Bellarmine Law Society Review

Volume XIII — Issue II

BELLARMINE LAW SOCIETY REVIEW
VOLUME XIII, ISSUE II

MASTHEAD

BELLARMINE LAW SOCIETY REVIEW
VOLUME XIII, ISSUE II

TABLE OF CONTENTS

Editors' Note: Volume XIII No. II of the *Bellarmine Law Society Review*	Calise, Isabella	01-02
Finding Judicial Constellations: A Relational Thematic Content Analysis of *Stare Decisis* During the Roberts Court	Chen, Alex	03-22
Establishment Along the Borderline: Supreme Court Jurisprudence on Ten Commandments Displays	Darrish, Joshua	23-31
The Insanity Defense and Psychiatry: The Advantage of a Cognitive Approach	Hoefling, Simon	32-45
A Brief Legal History of RICO Charges and Artistic Freedom & Their Unconstitutional Applications in *State of Georgia v. Kahlieff Adams, et al.*	Mahoney, Brendan	46-63
A Well-Regulated Militia: A Historical Reading of the Second Amendment	Treanor, Darya	64-78

Cover art courtesy of Isabella Calise.

Bellarmine Law Society Review

Volume XIII | Issue II

Editor's Note: Volume XIII No. II of the *Bellarmine Law Society Review*

Isabella Calise
Boston College, calisei@bc.edu

EDITOR'S NOTE: VOLUME XIII NO. II OF THE *BELLARMINE LAW SOCIETY REVIEW*

ISABELLA CALISE

In the second issue of the Bellarmine Law Society Review's (BLSR) thirteenth volume, a diverse group of scholars, including four undergraduates and a standout high-school senior, delve into compelling legal topics. The exploration encompasses a broad spectrum, ranging from Supreme Court rationale and psychiatry to the intricacies of LGBT+ rights and rap music—all viewed through the discerning lens of legal analysis. First, high-school senior Alex Chen navigates the uncertainties surrounding stare decisis interpretation with a thematic approach that unveils the foundational aspects of the Court's opinions and anticipates their future applications. Second, Joshua Darrish's analysis highlights cases like *McCreary County v. ACLU* and *Van Orden v. Perry* to accentuate the widening gap between separationist and accommodationist interpretations of the Bill of Rights. In doing so, Darrish argues that maintaining the Establishment Clause's vague nature will safeguard the secularity of the judicial system. Third, Simon Hoefling explores the insanity defense through a cognitive lens rather than one of volition. His argument posits that this approach establishes a higher standard for comprehending criminal culpability. Fourth, Brendan Mahoney dissects the implications of RICO charges, examining their impact on the admission of rap lyrics in the judicial system. Notably, Mahoney invokes topical cases such as *State of Georgia v. Kahlieff Adams et al.* to argue that restricting charges threatens a rapper's civil liberties. Finally, Darya Treanor examines the historical interpretations of the Second Amendment under *D.C. v. Heller* to advocate for a broader perspective that not only incorporates but also expands the liberties of LGBTQ+ Americans.

The release of this edition marks the inaugural venture of the BLSR under the guidance of Managing Editor Tommy Dee and myself. Since the fall, Tommy and I have taken strides to expand the Editorial Board by welcoming new associate editors, whose dedication has made the entire editorial process both effortless and gratifying. As a Board, we were genuinely impressed by the abundance and caliber of submissions this year and fervently anticipate that you, our esteemed readers, will discover them as engaging as we did.

Bellarmine Law Society Review

Volume XIII | Issue II Article I

Finding Judicial Constellations: A Relational Thematic Content Analysis of *Stare Decisis* During the Roberts Court

Alex Chen
West Chester East High School, alexwchen39@gmail.com

FINDING JUDICIAL CONSTELLATIONS: A RELATIONAL THEMATIC CONTENT ANALYSIS OF *STARE DECISIS* DURING THE ROBERTS COURT

ALEX CHEN [1]

Abstract: The Supreme Court's recent overturning of the long-standing precedent *Roe v. Wade* has cast uncertainty over the future of *stare decisis* application and interpretation. As the Court continues to shift ideologically, understanding the thematic frameworks in cases that fail to abide by the doctrine could prove valuable in consolidating an approach to the Roberts Court's interpretation of *stare decisis*. This paper explores a set of cases, the relationships between them, and the underlying themes in opinion rationale in order to unearth the intentions and potential implications of the Roberts Court's *stare decisis* application.

Introduction

On June 24th, 2022, the Supreme Court of the United States handed down its decision in the case *Dobbs v. Jackson Women's Health Organization (2022)*, reversing its nearly fifty-year-old precedent in *Roe v. Wade (1973)* and subsequently overturning the federal right to an abortion.[2] While outrage and controversy diffused across the nation, the interest in a singular two-word term among citizens and scholars alike spiked: *stare decisis*. Translated literally from Latin as "to stand by things decided," *stare decisis* is the legal and judicial doctrine that encourages, if not constrains, courts to abide by their previous decisions.[3] Thus, it enshrines precedent and creates a steady hand in the judicial sphere. The Supreme Court in *Dobbs* elected to break with the doctrine of *stare decisis* in overruling *Roe*.

With many recent decisions from the Court overturning past precedents, a shifting understanding of a modern interpretation of stare decisis has arisen. Despite the notion that precedent is ideally binding, decisions like *Dobbs* have suggested that precedent is less binding than previously thought. This problem has negatively affected the ability of judges, lawyers, and

[1] Alex Chen is a senior at West Chester East High School in Pennsylvania. At school, Alex advocates for bylaws and social structures to increase student representation. He has competed in the Harlan Institute Moot Supreme Court Competition, placing second nationally for the Petitioner position this year. His interests surround how the law interacts and influences communities, and he hopes that his research can underscore steps that legislators at all levels should consider. Upon graduation, Alex hopes to study Government and one day attend law school.

[2] Sherman, Mark, "Supreme Court Overturns Roe v. Wade; States Can Ban Abortion." *AP News*. June 24, 2022. https://apnews.com/article/abortion-supreme-court-decision-854f60302f21c2c35129e58cf8d8a7b0.

[3] "Understanding Stare Decisis." *American Bar.* December 16, 2022. https://rb.gy/ofh7q4.

scholars to understand, interpret, and apply *stare decisis* because of the recent shifting justifications for overturning precedent. Indeed, *stare decisis'* newest applications have shown "alarming effects … on legal stability, doctrinal consistency, and judicial legitimacy."[4] At the public level, decisions like *Dobbs* have led to 53% of Americans having "little or no trust in the Supreme Court to operate in the best interests of the American people."[5] This has led scholars to stress the importance of restoring a consolidated understanding of the doctrine in order to "reestablish the public's faith."[6] To rectify this, many scholars have sought to create comprehensive guides to Supreme Court *stare decisis*.[7] However, in many cases, these guides fall short in analyzing the rationale of the cases in question.

Thus, in order to address this exceedingly relevant research issue, further investigation into the doctrine's relationship with the Court is necessary. The key to understanding the Court's interpretation of *stare decisis* lies in the rationale of their opinions that deal with breaking or overturning the doctrine. It is there that the Court reveals its justification or adds understanding to the doctrine. In sidestepping *stare decisis*, the Court typically outlines — in a summary known as a syllabus — the primary component or case supporting their justification. Still, this conversation is not new; in fact, the Court has weighed in on *stare decisis* dozens of times since Chief Justice John Roberts assumed his position and began the Roberts Court. Indeed, each overturned case revitalizes the scholarly conversation surrounding the doctrine in some way.

In investigating individual cases over a set time period where *stare decisis* was not followed and looking at the primary reasons in its rationale, one can evaluate the changing foundation for the doctrine and, in turn, provide insight into the legal sphere and the American public as a whole.

Literature Review

The existing literature surrounding this research primarily weaves findings from four major works; collectively, they analyze the Supreme Court's interpretation and application of

[4] Gerhardt, Michael J., "The Role of Precedent in Constitutional Decisionmaking and Theory." *George Washington Law Review*. (1991). 83. https://scholarship.law.wm.edu/facpubs/980/.
[5] "Over Half of Americans Disapprove of Supreme Court as Trust Plummets." *Annenberg Public Policy Center* October 10, 2022. https://www.asc.upenn.edu/news-events/news/over-half-americans-disapprove-supreme-court-trust-plummets.
[6] Tilghman, James, "Restoring Stare Decisis in the Wake of Janus v. AFSCME, Council 31" *New York Law School Law Review*, *64*(2), (2019), 136.
[7] Murrill, Brandon, "The Supreme Court's Overruling of Constitutional Precedent." *Congressional Research Service*. September 24, 2018. https://crsreports.congress.gov/product/pdf/R/R45319.

stare decisis from a thorough spectrum of approaches. Despite their individual contributions to the scholarly canon, they fail to connect to each other in a manner that creates a cohesive picture. Nestled between the extent of their research, there exists an ever-present academic gap. Through detailing each, this literature review will unravel the complex connections between them and bring to light the components that have yet to dovetail and give way to my research.

Professor Michael Gerhardt's famous publication on precedent's influence on decision-making provides an exceedingly comprehensive view of the topic. He identifies "two kinds of structural functions" that "maintain government operations and relationships" and "inform the choices … of other branches."[8] Along with historical purposes, these functions provide for the role of precedent on the Supreme Court. Although precedent is often used to "immunize prior decisions from overruling," ultimately, it is not an unbreakable tenet of the Court.[9] Throughout his research, he looks not only at "what the Court already has decided expressly" but also why *stare decisis* was applied.[10] Using a wide range of cases, he expounds on the doctrine's ability to provide a scope for approaching familiar cases. In short, through analyzing dozens of important cases, he finds that the role of *stare decisis* is to provide stability in the application of the law. Although they clearly establish the role of precedent, Gerhardt's findings do not explicitly detail the broader reasons that are considered by the Court when determining when and how to apply precedent.

Looking at monumental decisions such as *Planned Parenthood v. Casey*, Randy Kozel established these very reasons when exploring the details of judicial doctrine in *stare decisis*. Publishing his work in the *Washington and Lee Law Review*, he conducted his research by analyzing and summarizing findings from keystone cases on *stare decisis*. His findings worked "to isolate the various components of the Supreme Court's *stare decisis* jurisprudence and to study their individual and collective functions."[11] Despite discovering precedent to be collectively "indeterminate," Kozel succeeded in unearthing a number of primary factors in the rationale of applying *stare decisis*: soundness, workability, and reliance.[12] In other words, the

[8] Gerhardt, "The Role of Precedent in Constitutional Decisionmaking and Theory," 86.
[9] *Id.* at 77.

[10] Gerhardt, "The Role of Precedent in Constitutional Decisionmaking and Theory," 77.
[11] Kozel, Randy, "Stare Decisis as Judicial Doctrine," *Washington & Lee Law Review*, *67*(2) (2010), 414.
[12] *Id.* at 465.

Court may maintain or overrule a precedent because of the quality of its reasoning, its ability to be shaped, and whether its absence would be detrimental to legal doctrine.

Combining the research of both Gerhardt and Kozel, Segal and Spaeth looked at the roles and factors of *stare decisis* to determine the doctrine's influence on the votes of individual justices in 346 landmark cases. They found that individual justices (with the exceptions of Justices Powell and Stewart) were not influenced by the roles and factors of precedents they disagree with ideologically.[13] Most notably, Segal and Spaeth brought the use of content analysis as a research method for analyzing Court precedents into the scholarly conversation. Their substantial use of past cases represents a quantitative analysis. In line with previous research, their extraction of ideas about Gerhardt's roles and Kozel's factors from the philosophies of individual justices is a strong qualitative addition to the research. Segal and Spaeth, however, did not explore the influence of *stare decisis* on the Court as a whole, specifically, the rationale found in the final opinions of the Court.

Fowler and his colleagues used a full Court content analysis in their research that determined "case centrality" or a "complete network of 26,681 majority opinions written by the U.S. Supreme Court" to "identify the most legally relevant precedents."[14] Their findings, as published in the peer-reviewed journal *Political Analysis,* demonstrated a systematic approach to evaluating which cases were cited the most by other cases.[15] Furthermore, their research marks the first time case mapping was used to find connections between cases. Despite its groundwork in content analysis research of the Supreme Court, the publication does not apply case mapping to *stare decisis* and, specifically, its rationale to draw connections. Moreover, Fowler and his colleagues' work concludes at the beginning of the ascension of Chief Justice Roberts in 2005.

In total, these four publications combine and share key research findings on the judicial application and interpretation of *stare decisis*. Yet, they leave a considerable gap in the existing literature. While Gerhardt and Kozel give foundation to the doctrine by determining the role and rationale, they do not explore its application to reversals in Court rationale. Similarly, while Segal and Spaeth explore its application to rationale, they fail to do so at a Court-wide scale,

---

[13] Segal, J.A. and Spaeth, H.J., "The Influence of Stare Decisis on the Votes of United States Supreme Court Justices," *American Journal of Political Science*, 40(4), (1996) 971–1003. https://doi.org/10.2307/2111738.

[14] Fowler et al., "Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court." *Political Analysis*, *15*(3), (2007) 325. http://www.jstor.org/stable/25791897325.

[15] *Id.* at 324–346.

leaving valuable research out of the conversation. Furthermore, while research exists mapping these doctrinal relationships on the Court, no mapping exists for the rationale of *stare decisis* specifically. Throughout all of this, the four publications fail to apply their various findings to the Roberts Court. Though inherently intertwined, the four works leave a gap in what primary reasons of opinion rationale using *stare decisis* have revealed about the Roberts Court's analysis of precedent as a whole. Research is needed that can bring an understanding of the role and rationale behind not abiding by *stare decisis* for the Court as a whole by mapping changes across a modern time span.

Any resulting research would not only bridge key ideas from the aforementioned four publications but also provide a new framework for understanding the shift and direction of the Supreme Court's application of *stare decisis*. This would be consequential to judges, scholars, lawyers, and the public seeking to understand the doctrine.

Thus, this study seeks to address and close that gap with research regarding the following research question: What have the primary rationales in the opinions of cases that overturned precedent revealed about changes to the Supreme Court's application of stare decisis during the Roberts Court? For the purposes of this research, "primary rationale" refers to the main reason the Court did not apply *stare decisis* in all cases that overturned other cases. Additionally, the Roberts Court refers to the timespan since Chief Justice Roberts led the Court: September 29th, 2005, to the present day. It must be noted that the key assumption was made that primary rationales could be identified in all cases that overturned others.

Prior to conducting the research and in line with my research question, I hypothesized that the primary rationales of many overturning cases would demonstrate a chronological progression of more willingness to rely on the principles of *stare decisis*. This would indicate a fundamental shift in the Court's outlook toward the future.

Methodology

My research utilized a relational thematic content analysis research method. To standardize and establish what is specifically meant by a relational thematic content analysis for the purposes of this study, a concrete definition has been provided and explicated. This definition represents the paradigm on which I based my methodology.

Generally speaking, content analysis is "any technique for making inferences by systematically and objectively identifying special characteristics of messages."[16] Researchers 'code' a set of media using regimented guidelines and then extrapolate qualitative conclusions based on the quantifiable data set produced. Researchers may code for "words, themes, or concepts" among other qualitative aspects; when researchers specifically code and search for themes in a given set of media, the research method is known as a *thematic* content analysis.[17]

Moreover, this research employs a subset of the method known as relational content analysis. This method adds a component that "involves exploring the relationships between concepts. Individual concepts are viewed as having no inherent meaning and rather the meaning is a product of the relationships among concepts."[18] In order to accomplish this, cognitive mapping is typically used. Cognitive mapping can be defined as any "graphic map that represents the relationships between concepts" in order to "create a model of the overall meaning of the text."[19]

In aggregate, these definitions provide the framework for what a relational thematic content analysis establishes for my methodological path. The rationale behind my decision to use this method stems from three primary reasons, each supporting a different component of what the method entails.

First, I chose a content analysis method because using a large dataset of media (Supreme Court opinions) would provide the greatest selection of insight into the Supreme Court's changing use of *stare decisis*. Since the Court writes its opinions over time, these insights can be extrapolated chronologically and applied to see change over time.

Second, a thematic approach was taken because it offered the most comprehensive and rational way to extract the broader concepts, something words or paragraphs alone would be insufficient to achieve. These themes could additionally be coded such that the primary rationale behind the reversal of a precedent could conveniently be categorized as the theme itself.

Third, because Supreme Court opinions are intrinsically related to other opinions, the relations between cases were considered. The only way to accomplish this was to incorporate the

---

[16] Holsti, O. R. "Content Analysis for the Social Sciences and Humanities." *Addison-Wesley Pub.* 1969. 3.
[17] "Content Analysis." *Columbia Mailman School of Public Health.* 2019. https://www.asc.upenn.edu/news-events/news/over-half-americans-disapprove-supreme-court-trust-plummets.
[18] *Id.*
[19] *Id.*

relational aspect of content analysis. In order to visualize this component, the aforementioned process of cognitive mapping was produced to demonstrate relationships.

Overall, this methodological design aligns incredibly well with my research question because it produces a useful quantitative data set of themes based on complex qualitative Court opinions. When mapped, this data set can be interpreted, and conclusions regarding the themes in the primary rationale of opinions can be made to determine changes in the interpretation of *stare decisis*. This is crucial because both substantive data and defensible inferential analysis could be interlaced.

Furthermore, concepts from both Segal and Spaeth's research and Fowler and his colleagues' research served as very broad guidelines. This research also deals with large quantities of case data, similar to Segal and Spaeth's work; likewise, case mapping is performed similarly to Fowler's work. Although no explicit methodology is copied, replicated, or simulated from either's research, it should still be acknowledged that these ideas were inspirational to my research.

Given all this, I followed three distinct steps, each with its own substeps, to gather my research data: selection, coding, and organization.

First, I had to choose how to select the media set I would perform the thematic analysis on. While some researchers may select a group of 100 songs or 30 news articles, I selected all of the cases that overturned other Supreme Court cases from September 29th, 2005, to the present. I did this because these cases would give the most insight into *stare decisis*. I was able to select these cases out of over a thousand based on explicit lists from two reputable sources.[20, 21] Cases appearing on both sources were kept. Cases on one but not the other were scanned for an explicit mention of overturning a precedent in the opinion or a legal scholastic appraisal indicating that a *de facto* overturning occurred. If either of these conditions were met, the case was kept in the set. This ensured high accuracy. Future research could easily apply this using the same data lists over any timespan of interest.

Second, the primary rationales had to be read for each case and categorized into an extrapolatory theme. I identified the main case, principle, or reason behind the justification. Take, for example, *Knick v. Township of Scott (2019)*, a case that overturned a precedent from the

[20] Murrill, "The Supreme Court's Overruling of Constitutional Precedent," 27–50.
[21] "Table of Supreme Court Decisions Overruled by Subsequent Decisions." *Constitution Annotated.* (n.d.). https://constitution.congress.gov/resources/decisions-overruled/.

