ellum seeks the enjoinment of these allegedly unconstitutional sections of the Texas Alcoholic Beverage Code, namely Sections 12, 62 and 74.[68] These are interpreted to ban the use of Crowlers and prescribe which sorts of alcoholic beverage manufacturers may and may not generally sell on-site for off-site consumption.[69] As trumpeted on Deep Ellum's website, "Texas allows every other alcoholic beverage manufacturer to do just that — wineries, distilleries and even brewpubs are allowed to sell their products directly to the end consumer for off-premise consumption."[70] But craft breweries cannot. Similar to *Live Oak*, *Deep Ellum* argues that the TABC infringes on "the right to pursue legitimate occupations free from unreasonable government interference."[71] It also claims that the TABC patently violates the Equal Protection Clause of the federal Constitution's Fourteenth

68 *See* TEX. ALCOHOLIC BEVERAGE COMMISSION, *General Questions*, (2015), https://www.tabc.state.tx.us/faq/general.asp.

69 *Id.*

70 *See* DEEP ELLUM BREWING, *Sue TABC: Operation Six Pack To Go* (2016), https://www.indiegogo.com/projects/sue-tabc-operation-six-pack-to-go#/updates.

71 Deep Ellum v. Tex. Alcoholic Bev. Comm 'n, 835 F. Supp.2d 227, 234 (W.D. Tex. 2011)

Amendment.[72]

Like *Live Oak*, Crowlers perfectly embody the aforementioned divergence between public interests and policymakers' agendas in context of Texas' alcohol regulation that. In a similar case against the TABC's Crowler ban filed by the Cuvee Coffee Bar of Austin, Texas, Cuvee owner Mike McKim says that Crowlers have "been a big hit with customers" and that "Cuvee sells about 50 a week and the quantity sold now far surpasses traditional growler fills.[73]" But the TABC would keep customers who enjoy a particular brew from either buying a six-pack to go or filling an improved version of a perfectly legal container.

Encouragingly, in the Cuvee Crowler suit, state administrative judge John Beeler wrote, "There is no material difference between growlers and Crowlers."[74]" In fact the *San Antonio Current* opines, "Beeler's findings pretty much dismantle every argument TABC threw at him for why Crowlers shouldn't be sold by bars.[75]" But *Deep Ellum's* suit against the ban of on-site alcohol sales for off-site consumption is much more challenging than Cuvee's Crowler suit and could benefit from *Live Oak*'s decision. As the *Houston Press* correctly observed, "The court battles are likely to continue for as long as brewers believe their rights are being infringed.[76]"

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72 *Id.*

73 Cook, *Austin Craft Beer Bar Defies TABC Ban on Crowlers,* HOUSTON PRESS Sep. 15, 2015, http://www.houstonpress.com/restaurants/austin-craft-beer-bar-defies-tabc-ban-on-crowlers-7764392.

74 *See.* Michael Barajas, *TABC Faces Setback in Its War on Crowlers,* SAN ANTONIO CURRENT Nov. 23, 2016, http://www.sacurrent.com/the-daily/archives/2016/11/23/tabc-faces-setback-in-its-war-on-crowlers.

75 *Id.*

76 Cook, *supra* note 29.

VII: Conclusion

To paraphrase Milton Friedman, economic freedom is requisite to all other freedoms.[77] All entrepreneurs should be alarmed when a legislative body is willing and eager to hamstring private enterprise by outlawing a legitimate revenue streams of some to benefit the private interests of others. Although *Live Oak* lessens government interference in private industry and offers potentially helpful precedent for cases like *Deep Ellum*, the legal battle for economic freedom in Texas is far from over. But cases like *Live Oak* signal that TABC's ludicrous power over the craft beer industry cannot persist indefinitely, and that any similar future laws from the Texan Congress will meet serious litigious pushback. Brewmasters and beer drinkers across Texas, therefore, have good reason to continue wholeheartedly pursuing their craft and raise a cold one to freedom—preferably a glass of Live Oak's "Liberator" Doppelbock.[78]

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77 Raplh Reiland, *Freedom's Requisite*, Mises Institute (2004), https://mises.org/library/freedoms-requisite.

78 *See Live Oak Liberator*, Beer Advocate (2005), https://www.beeradvocate.com/beer/profile/383/27598/.

"AS IF GOD HAD SPOKEN"

Daniel Munson

ABSTRACT: *One of the key issues that the Federalists and Antifederalists debated at our nation's founding was whether the United States should have a supreme federal court and, if so, how much power it should have. Anti-federalists like Brutus saw the proposed Supreme Court as an undemocratic and potentially uncheckable institution. While those in favor of a supreme federal judiciary won the day, the early Supreme Court stood on very tenuous ground. Even the great Chief Justice Marshall had to bend over backwards to avoid crossing President Jefferson. Today, on the other hand, the "swing" justice on the Supreme Court is sometimes referred to as the most powerful person in America. The Court is held in awe by the other two branches of government, and when it rules, it is as if the Constitution itself had spoken, or, as Nancy Pelosi puts it, "as if God had spoken."*[1]

How did this radical turnaround in the court's authority come about? More importantly, is this a constitutional change? This paper will argue that the recent acquiescence of the president and Congress to the will of the Supreme Court is an unprecedented and unconstitutional trend. It will begin by demonstrating how giving the power to interpret the Constitution solely to one branch creates an imbalanced government, continue by showing the undemocratic and irresponsible nature of judicial supremacy, and conclude with a historical argument showing how unprecedented judicial supremacy is.

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1 Jeff Jacoby, *Supreme Court Can't Be Absolute*, The Boston Globe, Jan 1, 2012.

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One of the first things a young student learns about the American government is its system of checks and balances. The Constitution was designed to set up three equal and separate governmental branches: the executive, the judiciary, and the legislature, none of them meant to dominate any of the others (although each has special areas of authority.) Alexander Hamilton explains why this is the case in Federalist Paper #71. "The same rule which teaches the propriety of a partition between the various branches of power, teaches us likewise that this partition ought to be so contrived as to render the one independent of the other. To what purpose separate the executive or the judiciary from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative?"[2] While there were a few Framers who supported a dominant legislature, those wanting a balanced, 3-part government were the majority, as reflected by the Constitution.

Throughout most of America's history, this system has worked quite well. There have been periods when one branch has had an inordinate amount of power, but the problem has been generally noticed and rectified over time. However, a new threat to the balance of the American government is rising, one that might not go away. Commonly known as "judicial supremacy," this view takes the power of judicial review and runs with it. While judicial review merely asserts the right of the Court to review specific laws passed by Congress in light of the Constitution, judicial supremacy claims that the Court, and the Court alone, is allowed to determine

2 THE FEDERALIST No. 71 (Alexander Hamilton)

the constitutionality of a law or executive order.

Unlike the departmentalist view of constitutional interpretation (which will be analyzed in more depth later on), where the executive can refuse to enforce a law because he deems it unconstitutional, judicial supremacy takes interpretation of the Constitution entirely out of the hands of the other two branches. In other words, judicial supremacy asserts that it is the Court's job to interpret the Constitution for the other two branches, and once the Court's decision is given, the issue is closed with no room for further debate.

One of the earliest and boldest statements of judicial supremacy came in *Cooper v. Aaron*.[3] In this decision, a unanimous Supreme Court ruled that the desegregation plan instituted by *Brown v. Board of Education* could not be suspended and must be immediately acted upon. More pertinent to this paper, however, is the Court's statement that all elected officials are obligated, not to follow the Constitution, but rather the Constitution as interpreted by the Supreme Court. Chief Justice Warren, in his ruling, referred to *Marbury v. Madison* as laying the foundations of this view. He quotes the opinion of then-Chief Justice Marshall from *Marbury v. Madison*[4], "it is emphatically the province and duty of the judicial department to say what the law is." Warren concludes his argument for judicial supremacy with this interesting statement, ". . . that principle (the quote from Marshall in *Marbury v. Madison*) has ever

3 Cooper v. Aaron (1958) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME I, 440-442.

4 Marbury v. Madison (1803) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME I, 106-112.

since been respected by this Court and Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land."

Unfortunately, there are some problems with this argument. First of all, it is an argument heavy on precedent and light on Constitutional analysis. Second, it is not altogether clear that precedent is quite so much on the side of Warren as he might wish. The historical precedent on this issue will be discussed in more depth later on, but Warren's argument warrants a quick look at *Marbury v. Madison*. In *Marbury v. Madison*, Chief Justice Marshall was trying to establish judicial review without stepping on the toes of President Jefferson. The Supreme Court at the time could only dream of being an equal with the president or Congress, let alone hold absolute constitutional authority over the other two branches. It would have struck anyone in Marshall's time as absurd to state that Marshall's opinion established judicial supremacy.

Warren's error in interpreting Marshall's meaning comes from two assumptions he makes about Marshall's quote. First, he assumes that Marshall means the Constitution when he says "the law". And secondly, even if one grants that Marshall meant the Constitution, Warren assumes that when Marshall said that it is the duty of the judiciary to say what the Constitution is, Marshall was also saying that it is not the duty of any of the other branches to interpret the Constitution. Both of these assumptions are highly problematic. In both the immediately preceding and following paragraphs, Marshall clearly distinguishes between the law, which

can be changed, and the Constitution, which is unchangeable except through amendment ("if both the law and the Constitution apply to a particular case . . ."). [5] It seems unlikely that Marshall would have reversed the meaning of "the law" in the intermediating paragraph. The second assumption is a basic case of Warren interpreting Marshall's statement in light of what he wanted Marshall to be saying.

In his work "The Unbearable Rightness of *Marbury v. Madison*: Its Real Lessons and Irrepressible Myths," [6] William H. Prior presents an entirely different interpretation of Marbury v. Madison, namely, that Marshall is merely asserting the Court's responsibility to judge individual cases in light of the Constitution. Prior argues that Marshall's point is not that the Court is supreme, but that the Constitution is supreme, and all branches, including the judiciary, are held accountable to it ("courts, as well as other departments, are bound by that instrument"). [7] Nowhere in Marshall's opinion do we see an assertion that it is the Court's job to tell the other branches what the Constitution means. Warren's argument reads into Marshall's opinion, manufactures precedent that is not there, and has very little constitutional foundation.