1980s. The Court's opinion primarily cites one individual case to defend *stare decisis'* absence: *Janus v. AFSCME (2018)*. While clearly, expository case information about *stare decisis* is present in the opinion, the main reason for their decision explicitly states the use of factors from *Janus,* as pictured below.

> We have identified several factors to consider in deciding whether to overrule a past decision, including "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision." *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ___, ___–___ (2018) (slip op., at 34–35). All of these factors counsel in favor of overruling *Williamson County*.

(*Knick v. Township of Scott,* 2019, slip op. at 20).[22]

This process was repeated for each case with varying rationales resulting from each. The primary rationale for all cases was identified — for the sake of replicability — by either one of two indicators: an explicit explanation or the presence of the explicit reason in the syllabus. A hypothetical example of this would be an objective citation of four separate cases that establish why *stare decisis* did not counsel the decision. Alternatively, a hypothetical general description of the principle based on decades of precedent in the syllabus would also constitute the primary rationale. This approach was used because it offered the least subjective approach to extracting rationales. Common threads for the nature of the primary rationale were conglomerated into groups that represented overarching themes. These themes were meticulously defined to ensure future researchers could replicate them.

The organization of these rationales was the crucial final step in my research. Once the qualitative data was collected, it was tabled, graphed on time, and cognitively mapped. This visualization was critical in determining the relationship between cases and projecting these results to a broader scale.

Limitations

In my methodology, there exist inherent limitations that should be considered and acknowledged. The preeminent limitation present was the human bias in converting extremely

[22] "Knick v. Township of Scott, No. 17-647," *United States Supreme Court.* June 21, 2019. https://www.supremecourt.gov/opinions/18pdf/17-647_m648.pdf.

sophisticated and complex legal rationales into subjective themes. It is thus plausible that because of the more qualitative nature of thematic content analyses, my own evaluation and judgment skewed the data. Although my themes for primary rationale are defined quite explicitly, it is still possible that human error in misinterpretation or misattribution of rationale gently influenced the results. Consequently, I may have misassigned cases. Since I do not possess formal educational training in law, my evaluation of the rationale and justification may not encompass the same effectuated assessment that a scholar or attorney would. It is also possible that the two lists of overturned cases have differing definitions that leave valuable case data omitted. Accordingly, the conclusions this research finds should be contextualized within these limitations.

Findings

After completion of the selection of cases steps, exactly twenty cases from the Roberts Court that overturned precedent were identified. These cases were all doubly appearing or scholastically verified from the two lists. Table 1 gives them in reverse chronological order. Years that did not have any cases overturning precedent have been skipped over for the convenience of the reader.

Furthermore, after application of the thematic categorization to the selected case opinions above, five main themes for reasons the Court chose to break with *stare decisis* emerged: (1) Direct Citation, (2) Eclectic, (3) Principle, (4) De Facto, and (5) Other. In Table 2, each primary rationale theme has been clearly defined and categorized by the frequency of appearance.

These themes and their frequency were subsequently plotted over time in each year of the Roberts Court. Doing so gave chronological perspective and aided in unearthing insights and inferences about the Court. The graph in Figure 1 demonstrates this.

Finally, a cognitive map or ‘constellation’ that demonstrates the relational connections between cases, especially those of the Direct Citation theme, was produced as seen in Figure 2. The colors for each box indicate which primary rationale theme that case used and match the colors in the legend of Figure 1. The arrows indicate the case that each case cited as its direct citation for that theme. Time progresses right to left within the horizontal lane for each year.

Table 1, Table 2, Figure 1, and Figure 2 are produced below.

Table 1: Case Set

Year of Roberts Court	**Case(s) Overturning Precedent**
2022	*Dobbs v. Jackson Women's Health Organization* *Kennedy v. Bremerton School District*
2021	*Edwards v. Vannoy*
2020	*Ramos v. Louisiana*
2019	*Franchise Tax Board of California v. Hyatt* *Herrera v. Wyoming* *Knick v. Township of Scott* *Rucho v. Common Cause*
2018	*Janus v. American Federation of State, County, and Municipal Employees, Council 31 (AFSCME)* *South Dakota v. Wayfair* *Trump v. Hawaii*
2016	*Hurst v. Florida*
2015	*Johnson v. United States* *Obergefell v. Hodges*
2013	*Alleyne v. United States*

2010	*Citizens United v. Federal Election Commission*
2009	*Montejo v. Louisiana* *Pearson v. Callahan*
2007	*Bowles v. Russell* *Leegin Creative Leather Products Inc. v. PSKS Inc.*

Table 2: Definitions and Thematic Frequency

Primary Rationale Theme	**Definition of Theme**	**Number of Cases Exhibiting Primary Rationale Theme**
Direct Citation	The primary rationale for not abiding by *stare decisis* relies chiefly on one singular past decision during the Roberts Court that is directly cited. If a brief supplementary case is attached to the rationale, it does not detract from the main direct citation. Expository details about the nature of *stare decisis* neither detract from the primary role of the direct citation nor change the theme.	8
Eclectic	The primary rationale for not abiding by *stare decisis* relies chiefly on an	4

	eclectic selection of cases that each provide different and relatively equal justification for the rationale. Expository details about the nature of *stare decisis* neither detract from the cases nor change the theme.	
Principle	The primary rationale for not abiding by *stare decisis* relies on decades or centuries old concepts regarding the broader nature or principles that govern *stare decisis*. In order to meet this theme, the Court may not fulfill the "Direct Citation" or "Eclectic" themes first. Expository details about the nature of *stare decisis* do not affect this primary theme.	3
De Facto	The primary rationale for not abiding by *stare decisis* is not expressly stated or addressed. Rather, the decision to overrule a past precedent is done *de facto* by the nature of the opinion.	3
Other	The primary rationale for not abiding by *stare decisis* is addressed but not by typical citation or principle. The Court cites other authorities or special circumstances. In order to meet this theme, the Court may not fulfill the "Direct Citation," "Eclectic," or "Principle" themes first. Expository	2

	details about the nature of *stare decisis* do not affect this primary theme.	

Figure 1: Graph

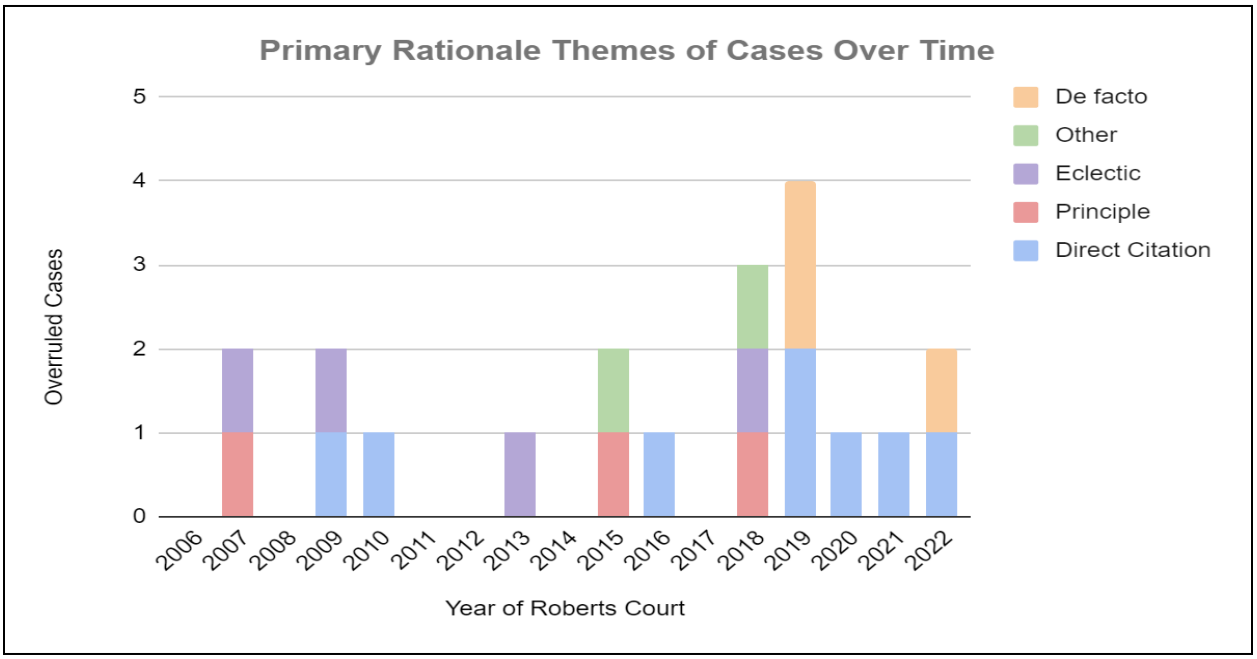
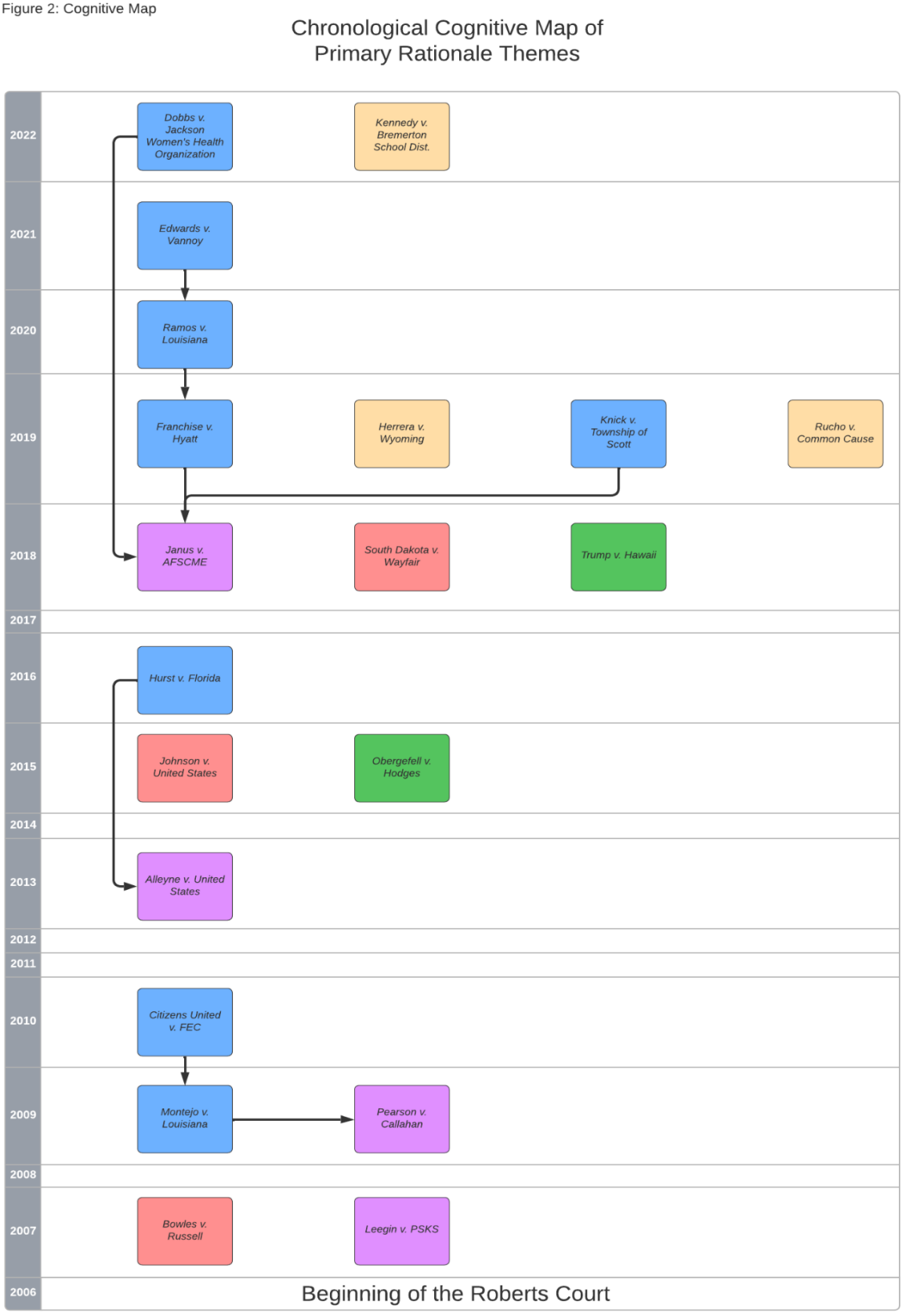


Figure 2: Cognitive Map



Discussion

From the findings, two novel understandings emerge about changes to the Court's application of *stare decisis* during the Roberts Court. A thorough interpretation of the primary rationales provides substantiation for these understandings. Since I performed a relational thematic content analysis, the relationships between themes and cases formed the basis for these new understandings.

First, in applying *stare decisis* the Court has demonstrated a new willingness to consolidate Eclectic primary rationale authorities on *stare decisis* into a single case which can be directly cited thereafter using the Direct Citation rationale theme. A fifth of cases utilized an Eclectic primary rationale, illustrating the Court's willingness to cite various cases and combine them to formulate a justification. However, the high number of Eclectic rationales is masked by these cases' relationships with other cases. Three explicit progressions of cases and their relationships to each other in the cognitive map provide evidentiary support for this study's first new understanding.

Between 2009 and 2010, the Court overturned three cases. The rationale relationship between them demonstrates the consolidation of Eclectic rationale into a stream of Direct Citation rationale. The Court first overruled a precedent from eight years prior in deciding *Pearson v. Callahan (2009)*, a case that used an Eclectic rationale as indicated by the cognitive map. In doing so, the Court created a consolidated approach to *stare decisis* that not only collected their past decisions but also could be cited individually as a cohesive authority. The Court later that term decided *Montejo v. Louisiana (2009)* and, using the primary rationale of Direct Citation, cited *Pearson* and its consolidated authority on *stare decisis*. This then created a stream of citations with *Citizens United v. FEC (2010)* citing *Montejo* and thus indirectly citing *Pearson* and all of its individual Eclectic citations as shown in Figure 2.

The Court repeated this process with *Alleyne v. United States (2013)* and *Hurst v. Florida (2016)*. Because *Alleyne* was justified using an Eclectic primary rationale, it was able to create a consolidated rule that combined doctrine from multiple past cases. When combined, they produced a rule that could be applied moving forward. In *Hurst*, the Court took advantage of this convenient consolidation and used it to justify their overruling of precedent.

However, the most notable example of this Eclectic-to-Direct-Citation pipeline is *Janus v. AFSCME (2018)* and the five subsequent cases that directly cite it as their primary rationale.

Decided in 2018, *Janus* utilized several different cases to justify overturning a past case. It produced a consolidated rule that gave the Court an easy rationale to apply in the future whenever it sought to break with *stare decisis*. As indicated by Figure 2, five cases, either directly or through a stream of citations, all cite *Janus* as the primary rationale in justifying their overruling of precedent: *Knick v. Township of Scott (2019)*, *Franchise v. Hyatt (2019)*, *Ramos v. Louisiana (2020)*, *Edwards v. Vannoy (2021)*, and *Dobbs v. Jackson Women's Health Organization (2022).*

Collectively, these three separate instances of consolidating and directly citing Eclectic opinions provide sufficient evidence that these thematic relationships are present. Looking primarily at the cognitive map, the intrinsic relationship between these two themes delivers a clear new understanding that could only be unearthed through my methodology.

More specifically, a second new understanding could also be made. Namely, the case *Janus v. AFSCME (2018)* seems to be a powerful genesis and main authority for rationale that breaks with *stare decisis* in the Court's recent history. Looking at Figure 1 and Figure 2, it is clear that *Janus* was the last time the Court applied any rationale other than Direct Citation or De Facto. This is because it consolidated all other typically isolated rationales into a rule that has been convenient to apply for future cases. In *Janus,* the Court collected different cases to identify the quality of reasoning, workability, consistency, new developments, and reliance as the five factors in sidestepping *stare decisis*.[23] This is significant because it demarcates a substantial shift away from justifying opinions with Eclectic and Principle primary rationale themes. This also makes logical sense because these varying ideas and principles have already been consolidated into a Direct Citation case. The cognitive map indicates a clear stream of cases that have all either directly or indirectly relied on *Janus'* consolidated rationale, something not seen anywhere else in the Roberts Court. The density of Direct Citation themes in Table 2, when plotted chronologically in Figure 1, shows how *Janus* has ignited a greater prevalence of reliance on the case. *Janus* signifies this by being the midway point between the shift from Eclectic and Principle themes to a Direct Citation theme. Therefore, it can be inferred that *Janus* is a large reason behind Direct Citation being the most prevalent theme in Table 2. The increased

[23] Janus v. American Federation of State, County, and Municipal Employees, Council 31, No. 16-1466," *United States Supreme Court.* June 27, 2018. 34-35 at https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf

application of Direct Citation themed cases suggests a willingness to apply the five-factor consolidated rule in *Janus* and overturn more cases that systematically check the rule's requirements.

Although the findings of my research dealt with more than just an analysis of the Principle theme, my hypothesis was still soundly rejected based on these two new conclusions. Quite the opposite has been demonstrated to have occurred in the Court's application of *stare decisis*. Clearly, there has been less emphasis on the Principle primary rationale theme following *Janus*.

With four new justices in just over five years, the Court is continuously changing its approach to doctrines. Luckily, the scholarly conversation around *stare decisis* continues to grow, and my research furthers the conversation with earlier research. It substantiates the idea that *Janus* is a key case that has the potential for reshaping doctrine, as put forth by research from Michael Gentithes.[24] Also, my research expands on many of the capabilities of content analyses in legal research that Hall and Wright put forth by using a thematic approach.[25] Finally, it adapts scholarly work from Fowler and his colleagues by applying case mapping to a different yet specific aspect of the law. My research's interconnectedness to other legal research helps to improve our understanding of the Court.

Conclusion

Ultimately, this research was successful in identifying two new conclusions that fulfill the research question: What have the primary rationales in the opinions of cases that overturned precedent revealed about changes to the Supreme Court's application of stare decisis during the Roberts Court? Namely, the Court has both a new receptiveness to consolidating Eclectic primary rationale authorities on *stare decisis* into a single citable Direction Citation theme case and a newfound reliance on *Janus v. AFSCME (2018)* for justifying modern overturning of precedent. This research underscores the importance of using creative but operationally effective and well-defined methodology to understand changes to the Court's interpretation of *stare decisis* and successfully fill the intended gap.

[24] Gentithes, Michael, "Janus-Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis," *William & Mary Law Review*, *62*(1) (2020).
[25] Hall, M. A., and Wright, R. F., "Systematic Content Analysis of Judicial Opinions." *California Law Review*, *96*(1), (2008) 63–122. http://www.jstor.org/stable/20439171.