Furthermore, his argument leaves one wondering if the judicial system would not be worse off had his reasoning been right. The governmental structure Warren lays out in his opinion

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5 Marbury v. Madison (1803) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME I, 106-112.

6 WILLIAM H. PRIOR, THE UNBEARABLE RIGHTNESS OF *MARBURY V. MADISON*: IT'S REAL LESSONS AND IRREPRESSIBLE MYTHS.

7 Marbury v. Madison (1803) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME I, 106-112

does not appear to be very balanced. The Constitution is the basis for the entire American state, and if one branch can decide what it means, that branch can go a long way toward determining how the entire American state will operate. It does not matter which branch has supreme Constitutional authority–the government would still become imbalanced.

Thomas Jefferson, one of the most important Founding Fathers and author of the Declaration of Independence, predicted the danger of a judiciary which saw itself as the sole interpreter of the Constitution. In a letter to Spencer Roane he wrote,

> "If this opinion (that the Supreme Court is the final authority on the meaning of the Constitution) be sound, then indeed is our constitution a complete *felo de se* [suicide]. For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation . . . The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."[8]

Despite the fact that at the time of the founding the "hypothesis" Jefferson was writing about seemed improbable and

8 Thomas Jefferson, *Thomas Jefferson on Departmentalism*, (September 6, 1819) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME *1*, 113 (Howard Gilman, 2013).

unrealistic, Jefferson was right. The Supreme Court would not even establish judicial review as constitutional until *Marbury v. Madison*, and even then they could not exercise it for fear of being ignored. However, that is no longer the case today. One of the branches of the American government has decided it has the power to tell the rest of the government what the Constitution means, and the other branches have meekly acquiesced, leaving a profoundly unbalanced government.

However, the unbalanced character of judicial supremacy is not the only issue. One of the foundational principles of the American government is that it is a government "of the people, by the people, for the people."[9] While avoiding the dangers of a democracy, the American government was designed to incorporate democratic principles into a republican form of government, leaving most of the power to the people to decide who their leaders will be.

This paper has already asserted that setting up a "voice of God" – giving supreme Constitutional authority to any single branch of government – creates an unbalanced government. However, the fact that the judiciary has decided that it in particular is the special branch makes it even worse. Now, not only is the American government unbalanced, it violates the natural right of popular sovereignty. Jefferson's letter to Roane also addresses this concern, throwing in the line, "and to that one too, which is unelected by, and independent of the nation." Suddenly, the Constitution, which begins "We the People of the United States of America,"[10] has its

9 Abraham Lincoln, *The Gettysburg Address* (1863).

10 U.S. CONST. Pmbl.

meaning determined by the only branch that the people do *not* have direct oversight over.

Lincoln, too, addressed judicial supremacy and its violation of popular sovereignty. After Taney's decision in *Dred Scott v. Sandford*, Stephen Douglas said, "I am content to take that decision as it stands delivered by the highest judicial tribunal on earth . . . [a] decision that becomes the law of the land, binding on you, on me, and on every good citizen, whether we like it or not."[11] Lincoln, on the other hand, strongly disagreed. He contested Douglas' assertions of judicial supremacy in their famed debates, and reiterated his beliefs on the matter in his first inaugural.[12] "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers." Once again, one can see concern expressed by a historically important American politician over the tendency of judicial supremacy to subvert popular sovereignty long before the Court's supremacy reached the lengths it has today.[13]

There is a somewhat less obvious outcome to judicial supremacy than either an unbalanced or an undemocratic government, however. It creates a government of less accountability. Accountability was an important part of the Founders' plan for

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11 Stephen A. Douglas, *Third Debate with Stephen A. Douglas at Jonesboro, Illinois*, (1858) *in* THE COLLECTED WORKS OF ABRAHAM LINCOLN 102.

12 Abraham Lincoln, *Lincoln's First Inaugural*, (1861) *in* THE COLLECTED WORKS OF ABRAHAM LINCOLN 268.

13 As an interesting note on democracy and judicial supremacy, there is an old Latin saying "vox populi, vox dei", which means that the voice of the people is the voice of God. Not only would it have been odd for the Founders to set up a fundamentally unbalanced government by setting up a supreme branch of Constitutional authority, it would be even more odd for that "voice of God" to be the one branch that is not the voice of the people.

the American government. In the Congressional Debates on the president's appointment and removal powers, Madison and the other major founders argued that the president should be allowed to fire executive employees without the approval of Congress so that he and he alone could be held accountable for the actions of the executive branch.

> "This... makes the President responsible to the public for the conduct of the person he has nominated and appointed to aid him in the administration of his department. . . You here destroy a real responsibility without obtaining even the shadow; for no gentleman will pretend to say the responsibility of the Senate can be of such nature as to afford substantial security."[14]

However, a government where the judiciary tells the other branches what the Constitution means automatically lessens the constitutional responsibility of the other two branches. Now, Congress and the president do not have to worry whether their actions are constitutional. The Court will tell them whether their actions are constitutional or not after they have done them. It strikes one as highly likely that the eager acquiescence of the other two branches to the Supreme Court is because they do not want to have the responsibility of performing a Constitutional check before acting.

Still, one would imagine that Madison's checks and balances would prevent one branch from gaining control of the

14 James Madison, *House Debate on Removal of Executive Officers* (1789) *reprinted in* AMERICAN CONSTITUTIONALISM 170-171.

government, even if it was in the interest of the other two branches. Unfortunately, the advent of partisanship, in the form of a two-party system, damaged the system of checks and balances. If the Court attempted to gain more power (as it did in *Dred Scott* and *Brown v. Board*) and the president and Congress liked what the Court was accomplishing in the decision, they would be much less likely to challenge the Court's decision. Without partisanship and the lessened responsibility that accompanies it, it would have been much harder for judicial supremacy to gain the foothold it has today in American politics.

This leaves one wondering what the alternative is. If the government America of today is unbalanced, undemocratic, and irresponsible due to judicial supremacy, what is the remedy? The Anti-Federalists were excellent at pointing out the problems of the Constitution, but not so great at finding solutions.[15] The states-rights advocates were upset when the federal government started overruling states, but could not find a better solution than secession, which led to America's bloodiest war.

Happily, this is not the case with alternatives to judicial supremacy. The answer is departmentalism. Departmentalists argue that while judicial review is constitutional, judicial supremacy is not. The Supreme Court's view on the Constitution is no weightier than that of the other branches. The president must judge for himself whether a law is constitutional or not before he enforces it. The same goes for Congress; it is their job to evaluate the constitutionality

15 HERBERT STORING, WHAT THE ANTIFEDERALISTS WERE FOR INTRODUCTION (1981).

of a law before they pass it. Immediately, all the problems with judicial supremacy are solved. The government is balanced because all three branches have a right to interpret the Constitution for themselves. The process is not opposed to democratic principle because the elected officials of the people are now expressing their opinion on the constitutionality of actions. Finally, responsibility of the government is insured, because each branch must defend their own actions *before* they make them.

In addition, departmentalism is not some new and untried scheme. In fact, it was the model for Constitutional interpretation from America's founding to the 1960's. Many of America's best politicians and lawmakers have written eloquent defenses for departmentalism.

In his third debate with Stephen Douglas, Lincoln applied the principle of departmentalism to the *Dred Scott* decision.

> "We do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob, will decide him free . . . but we nevertheless do oppose that decision as a political rule . . . which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision."

Lincoln, while acknowledging the legitimacy of judicial review, is affirming the departmentalist assertion that while this particular case may be decided, the issue of slavery was not closed for all time. The meaning of the Constitution was certainly not permanently set by the Court's ruling in *Dred Scott*.

Jefferson, too, outlined the workings of departmentalism in a letter to Abigail Adams. Speaking about the validity of the sedition law,

> "Nothing in the Constitution has given them [the Supreme Court] a right to decide for the Executive, more than to the Executive to decide for them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment, because the power was placed in their hands by the Constitution. But the Executive, believing the law unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution."[16]

In this case, the president acted as an executor of the Constitution, and not of the Court. In both instances, departmentalism has helped balance the government, given the power of Constitutional interpretation back to the representatives of the people, and made the other branches responsible to evaluate the constitutionality of political actions.

However, there is one more aspect to this issue that this paper has yet to consider: the place of precedent. The placement of the idea of precedent at the end of this paper is in no way meant to downplay its importance. In the United Kingdom, their precedent *is* their Constitution. Stare decisis is an important factor in most Constitutional cases. Depending on the situation, it can make or break a constitutional argument. Furthermore, many judicial

16 Thomas Jefferson, *Thomas Jefferson on Departmentalism* (September 11, 1804) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME 1, 113.

supremacists have made bold assertions as to the precedent they were following in having the Court interpret the Constitution for the other branches. As seen earlier, Chief Justice Warren in *Cooper v. Aaron* stated,

> ". . . that principle [judicial supremacy] has ever since been respected by this Court and Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land."

As it turns out, precedent is overwhelmingly in favor of Departmentalism. Warren's statement has left many wondering to what precedent he was referring. There is no evidence of judicial supremacy being anything other than a minority view until the mid-1900's after the New Deal. Larry Kramer, dean of Stanford's Law School, puts it this way in his book, *The People Themselves: Popular Constitutionalism and Judicial Review*, "This was all just bluster and puff . . . *Marbury* said no such thing and judicial supremacy was not cheerfully embraced in the years after *Marbury* was decided. The justices in *Cooper* were not reporting a fact so much as trying to manufacture one."[17]

This is true. This paper has already mentioned how the Court had to fight even to get into existence and later establish judicial review. In fact, as late as 1867, not only was the Court

17 LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 21 (2004).

not asserting judicial supremacy, it was admitting the right of the president to decide what was constitutional to execute. In *Mississippi v. Johnson,* Chief Justice Chase said that it is not the place of the Court to tell the president what he should and should not enforce, and rather that it is up to the president to determine what is constitutional. "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department."[18] A pretty striking defense of departmentalism from the Supreme Court itself.