This research has multiple key implications for the community of practice in the legal field. In a scholarly sense, these findings add more analysis to *Janus v. AFSCME (2018)*, a case that has primarily been analyzed through a labor law perspective. By understanding that *Janus* has effects in other fields, such as *stare decisis,* this research improves upon our understanding of both the case and the doctrine. Additionally, this research expands on the abilities of case mapping and thematic content analyses by producing interpretable results. Legal research is not typically approached using content analyses, let alone a thematic one. The success of this research hence affects the legal field by potentially expanding our tools for analyzing cases. This research additionally has implications for appellate lawyers and those practicing law. For lawyers arguing before the Court, this research could provide insight into which arguments to propose when asking the Court to overturn precedent. For example, a lawyer might reasonably see more success arguing for the application of *Janus* factors than general *stare decisis* principles. They might use this research to look at the direction of the Court and which arguments are seen more favorably. Thereby, my research allows more insight for lawyers seeking to tailor their arguments surrounding *stare decisis*. My research has targeted implications because it is crucial that appellate lawyers are able to recognize the Court's preferred interpretation of rationale application regarding a doctrine as important as *stare decisis*.

Apart from the limitations to the methodology discussed earlier, there were additional limitations to interpreting the results. The analysis failed to produce results that could comment on relationships between the cases studied and the overturned case itself. By reading the opinions of both, additional data could have enhanced the conclusions made. With more time for extensive cognitive mapping, further relationships could have been included. Furthermore, because the sample size of cases was twenty, there was not enough data to formulate statistically significant conclusions about a quantifiable change to the Court. This was a large limitation that restricted my research to making qualitative conclusions only.

Accordingly, it would be beneficial for future researchers to potentially expand the selection of cases to cover the Rehnquist and even the Burger Court. This larger data set would allow for trend lines and statistical interpretation that would enrich the qualitative conclusions made in this research study. Alternatively, this research could inspire future research in applying my methodology of relational thematic content analysis to other doctrines of the Court, such as the Miller test or Chevron test. It is reasonably plausible that thematic content analyses could

have the potential to reveal changes to key doctrines that have experienced great uncertainty on the Court. This research similarly suggests future investigation of the origins of *stare decisis* using my methodology.

While the law is often depicted blindfolded, it is nonetheless important to take a deep look into the specific directions of its interpretation, especially in regard to *stare decisis*. In the end, this research follows the hope of all Supreme Court researchers — that out of a web of cases, a constellation of truth may be found.

Bellarmine Law Society Review

Volume XIII | Issue II Article II

Establishment Along the Borderline: Supreme Court Jurisprudence on Ten Commandments Displays

Joshua Darrish
University of California, Santa Barbara, jdarrish@umail.ucsb.edu

ESTABLISHMENT ALONG THE BORDERLINE: SUPREME COURT JURISPRUDENCE ON TEN COMMANDMENTS DISPLAYS

JOSHUA DARRISH [1]

Abstract: Throughout the 20th and subsequent centuries, the United States Supreme Court has debated the First Amendment's regulations on religious establishment. Particularly, the belief in the "separation between church and state" has become a bedrock constitutional value for some, while for others, it has been rejected for a more accommodationist approach to religion and government intermingling. In 2005, the debate over the legality of religious establishment became further muddied through *McCreary County v. ACLU* and *Van Orden v. Perry.* Both cases revolved around whether a state institution would be allowed to display the Ten Commandments on its property: for the former, in a Kentucky courthouse; for the latter, the Texas state capitol. McCreary ruled the display unconstitutional, yet Van Orden decreed otherwise. These decisions created incongruity in the Supreme Court's line of reasoning, worsening the divide between separationist and accommodationist interpretations of the Bill of Rights. However, by situating these cases in a chronology of similarly back-and-forth decisions on the establishment, it becomes clear that the Supreme Court has purposefully adopted a vague interpretation of the Establishment Clause. Doing so ensures that separation of church and state remains a viable ideal and realistic to popular American Christian sentiment. I craft my argument using Justice Stephen Breyer's employment of a "borderline" to which the Court must adhere. Along it, there is a critical respect for Judeo-Christian values that underscore the American social fabric that the Bench must not uproot. Meanwhile, the 2005 cases place barriers on allowing religious imagery on public grounds by forcing governments to seriously weigh legal consequences, wherein overt attempts to establish a religion can be entirely struck down. Thus, I argue that the Establishment Clause must be kept in vague language that neither entirely codifies separationism nor accommodationism for the sake of lasting societal cohesion. McCreary and Van Orden necessarily came to opposing conclusions on the Ten Commandments displays' constitutionality to enshrine the Establishment Clause as a truly secular guide.

[1] Joshua Darrish is a third-year undergraduate student at the University of California, Santa Barbara (UCSB). He is pursuing a B.A. in history with a focus on the United States. He has a particular interest in the Early Republic, comparing and contrasting the Constitution from the time of its writing to its application today, especially in the realm of privacy rights and civil liberties. Beyond his passion for constitutional analysis, Joshua is an avid rower, reader, squash player, and a lover of classic rock music.

In his 1952 *Zorach v. Clauson* majority opinion, Justice William Douglas declared, "we are a religious people whose institutions presuppose a Supreme Being."[2] The Supreme Court of the United States has attempted to marry the foundational Protestant religiosity of the American people with First Amendment restrictions on establishment. Specifically, Ten Commandments case law has struck at the legality of government-sponsored religious iconography. *McCreary County v. ACLU* (2005) and *Van Orden v. Perry* (2005) saw the overturning of Kentucky courthouse Ten Commandments displays and the approval of another at the Texas State Capitol, respectively, seemingly creating incongruity. The opinions, however, reveal a line of constitutional reasoning that protects a separationist approach with the necessary flexibility. The outcomes prevent national division that the very spirit of the Establishment Clause implies. *McCreary* and *Van Orden* do not reach the same conclusion on the Ten Commandments displays' constitutionality by design. Together, they follow the Establishment Clause precedent that reasonably delineates a necessary but situational relationship between religion and government derived from national tradition and political harmony.

McCreary v. ACLU sparked a constitutional challenge to a King James' Bible Ten Commandments display alongside an Exodus passage in the McCreary County, Kentucky courthouse. Since its creation, the American Civil Liberties Union of Kentucky has held a strict separationist view of the Establishment Clause. Thus, the Ten Commandments display being "'readily visible to…county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote'" came as a flagrant violation.[3] McCreary County argued that the Ten Commandments served a secular purpose as the basis for Kentucky law. Two other subsequent displays were added to better adhere to secular principles and to avoid a federal district court ruling. The second display included "eight other foundational documents, including the Declaration of Independence."[4] However, the apparent religious passages continued to make McCreary County's

[2] Douglas, William O, "Zorach et al. v. Clauson et al," Legal Information Institute, n.d. https://www.law.cornell.edu/supremecourt/text/343/306.
[3] Dunman, L. Joe, "Religion in the Law: An Open Access Casebook (1st Ed.)," *SSRN Electronic Journal*, August 20, 2021, https://doi.org/10.2139/ssrn.3903347, 194-195.
[4]Schaps, Mike, "Vagueness as a Virtue: Why the Supreme Court Decided the Ten Commandments Cases Inexactly Right," *California Law Review, Inc.* 94, no. 4 (July 2006): 1243–69, https://doi.org/10.2307/20439063, 1255.

secular claims suspicious. The final attempt included documents of equal physical size to the Ten Commandments display, such as the Magna Carta, Mayflower Compact, and the Kentucky Constitution's Preamble; in spite of this, the ACLU continued its pursuit, leading to the United States Supreme Court's involvement. Primarily utilizing the *Lemon* test, a three-pronged assessment to determine if a religious establishment has occurred, Justice David Souter maintained that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."[5] The majority concluded that the display violated the Establishment Clause for having an unavoidable religious agenda that no later secular additions could obfuscate.

In a contrasting outcome, a majority ruled the Ten Commandments displayed in *Van Orden v. Perry* constitutional. Petitioner Thomas Van Orden filed a suit against the Texas government for placing a Ten Commandments display on the State Capitol Grounds. This exhibit was privately donated by the Fraternal Order of the Eagles of Texas to spread their anti-delinquency message and engraved with "two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ."[6] Van Orden argued that his First Amendment right had been violated due to a religious expression on the public grounds he frequented. Moving away from the *Lemon* test as a definitive marker of constitutionality, the Court aligned with Chief Justice William Rehnquist's accommodationist view of the Establishment Clause. Though often "the Rehnquist Court did not go nearly as far as Rehnquist would have liked in changing the law regarding the Establishment Clause," *Van Perry v. Orden* successfully upheld a religious and governmental relationship.[7] One of the primary objectives of Chief Justice Rehnquist was relaxing the Establishment Clause's restrictions.[8] Despite Van Orden identifying a religious image on state property, it held a passive and historically relevant position that could not be construed as coercive. Its non-imposing nature gained credence as the display had been in place for 40 years without challenge, whereas in *McCreary*, the displays were newly placed. Justice Breyer agreed the lack of legal battles over four decades "suggest more strongly than any set of

[5] Dunman, "Religion in the Law," 197.
[6] Dunman, "Religion in the Law," 205.
[7] Chemerinsky, Erwin, "Assessing Chief Justice William Rehnquist," *University of Pennsylvania Law Review* 154, no. 6 (2006): 1331-64, https://doi.org/10.2307/40041341, 1354.
[8] Chemerinsky, "Assessing Chief Justice William Rehnquist," 1343.

formulaic tests that few individuals…are likely to have understood the monument as amounting…to a government effort to favor a particular religious sect…"[9] Conforming to the Rehnquist position against strict separation, the plurality rejected Van Orden. In combination with *McCreary*'s focus on a display's intent regarding time, *Van Orden* made the constitutionality of public Ten Commandments scenes dependent on physical, situational context.

Legal precedent for religious display cases oscillates between separation and accommodation, justifying the opposing decisions from *McCreary* and *Van Orden*. The Court relied on *Stone v. Graham* (1980) to uphold the Ten Commandments exhibition display in *Van Orden*. Chief Justice Rehnquist placed importance on the setting of the display in determining how intrusive it is on onlookers. He writes that "the placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone,* where the text confronted elementary school students every day."[10] *Stone* focused on a Ten Commandments display in elementary schools that created a coercive environment for impressionable students. Meanwhile, in *Van Orden*, the mere existence of the Ten Commandments in the open space of the Texas State Capitol did not comparably pressure onlookers. Conversely, the displays in Kentucky courthouses in *McCreary* were required "[to] be posted in 'a very high traffic area'…"[11] Kentucky eventually created an exhibit with a more secular title and theme of "The Foundations of American Law and Government," but Justice Souter was not convinced that the secular purpose of the display outweighed the clearly religious intent. He deferred to the reasonable observer who would have had a memory of the original display's sole focus on Judeo-Christian passages.[12] Thus, the framing, both in a physical and a temporal sense, of the displays played a significant role in the Supreme Court's contrasting decisions in 2005.

Lynch v. Donnelly preceded *Graham* in 1984, now approving the public display of a crèche during the holiday season in Pawtucket, Rhode Island. Accepting religious involvement as inextricably linked to the American national identity and civil life, Pawtucket "has principally

[9] Dunman, "Religion in the Law," 209.
[10] Dunman, "Religion in the Law," 207.
[11]Dunman, "Religion in the Law," 194.
[12]Dunman, "Religion in the Law," 197.

taken note of a significant historical religious event long celebrated in the Western World."[13] By placing the crèche alongside secular objects such as reindeer and Santa's house, the crèche integrated into the widely celebrated holiday tradition. Combined with other historic Christian invocations, such as "congressional and executive recognition of the origins of Christmas, or the exhibition of religious paintings in governmentally supported museums," the Court could not have realistically singled out the crèche.[14] If violative, government buildings across the United States would be unreasonably scrutinized for containing religious images deemed essential to the foundational values of the nation, like the Supreme Court, Capitol, and Library of Congress's Jefferson Building. In *Van Orden*, Chief Justice Rehnquist makes further reference to the Ten Commandments as a source of American values. He asserts that "since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew" in the Supreme Court building.[15] While religious in nature, the Ten Commandments fundamentally shaped Western law and, thus, American law, giving them civic value. Following the reasoning from *Lynch*, *Van Orden* ensures that the Establishment Clause respects the core religious identity of the United States, as "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[16] The 2005 decision keeps with the 1984 Court to preserve the national spirit.

Placing *McCreary* and *Van Orden* in the chronology of other display case law unravels their contradictory appearance. The 2005 decisions present the back-and-forth precedent as "borderline cases."[17] Justice Stephen Breyer applies the "borderline cases" reasoning in his *Van Orden* concurrence. Establishment Clause vagueness mitigates attempts at serious religious encroachment. Before *McCreary*, "government actors inclined to erect a display of dubious constitutionality had little reason for refrain" because "at worst they might be sued."[18] After the decision, if a government attempts to place a display and hopes to eventually gain governmental approval by gradually secularizing the piece, "government actors stand to lose all by violating the

[13] Burger, Warren E, "Dennis Lynch, Etc., et al., Petitioners v. Daniel Donnelly et al," Legal Information Institute, n.d, https://www.law.cornell.edu/supremecourt/text/465/668.
[14] Burger, "Dennis Lynch, Etc., et al., Petitioners v. Daniel Donnelly et al."
[15] Dunman, "Religion in the Law," 206.
[16] Dunman, "Religion in the Law," 207.
[17] Dunman, "Religion in the Law," 208.
[18] Schaps, "Vagueness as a Virtue," 1265.

Establishment Clause in the first instance."[19] The Kentucky counties attempted to retain a Ten Commandments display by slowly conforming to judicial approval. However, the vague case law between *McCreary* and *Van Orden* effectively forces the state or local government to weigh the potentially heavy legal implications of installing the display. The Supreme Court noted that the religious primary legislative purpose of the *McCreary* display had always existed since its first rendition, only being insincerely softened to fit Establishment Clause parameters. To the benefit of separationists, there is a higher chance for a display to be completely removed by avoiding a universal constitutional standard that local governments could work around much in the way McCreary County attempted.

Justice Breyer's concurrence in *Van Orden* further advanced the necessary vagueness of the Establishment Clause in religious display cases because he departed from the *Lemon* test. He writes, "the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation…create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[20] He emphasized the responsibility vested in the justices to uphold social order that removing religious images central to the nation's heritage would undermine. The reasoning follows *Lynch* by recognizing the cohesive role that religion plays. By making the Establishment Clause universally antagonistic toward the Ten Commandments, Justice Breyer argues that "religious divisions…recognized in *Van Orden*, number among the most dangerous risks to Americans' sense of themselves as coparticipants in a venture shaped by a common heritage and shared ideals."[21] An Establishment Clause that restricts all governmentally-sponsored religious symbolism turns the judicial system against the spirit of the nation. The Supreme Court has a duty to preserve religious guardrails that separate church from state. Yet, the *McCreary* and *Van Orden* rulings also underscored necessary flexibility that does not charge the government strictly against the religious beliefs of the American people: in 2014, over 70% of Americans had no objections to public Ten Commandments displays.[22] Justice

[19] Schaps, "Vagueness as a Virtue," 1266.
[20] Dunman, "Religion in the Law," 209.
[21] Fallon, Jr., Richard H, "A Salute to Justice Breyer's Concurring Opinion in 'Van Order v. Perry,'" *The Harvard Law Review Association* 128, no. 1 (November 2014): 429–33, http://www.jstor.org/stable/24643933, 433.
[22] Klarman, Michael J, "Judicial Statesmanship: Justice Breyer's Concurring Opinion in 'Van Orden v. Perry,'" *The Harvard Law Review Association* 128, no. 1 (November 2014): 452–56, https://www.jstor.org/stable/24643935, 456.

Breyer's concurrence hoped to prevent the judiciary from alienating the majority of Americans from their own political institutions.

Justice Breyer's concurrence also leverages vagueness to mitigate the Supreme Court's more radical voices as well. Justice John Paul Stevens dissented in *Van Orden*, pushing for a strict separationist interpretation of the Establishment Clause: the Ten Commandments, as a "Judeo-Christian message of piety would have the tendency to make nonmonotheists and nonbelievers feel like outsiders in matters of faith, and strangers in the political community."[23] To him, the display made religious morality paramount to the Fraternal Order of the Eagles of Texas' anti-delinquency efforts, with the state sponsoring the effort. Opposingly, in *McCreary,* Justice Scalia believes that the Establishment Clause legally discriminates against polytheists and non-believers, with Judeo-Christian monotheism given a protected status emanating from the nation's Protestant origins.[24] The concurrence uplifts the moderate voice in the judiciary as a vehicle for civil discourse on religion's role in the American people's lives. The Court appears split between strict separationism and loose accommodation, with Breyer searching for a compromise between both.

Hence, Justice Breyer emphasizes the "borderline" in the Ten Commandments cases to practice a rational Establishment Clause. By over-enforcing strict separationism, expansive removal of the Ten Commandments and other images would become "fodder for political ads…The inevitable political backlash would make it more likely that future presidents and senators, and the future Supreme Court justices they nominate and confirm, would be hostile" to church-state neutrality.[25] By generating hostility toward all Ten Commandments displays, the separationist justices work contrary to their vision. Their decisions do not exist in a political vacuum. Popular backlash leads to politicians who take advantage of the electorate's anger; then, the Supreme Court is downstream, being appointed and confirmed by those elected leaders. Justice Breyer recognizes that separationism can only persevere in the long term through selective permission of religious displays rather than complete removal in a more uniform jurisprudential manner. Historically, such aggression toward religious involvement in public life

[23] Dunman, "Religion in the Law," 211.
[24] Dunman, L. Joe, "Religion in the Law," 202-203.
[25] Schaps, "Vagueness as a Virtue," 1264.

has "contributed significantly to the reemergence of religious fundamentalists in American politics and the rise of the Religious Right," consequent of the proliferation of strict separationist rulings in the 1960s that 70 to 80% of Americans still oppose.[26] Even a liberal justice like Breyer recognized the profoundly political and popular role Judeo-Christian images play in the United States. He also appears to signal to liberal voters who may have felt betrayed by his decision to support the display's constitutionality by suggesting that it is for their electoral benefit in the long term. To prevent the heavy incursion of religion on government that Justice Scalia endorsed, concessions need to be made that give leeway to the Ten Commandments' legality based on temporal and physical setting, not the display itself.

McCreary v. ACLU and *Van Orden v. Perry* represent the Court's historic balancing of religious interests intrinsic to national identity with that of government neutrality. While the cases come to independent conclusions on the constitutionality of Ten Commandments displays, when placed together in precedent, they outline a deliberately vague and flexible interpretation of the Establishment Clause. As expressed through Justice Breyer's swing vote, the survival of separationism rests on its ability to accept religion's integrated role in American life. No test, whether under *Lemon* standards, endorsement, or coercion, properly determines the role of the Ten Commandments in civil affairs. The "borderline" allows for context to be the scrutable issue instead of the Commandments themselves. *McCreary* and *Van Orden* necessitate each other to define an Establishment Clause respectful of American tradition while avoiding social upheaval that could threaten democratic processes.