It is not until the Civil Rights cases of the mid-1960s that the Court began asserting judicial supremacy. For a variety of reasons, the president and Congress acquiesced. One reason previously proposed in this paper is the lessened responsibility. Another, for the most part, is that the president and Congress agreed with the actions of the Court in the Civil Rights cases. This reason, has been the downfall of the Founders' brilliant checks and balances scheme: if politicians agree with an end, they will be tempted to support it no matter what dangerous precedent it sets for the American government. Whatever the reasons, President Eisenhower gave his approval to the Court's decisions in the 1960s and Congress made nary a peep.[19] From there on out, besides a few dissents from Newt Gingrich and other conservatives, judicial supremacy has gone

18 *Mississippi v. Johnson* (1867) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME 1, 258-261 (Howard Gilman, 2013).

19 Dwight Eisenhower, *Address to the Nation on the Introduction of Troops in Little Rock* (1957) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME 1, 258-261.

largely unchallenged.[20]

It is only natural that a country would eventually drift from the original creation of its founders. In many ways, it is amazing that America has remained as faithful as it has to the Constitution. Yet the current indifference of the American government and people to the incursion of judicial supremacy is unfortunate to say the least. Thanks to that indifference, America now has a government that is less balanced, less true to democratic principles, and less responsible. America now has an unprecedented "voice of God."

20 Newt Gingrich, *The Rule of Law* (2011) *reprinted in* A NATION LIKE NO OTHER: WHY AMERICAN EXCEPTIONALISM MATTERS, 149-151

THE ELECTORAL COLLEGE, DEMOCRACY, AND THE CONSTITUTION:
AN ARGUMENT FOR THE FOUNDER'S INTENT

Sarah Gibbs

ABSTRACT *Against the backdrop of President Trump's election and scenes of thousands of Americans rioting in the streets chanting "Not my President," the calls for a change in the way the president is elected take on new significance. Many Americans have expressed a preference for a national popular vote over the traditional and constitutional Electoral College. Many more Americans do not understand why this complex election system even exists. This article presents a defense of the Electoral College and explains its place as the guardian of the American system of government.*

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In the Constitution, the Founders attempted to balance the competing interests of both the small and large states, the urban and the rural areas, and the Federalist and Anti-federalist thinkers. They attempted to form a system that would harness these interests and human nature to create a form of limited government that would be responsive to the people's wishes but maintain its limitations. On the question of the election of the chief executive, the Founders concluded that the best way to balance these competing interests was "to form an intermediate body of electors," known as the Electoral College.[1] Since the Progressive Era, there has been growing popularity, in the name of democracy, for the popular election of the President. A change in the system to a popular election, however, would ignore the labored efforts of the Founders and would harm the United States. The Electoral College is better than the more democratic popular election for three main reasons: democracy is not an inherent good, federalism is important, and the system is still the most practical way to choose a president.

First, the Electoral College is better than popular election because democracy is not an inherent good. "Democracy" is somewhat of a nebulous term, and more of a spectrum than a specific definition. The term refers to any form of government by the common people, be that through direct popular vote or a representative body, but the term in its essence refers to a system built on majority rule.[2] American political culture upholds

1 Joseph Story Commentaries on the Constitution, in *3 FOUNDERS' CONSTITUTION* 558 (Philip B. Kurland and Ralph Lerner, eds., 1987).

2 MICAH ISSITT, SALEM PRESS ENCYCLOPEDIA.

democracy as an inherent good, but the Founders disagreed strongly. First, I will explain how American political culture upholds democracy as a political good, and then I will demonstrate why the Founders designed a system to combat democracy's essence, majority rule.

First, American political culture sees democracy as an inherent good. President Franklin Roosevelt and the activists of the Progressive Era first popularized the idea of "democracy" as an inherent good in American political thought in the early 1900s and championed the idea as a social and political goal.[3] The Progressive movement succeeded in making democratic reforms across the states (adding initiatives, referendums, and recalls into American state politics) and on the national level (changing the election of senators to popular election through the 17th Amendment to the Constitution).[4] Through the following years, presidents continued to use the term "democracy," and, today, referring to America as a democracy is commonplace, and reporters commonly measure the government by its level of democracy. For example, veteran reporter Rick Hampson of *USA Today*, wrote an article following the 2016 presidential election that posed the question, "what does democracy [in America] mean today?" [5] Other, similar articles

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3 SIDNEY M.MILKIS & MICHAEL NELSON, THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT, 1776-2011 *(2012)*.

4 Thomas G. West & William A. Schambra. *The Progressive Movement and the Transformation of American Politics*. HERITAGE.ORG (December 15, 2016), http://www.heritage.org/research/reports/2007/07/the-progressive-movement-and-the-transformation-of-american-politics.

5 Rick Hampson, *From E.B. White to Colin Kaepernick: What Does Democracy Mean Today?* USA TODAY (Nov. 24, 2016), http://www.usatoday.com/story/news/politics/2016/11/24/eb-white-colin-kaepernick-what-does-democracy-mean-today/94344960/.

questioning the future of American democracy have appeared in the *New York Times*[6] and on CNN's website.[7] This idea of "democracy" as a good is pervasive in American politics, affecting all areas, including foreign policy. In the early 1990s, Presidents George H. W. Bush and Bill Clinton initiated the strategies of democratic engagement and enlargement, in accordance with the American consensus to spread democracy around the globe.[8] Later, President George W. Bush justified his policy toward Iraq in the Iraq War as being "part of a global campaign for democracy and freedom."[9]

This pervasive idea of democracy as an inherent good is the impetus for the calls for the reform of the Electoral College. Progressive groups have called for reform before, but with the recent election results of 2000 and 2016 in which the outcome of the popular vote and the outcome of the Electoral College vote differed, groups are reenergizing their call for reform. Based on principles of "majority rule" and "fair representation,"[10] and with

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6 Steven Levitsky & Daniel Ziblatt, *Is Donald Trump a Threat to Democracy?*, NEW YORK TIMES, Dec. 16, 2016

7 Julian Zelizer, *Is American Democracy Dead?* CNN.com.

8 Douglas Brinkley, *Democratic Enlargement: The Clinton Doctrine*, FOREIGN POLICY, Spring 1997, at 111.

9 Ivo H. Daalder, *On the Record President Bush's Speech on Global Democracy and Freedom*, Brookings.edu, November 10, 2003, https://www.brookings.edu/on-the-record/president-bushs-speech-on-global-democracy-and-freedom/.

10 Ulrich, Roy, *Dump the Electoral College*! THE AMERICAN PROSPECT. http://prospect.org/article/dump-electoral-college.

700 failed attempts at national reform,[11] progressive groups have introduced the "National Popular Vote" as a way to circumvent the amendment process. They have proposed an interstate compact that would bind states' electors to cast their vote for the winner of the popular vote in the nation. As of October 2016, 10 states and the District of Columbia have signed on to the agreement, but it will not take effect until a majority of states sign.[12] Progressive groups capitalized on the most recent election by organizing protests across the nation on December 19th when the official Electoral College vote for the 2016 election took place.[13] These increased calls for reform reopened the debate on the Electoral College and democracy in the United States.

In spite of what one would be led to believe by the centrality of "democracy" to American political thought and life, the Founders of the nation did not view pure democracy as a positive concept. In fact, the Founders feared democracy and actively tried to avoid it. Madison wrote in the Federalist Papers that no "pure democracy" can solve for "the mischiefs of faction" and that democracy will result in a tyranny of the majority.[14] The Founders wrote extensively about the composition and the mischiefs of

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11 John Nichols, *The Electoral College Lets Losers Like Trump Become President*, THE PROGRESSIVE, November 29, 2016, http://www.progressive.org/news/2016/11/189079/magazine-electoral-college-lets-losers-trump-become-president.

12 Ulrich, Roy, *Dump the Electoral College!* THE AMERICAN PROSPECT, http://prospect.org/article/dump-electoral-college.

13 Gabriel Debenedetti, and Kyle Cheney, *Progressive Groups Plan to Protest Electoral College Vote*, POLITICO (2016) http://www.politico.com/story/2016/12/electoral-college-vote-protests-232311.

14 THE FEDERALIST No. 10, at 46 (James Madison)(George W. Carey and James McClellan ed., 2001).

factions in the Federalist Papers.[15] They defined faction as a group within the populace that is "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[16] Today, in a country of about 300 million, factions are prevalent. Some current examples are the Pro-Life movement, the LGBTQ movement, the Black Lives Matter movement, and, more generally, labor unions (with manufacturing interests) and banks (with finance interests). Each of these movements pits the rights of one group against the rights of another: the rights of a mother against the rights of her unborn child, the rights of gay citizens against the rights of a store owner, the rights of black citizens against the rights of police, the rights of consumer versus producer, and the rights of lender versus borrower. The Founding Fathers designed the American system to give equitable credence to the rights and interests of all—those in the majority and those in the minority. They did not design a pure democracy; they designed a representative *republic*.[17]

A majority of the Founders opposed democracy. They did not see the ideal of democracy as an inherent good. Many of the Founders opposed majority rule for its disregard for justice and its oppression of minorities. Madison warned in Federalist No. 10 that the factions inherent in "popular government" lead to a government "not according to the rules of justice and the rights of

15 James Madison, THE FEDERALIST. (George W. Carey and James McClellan eds., Liberty Fund 2001).

16 *Id. No. 10* at 43.