[26] Klarman, "Judicial Statesmanship," 456.

Bellarmine Law Society Review

Volume XIII | Issue II Article III

The Insanity Defense and Psychiatry: The Advantage of a Cognitive Approach

Simon Hoefling
Boston College, hoeflisi@bc.edu

THE INSANITY DEFENSE AND PSYCHIATRY: THE ADVANTAGE OF A COGNITIVE APPROACH

SIMON HOEFLING [1]

Abstract: The insanity defense is an important part of criminal law because it allows individuals who suffer from severe mental disorders to face more lenient sentences for their crimes. In American courts, several different standards for this defense strategy are codified into state law. The main point of dispute between psychiatrists and legal scholars is whether insanity defense rules should focus on cognition or volition. This paper examines some psychological disorders commonly associated with criminal activity and how they interact with the various standards employed by different states. Ultimately, it argues that the insanity defense should be centered around a purely cognitive paradigm, as this creates a higher standard that more accurately implants the psychiatric conception of insanity into law. This debate is an important intersection between psychology and law and raises important questions about criminal culpability.

I. Introduction

Mental illness and the legal system have often crossed paths throughout human history, as some individuals plagued with delusions or those devoid of empathy find it difficult to conform their actions to societal norms and codified laws. In the United States, the insanity defense has often been used in high-profile cases such as the Hinckley trial, wherein John Hinkley was found not guilty of attempting to assassinate President Reagan by reason of insanity, to the outrage of many Americans. This case and others have brought the use of the insanity defense into the public eye; contrary to depictions in popular media, this type of defense strategy is extremely uncommon and rarely successful. Only about 1% of criminal cases involve an insanity plea, and

[1] Simon Hoefling is a second-year student at Boston College studying Political Science and Philosophy. He is interested in the intersection of psychology, philosophy, and law. Simon would like to express thanks to Professor Andrea Heberlein for directing his attention to psychiatry and the legal issues that accompany it.

of these, only 26% are accepted by the jury.[2] Nevertheless, this defense strategy represents a very important intersection between psychiatry and the legal system, raising pertinent questions about standards for culpability and the future of criminal justice in America.

II. History

In general, the insanity defense is a form of legal argument in which the defendant admits to the action in question but denies responsibility because of some sort of mental illness.[3] This approach has been around for as long as sophisticated legal systems had existed, with one of the earliest cases being argued in Rome around 230 B.C.E. when a lawyer stated that "if a madman commit homicide he is not covered by the Cornelian law because he is excused by the misfortune of his fate."[4] Since then, this defense has appeared in criminal courts everywhere, with the standard for its application appearing in subtly different forms in various contexts. Some of these legal definitions are still codified in American laws today.

IIa. The M'Naghten Rule

The first appearance of the insanity defense that is relevant to contemporary American law was in 1843 in England. Daniel M'Naghten, a man troubled by paranoid thoughts, shot Edward Drummond, the private secretary to the Prime Minister at the time. He falsely believed that the Tories were attempting to persecute him and thought that his act would put an end to the political conspiracy that was being leveled against him. He was found not guilty by reason of insanity.[5] This decision, given it absolved a man of the murder of a prominent public figure, was extremely controversial in England, so much so that the House of Lords requested a description of the criteria by which the judges arrived at such a conclusion. Thus, the M'Naghten Rule was

[2] Callahan, L A, H J Steadman, M A McGreevy, and P C Robbins. "The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study." The Bulletin of the American Academy of Psychiatry and the Law 19 (1991): 331–38. https://pubmed.ncbi.nlm.nih.gov/1786413/.
[3] "Insanity Defense." Legal Information Institute, 2020. https://www.law.cornell.edu/wex/insanity_defense.
[4] Walker, Nigel. "The Insanity Defense before 1800." The Annals of the American Academy of Political and Social Science 477 (1985): 25–30. http://www.jstor.org/stable/1045999.
[5]Kaplan, Robert. "Daniel M'Naghten: The Man Who Changed the Law on Insanity." *Psychiatric Times* 40, no. 1 (January 23, 2023).
https://www.psychiatrictimes.com/view/daniel-m-naghten-the-man-who-changed-the-law-on-insanity.

born; this defense asserts that the defendant is afflicted with some sort of mental illness, to such a degree that they either did not know what they were doing when they committed the crime or did not know that what they were doing was wrong.[6] If either of these conditions are met, the defendant can be declared not guilty by reason of insanity.

IIb. The Irresistible Impulse Test

The M'Naghten Rule was the primary standard for the insanity defense in the United States until the 1950s and remains the measure of criminal insanity in 25 states. However, even soon after its inception, criticisms were lodged from many sides. In 1887, the Alabama Supreme Court adopted another method of determining criminal culpability known as the Irresistible Impulse Test. This legal standard simply posits that the defendant, suffering from a mental illness, was unable to resist the urge to commit the crime.[7] It was taken in many states as a corollary to the M'Naghten Rule: a separate set of circumstances to be considered in conjunction with the original standard. This is the status that it retains today in Texas, though all other states have abandoned it.

IIc. The Durham Rule

After this, a new formulation of the insanity defense was proposed with the appearance of a new case concerning mental illness in 1952. In this instance, Monte Durham was convicted of breaking into a house, but his lawyers argued that he was not culpable due to his mental illness. The judge overturned Durham's conviction after numerous testimonies stated that he was of unsound mind. The judge used his opinion to formally denounce the M'Naghten Rule, stating "by its misleading emphasis on the cognitive, the right-wrong test [the M'Naghten Rule] requires court and jury to rely upon what is, scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility."[8] Later, the judge devised the Durham Rule, which states that "an accused is not criminally responsible if his unlawful act was

[6] "The M'Naghten Rule." Legal Information Institute, 2020. https://www.law.cornell.edu/wex/m%27naghten_rule
[7] "Irresistible Impulse Test," Legal Information Institute, 2023. https://www.law.cornell.edu/wex/irresistible_impulse_test
[8] Durham v. United States, Justia (US Court of Appeals for the District of Columbia Circuit 1954).

the product of mental disease or mental defect."[9] Many scholars believed that this standard for criminal insanity moved in a more progressive and scientifically accurate direction. Despite these benefits, it is believed that the Durham Rule still has many shortcomings; it has been all but abandoned in the realm of criminal law, with only the state of New Hampshire still adhering to it.[10]

IId. The Model Penal Code

The final test for legal insanity was developed in 1972 after a team of legal scholars at the American Law Institute sought to create a model upon which states could update their own legal codes.[11] The project, titled the Model Penal Code, was incredibly broad in its efforts to reform the criminal justice system, touching on all pertinent topics, including the insanity defense. In Section 4.01, a new standard was formed, stating, "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law."[12] This rule seeks to fuse together the disparate standards for legal insanity that have been present throughout the history of common law. The Model Penal Code rule, with some modifications, is the standard for criminal insanity in 23 states today.

IIe. Federal Rule

Each state has the ability to determine its own criteria for an insanity defense to be utilized in its own courts. On the federal level, the most recent formulation of an insanity defense is the Comprehensive Crime Control Act of 1984. U.S. Code §17 states that this defense can be applied if "the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts."[13] Given that this standard is

[9] Durham v. US
[10] "The Insanity Defense Among the States," January 23, 2019. https://www.findlaw.com/criminal/criminal-procedure/the-insanity-defense-among-the-states.html.
[11] "Model Penal Code," Legal Information Institute, 2021. https://www.law.cornell.edu/wex/model_penal_code_(mpc)
[12] Model Penal Code § 4.01 http://individual.utoronto.ca/dubber/web/website/respons/Model_Penal_Code.htm
[13] 18 US Code § 17 - Insanity Defense https://www.law.cornell.edu/uscode/text/18/17

nearly identical to that of the Model Penal Code, this paper will focus on the various rules used in states and exclude the federal rule from discussion.

III. Analysis

The contrasting qualities of each of these definitions are important to note with regard to criminal pathology. In psychology, cognition is all of the mental activities associated with understanding the world and performing actions. The M'Naghten Rule crucially focuses on cognition, specifically the defendant's cognitive awareness of the existence or wrongfulness of their criminal act. The test is designed to determine if the subject is conscious of their actions with regard to the law. Thus, the M'Naghten Rule has been criticized for only taking cognition into account because some scholars believe the defendant's ability to control their actions should be considered. Furthermore, the particular language used in the second condition of the M'Naghten Rule has often been the target of criticism, as the word "wrongfulness" is seen as not engaging with law but with morality. This perhaps places the M'Naghten Rule in an awkward position concerning determining a subject's knowledge of the law itself.

The Irresistible Impulse Test, on the other hand, draws upon the defendant's volition rather than their cognition.[14] It places the emphasis on whether the subject was able to willingly decide to commit the crime or not. Similarly, the Durham Rule, often dubbed "the product test," deals with the defendant's volitional capacity. Volition is one's ability to voluntarily choose one's actions. A sneeze, for example, is an act that is not done with volition, whereas throwing a baseball is. Thus, if one is afflicted with a mental disorder that involuntarily "produces" their crime like a sneeze, they are seen as having no free will in the matter and therefore are not responsible. Some scholars believe that this is a more accurate and lenient formulation of the insanity defense. In sum, the M'Naghten Rule and these two methods outline the main point of dispute in these cases: cognition versus volition.

According to some, the strength of the Model Penal Code's conception of the insanity defense lies in its synthesis of these two terms, as well as its integration of both law and morality. It attempts to combine all of the disparate notions of criminal insanity into one rule: either the defendant is cognitively unaware of the nature of his crime, or he is unable to willfully act in

[14] "Insanity Defense," Legal Information Institute

accordance with the law. Additionally, the Model Penal Code deliberately uses both "criminality" and "wrongfulness" in this first provision concerning the cognitive aspect of insanity. In this way, the Model Penal Code seeks to combine each aspect of the various legal standards for criminal insanity.

IV. Application of Modern Psychiatry

Each of these definitions of insanity is the attempt of the legal system to integrate scientific knowledge into the consideration of crimes. Given the gap between these two separate institutions and the uncertain nature of psychiatry, any legal definition of insanity is destined to be at least somewhat vague and perhaps even inapplicable or incorrect in certain situations. However, the official clinical definitions of mental disorders can be helpful in elucidating what a proper standard looks like. The most recent diagnostic criteria can be found in the fifth edition of The Diagnostic and Statistical Manual of Mental Disorders (DSM-5), published by the American Psychiatric Association. Specific disorders most commonly associated with criminal acts can be input into each rule, and different determinations of sanity are arrived at by whether the emphasis is placed on cognition or volition.

IVa. Antisocial Personality Disorder

It is clear that certain disorders engage only with the volitional or product aspect of these legal definitions, and an issue raised by legal scholars and psychiatrists alike is that this allows an excuse for individuals who are otherwise clearly responsible for their acts. One such disorder is antisocial personality disorder, whose sufferers are known colloquially as "sociopaths." The prevalence of this disorder could be as high as 3.6% of the population.[15] It is defined as "a pervasive pattern of disregard for and violation of the rights of others."[16] Symptoms include lack of remorse, disregard for the safety of others, and repeated behaviors that violate social norms or laws. Consequently, this disorder is overwhelmingly associated with a high rate of incarceration:

[15] "Antisocial Personality Disorder: Often Overlooked and Untreated." American Psychiatric Association, December 29, 2022. https://www.psychiatry.org/News-room/APA-Blogs/Antisocial-Personality-Disorder-Often-Overlooked.
[16] "Personality Disorders." Diagnostic and Statistical Manual of Mental Disorders: DSM-5. Arlington, VA: American Psychiatric Association, 2017.

studies have found that at least 16% of the male prison population in the United States has antisocial personality disorder.[17]

However, despite the intense symptoms, people with this disorder are still cognitively healthy and experience no delusions, hallucinations, or paranoia. In fact, those with this disorder can actually become extremely successful when they stay out of prison; a study of high-level corporate professionals found that 21% meet the criteria for antisocial personality disorder. Evidently, this disorder does not cause its sufferers to be completely unable to function in society, and offenders with this disorder have full knowledge that their actions are wrong or illegal - they may even sadistically revel in this fact.[18]

Given this information, many critics worry that those with antisocial personality disorder may still be able to avoid penalties for their criminal actions under certain insanity defense rules, namely the Irresistible Impulse Test and the Durham Rule. Within both these paradigms, crimes committed by individuals with antisocial personality disorder could possibly be grounds for an insanity defense as they are unable to control their behavior given their pathology. It could potentially be argued that a crime committed by someone with antisocial personality disorder is involuntary. On the other hand, states with the M'Naghten Rule would not allow such an argument to be mounted because those with antisocial personality disorder clearly understand their actions and are aware of the law. Almost all psychiatrists agree that subjects with antisocial personality disorder should not avoid consequences for their crimes, and the leniency of volitional tests with regard to ASPD would, therefore, be a weakness. Tellingly, the creators of the Model Penal Code seemed to have recognized this oversight, as Section 4.01(2) specifically prohibits the use of the insanity defense for those with antisocial personality disorder.[19] The Irresistible Impulse Test and Durham Rule contain no such provision.

IVb. Pedophilic Disorder

[17] Kiehl, Kent, and Morris Hoffman. "The Criminal Psychopath: History, Neuroscience, Treatment, and Economics." Jurimetrics 51 (2011): 355–97. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4059069/.
[18] Holt, S E, J R Meloy, and S Strack. "Sadism and Psychopathy in Violent and Sexually Violent Offenders." Journal of the American Academy of Psychiatry and the Law 27 (1999): 23–32. https://pubmed.ncbi.nlm.nih.gov/10212024/.
[19] Model Penal Code § 4.01(2) http://individual.utoronto.ca/dubber/web/website/respons/Model_Penal_Code.htm

Another disorder in the DSM-5 that affects the volitional capacity is pedophilic disorder, which involves intense sexual urges towards children.[20] Surveys have concluded that about 1% of the population may have this disorder.[21] Pedophilic offenders could perhaps be allowed an insanity defense under the Irresistible Impulse Test and the Durham Rule if it is argued that they are unable to stop themselves from committing related crimes due to their diagnosed disorder. However, unlike antisocial personality disorder, there is no specific provision in the Model Penal Code that prevents the use of the insanity defense for pedophilic individuals. This opens the door for individuals diagnosed with this disorder to employ an insanity defense in states with this standard. Indeed, this exact scenario occurred in 1994 in Maryland, a state that adheres to the Model Penal Code rule. James Kowalski was accused of running a pedophile ring and thus charged with 84 counts of child abuse. His lawyer argued that pedophilia was a mental illness with powerful urges, the intensity of which left him unable to follow the law.[22] Ultimately, the insanity plea was rejected, and the man was convicted of the crime, but the very fact that such a defense was possible concerned many legal scholars, who argue that pedophilic disorder is a potentially disastrous oversight of the Model Penal Code.[23] Any use of the insanity defense for pedophiles would be entirely impossible by the M'Naghten Rule, as these individuals are completely aware of the illicit nature of their acts.

IVc. Schizophrenia

Contrary to psychopaths, sociopaths, and pedophiles, those with a psychotic disorder such as schizophrenia are more traditionally considered to be "insane." Schizophrenia, according to the DSM-5, is characterized by delusions, hallucinations, and disordered thinking.[24] Sufferers are often plagued with paranoia as well. In general, schizophrenia causes the subject to be

[20]"Paraphilic Disorders." Diagnostic and Statistical Manual of Mental Disorders: DSM-5. Arlington, VA: American Psychiatric Association, 2017.
[21] Tenbergen, Gilian, Matthias Wittforth, and Helge Frieing. "The Neurobiology and Psychology of Pedophilia." Frontiers in Human Neuroscience 24 (2015). https://pubmed.ncbi.nlm.nih.gov/26157372/.
[22] Jeter, Jon. "Pedophile Seeks Insanity Ruling." The Washington Post, February 9, 1994. https://www.washingtonpost.com/archive/local/1994/02/09/pedophile-seeks-insanity-ruling/3bf285ad-23e8-49e0-bc0e-1509331191b2/.
[23] Jeter, Jon. "Kowalski Found Responsible in Molestation of Four Boys." The Washington Post, June 7, 1994. https://www.washingtonpost.com/archive/local/1994/07/07/kowalski-found-responsible-in-molestation-of-four-boys/6bd53cbe-5267-49c9-87d7-049f6b2ac8c0/
[24] "Paraphilic Disorders," Diagnostic and Statistical Manual of Mental Disorders: DSM-5

radically out of touch with reality itself. These individuals are often severely incapacitated and unable to take care of themselves, with some even lapsing into catatonic states. Only about 0.32% of people will suffer from this disorder in their life.[25] However, numerous surveys have found that almost half of homeless people unfortunately suffer from one of the psychotic disorders, with 10% plagued specifically with schizophrenia.[26] This illustrates the severity of the functional impairment that it can cause, as those with the disorder are often incapable of taking care of themselves.

Nearly every scholar agrees that people plagued with psychosis should have the insanity defense available to them. Indeed, psychotic individuals who commit a crime would be able to pursue an insanity plea under the Irresistible Impulse Test and the Durham Rule because they could have been unable to control their actions in the legal sense. Therefore, schizophrenia is covered under volitional approaches. In addition to this, the M'Naghten Rule covers psychotic disorders; psychotic people are often so out of touch with reality that they have no notion of the rules that govern them or what they are actually doing at the time. In fact, it is very likely that Daniel M'Naghten, the rule's namesake, was suffering from a psychotic disorder at the time of his crime. An insanity defense for schizophrenics could also be pursued under the Model Penal Code rule, theoretically in either of the two prongs, as it could qualify as a cognitive impairment or a volitional one. Thus, schizophrenia, arguably the most intense and debilitating psychiatric disorder, is incorporated into the insanity defense in all its iterations.

V. Advantages of a Cognitive Approach

Constructing an adequate standard for the insanity defense is extremely important because it will help those who have an incapacitating mental impairment and disallow others from taking advantage of the system to achieve more favorable rulings in court. Analysis of these three disorders and their relationship to the various versions of the insanity defense rule provides evidence for the superiority of a purely cognitive approach. The Irresistible Impulse Test,

[25]"Schizophrenia." World Health Organization, January 10, 2022. https://www.who.int/news-room/fact-sheets/detail/schizophrenia.
[26]Ayano, Getinet, Getachew Tesfaw, and Shegaye Shumet. "The Prevalence of Schizophrenia and Other Psychotic Disorders among Homeless People: A Systematic Review and Meta-Analysis." BMC Psychiatry 19 (2019). https://bmcpsychiatry.biomedcentral.com/articles/10.1186/s12888-019-2361-7.