17 *Id.* at 46.

the minority party," but to a government "by the superior force of an interested and overbearing majority."[18] He assured Americans that the "well-constructed" government in the Constitution, with its checks and balances and its Electoral College, would mitigate this problem of tyranny of the majority.[19] Many of the Founders even specifically opposed popular election. As described by Joseph Story in his *Commentaries on the Constitution*, at the Constitutional Convention the Founders discussed popular election and its tendency to lead to volatile elections decided by public passions of the moment.[20] This volatile opinion of the majority can be seen in the most recent election in the United States. In a culture where many in the populace believe that the government should be responsive to the majority opinion, the discrepancy between the popular vote and the election of the President caused thousands across the country to protest, chanting "Not my president."[21] Imagine a government where these crowds of protesters were allowed to decide government policy. Doing away with the Electoral College would not make the United States a pure democracy, but it would introduce popular election, or majority rule, into the most visible and the only nationally elected office in the United States' system. The introduction of majority rule would erode at the Founders' principles of compromise

18 James Madison, THE FEDERALIST, (George W. Carey and James McClellan eds., Liberty Fund 2001), 46.

19 *Id.*

20 Joseph Story Commentaries on the Constitution, in *3 FOUNDERS' CONSTITUTION* 558 (Philip B. Kurland and Ralph Lerner, eds., 1987).

21 Matea Gold, Mark Berman, & Renae Merle, *'Not My President': Thousands Protest Trump in Rallies Across the U.S.* THE WASHINGTON POST, Nov. 11 2016.

and balancing interests and would strip away the protection that the Electoral College offers minorities by giving the majority the power to control the presidency and thus control cabinet, bureaucratic, and judicial appointments and effectively leave minorities with only the representatives in Congress that they can manage to elect.

The Founders decided that elections like these would not yield one of the "highest and purest, and most enlightened men in the country" as President.[22] Madison wrote in strong support of, and the Founders decided on, "an intermediate body of electors" (the Electoral College) who would be chosen by the people for their likelihood "to possess the information, and discernment, and independence" "to discharge of the duty" of choosing the President of the United States.[23] He wrote that such a system would be the best defense against "cabal, intrigue, and corruption" in the republic.[24] The Founders intended that the Electoral College be representative of the population, and originally they intended that it be deliberative. Unfortunately, in direct contrast to what the Founders intended, the practice of electors "pledging" to a particular candidate before the election effectively ended the possibility of deliberation before it even began.[25] In spite of this development, the Electoral College continued to be a means by which to elect a president who could be "the voice of the people"

22 Story, *supra* note 1 at 558.

23 *Id.*

24 *Id.*

25 *Id.* at 559.

without favoring the majority over the minority.[26]

The Founders understood that democracy was not an inherent good, and they built a system based on balancing interests and preserving the rights of the minority. Any move away from the Electoral College and toward democracy is a dangerous move for the stability of the system and for every American's rights.

Not only is the Electoral College better than popular election because democracy is not an inherent good, but, secondly, the Electoral College is better because federalism is an important component of the U.S. government, and that component is preserved by the Electoral College. Federalism is central to the American system as the Founders envisioned it. The Founders worked hard to incorporate federalism into the new government and established a government that was both national and federal.[27] They wanted to strike a balance between protection of individual rights and protection of state rights. The national components of the government were necessary to safeguard individual rights, and the federal components of the government were necessary to safeguard state rights. The national components included the popular election of the House of Representatives, the authority of the Supreme Court over disputes between the states, and the universal application of the Bill of Rights across the states. The federal components included the ratification of the Constitution (only binding on those states that ratified) and the election of the Senate by state legislatures. Additionally, the Founders designed

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26 *Id. at* 558.

27 Madison, *supra* note 13, *No. 39*, at 193-199.

the election of the president and amendments to the Constitution to be processes that combined national and federal aspects.[28] The major plank of federalism found in the election of Senators by the state legislatures has already been done away with by a Progressive reform in the early 1900s. As state rights have been restricted and de-emphasized, the Electoral College remains the most constant reminder to citizens that they live in a country of not just a national government, but of a federal government too.

The Electoral College reinforces the idea of federalism in the minds of citizens and preserves federalism in three key ways. First, the presence of differing election rules between the states preserves federalism. Some states apportion their electors to whichever candidate wins the popular vote in their state, while others apportion their electors by Congressional District (meaning that both candidates could receive electors from a single state).[29] These different rules remind citizens that states are different jurisdictions with different laws and some level of autonomy.

Second, the manner in which the Electoral College influences the party system preserves federalism. Interestingly enough, the political party system in the United States has emulated the Electoral College in its nominating process. The presidential primary process reflects the Electoral College in several ways. Just as states apportion their electors in different ways in the Electoral College, states in the presidential primary system

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28 *Id.*

29 NATIONAL ARCHIVES AND RECORDS ADMINISTARTION *What is the Electoral College?*, https://www.archives.gov/federal-register/electoral-college/about.html.

nominate candidates in various ways, with some holding caucuses while others hold open or closed primaries.[30] Additionally, just as the Electoral College accounts for geographical differences in the way it allocates electors, the party nominating system accounts for geographical differences in the way it holds their primaries/ caucuses on different days. By holding the contests on different days, the system forces candidates to focus on various issues that concern different geographical regions throughout the campaign,[31] and thus making the candidates more viable in the geographically diverse Electoral College. These two components of the party system reflect the Founders' intent for an electoral system that was federal and that balanced the various interests within the country. The federalism of the presidential primary process reinforces federalism in the broader political culture. But if the presidential election process were to change to a popular vote, the nominating system would likely fall in line in order for parties to maximize their potential to win in November. Parties would no longer need to test candidates' abilities to win a plurality of states, but their abilities to win one national popular vote. There would be no reason to focus on different geographic regions. In fact, rather than having separate primaries in each state, it would make more sense to have a national "best 2 out of 3." This would allow the

30 *State Primary Election Types*, National Conference of State Legislatures(July 21, 2016,). http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx.

31 LINDSEY COOK, *Why New Hampshire Matters in Presidential Elections.* U.S. NEWS AND WORLD REPORT (Feb. 2, 2016), http://www.usnews.com/news/blogs/data-mine/2016/02/02/why-new-hampshire-matters-in-presidential-elections.

party to test the viability of each candidate through the test of current events and the ebb and flow of public opinion. Without the Electoral College, the federalism of presidential primaries would not be needed and would likely fade away.

Political parties also emulate the Electoral College by holding a convention where delegates from each state come to cast their vote for the nominee their state chose and to partake in the platform writing and other party development activities at the convention. If the Electoral College were abolished, it would be all too easy for parties to morph into a simple electronic reporting of the popular vote and a roundtable of elites and pollsters strategizing how best to capture the California and New England vote. The Electoral College is important for preserving federalism in and of itself, but it is also important because of the way it influences the party system.

Third, the Electoral College preserves federalism by making sure that one man does not equal one vote, but that all men receive the considerations of the candidates. Critics of the Electoral College say that the system is unfair because Wyoming receives one elector for every 160,000 voters, but California only receives one elector for every 600,000 voters.[32] But if the votes were "equitable," Wyoming would only receive one vote to California's 55. In that world, a candidate would pay much more attention to the concerns of the people of California than to what issues matter to the people of Wyoming. In that world, living in a large state would make your vote worth more than a

32 Nichols, *supra* note 9.

person living in a small state. In the same way, the change would affect the worth of people's votes between rural and urban areas. In a popular-vote world, a voter in an urban area would be worth more than a voter in a rural area, because it is easier to reach urban voters in a campaign. In this way, the delicate balance the Founders created between the large and small states and between urban and rural areas would be lost to the tyranny of the interests of the urban centers in the large states.

A move away from the Electoral College would cast away the last remnants of the federalist balance that the Founders attempted to achieve in their republic. It would exchange the balanced interests of manufacturers in Michigan and Ohio, farmers in Wisconsin and Iowa, social conservatives in the South, technology gurus in Silicon Valley, and investors on Wall street for the volatile opinion of the amorphous majority. It would exchange the balanced consideration of the president of these various interests for the interests of the 51% across the nation that can elect him. Without the Electoral College, the United States would lose federalism, and in its place get majority rule in the White House and in the Supreme Court that the White House appoints. Minorities would be left with only the little influence they have in Congress.

Finally, the third reason that the Electoral College is better than popular election is because, even after 200 years, the system is still the most practical way to elect the President. It is the most practical way to get an election with clear and secure results. In the late 1700s, a popular election was simply not practical due to time

and transportation restraints. But even today with transportation and technological advances, a national popular election is still not practical. First, a nationwide election would mean nationwide recounts. Currently recounts are done at a precinct level,[33] meaning that the individual outcome does not impact the overall outcome of the election very much. A nationwide recount, however, would have a much bigger impact, and would, therefore, lead to more calls for recounts and more protest and unrest over the recounts. Second, a nationwide election would most likely mean an increase in national election rules and federal oversight. These increases in federal control would mean that the behemoth of federal government bureaucracy would have its hands deep in one more area of the American political system, bringing with it incompetence, backlogs, and corruption. With a nationwide election, the executive branch itself could very well be in charge of the election of the executive branch. Because a national popular election would lead to volatile nationwide recounts and federal incompetence, backlogs, and corruption, the Electoral College is still the most practical way to elect the President.

Through the long process of the Constitutional Convention, the Founders agreed on a system that they believed would best balance competing interests in order to form a government of limited means and ends that would endure. The Electoral College is a key part of that system that has thus far endured, even while other components have faded away through Constitutional

33 Meghan Keneally, *Everything You Need to Know About the Election Recount Efforts*, ABCNEWS, Dec 9, 2016.

Amendments and Court decisions. In fact, the Electoral College may be one of the most important components of the balanced government that the Founders devised, as it staves off democracy, preserves federalism, and peacefully and securely elects a President every four years. The Electoral College effectively preserves the Founders' Intent for a government that is not democratic, but one of constitutional limits.

Endnotes:

1 Madison and Hamilton wrote extensively about faction and its dangers in their defense of the Constitution in the Federalist Papers. Both men specifically mentioned faction in Federalist No. 8, No. 9, No. 10, No. 15, No. 21, No. 27, and No. 51.