Durham Rule, and Model Penal Code rule are poor formulations of the insanity plea because of the loophole they leave open through the volitional provisions. The M'Naghten Rule, though the oldest of them and therefore the most distant from modern psychiatry, is nonetheless more accurate in its staging of insanity because of its emphasis on the subject's ability to understand and navigate the world.

A lack of volition alone is not enough to disqualify an individual from criminal responsibility because it is too vague and difficult to recognize. Determining whether an act is the product of mental illness or if a subject is truly unable to resist their urges is not a clear-cut decision in the field of psychiatry. People with antisocial personality disorder or pedophilic disorder may be able to argue that their incredibly strong desires "force" them to commit crimes, but it is impossible to determine if this is actually true because the space between mental processes and behavior is murky. Many of these individuals are fully capable of existing in society, walking among us, working in our companies, and participating in our government, so it is clear that at least some of them do have the capacity to resist their urges and stay out of prison. Research has found that "criminal and non-criminal psychopaths share the same neuropsychological profile," and whether a psychopath ends up committing a crime is more so determined by their background, specifically socioeconomic status and early parental supervision.[27] Similarly, some individuals diagnosed with pedophilic disorder do not offend at any point in their lives and instead develop numerous coping mechanisms.[28] Ascertaining the extent of a subject's volitional ability is nearly impossible in a psychiatric evaluation, while a lack of proper cognition is extremely obvious because it is constantly manifested in the sufferer's behavior. Psychopaths and pedophiles have the ability to blend in with normal, healthy individuals, but schizophrenics often do not. This variance in the ability of these disordered individuals to resist their urges places the volitional tests on very shaky ground; the psychological determinism that they advocate for is insufficiently backed up.

Even if it is somehow granted that some psychopaths or pedophiles have extremely strong desires that they are to curb, there is not sufficient cause to consider them in the company

[27]Jarrett, Christian. "Not All Psychopaths Are Criminal." British Psychological Society, June 26, 2008. https://www.bps.org.uk/research-digest/not-all-psychopaths-are-criminal.
[28]Stevens, Eleanor, and Jane Wood. "'I Despise Myself for Thinking about Them.' A Thematic Analysis of the Mental Health Implications and Employed Coping Mechanisms of Self-Reported Non-Offending Minor Attracted Persons." Journal of Child Sexual Abuse 28, no. 8 (2019): 968–89.https://pubmed.ncbi.nlm.nih.gov/31509097/

of those who genuinely cannot tell real from imaginary. The fact of the matter is that they still know that what they are doing is wrong. They suffer from no delusion or mental distortion that renders them unable to be completely aware of the law in its intricacies or even common moral norms at large. Fully lucid in themselves yet plagued by uncomfortable and distressing impulses, these individuals should prevent their urges by seeking psychiatric treatment and alleviating their symptoms; many already do. On account of this, psychopaths and pedophiles should not be allowed to take an insanity plea to escape consequences for their actions, which they were wholly aware of at the time. Someone who is perhaps unable to control themselves can still have full, perhaps even intimate and professional, knowledge of the law and a competent ability to escape the criminal fate that their disorder has ostensibly condemned them to. Unfortunately, the volitional rules of certain insanity defenses leave the option open for these characters to exploit the system.

In addition to this, a purely cognitive approach like that of the M'Naghten Rule already contains elements of volition it, only with a higher standard for determining insanity. Nearly everyone would agree that schizophrenics should be allowed the insanity plea. Indeed, they are afforded it by all of the various rules that exist in the United States, including those like the Durham Rule that only concern the subject's ability to control their actions. Schizophrenia often causes auditory and visual hallucinations, rendering the sufferer unable to determine what is real from what is a figment of their imagination. Thus, it follows that untreated schizophrenics cannot control what they do because they are not even in touch with reality itself; they cannot resist their delusions, and if they commit some horrific act because a voice in their head tells them to do so, the crime is a product of their illness. We see here that the cognitive defect present is actually the cause of the volitional deficit. Someone who is unaware of the true nature of their actions is necessarily unable to properly control themselves. Therefore, a volitional aspect of insanity is already contained within the cognitive aspect of it, only with a higher threshold for consideration. This means that anyone who meets either of the requirements of the M'Naghten Rule would also already be considered insane by the Irresistible Impulse Test, Durham Rule, or Model Penal Code rule standards; cognition alone is a higher bar.

Solely volitional tests are too broad, while the M'Naghten Rule is more specific and sets a higher standard for what is considered insanity. It makes sense that an extremely strict and

limiting standard should be set for insanity because of the minuscule number of cases that actually concern it. Furthermore, stricter evaluations of criminal insanity are important because they disallow malicious actors from taking advantage of a rule designed for those who are genuinely disabled by their disorder. To eliminate the volitional provisions in the insanity defense is to prevent certain individuals from taking advantage of the system to earn themselves more lenient sentences. The flaw of the volitional perspectives of criminal insanity is a completely unnecessary ambiguity in this corner of the law, and it can be avoided through an entirely cognitive approach. The M'Naghten Rule provides this wholly cognitive standard which more appropriately situates criminal insanity in whether an individual is able to understand the world around them, the inability to do which is far more easily diagnosed than whether one can control their actions.

Ultimately, it is up to a jury to decide whether a defendant successfully employs the insanity plea. As mentioned before, pedophiles who have used the defense have been unsuccessful because of this fact. Furthermore, a legal scholar, when writing on New Hampshire, the only Durham Rule state, argued that "whether a jury would regard a psychopath as criminally insane is doubtful."[29] It has been shown that juries rarely, if ever, allow psychopaths and pedophiles insanity defenses under the volitional rules. Despite this, all it takes is one strangely inclined jury, and a pedophile may be able to avoid prison through an insanity defense; even if it is largely unsuccessful, the loophole still exists and must be amended.

The M'Naghten Rule is simply a more refined and focused version of the volitional rules. It allows an insanity defense to those who are out of touch with reality while stopping those who are not from utilizing one. This is the most accurate codification of common sentiment into law. Half of the states recognize the superiority of the M'Naghten Rule; most others use the Model Penal Code rule, which, in its second provision, allows the possibility for paraphilic disorders to count as insanity. Even with the supposed steadfastness of juries with regard to certain disorders, this still creates an uneasy and perilous situation going forward. Psychiatry must work in tandem with the law to furnish fair and accurate standards that protect the rights of the accused while also maintaining a certain precision that prevents the abuse of such rules. A cognitive approach

[29]Reid, John P. "The Working of the New Hampshire Doctrine of Criminal Insanity ." University of Miami Law Review 15 (1960): 14–57. https://repository.law.miami.edu/cgi/viewcontent.cgi?article=3414&context=umlr

to criminal insanity meets both of these criteria and places the insanity defense in a strict and clear-cut position, one void of any ambiguity or cracks to slip through.

Bellarmine Law Society Review

Volume XIII | Issue II Article IV

A Brief Legal History of RICO Charges and Artistic Freedom & Their Unconstitutional Applications in *State of Georgia v. Kahlieff Adams, et al.*

Brendan Mahoney
Boston College, mahoneez@bc.edu

A BRIEF LEGAL HISTORY OF RICO CHARGES AND ARTISTIC FREEDOM & THEIR UNCONSTITUTIONAL APPLICATIONS IN *STATE OF GEORGIA V. KAHLIEFF ADAMS, ET AL.*

BRENDAN MAHONEY [1]

Abstract: This paper seeks to analyze how the history and precedent of racketeer-influenced and corrupt organizations (RICO) charges and the admission of rap lyrics into a courtroom both play into the case of State of Georgia v. Kahlieff Adams et al. This case, better known as the Young Slime Life (YSL) Case, features the likes of famous rappers Young Thug and Gunna and initially charged twenty- eight individuals. This case garnered national attention and has since made both legal and lay observers question the ways in which the strategies employed by the State of Georgia have followed the precedent of other RICO cases in the subversion of the constitutional rights of all defendants as citizens of the United States. Beyond analysis, this paper will also argue that the melding of the unjust concepts of RICO charges and restrictions on artistic freedom combine forces in the YSL case to restrict the civil liberties of all the defendants involved.

Basic Tenets of Artistic Freedom:

An excerpt from "Rap on Trial," by Charis Kubrin and Erik Neilson:

> Rap is a form of artistic expression entitled to First Amendment protections, [therefore] it is critical for courtroom players to be cognizant of rap as a complex, highly sophisticated form of poetry with lyrics that, by convention, rely heavily upon hyperbole and metaphor. As a result, these players must likewise be careful not to assume that the lyrics are autobiographical or inculpatory, thereby conflating fact with fiction.[2]

Beyond the practical rationale that the above excerpt provides on understanding the ways in which rap as an art form should not be admitted into court as fact, this excerpt encourages all

[1] Brendan Mahoney is a junior history major at Boston College. His research revolves around issues and legacies of the New Left and other radical social movement groups of the "long 1960s," specifically the Students for a Democratic Society (SDS). His work seeks to fill in gaps in scholarship that exist surrounding student radicalism at smaller colleges in New England. Additionally, Brendan is interested in the historical legal theories of movement lawyering, and the strategies lawyers employ to represent large groups of defendants charged with various types of conspiracy charges.

[2] Charis E. Kubrin and Erik Nielson, "Rap on Trial," *Race and Justice* 4, no. 3 (2014): 185–211, 204.

readers to consider the question of the boundary between fact and fiction within art. There is no clear answer to this question, and different people will have varying responses.

One method of consideration is to evaluate whether there is a defined 'genre' that rap fits into. Within literature, there are a plethora of genres that artistic works can fit into (i.e., fiction, non-fiction, historical fiction, etc). However, before pondering whether rap fits into any of these genres, one must evaluate the extent to which each genre is defined and, at times, erased in certain literary works.

Take, for example, *The Things They Carried* by Tim O'Brien. This collection of short stories allows O'Brien to analyze the Vietnam War reflectively through a series of personal anecdotes.[3] While this book is labeled as a "work of fiction" on the title page, considering the fact that O'Brien served in Vietnam, as well as the accompanying vivid details provided in the collection, it is hard for one to think that this book exists in a vacuum separate from O'Brien's experiences. If we assume for theoretical purposes that this novel considers his personal experiences within history but also exaggerates certain aspects of the stories, this work fulfills all the aforementioned genres. As one analysis of the novel puts it, a work such as this illuminates "the relationship between fiction and the discourse of history," which inevitably leads a reader to conclude that history is innately structured in a fantastical way.[4] Does this imply that Tim O'Brien's work is genreless? Or does this mean that this work is something that many genres can define? Regardless of which approach the reader favors, they will agree that there is no singular genre that this novel fits into.

The Things They Carried can be useful in an examination of law, artistic freedom, and RICO charges because we can analyze such legal issues with the same multifaceted lens as we do with novels. To assume that there is even a small element of fiction within a body of work is to assume that *all* of it is fiction, or at the very least, exaggerated reality, which makes it nearly impossible to admit anything from a body of literary work into a court of law.

The history of artistic freedom in rap began in the 1990s with the rise of Tupac Shakur. There were various lawsuits from victims' families over crimes committed by Tupac and associates, claiming Tupac should assume some level of liability, accounting for how he talks

[3] Tim O'Brien, *The Things They Carried: A Work of Fiction*, First Mariner books edition (Boston: Mariner Books/Houghton Mifflin Harcourt, 2009), http://catdir.loc.gov/catdir/enhancements/fy1108/2009029928-b.html.
[4] Michael Travel Clarke, "'I Feel Close to Myself': Solipsism and Us Imperialism in Tim O'brien's 'the Things They Carried,'" *College Literature* 40, no. 2 (2013): 130–54, 132.

about "blast[ing] his punk ass," in reference to a murdered police officer.[5] However, there is a strong precedent that exists in the US legal system that allows for a "loophole" in a case such as Tupac's: the First Amendment.[6] The First Amendment essentially acts as a documented gray area in which defendants who use artistic media as a vehicle to express acts of violence or crimes can claim "freedom of speech."[7]

The most notable of these precedent cases comes from a 1991 US District Court of Georgia case against the metal artist Ozzy Osborne. The case, *Waller v. Osborne*, was brought against Osborne by the parents of the deceased Michael Waller, alleging that the "subliminal messaging" present in Osborne's music incited their son to commit suicide.[8] The court decided that there were "no issues of material fact" that would lead to any sort of causation between the music of Osborne and the suicide of Waller.[9] This decision upholds the right of the musical artist (Osborne, in this case) to express any and all thoughts through art as a medium, no matter how harmful to the public they may be.

Other related cases deal with other individual freedoms, such as the ability of video performers to dance nude in a "non-obscene way" or the ability of protestors to wear jackets that read "Fuck the Draft."[10] The first of these two*, Schad v. Borough of Mount Ephraim*, was a case that sought to overturn the convictions of the owners of an adult film store in New Jersey who were charged for their demonstration of nude, live entertainment on coin-operated video devices.[11] The court ruled to overturn the convictions due to the First and Fourteenth Amendment rights of the store owners as these acts are acts of expression and do not interfere with the "immediate needs" of the borough.[12] The second of these cases, *Cohen v. California*, deals with Paul Cohen, a young man who was charged for his wearing of a jacket that read "Fuck the Draft." The case asserted that in accordance with the constitutional rights of the accused,

---

[5] Jason Talerman, "The Death of Tupac: Will Gangsta Rap Kill the First Amendment Notes," *Boston College Third World Law Journal* 14, no. 1 (1994): 117–44, pp. 117-119.
[6] Talerman, pp. 119-120.
[7] Talerman, 119.
[8] FITZPATRICK, District Judge, Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991), No. Civ. No. 88-111-ALB/AMER(DF). (United States District Court M.D. Georgia, Albany/Americus Division. May 6, 1991).
[9] FITZPATRICK, District Judge.
[10] Supreme Court Justice White, Schad v. Borough of Mount Ephraim, 452 U.S. 61, No. No. 79-1640 (US Supreme Court June 1, 1981); Justice Harlan, Cohen v. California, 403 U.S. 15 (1971), No. No. 299 (THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT June 7, 1971).
[11] Supreme Court Justice White, Schad v. Borough of Mount Ephraim, 452 U.S. 61.
[12] Supreme Court Justice White.

there can be no prohibition on the wearing of this jacket.[13] The court stated that it "cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[14] This assertion bases itself not only on the precedent of the First Amendment but also on the precedent of the civil liberties that serve as foundational ground for what American law represents.

Overall, various courts have cited that there cannot be a limit on the freedom of expression clause of the First Amendment in terms of artistic media such as video, song, and style of dress. These precedent cases are of great importance in the Young Slime Life case, as the rap lyrics of members of the group, such as Young Thug (Jeffery Williams) and Gunna (Sergio Kitchens), are being brought into evidence by the State of Georgia under the RICO statute. Before the analysis of the YSL case, it is necessary to evaluate and understand RICO charges, how they operate, and how they are applied to 'gang activity.'

Understanding RICO

RICO, or Racketeer Influenced and Corrupt Organizations statute was established in 1970.[15] This statute was written by Cornell Law Professor G. Robert Blakey with the intention of taking down organized crime by targeting groups of people instead of individuals. Within section four of this act, "enterprise" is defined as something that "includes any individual, partnership, corporation, association, or other legal entity and any union or group of individuals associated in fact although not a legal entity."[16] Essentially, this definition allows the law to tie people together through criminal activities in the same way that the law defines associates in a legal business. RICO's definition also includes specific crimes that can fall under this umbrella, such as robbery, extortion, and murder.[17] However, the most pertinent section of RICO, in terms of the present YSL case and its being thrown out, is the commerce clause. This clause essentially states that RICO organizations are tied inherently to the infiltration of legitimate businesses,

[13] Justice Harlan, Cohen v. California, 403 U.S. 15 (1971).
[14] Justice Harlan.
[15] G. Robert Blakey, "RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS," 18 U.S. Code Chapter 96 § (1970), https://www.law.cornell.edu/uscode/text/18/part-I/chapter-96.
[16] G. Robert Blakey, Section 4.
[17] G. Robert Blakey, Section 1.

particularly businesses that are interstate commerce-based, which allows for a more economic angle on the prosecution of crimes under the RICO statute.[18]

The biggest application of the RICO statute came in 1985, in the famous "Mafia Commission Trial."[19] The Commission was a collection of the bosses of the five mafia families of New York in one conspiracy that met and decided the 'jurisdiction' of each family within the city.[20] This trial led to many convictions, especially within the Genovese family and its boss, Anthony "Fat Tony" Salerno, for loan sharking, murders, extortion, and even plots to kill government officials such as Rudy Giuliani, the lead prosecutor of the case.[21] This was all possible because the RICO Act allowed people like Salerno to be tied to crimes that they did not actually commit with their own hands but crimes that they ordered to be committed within a larger conspiracy of their organization.

While taking down the mafia in NYC seems to be well-intentioned in decreasing crime in the city, it set a dangerous precedent that came to restrict the civil liberties of people everywhere. Perhaps the most dangerous of examples comes, once again, within the lines of the mob. However, this time, it is the association that the mob had between its own organizations and local unions.

The mob, in NYC and other places, was heavily involved in the structure of many local unions, the most famous of these cases being *United States v. Local 560, International Brotherhood of Teamsters*. This lawsuit from the US Government had the express purpose of purging all mob elements from this local union using RICO.[22] This case introduced a new style of using RICO: a RICO trusteeship. In a trusteeship, the government, in an attempt to deter or remove all mob activity, denotes certain employees or former prosecutors who are familiar with RICO and racketeering, in general, to become associated with the union on a professional level.[23] This professional relationship is defined by an "all-powerful trusteeship" in which the

[18] Jordan Woods, "Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs," *Michigan Journal of Race and Law* 17, no. 2 (January 1, 2012): 303–57, 305.
[19] Robert Marriaga, Sayd Hussain, and Leanet Gutierrez, "RICO: The Anti-Mafia Law," *FAU Undergraduate Law Journal*, April 15, 2021, 8–15, 13.
[20] Marriaga, Hussain, and Gutierrez, 10.
[21] Marriaga, Hussain, and Gutierrez, 13.
[22] James B. Jacobs, Eileen M. Cunningham, and Kimberly Friday, "The RICO Trusteeships after Twenty Years: A Progress Report," *The Labor Lawyer* 19, no. 3 (2004): 419–80, 419.
[23] Jacobs, Cunningham, and Friday, 425.

government employees have the ability to negotiate contracts, initiate strikes, and handle grievances.[24]

Again, while this use of RICO seems well intentioned, it actually restricts the free speech rights of the majority of union members and leaders. Clyde Summers, a leading labor law expert who testified in the *Local 560* trial, believes that trusteeships "allow for absolutely no possibility of exercising [First Amendment] rights."[25] The harm that something like the RICO trusteeship causes may outweigh the potential benefits for those within the unions who had been otherwise abused by the mob. In essence, this use of RICO allows for the government to assume that illegitimate racketeering exists within the union. Consequently, this line of thinking allows for a complete assumption of power and control over an organization that advocates for the rights of the average laborer.

RICO has also been abused when it comes to the organization of protestors, specifically those at abortion clinics. While scholars deem the majority of these protests to be "obnoxious and harassing" in nature, they are still protected under the First Amendment.[26] Although these actions should be protected under the First Amendment, prosecutors have used RICO statutes to tie protestors together through their organizers in cases such as *Northeast Women's Center Inc. v. McMonagle, Feminist Women's Health Center v. Roberts*, and *Town of West Hartford v. Operation Rescue.*[27] These cases all demonstrate various ways in which RICO has been used to unconstitutionally associate the individual crimes by members of these groups that occurred in contexts outside of the organized whole with the group in favor of taking away the right to assembly of these protestors.[28]

While these examples abuse RICO in their own way, the most important exploitation of RICO in this case study would be the unjust application of the statute to street gangs, such as YSL. One aspect of the RICO statute that can be used to understand the unconstitutionality of the charges against street gangs is the previously mentioned commerce clause that creates an association with a legitimate business. Legal scholar Jordan Woods offers two reasons that the

[24] Jacobs, Cunningham, and Friday, 427.
[25] Kenneth R. Wallentine, "A Leash upon Labor: RICO Trusteeships on Labor Unions," *Hofstra Labor Law Journal* 7, no. 2 (1990 1989): 341–68, pp. 354-355.
[26] Antonio J. Califa, "RICO Threatens Civil Liberties Symposium: Reforming RICO: If, Why, and How," *Vanderbilt Law Review* 43, no. 3 (1990): 805–50, 823.
[27] Califa, 805.
[28] Califa, 823.

legal interpretation of RICO does not fit gangs such as YSL. The first of these reasons is that gangs such as YSL do not attempt to infiltrate existing legitimate businesses. The second is the fact that gangs do not significantly affect interstate commerce; therefore, under the precedent of *United States v. Lopez*, the government cannot attempt to regulate businesses that *do not* substantially affect interstate commerce.[29]

Beyond statutory reasons, Woods cites the racial aspect of RICO charges to be the most unjust of all. Woods argues about the ways in which there is an overrepresentation of racial minority 'gang' prosecutions, while white 'gang members' seemingly avoid all associations with RICO charges.[30] The author even connects the enactment of RICO to race because of the ways in which it focused on protecting white crime victims (i.e., those who were victimized through mafia threats), but did not make any attempts to enact legislation against those who were victimizing groups of black people, such as the Ku Klux Klan.[31] The final point that Woods makes, through the use of his extensive criminological study, is that there is a higher frequency of RICO prosecutions within local gangs when at least one minority group is associated with that gang.[32] This information goes to show that although G. Robert Blakey in part wanted to use RICO to fight against "white extremist" gangs, it seems as though the only gangs that are actually being targeted on a large scale are those that feature minority groups.[33]

Young Slime Life Case: Origins

This background information transitions into the way in which these two contested legal issues (artistic freedom and RICO charges) relate to the topic at hand: *State of Georgia v. Kahlieff Adams et al.* This case was brought against the organization known as "Young Slime Life," in May of 2022. This case featured twenty-eight accused for fifty-six different charges, which included murder, aggravated assault, and theft, but the only charge that all the accused had in common was the first charge— "CONSPIRACY TO VIOLATE THE RACKETEER

[29] Woods, "Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs"; Justice Rehnquist, United States v Lopez, No. 93-1260 (US Supreme Court April 26, 1995).
[30] Woods, "Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs," pp. 307-308.
[31] Woods, 319.
[32] Woods, 332.
[33] Cherie Deogracias, "Race, Reconstruction, and the RICO Act: Using the Racketeer Influenced and Corrupt Organizations (RICO) Act in Prosecutions Against White Supremacist Organizations in America," *University of Maryland Law Journal of Race, Religion, Gender and Class* 20, no. 2 (January 1, 2020): 306, 334.

INFLUENCED AND CORRUPT ORGANIZATIONS ACT," coded as O.C.G.A. §16-14-4, which is Georgia's RICO statute.[34]

O.C.G.A. §16-14-4 follows many of the precedents from the original RICO Act of 1970 and features the keywords "employed by or associated with," in reference to those who can be charged with the RICO crime at hand.[35] This phrase paints an expressly broad picture of who and what can be associated with racketeering charges. Since the national statute states that there need not be any legal associations between those involved in an "enterprise," it allows nearly anyone associated with those culpable by law to be culpable themselves. As Sidney Madden, a reporter on popular culture for *NPR,* puts it:

> Basically, it allows prosecutors to hold anyone and everyone in an entire group responsible for the worst things someone in their circle has done. So if you're a rapper and you associate with people engaging in criminal activity — maybe y'all grew up on the same block, maybe you used to run the same streets before you switched into entertainment, maybe you brought them with you out of the streets into entertainment — prosecutors can use all that and use RICO laws to brand y'all as an organized crime syndicate.[36]

Madden's point is supported by the fact that the two famous rappers on trial, Young Thug and Gunna, face different charges. Gunna is only charged with Count 1 (which is the conspiracy to violate RICO), while Young Thug is being indicted on Counts 1 and 56 (count 56 being "participation in criminal street gang activity")..[37] Moreover, these rappers and their lyrics are being indicted and examined to be used as pieces for a large puzzle: the conviction of their associates at YSL.

Rap lyrics have faced substantial public scrutiny in recent years, in the courts and at a political level. One example is the case of Lawrence Montague. In early 2021, as part of an

---

[34] Cathlene Robinson, State of Georgia v. KAHLIEFF ADAMS, et. al., Courthouse News (Fulton Superior Court 2022).

[35] State of Georgia, "2020 Georgia Code, Title 16 - Crimes and Offenses, Chapter 14 - Racketeer Influenced and Corrupt Organizations, § 16-14-4. Prohibited Activities," §16-14-4 O.C.G.A. § (2020), https://law.justia.com/codes/georgia/2020/title-16/chapter-14/section-16-14-4/#:~:text=It%20shall%20be%20unlawful%20for,of%20any%20nature%2C%20including%20money.

[36] Sidney Madden et al., "The Charges against Young Thug Build on a Growing Trend of Criminalizing Rap Crews," *NPR*, May 15, 2022, sec. Music News, https://www.npr.org/2022/05/15/1099004661/young-thug-is-the-latest-rapper-to-be-charged-under-historically-problematic-ric.

[37] Cathlene Robinson, State of Georgia v. KAHLIEFF ADAMS, et. al., Courthouse News.

ongoing murder trial of Montague, a Maryland Court of Appeals Judge ruled that lyrics of a rap that Montague said over the prison pay-phone counted as a confession as they were ultimately probative despite warnings from across the country about the precedent that something like this could set.[38] The court argued that this did not set a precedent at all, rather it followed the precedent of *New Jersey v. Skinner* (2014), which convicted rapper Vonte Skinner of murder based on rap lyrics, and the case was eventually overturned by a higher court.[39] *Montague v. Maryland*, although appealed by Montague, set a dangerous precedent in its ruling by significantly limiting rappers' freedom of speech. To combat dangerous precedents like this, governing bodies such as the New York State Senate have introduced bills such as the "Rap Music on Trial Bill" (2021, passed 2023), which seek to decriminalize the use of rap music as a means of self-expression.[40] These bills draw on cases such as *Waller v. Osborne* as a means to cite other genres of music in which the musicians do not face the same resistance from the law that rap music does. The defense team for YSL has argued that these lyrics should be left out of the charge, as it is unconstitutional for them to be admitted under the free speech aspect of the First Amendment.

The Lyrics and Their Use in Count 1

Within the indictment, there are references to a plethora of rap lyrics from both Young Thug and Gunna, as well as other members of YSL, and references to social media posts. Some of these lyrics come from individual songs that Young Thug had released independent of YSL (which in this case is Young Stoner Life, as opposed to Young Slime Life) records, such as "Bad Boy" with Juice WRLD, and others were released on the larger collaborative album, "Slime Language 2."[41] These lyrics are assumed to be truthful, as almost all of them are stated to be "an

[38] Brad Kutner, "Maryland Appeals Court Allows Rap Lyrics to Be Used in Murder Trial," January 2, 2021, https://www.courthousenews.com/maryland-appeals-court-allows-rap-lyrics-to-be-used-in-murder-trial/.
[39] Brad Kutner.
[40] BRAD HOYLMAN-SIGAL, "Senators Brad Hoylman & Jamaal Bailey Introduce 'Rap Music on Trial' Legislation to Prevent Song Lyrics From Being Used As Evidence In Criminal Cases," *NY State Senate*, November 17, 2021, https://www.nysenate.gov/newsroom/press-releases/brad-hoylman/senators-brad-hoylman-jamaal-bailey-introduce-rap-music-trial; Shannon Dawson, "What Does The 'Rap Music On Trial' Bill Mean For Hip-Hop?," *NewsOne* (blog), February 28, 2023, https://newsone.com/4341704/rap-music-on-trial-bill/.
[41] Cathlene Robinson, State of Georgia v. KAHLIEFF ADAMS, et. al., Courthouse News; Devin Lazerine, "Young Thug Drops 'Slime Language 2 (Deluxe),'" *Rap-Up* (blog), 2021, https://www.rap-up.com/2021/04/23/young-thug-ysl-slime-language-2-deluxe-stream/.

overt act in furtherance of the conspiracy"[42] within the indictment. An example of this can be seen below in is a piece of evidence under the charge of Count 1.

131	04/16/2021	Defendants **MARTINEZ ARNOLD, SERGIO KITCHENS and JEFFERY WILLIAMS**, associates of YSL, appeared in a video released on social media titled "Ski," with lyrics stating "I fuck with slatts and we come to eat rats and I came with some fuckin' piranhas" "I tote an FN on me, call Neechie-Neech, it's a Glock he keep" "Duke Rollin' 60's, he locked in C's," an overt act in furtherance of the conspiracy. 

Figure 1: Act 131 of the Indictment, featuring the lyrics of "Ski," a song on "Slime Language 2"

Above, the prosecutors utilize language from a song that features YSL members Gunna, Young Thug, and Duke (Martinez Arnold), and the specific word choice of "slatts" combined with the use of the words "FN" and "Glock," which both refer to guns.[43] Prosecutors have associated the word "SLATT" with the acronym used by YSL members that means "Slime Love All the Time."[44] This word, as well as other symbols such as red and green emojis (the throwing-up emoji, for example), are seen as symbols of YSL and are inextricably linked to the gang and its activities.[45]

[42] Cathlene Robinson, State of Georgia v. KAHLIEFF ADAMS, et. al., Courthouse News.
[43] Cathlene Robinson, Courthouse News.
[44] Cathlene Robinson, Courthouse News.
[45] Cathlene Robinson, Courthouse News.

Cracks in the Glass of the Case

Three major cracks in the metaphorical glass of the case appear when examining the charges of RICO for YSL. These three cracks revolve around three central legal questions that are crucial to ask oneself when analyzing the case: (I). Are rap lyrics admissible? (II). Does mention of YSL symbols/crimes mean a RICO connection? (III). Are RICO charges applicable to street gangs? These questions are all to be answered both in a legitimate sense of answering the question asked but also in the sense of the constitutional rights of all the defendants, all citizens of the United States.

I. Are rap lyrics admissible?

The evidence cited above indicates that this question can be easily answered in the negative. The decision in *Waller v. Osborne* establishes the fact that there exists no direct causality between the lyrics of a song and the actions of a person in the real world.[46] While *Waller* and the YSL case are different, as they represent different levels of harm and different actions that the harm could be acted upon, *Waller* establishes the precedent that it is a "difficult task of attempting to impose liability on the defendants based on their dissemination of speech fully protected by the first amendment" within the lyrics of song.[47] Within the YSL case, the use of lyrics from Williams, Kitchens, and others as an "overt act in furtherance of the conspiracy"[48] attempts to impose liability. Therefore, drawing a causation between the song and the acts of conspiracy is a task that must be deemed difficult, if not impossible.

Beyond the argument of precedent, there exists the argument against the admissibility of rap lyrics under the First Amendment. The fantastical elements of these specific lyrics further the argument against these lyrics being admitted. For example, Act 78 of the indictment cites the song "Bad Boy," which includes a line about "smok[ing] [an enemy] like a blunt," which the prosecutors saw as an implication that he would kill someone for YSL.[49] Since the prosecutors would like to deduce the truth from the song, does that mean that they believe that Juice WRLD

[46] FITZPATRICK, District Judge, Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991).
[47] FITZPATRICK, District Judge.
[48] Cathlene Robinson, State of Georgia v. KAHLIEFF ADAMS, et. al., Courthouse News.
[49] Cathlene Robinson, Courthouse News.

really had "futuristic rides imported from Mars?"[50] No—of course, it does not; these artists are just using their First Amendment Rights to express themselves artistically. The artists on this song (Young Thug and Juice WRLD) utilize fantastical elements in their songs to add artistic allure The same is true with other songs that are mentioned in the indictment, such as "Take it to Trial" (Act 130), which also mentions fantastical elements such as Young Thug comparing himself to "Chef Boyardee," who is an advertisement character for a canned product.[51] Obviously, Young Thug employs metaphor here, which is not meant to be understood as Williams being an actual chef. Moreover, who is to say what is truthful and what is not, what lyrics are metaphors and what are not? It is not the prosecutors, and most likely not the audience, which leaves this truth to the artist and the artist alone. Therefore, admission of lyrics like this is not only against precedent, but it is against the freedom of expression afforded to all artists

II. Does mention of YSL symbols/crimes mean a RICO connection?

The next question that casts a shadow of doubt on this RICO case is what is/can actually be defined as association with the "enterprise." For Young Thug and Gunna, those associated with YSL who have the biggest public influence, their associations with YSL are based on their songs and social media posts.

One clear counterargument to this would be that every musical artist who has either collaborated with YSL or referenced YSL within their own work could fall under the definition of "enterprise."[52] The definition of enterprise that is laid out is vague at best and essentially allows anyone who is in a group or union of individuals to fall under the enterprise. One associated artist to look at is Drake (Aubrey Graham). Drake is featured on one of the songs from the "Slime Language 2" album, "Solid," therefore putting him in a group or union with YSL.[53] This is the same album that is produced by Young Stoner Life and the same album that features YSL imagery and language Additionally, within this song, Drake alludes to violent actions similar to YSL members, such as saying he will "hop in the tank, and move militant,"

[50] Juice WRLD & Young Thug, *Bad Boy* (Lyrical Lemonade, 2019), https://genius.com/Juice-wrld-and-young-thug-bad-boy-lyrics.
[51] Young Stoner Life, Young Thug & Gunna (Ft. Yak Gotti) –, *Take It to Trial* (Young Stoner Life, 2020), https://genius.com/Young-stoner-life-young-thug-and-gunna-take-it-to-trial-lyrics.
[52] See page 5 for the definition of enterprise per the RICO Act of 1970.
[53] Devin Lazerine, "Young Thug Drops 'Slime Language 2 (Deluxe).'"

which is obviously taken to not be literal.[54] Drake, in a later song called "Sticky," uses his platform as a global artist to call for the freeing of YSL in his music video for the song, which further ties him to YSL per the definition of enterprise.[55] With all of this evidence, Drake should, according to the logic the State of Georgia uses based on the criminal code §16-14-4, be tied to YSL.[56] However, he is not. For the same reason that Drake is not tied to the aforementioned mob family, the Genovese, even though he mentions them in another song: "crime family like the Genovese."[57] This reason is proximity: Georgia is building their entire case upon the fact that YSL members all exist in the "locale" of Atlanta.[58]

This idea ties back to the Woods article that expands on the racialized aspect of RICO, which attempts to group minority groups together as "gangs" regardless of their existent ties or lack thereof to crimes within that locale.[59] Not only is this classification unjust, but it is also unfounded in logic, as the mention of specific words or symbols cannot inherently tie people to a crime. Therefore, the inherent relation of Gunna and Young Thug to these RICO crimes, based solely on the fact that they mention YSL, SLATT, or use certain emojis, does not pass any sort of legal test to tie people together. The idea that these rappers are tied together based on their use of words or emojis adds an inherently racialized element to this RICO charge, especially in comparison to the extensive evidence that was needed through wiretaps and other means to connect mafia members together.[60] This represents the apparent bias that law enforcement and prosecutors have towards people of color as biases and correlations were drawn with very little evidence (i.e., the use of emojis) against people of color while heavy evidence was needed to tie white mobsters together. This minimal evidence needed restricts the access of artists to free speech, and more specifically, freedom of expression in an artistic sense, as now artists in the Atlanta area who may or may not have collaborated with YSL members may feel a restriction to

[54] Young Stoner Life, Young Thug & Gunna (Ft. Drake), *Solid* (Young Stoner Life, 2020), https://genius.com/Young-stoner-life-young-thug-and-gunna-solid-lyrics.
[55] Ellie Robinson, "Drake Shows Support for Young Thug and Gunna with 'Free YSL' Call in 'Sticky' Video," *NME* (blog), August 3, 2022, https://www.nme.com/news/music/drake-shows-support-for-young-thug-and-gunna-with-free-ysl-call-in-sticky-video-3282370.
[56] State of Georgia, 2020 Georgia Code, Title 16 - Crimes and Offenses, Chapter 14 - Racketeer Influenced and Corrupt Organizations, § 16-14-4. Prohibited Activities.
[57] Drake, *Sandra's Rose* (OVO, 2018), https://genius.com/Drake-sandras-rose-lyrics.
[58] Cathlene Robinson, State of Georgia v. KAHLIEFF ADAMS, et. al., Courthouse News.
[59] Woods, "Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs," 332.
[60] Marriaga, Hussain, and Gutierrez, "RICO," 9.

use the word "SLATT" or talk about YSL. This essentially removes many free speech protections from artists that should be afforded to all citizens of the US.

III. Are RICO charges applicable to street gangs?

In terms of YSL, many of the charges in the indictment relate to different sections of "involvement in criminal street gang activity."[61] This means that the first charge of RICO conspiracy is not tied to any sort of mafia group (i.e., The Commission Trial) or a union (i.e., *Local 560*), rather it is tied to YSL, which is a street gang by the indictment's definition. As mentioned in the Woods article, there needs to be an effect on interstate commerce for there to be regulation under the RICO statute, due to *Lopez*.[62]

This idea is expanded upon legally by Matthew Blumenstein in the Vanderbilt Law Review, as he analyzes the Commerce Clause of the Constitution (Article 1, Section 8, Clause 3 of the US Constitution), as expanded by the famous case of *Gibbons v. Ogden*.[63] Blumenstein builds on *Lopez* by mentioning the original decision of the Supreme Court on interstate commerce, which was *Gibbons v. Ogden* (1824), which asserted that the federal government had the exclusive right over interstate commerce.[64] However, when understood with the likes of *Lopez*, it is unconstitutional for the government to legislate "noneconomic activity" on the federal level without conducting a "test" on the level of economic impact that this street gang can have.[65] This information, combined with the precedent of *United States v. Morrison*, a case that overturned parts of federal law (Violence Against Women Act of 1994), as it attempted to place federal jurisdiction over violence that occurred at an interstate level but simultaneously lacked a significant impact on interstate commerce, leads to a strong precedent against the use of RICO charges on street gangs.[66]

In the case of YSL specifically, there is no mention of any effect of interstate commerce at any level. Additionally, there is only a mention of one city in particular, Atlanta.[67] Therefore,

[61] Cathlene Robinson, State of Georgia v. KAHLIEFF ADAMS, et. al., Courthouse News.
[62] Justice Rehnquist, United States v Lopez.
[63] Matthew Hardwick Blumenstein, "RICO Overreach: How the Federal Government's Escalating Offensive against Gangs Has Run Afoul of the Constitution Note," *Vanderbilt Law Review* 62, no. 1 (2009): 211–38, 225; Justice John Marshall, Gibbons v. Ogden, No. 22 US 1 (1824) (US Supreme Court 1824).
[64] Justice John Marshall, Gibbons v. Ogden.
[65] Blumenstein, "RICO Overreach," 228.
[66] Clarence Thomas, United States v. Morrison, No. 99-5 (US Supreme Court 2000).
[67] Cathlene Robinson, State of Georgia v. KAHLIEFF ADAMS, et. al., Courthouse News.

there is no way that there was any test of effect on interstate commerce, as there is not even a mention of any other state besides Georgia, making this not fall under RICO due to *Lopez*.[68] Similarly, there is nothing proving any trans-state economic activity, meaning that there is an attempt to govern interstate violence, which goes against *Morrison*.[69] All in all, these precedents warrant a condemnation of the use of RICO in the YSL case, as it goes against the constitutional rights of what the government can/cannot regulate.

Conclusion

"If the Mafia replaced the government, we'd probably have half the corruption and twice the fun." — Anthony "Fat Tony" Salerno.[70]

Although this is a colloquial phrase that many people do not take seriously, as it comes from a mob boss of the Genovese family, it has a certain level of merit to it. While the corruption is not the same as in the mafia, corruption is illegal and takes the form of hierarchies based on nepotism. The government, in terms of RICO, takes the route of 'legal' corruption. This 'legal' corruption manifests itself through Supreme Court Precedents, statutory laws, and prosecution based on the former.

From the prosecution standpoint, there is no difference between the 1985 Commission Trial and the current YSL trial. However, as illustrated through this paper, from the standpoint of a defense attorney and in the grand scheme of the legal system of the United States, there are an immense number of complexities within the YSL case specifically, regarding everything from artistic freedom to the exception of gangs from RICO charges.

Even with the complexities put aside, there is still a different aura that exists when looking at the YSL case. This aura is at least partly because this case is the first famous RICO case that exists in the digital age. Social media can have both a hindering effect and a furthering effect on the facts of the case.[71] It has served as both a place for evidence and a place for

[68] Justice Rehnquist, United States v Lopez.
[69] Clarence Thomas, United States v. Morrison.
[70] Lisa Babick, "Out of the Mouths of the Infamous - II," *The New York Mafia* (blog), May 22, 2020, https://thenewyorkmafia.com/more-famous-mobster-quotes/.
[71] Emily M. Janoski-Haehlen, "The Courts Are All a Twitter: The Implications of Social Media Use in the Courts," *Valparaiso University Law Review* 46, no. 1 (2012 2011): 44.

resistance in the YSL case, further proving the previous statement. The biggest effect, however, is the fact that people are talking about the case. Every few days, there are new articles on *Yahoo News* about developments of the case, one of which read "Lawyer In YSL RICO Case Throws Out Slang Term 'Cap' In Court."[72] Cap, which is a term used to call something a lie or call out a falsehood, is a vernacular term that is used most prevalently in Generation Z (GenZ).[73] One of the lawyers for YSL used this term in response to a remark that they deemed to be false but that the court saw as offensive and dishonorable in a court of law.[74]

As silly as a headline like this may seem, it is indicative of a greater shift in the courts of the United States. This trial has become that of a people's trial, featuring the language of the general populace. Social media allows people to see this trial and sympathize with the defendants who make some of the music that they listen to frequently. It is also a trial for the people in the way that this trial represents an opportunity to uphold the rights of individual artists' free speech rights. In a final way, this represents a trial for the people because it is an opportunity to establish the notion of equality for rap music under the law, to be afforded the same protections that all other genres of music are given. Given the wide access in the United States to social media, it is much easier for something such as the YSL trial to become a trial of the people and their values because of the way in which a wider audience can view and 'judge' the trial for themselves.

However, all these possible changes to create a new zeitgeist of the twenty-first-century courts in the United States are *impossible* if the court does not uphold the civil liberties of all the defendants in *State of Georgia v. Khaleiff Adams et al.* by acquitting them,[75] given all the legal precedent for not only free speech law but also that of RICO law and the impossibility of applying that to YSL's case. This case is the opportunity to uphold rap as a form of art, just as metal was in the past.[76] This case is the opportunity for "enterprise" within the definition of

[72] Armon Sadler, "Lawyer In YSL RICO Case Throws Out Slang Term 'Cap' In Court," *VIBE.Com* (blog), April 18, 2023, https://www.vibe.com/news/entertainment/lawyer-ysl-rico-case-says-cap-court-1234749641/.
[73] Sadler.
[74] Sadler.
[75] As of the Summer of 2023, there are only eight defendants who plan to stand trial, including Young Thug, while other defendants such as Gunna have entered an Alford Plea, which allows them to maintain their innocence, whilst pleading guilty: Guy, Zoe. "Everything We Know About YSL's RICO Case." Vulture, July 11, 2023. https://www.vulture.com/article/ysl-young-thug-gunna-arrest-charges-explained.html.
[76] FITZPATRICK, District Judge, Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991).

RICO to be clearly defined.[77] This is the case that can set a precedent for loosely affiliated gangs like YSL to be excluded from RICO statutes as they do not affect interstate commerce.[78] The people of Georgia have the power to make this case the beginning of the end for racial injustice within modern RICO charges. And finally, this is the case that can prove "Fat Tony" right about the corruption of the government by acting on it through the reversal of the hypocrisy that the government has solidified through precedent.

Addendum

As of late December of 2023, there have been the following updates on the YSL Case. First, the Court ruled that the use of lyrics in the trial is allowed, as the prosecution began citing their "significance to real life."[79] While more specific guidelines exist surrounding the use of these lyrics, in order to prevent the jury from taking these lyrics literally, the defense counsel has pivoted from fighting against the allowance of the lyrics to making their meaning clear. By this, I mean the defense counsel has made claims that "Thug" in Young Thug's name is actually an acronym that stands for "truly humble under God" and that the phrase "pushin' P" refers to pushing positivity.[80] While it is unclear that these more positively connoted meanings of commonly used YSL phrases are truly what they have always meant, these alternative meanings result in a level of reasonable doubt within lyrics, which the Court has allowed. While the result of this case is still yet to be determined, it is clear to me and many legal scholars that this is a miscarriage of justice, no matter how it is spun. Saying that is not to discount the alleged crimes that have been committed against many people in Georgia from other people, associated or not with Young Thug or others. Rather, it is to call for a more egalitarian carriage of justice for all citizens of America.

[77] State of Georgia, 2020 Georgia Code, Title 16 - Crimes and Offenses, Chapter 14 - Racketeer Influenced and Corrupt Organizations, § 16-14-4. Prohibited Activities.
[78] Clarence Thomas, United States v. Morrison; Justice Rehnquist, United States v Lopez.
[79] Jessica Murphy and Max Matsa. "Young Thug's Lyrics Used against Him as Gang Trial Starts," November 27, 2023. https://www.bbc.com/news/world-us-canada-67527707.
[80] Loh, Matthew. "Young Thug's Defense Lawyer Said His Name Stands for 'Truly Humble Under God.'" Business Insider, November 29, 2023.
https://www.businessinsider.com/young-thugs-name-stands-truly-humble-under-god-defense-lawyer-2023-11.

Bellarmine Law Society Review

Volume XIII | Issue II Article V

A Well-Regulated Militia: A Historical Reading of the Second Amendment

Darya Treanor
Boston College, treanoda@bc.edu

A WELL-REGULATED MILITIA: A HISTORICAL READING OF THE SECOND AMENDMENT

DARYA TREANOR [1]

Abstract: The Second Amendment is one of the most controversial parts of the United States Constitution, and since its reinterpretation in the 2008 Supreme Court Case *D.C. v. Heller*, it has officially been understood to protect the individual right to own and bear arms. Even the opponents of this view, who often point to the Militia Clause to argue that the amendment is not about individual gun ownership, do not pay enough attention to the military history and language behind the Second Amendment. This paper will argue that the Second Amendment was initially written to protect the rights of service members, not civilians. If it were to be interpreted and applied according to this originalist reading, the Second Amendment would be able to invalidate laws and regulations against LGBTQ+ people in the military or restrictions on women in combat. This paper lays out a historical explanation of why the Second Amendment should be read this way and an example of how the legal reasoning springing from this reading could be used to protect the civil rights of members of the American armed forces.

Introduction

The exact wording of the Second Amendment to the United States Constitution is "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[2] There are many ways to read this passage, but in the 2008 case *D.C. v. Heller*, the United States Supreme Court chose to interpret the amendment as a protection of the individual right to gun ownership, despite the wealth of historical data showing that the Framers of the Constitution had no such intention. This interpretation of the Second Amendment, however, completely overlooks the Militia Clause, which is consequentially underutilized and too often ignored in contemporary debate. This is a misgiving because while the Militia Clause is not of much use in the political and legal fight over gun control laws, it shows promise as a defense of the rights of soldiers. In particular, a historically informed reading

[1] Darya Treanor is a senior at Boston College studying philosophy and political science. She is interested in the legal and constitutional history of the United States, and plans on attending law school starting in the fall of 2024.
[2] U.S. Constitution, amend. II.

of the Second Amendment might provide legal grounds for a constitutional defense of LGBTQ+ soldiers facing discrimination in the United States military.

Summary

To summarize the legal argument, based on the exact language of the Constitution and its author's own interpretation, the Second Amendment establishes the right of States to maintain a militia and the right of citizens to join their state militia. The National Guard, the legally recognized successor of state militias, has now been incorporated into the standing military, so regulations about joining the military should match those of the National Guard. In other words, by incorporating the National Guard into the standing military, the government also incorporated laws and provisions like the Second Amendment so that they now apply to the standing military. The Second Amendment, therefore, protects an individual's right to join the military and serve their country, and given the Fourteenth Amendment, sex (and therefore sexuality and gender identity, which are reliant on sex) are protected categories against which the government cannot discriminate. Any policy that would discriminate against LGBTQ+ Americans seeking to join the military violates the Second Amendment and is consequently argued unconstitutional.

Origins of the Second Amendment

The Second Amendment to the US Constitution was passed in 1971, along with the other amendments that make up the Bill of Rights. As Congress deliberated on the need for the Bill of Rights and for specific amendments, many issues had to be discussed and clarified. However, during the discussion of what would become the Second Amendment, "what was not mentioned at all, by anyone, was any private use of arms."[3] Instead, the Congressmen discussed the purpose of a militia and how to ensure that the states were able to maintain militias without interference from the federal government, thus allowing states to protect themselves from federal overreach. States' rights and autonomy, and the role of a militia in securing the same, are the proper subject of the amendment. There is no sign that the amendment addressed private gun ownership or use.

In fact, the debate surrounding what later became the Second Amendment invoked the rights of individuals, specifically, religious freedom. Future Vice President Elbridge Gerry argued that Congress should alter a clause from the proposed amendment reading, "but no person

[3] Robert A. Goldwin, "From Parchment to Power," (Washington: The AEI Press, 1997), 128.

religiously scrupulous shall be compelled to bear arms."[4] Gerry worried that this clause, meant to allow conscientious objectors to avoid military service, could be co-opted by the federal government to designate members of certain religious groups as religiously scrupulous and then ban them from bearing arms and joining the militia. By misusing the clause in this way, Gerry believed that the federal government could arrogate state power over the state militias and even stop the formation of effective militias altogether. Gerry's concern was that the federal government might strip the right to bear arms from individuals based on their religious backgrounds; this fear suggests that the right to bear arms was not only intended to allow the establishment of state militias, but it would also protect the rights of individuals to join those state militias.

Gerry's suggestion that the conscientious objector clause should be changed in order to close this loophole was narrowly defeated, but the debate continued on the amendment's original draft, which read: "[t]he right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[5] This expanded attempt to summarize the Founders' thoughts on the right to bear arms makes it very clear that the Second Amendment is, at its core, a military regulation.

Between the initial debate about the amendment and its ultimate ratification and adoption, the language evolved and changed. Nevertheless, the origins of the Second Amendment strongly suggest that it was intended to protect the right of citizens to organize in regulated and state-run military groups. There is no textual or contextual suggestion of an individual right to bear arms. The military origins of the Second Amendment appear to be largely ignored in debates over its role in modern law and jurisprudence; however, they are relevant to certain contemporary military applications.

Pre-*Heller* Second Amendment Law

Many Americans would be surprised to learn that until 2008, the Supreme Court had never held that the US Constitution provides for the individual right to own a gun. Although people claimed that it was a constitutionally protected right before the Supreme Court recognized

[4] Ibid 127.
[5] *Annals of Congress,* 1st Cong., 1st sess., 451. Available at: https://web.archive.org/web/20110111095149/http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001%2Fllac001.db&recNum=227.

that right, individual gun ownership only came to be understood as a right very late in American constitutional discourse.

Many twentieth-century scholars of the Constitution believed that when the Second Amendment refers to arms, it means specifically arms for use in well-regulated state militias. David Hutchinson, for example, argued in 1928 that the relevant "arms" were "those of the soldier to be used for defence [*sic*], and [does] not include knives, daggers, sling-shots, or other such weapons."[6] While his specific assertion about Second Amendment relevance to weapons other than firearms would not be readily accepted today, the implication here is not only that "arms" are for use in a regulated militia but also that "[t]he carrying of concealed weapons may, therefore, be prohibited by law under the police power."[7] Hutchinson cites the Supreme Court case *US v. Cruickshank* and several federal and state laws to support this claim. It is telling that, in his nearly four-hundred-page book on the origins of the ideas within the Constitution, he dedicates less than a full page to the Second Amendment. In contrast, the First Amendment is the focus of four and a half pages of detailed dissection, and even the oft-ignored Third Amendment is the subject of one and a half pages. This suggests that, in the early 20th century, Hutchinson considered his interpretation of the Second Amendment to be so blatantly obvious that he did not have to go to any great lengths to prove it or address any other opinions. In short, in this period, it was widely understood that the Second Amendment did not invalidate the existence of regulations and limits on individual gun ownership.

The landmark 2008 case that changed the understanding of the law was *District of Columbia v. Heller.* While this case has been praised as a long-awaited recognition of individual freedoms, it has also been criticized as blatant judicial activism from a conservative court. The case concerns a DC law that placed limits and regulations on the ownership of handguns, including a ban on the registration of handguns and requirements for how legally owned firearms had to be stored when not in use.[8] The plaintiffs, including the case's namesake Dick Anthony Heller, asked the courts "to enjoin the city from enforcing the bar on handgun registration, the licensing requirement insofar as it prohibits carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibits the use of functional firearms in the home" on

[6] David Hutchinson, *The Foundations of the Constitution* (New Jersey: University Books, Inc., 1975), 291.
[7] David B. Kopel, Clayton E. Cramer & Joseph E. Olson, *Knives and the Second Amendment*, 47 U. Mich. J. L. Reform 167 (2013). Available at: https://repository.law.umich.edu/mjlr/vol47/iss1/4.
David Hutchinson, *The Foundations of the Constitution* (New Jersey: University Books, Inc., 1975), 291.
[8] *District of Columbia v. Heller*, 478 F.3d 370 (U.S. 2008).

Second Amendment grounds.[9] After the District Court dismissed the suit, the plaintiffs appealed, and the Supreme Court reversed the lower court's decision and held that the Second Amendment protects the individual right to own firearms, regardless of militia or military service, and to use those firearms for lawful purposes.

Until *Heller*, the legal consensus was that the Second Amendment did not prevent the creation and enforcement of gun regulations, and in fact, "no federal appellate court had ever invalidated any law as a violation of the Second Amendment."[10] As such, *Heller* represents a marked shift in judicial behavior as well as mainstream thought about the amendment. Most judges and legal scholars, such as Justice James C. McReynolds in *United States v. Miller,* understood the Militia Clause to mean that the Second Amendment only applied to the right to own and operate firearms so long as it had "some reasonable relationship to the preservation or efficiency of a well-regulated militia."[11]

Regulations on gun ownership in the US date back to the British colonies in America, and the presence of these largely unchallenged laws suggests that early Americans did not view gun control as conflicting with the Second Amendment or the American value of freedom. Even after gaining independence, most states continued using English common law, complete with traditional restrictions on gun use**,** such as a prohibition on traveling with concealed weapons in populated areas and strict regulations about how firearms should be stored.[12] In fact, according to John Adams' autobiography, during the American Revolution, the Founders recommended that state and local governments "cause all Persons to be disarmed, within their respective Colonies, who are notoriously disaffected to the cause of America."[13] This is more evidence that the Founders were comfortable with gun regulations and that they intended the right to bear arms to mean that the people could fight *for*, rather than against, or in spite of, the government. The right to bear arms was explicitly tied to military service, with potential enemies of the Patriots stripped

[9] "District of Columbia v. Heller," Legal Information Institute (Cornell Law School), accessed February 3, 2023, https://www.law.cornell.edu/supremecourt/text/07-290.
[10] Lainie Rutkow, Stephen P. Teret, Jon S. Vernick, and Daniel W. Webster, "Changing the Constitutional Landscape for Firearms: The US Supreme Court's Recent Second Amendment Decisions," *American Journal of Public Health* 101, (2011): 2021-2026, https://doi.org/10.2105/AJPH.2011.300200.
[11] *US v Miller*, 307 US 174, 178 (U.S. 1939).
[12] Saul Cornell and Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487 (2004). Available at: https://ir.lawnet.fordham.edu/flr/vol73/iss2/3.
[13] John Adams in *The Adams Papers*, Diary and Autobiography of John Adams, vol. 3, *Diary, 1782–1804; Autobiography, Part One to October 1776*, ed. L. H. Butterfield, (Cambridge: Harvard University Press, 1961), 369–370.

of their arms and those with religious objections to military service subject to a higher tax rate.[14] Moreover, in many states, the right to bear arms was contingent on the swearing of loyalty oaths in which a person pledged allegiance to their individual state or the United States altogether, or at least repudiated allegiance to the British king.[15] The diversity of the gun regulations during colonial and post-colonial America shows the long history of laws restricting gun ownership and that the very Founders who created the Second Amendment were entirely comfortable with some regulation on firearms.

State Militias and the National Guard

It is clear that the Second Amendment's phrase "bear arms" has had a primarily military context throughout much of history, and indeed, the Second Amendment was originally intended to apply to the state militias. Scholars have argued that the phrase has two separate meanings: a natural meaning relating to the literal carrying of firearms and an idiomatic meaning relating to military service and activities. Several post-*Heller* researchers attempting to determine exactly what the authors of the Second Amendment thought "bear arms" to mean have agreed that it "was mostly used in its idiomatic or military sense during this period, but not solely or exclusively so."[16] It, therefore, cannot be definitively concluded from this phrase alone that the Second Amendment is meant to refer to military activity, but in conjunction with the Militia Clause, it seems to suggest that there is a military connotation to the amendment's text as a whole. The Militia Clause or the phrase "bear arms" on its own would not necessarily mean that the Second Amendment refers to military weapons, but when considered together, the Framers' concern with the military is clear.

Before writing his book *Armed in America*, Patrick J. Charles performed a detailed historical analysis of the antecedents of the Second Amendment, which produced two historical conclusions: in eighteenth-century militia laws, all of the language that comprised the Second Amendment–"well-regulated militia," "necessary to the security of a free state," "bear arms,"

---

[14] Ibid.
[15] John D. Sinks, "Oaths of Allegiance During the American Revolution," District of Columbia Society, Sons of the American Revolution, May 8, 2021, https://www.dcssar.org/resources/Documents/Publications/Oaths%20of%20Allegiance%20During%20the%20American%20Revolution%208%20May%202021.pdf.
[16] E. Gregory Wallace, "Legal Corpus Linguistics and the Meaning of 'Bear Arms,'" Duke Center for Firearms Law, Duke University, July 16, 2021, https://firearmslaw.duke.edu/2021/07/legal-corpus-linguistics-and-the-meaning-of-bear-arms/.

and "keep arms"–appeared regularly. Conversely, in all the other eighteenth-century laws, including the laws pertaining to crime, self-defense, weapons, and hunting, none of the languages that comprised that Second Amendment was present–not even different variants of the term "bear arms"--i.e., "to bear arms," "bearing arms," etc. Even more telling was the fact that not one eighteenth-century legal commentator or one eighteenth-century legal case used the term "bear arms" or any variant of the terms to describe the act of carrying arms or using arms in the act of self-defense.[17] Given this, even if the evidence does not overwhelmingly prove that the language of the Second Amendment applies only to the military, it certainly establishes that there is no historical basis for the individualist reading of the Second Amendment. The weight of the historical evidence shows that the language of the Second Amendment implies a military context, and although there are occasional instances of other uses of the phrase "bear arms," the Framers clearly had the military, and more specifically, the state militias, in mind while drafting the amendment.

The state militias of the late eighteenth century were meant to provide a mechanism for national defense while avoiding the creation of a standing army, which was viewed as a potential weapon that the federal government could use to exert tyrannical power over the states. Each state raised a militia of its own, but because these militias might have needed to work together, they had to be "well-regulated," meaning that the standards for the different militias would be set by the federal government so that there would not be irreconcilable differences between discipline or training that might complicate a combined endeavor. These militias became somewhat obsolete, however, with the advent of the national standing army. The Continental Army, which won the Revolutionary War, was ordered to disband in 1784 (although two companies remained active in order to protect military equipment.)[18] Later, under the Militia Act of 1792, the state militias were legally recognized, and additionally, the law gave the President the right to call on the militias of any state.[19] This law made the state militias a part of the federal military system; they no longer answered only to the individual states.

In *Presser v. Illinois*, an 1886 Supreme Court case, the unanimous court ruled that the Illinois National Guard was "the regular organized volunteer militia of [the] state" and that no

[17] Patrick J. Charles, *Armed in America* (Amherst: Prometheus Books), 23-24.
[18] "The U.S. Army: America's First National Institution," U.S. Army, accessed February 16, 2023, https://www.army.mil/1775/.
[19] Militia Act of 1792, May 2-8, 1792.

other group was legally recognized as a military organization.[20] *Presser* effectively declared that the National Guards are the modern successor or equivalent of the state militias to which the Second Amendment refers, and the decision was reinforced by Congress when it passed the Militia Act of 1903, which reorganized the National Guard out of the militia system.[21] The National Guard itself seems to conform to this view as well; they claim that December 13th, 1636, the date on which the first Massachusetts militias were organized, is the birthday of the National Guard.[22] Today, however, the National Guard is not solely under the jurisdiction of the states; rather, the National Guard is considered a special unit of the American military that answers to both the President and the governors of states.[23] The National Guard, and therefore the state militias, was effectively absorbed into the national military.

It seems plausible that once the National Guard was incorporated into the rest of the military, the Second Amendment was also incorporated into the legal corpus surrounding the military. In other words, while the Second Amendment was originally designed to apply to state militias, the evolution of the relationship between the state militias and the standing military has resulted in an expansion of the meaning and role of the Second Amendment. The constitutional framework pertaining to the militias now applies to the National Guard and the rest of the standing military as well.

Anti-LGBTQ+ Laws in the Military

There are a number of reasons why a person might want to join the United States military. Putting aside the obvious points of patriotism and a desire for public service, working in the military can offer Americans who may not have many other options a job and steady salary, benefits like healthcare that might otherwise be out of reach, preference for future government positions, funding for their education, and retirement pensions.[24] Benefits like these can make a

---

[20] "Presser v. State of Illinois," Legal Information Institute (Cornell Law School), accessed February 17, 2023, https://www.law.cornell.edu/supremecourt/text/116/252.
[21] Militia Act of 1903, 32 Stat. 775 (1903).
[22] "About the Guard: How We Began," National Guard, accessed February 16, 2023, https://www.nationalguard.mil/About-the-Guard/How-We-Began/.
[23] Anshu Siripurapu, "A Unique Military Force: The U.S. National Guard," Council on Foreign Relations, last modified January 15, 2021, https://www.cfr.org/backgrounder/unique-military-force-us-national-guard.
[24] "VA Benefits for Service Members," U.S. Department of Veterans Affairs, last modified October 4, 2022, https://www.va.gov/service-member-benefits/.
"Veterans' Preference Information," U.S. Department of Labor, accessed February 17, 2023, https://www.dol.gov/agencies/vets/programs/vetspref.

substantial difference in an individual's life and help them to support themselves and their families. However, there are many limits on who can join the military. The government cites a variety of reasons for these limits, ranging from the rational to the absurd, and historically, one of the groups that has been discriminated against in military service is LGBTQ+ Americans.

The first reported case of an officer in the US military being discharged due to their sexuality was in February 1778, in the middle of the Revolutionary War, when two soldiers were found together in bed.[25] One of them was Lieutenant Gotthold Frederick Enslin, who was court-martialed and subsequently expelled from the Continental Army on the orders of George Washington himself. This is to say that military discrimination against gay Americans is as old as the country itself—or arguably even older, given that the United States had not formally won independence in 1778.

However, the United States did not formally ban gay individuals from the military or even technically forbid homosexual behavior until much later. In 1917, Congress adopted the Articles of War of 1916, which criminalized sodomy and the intent to commit sodomy.[26] Consensual sodomy remained criminalized in the military even after the Supreme Court case of *Lawrence v. Texas* declared anti-sodomy laws unconstitutional in 2003.[27] It was not until ten years later that Barack Obama signed the National Defense Authorization Act of 2014, repealing the ban.[28] These anti-sodomy provisions did not technically exclude homosexual Americans from joining the military, but in 1982, the Department of Defense created a policy stating that "[h]omosexuality is incompatible with military service."[29] Although this was the first explicit ban on homosexual members of the military, in practice, American soldiers could be discharged for homosexual activity throughout the nineteenth and twentieth centuries.[30]

"Military Programs and Benefits," USA.gov, last updated November 10, 2022, https://www.usa.gov/military-assistance.

[25] "Uniform Discrimination," Humans Rights Watch, accessed February 17, 2023, https://www.hrw.org/reports/2003/usa0103/USA0103FINAL-02.htm.

[26] Ibid.

[27] Jeremy J. Gray, "The Military's Ban on Consensual Sodomy in a Post-Lawrence World," *Washington University Journal of Law and Policy* 21 (2006): 379-406, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1235&context=law_journal_law_policy.

[28] Chris Johnson, "Defense bill contains gay-related provisions," *Washington Blade*, December 20, 2013, https://www.washingtonblade.com/2013/12/20/defense-bill-contains-gay-related-provisions/.

[29] William A. Woodruff, "Homosexuality and Military Service: Legislation, Implementation, and Litigation," 64 UMKC L. Rev. 121 (1995-1996): 131, https://scholarship.law.campbell.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1037&context=fac_sw.

[30] "Uniform Discrimination," Humans Rights Watch, accessed February 17, 2023, https://www.hrw.org/reports/2003/usa0103/USA0103FINAL-02.htm.

When Bill Clinton became President of the United States in 1993, he attempted to lift the ban on homosexuality despite public and military opposition. He failed, but as a compromise, Congress passed a law allowing homosexuals in the military to serve if their homosexuality remained a secret. This rule, often called "Don't Ask, Don't Tell," remained in place until 2010, and it had a number of flaws that allowed the military to continue discriminating against its gay members. For instance, while recruiters did not ask potential soldiers about their sexual orientation, the Pentagon continued to investigate serving members of the military, and members of the military with same-sex partners were forced to keep their relationships and major parts of their lives from their coworkers. The same-sex military partners were also denied the benefits and support available to heterosexual military spouses, and if someone was outed for whatever reason, they could receive an other-than-honorable discharge on the basis of their sexuality, which meant they could be denied benefits, including the education benefits of the GI Bill, pension payments, and health care.[31] As a result, outed servicemembers forced out of the military would not just lose their military career but access to many of the resources intended to help them build post-military careers. Due to the bigotry that the law enabled and the lack of evidence that one's sexual orientation impeded the military's organization and discipline in any way, Don't Ask, Don't Tell was repealed in 2010, allowing gay and lesbian servicepeople to serve openly as of September 2011. However, even with this policy change, veterans who were less-than-honorably discharged under the law did not necessarily regain access to benefits until ten years later. On the tenth anniversary of the repeal coming into effect, the Biden White House instructed the Department of Veterans Affairs to work with veterans who were discharged on the basis of their sexuality, gender identity, or HIV status.

The current guidelines regarding the sexuality and gender identity of military employees state that transgender and homosexual individuals are permitted to serve.[32] Still, LGBTQ+ servicemembers may be afraid to live openly due to fears about discrimination and harassment or

---

[31] Quil Lawrence, "Veterans Discharged Under 'Don't Ask Don't Tell' Get A Chance for VA Benefits," *All Things Considered*, NPR, September 20, 2021, https://www.npr.org/2021/09/20/1039071130/veterans-discharged-under-dont-ask-dont-tell-are-now-eligible-for-va-benefits.

[32] "LGBTQ in the Military," Military One Source, U.S. Department of Defense, accessed February 26, 2023, https://www.militaryonesource.mil/military-life-cycle/friends-extended-family/lgbtq-in-the-military/.
"5 Things to Know About DOD's New Policy on Military Service by Transgender Persons and Persons With Gender Dysphoria," U.S. Department of Defense, accessed February 26, 2023, https://www.defense.gov/News/News-Stories/Article/Article/1783822/5-things-to-know-about-dods-new-policy-on-military-service-by-transgender-perso/.

concerns that a rollback of LGBTQ+ rights in the future will lead to the reimplementation of a policy like "Don't Ask, Don't Tell."

Sexuality, Gender, and the Fourteenth Amendment

There have been many constitutional arguments against and challenges to laws limiting the membership of LGBTQ+ Americans in the military, but most of them cite the First, Fifth, and Fourteenth Amendments, using free association, due process, and anti-discrimination grounds.[33] However, they have not had much success in the court system, and this is not only due to the presence of homophobia and transphobia in society; there are fair legal arguments against using the Fifth and Fourteenth Amendments to strike down these laws. Both courts and academics have thoroughly examined the debates over the validity of these constitutional challenges. However, to my knowledge, there is no apparent scholarship suggesting that the Second Amendment might be used to overrule these laws.

The Fourteenth Amendment is almost universally understood to forbid discrimination on the basis of sex, with Supreme Court cases such as *Reed v. Reed* and federal laws like the Civil Rights Act of 1964 using this interpretation.[34] The Civil Rights Act of 1964 was a response to the promise of the Fourteenth Amendment and an attempt to make the principles laid out in the amendment legally practical and usable, and the law's Title VII prohibits, among other things, discrimination on the basis of sex.[35] It is clear that our legal system relies on the understanding that under the Fourteenth Amendment, sex is a protected category.

Despite this, there is debate about whether the Fourteenth Amendment protects gender identity and sexuality. Opponents of such protection argue that different LGBTQ+ groups are not subject to the same level of discrimination as the traditionally acknowledged suspect classes, including racial and religious minorities, or quasi-suspect classes like sex. The main argument is that gender identity and sexuality are not "obvious, immutable, or distinguishing characteristics," unlike, for instance, the physical markers that accompany race, ethnicity, and sex.[36] Under this

[33] See *McVeigh v. Cohen*, *Witt v. Department of the Air Force*, and *Log Cabin Republicans v. United States of America*.
[34] "Timeline of Major Supreme Court Decisions on Women's Rights," ACLU, accessed February 26, 2023, https://www.aclu.org/sites/default/files/field_document/101917a-wrptimeline_0.pdf.
"Legal Highlight: The Civil Rights Act of 1964," U.S. Department of Labor, accessed February 26, 2023, https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964.
[35] "Legal Highlight: The Civil Rights Act of 1964," U.S. Department of Labor, accessed February 26, 2023, https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964.
[36] *Lyng v. Castillo*, 477 U.S. 635 (1986).

argument, since one's sexuality and gender identity are not necessarily obvious, it is harder to discriminate against someone on the basis of these qualities, and thus, a high standard of judicial scrutiny is unnecessary. Moreover, since these identities can change over time, some people argue that there are ways, such as the controversial pseudomedical practice of conversion therapy, that someone can avoid this type of discrimination. On the other hand, proponents of these protections point out that gender identity and sexuality are understood differently depending on one's biological sex and that any discrimination on the grounds of one's gender or sexuality is also on the grounds of one's sex. As it turns out, however, there is legal precedent suggesting that gender or sexuality-based discrimination is legally considered sex discrimination. In *Bostock v. Clayton County, GA*, the Supreme Court held that firing an employee due to their sexual orientation is a violation of Title VII.[37] Since Title VII derives from the Fourteenth Amendment, the outcome of *Bostock* suggests that sexual orientation's derivation from sex means that, like sex, sexual orientation is a protected category against which people cannot (easily) legally discriminate. In this way, discrimination on the basis of one's sexuality can be held to violate the Constitution.

The Legal Case

A hypothetical legal case relying on a military reading of the Second Amendment is fairly simple. The Framers' intention in creating the Second Amendment was to protect the existence of the state militias, which includes the right of the people to join and serve in state militias. The state militias of the late eighteenth century, of course, no longer exist, but there is legal evidence that the National Guard is the officially recognized successor to those militias. Since the National Guard now occupies a peculiar position in which it answers to both the President and state governors, it has effectively been incorporated into the standing army, and by absorbing the state militias into the standing military's body, the military also absorbed the obligations of the militias, including the Second Amendment's protection of those seeking to join the militias.

Due to the Fourteenth Amendment's Equal Protection Clause and the widespread understanding that it prohibits discrimination based on sex, along with the legal evidence that it prohibits discrimination on the basis of sexual orientation or gender identity, the Second

[37] *Bostock v. Clayton County, GA*, 590 U.S. ___ (2020).

Amendment right to join the military and serve one's country belongs to Americans regardless of their LGBTQ+ identity.

Even if people have the right to join the military under the Second Amendment, there *are* qualities that can act as disqualifiers. The government *can* prevent certain types of people from joining the military if it impedes military discipline or efficacy; after all, the Second Amendment refers to "a well-regulated Militia." This means that in order to create any new bans on LGBTQ+ military personnel, the United States military would need to provide evidence that limitations on gay or trans servicemembers are necessary to maintain the discipline and regulation of the military. Unless they can provide this evidence–and scholarly argument as well as the absence of an effect from the repeal of "Don't Ask, Don't Tell" suggest that no such evidence exists–then sexuality and gender identity are protected categories against which the government cannot discriminate for military purposes.

Conclusion

Despite the historical and legal evidence in favor of this argument, it is difficult to imagine any lawsuit being brought on these grounds in the near future since current military policy allows servicemembers to serve openly regardless of their sexuality. At least for this particular issue, nobody has standing to bring the case in the first place, although it is possible that there are people who could use this interpretation of the Second Amendment to bring related cases against the United States government. For instance, a woman in the Armed Forces would be able to challenge any restrictions on women in combat that still exist, and men might be able to use the principles of this case to challenge the sex-specific burden of Selective Service.[38]

More importantly, however, this is an unusual and fringe reading of the Second Amendment, and it's hard to picture many, if any, judges espousing it in today's world. Although this is a valid application of the Framers' intent and the legal principles set out in the Second Amendment, it would take a considerable change in the legal and cultural understanding of the Constitution for any argument based on this interpretation to succeed in court. At the moment, the military history of the Second Amendment probably does not offer a very practical way to reshape civil rights for soldiers or access to the military.

[38] Technically, all combat positions in the US military have been open to women since 2016. However, in practice, the implementation of the new rules is not yet complete.

The Second Amendment entails much more than we normally suspect, and we do the amendment a disservice by thinking of it in the narrow terms that the Supreme Court set down in 2008. The historical record very clearly establishes that the Second Amendment is supposed to protect the states' right to maintain militias and the people's right to serve in those militias.

But *D.C. v. Heller* established that the Second Amendment protects individual gun ownership, and this is now the law of the land. I believe that, at the very least, this interpretation of the Second Amendment's potential applications in our twenty-first-century world is *no less* plausible than the one that the Supreme Court set out in *Heller*.

While this argument is legally sound, it may seem less-than-practical in the current political climate. Nevertheless, legal arguments that are not currently in vogue in the legal community still have value, both academically and as a roadmap for future efforts to secure constitutional rights.

The Second Amendment occupies a controversial and delicate position in American politics due in large part to very distinct understandings of what the amendment actually says and what the Founding Fathers meant to accomplish via the amendment. This reading of the Second Amendment will not settle the argument, but it reveals a different set of problems and controversies that the amendment might play a role in addressing. Shifting the focus of the Second Amendment from individual gun ownership to the social role of public defense would exemplify a change that might resolve many of our country's long-standing issues: a shift from individualism to civic society that could, in its own way, reunite us.