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Social Media: Do We Have The Right To Not Be Offended?

Rushil Vashee | Georgetown University

Edited by Kiran Dzur, Ben Erdmann, Charles Huang, Clara Hu, Joyce Liu, Kylie Gall

Abstract

America hails freedom of speech as one of the most critical aspects of its democracy. However, since the rise of social media in the mid-2000s, the clashing values of protecting free speech and protecting people from offensive speech have been difficult to balance. Recently, the increasing pervasiveness of social media has tipped the balance to favor the latter. In 1978, the United States Supreme Court allowed the Federal Communications Commission to regulate offensive and indecent speech in the specific medium of radio broadcasting. In 2009, it expanded that power to include television broadcasting. As a result, many scholars believe that the FCC should next strip users of their right to free speech on social media, despite social media's liability protections under the Communications Decency Act. While many categories of speech rightfully remain unprotected by the First Amendment, though, offensive speech should never become one of them, primarily because it is so difficult to define what is offensive. Majoritarian bans of offensive speech could cause detrimental suppression of minority voices, as different individuals may categorize the same speech as either revolutionary or offensive. Therefore, the courts must continue to preserve free speech as a paramount democratic concept..

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I. Introduction

Germany's controversial 2018 Network Enforcement Act set the stage for the European Union's contemporary bans on free speech. The Act, known as the NetzDG, attempts to regulate offensive speech online, mandating that every social media company "removes or blocks access to all unlawful content immediately" to avoid facing regulatory fines.[1] The law extends beyond content that is "manifestly unlawful,"[2] forcing social media companies to interpret ambiguous exceptions to free expression, like if speech violates the "right to personal honor."[3] These broad and ill-defined bans—supported by Article 10 of the European Convention on Human Rights—are becoming a trend among European Union nations, which have collectively attempted to impose a vast array of restrictions banning offensive speech on social media networks in their nations.[4]

For Germany, NetzDG has induced social media platforms to overcorrect by banning speech that is offensive, though not illegal.[5] Of the more than half a million online posts flagged as illegal under the NetzDG within the first six months of the act's passage, the majority were insult-related offenses.[6] Allegedly illegal content on YouTube predominantly consisted of content flagged as "hate speech," followed by "insults."[7] Insult-related content was flagged the most often on Facebook[8] and the second-most often on Twitter.[9] Recently, though, the delineation between insulting and discriminatory speech has become blurry. Some instances of offensive speech that garner complaints, such as satirical commentaries on social and political issues, are likely perfectly acceptable to many users. For example, when German politician Beatrix von Storch sent a racist tweet targeting Arabic-speaking Muslims living in the United Kingdom, Twitter was understandably forced to suspend her account. However, the NetzDG further forced the suspension of humor magazine *Titanic* for satirically mocking her

comments, extending its restrictions to creative content.[10] If Twitter did not suspend both users, it could have faced fines under the NetzDG.

The drastic extent of censorship by social media companies under the NetzDG prompted many opponents to speak out against the policy. Some argued that the NetzDG places too much authority in the hands of private social media companies, notably "the power to decide what is free speech and what is hate speech."[11] Recently, the United Nations also expressed its disapproval of Germany's law, citing freedom of speech. The UN Human Rights Committee noted its concern "that these provisions and their application could have a chilling effect on online expression" since the NetzDG incentivizes social media companies to err on the side of censorship when they cannot decide if speech is offensive, hateful, or neither, just as they did for *Titanic*.[12]

Despite Germany's wide grant of discretion to social media companies, the fluidity of societal categorizations of speech makes it dangerous for any individual entity to decide what constitutes offensive speech, not just technology companies. No company or government is capable of effectively and objectively identifying which speech should be considered prohibitively offensive. While the intensifying debate over if and how the courts should regulate offensive speech has global implications, the complexity of the American free speech precedent has caused unprecedented tension between the conflicting values of freedom and privacy.

First, this paper will examine the legal precedent surrounding the regulation of offensive speech on various platforms, including digital media. Section II will lay out the relevant case law that has established the Court's definition of offensive speech over the last 102 years, drawing increased focus to cases where the Court set precedent in the regulation of novel mediums like radio and television broadcasting. Section III will outline the modern controversy surrounding speech regulation on social media, using quotations from leaders of

social media companies to articulate the heated debate over classifying social media sites as "content platforms" or "content publishers." This discussion inevitably involves Section 230 of the Communications Decency Act; therefore, Section IV will introduce Section 230's enactment by the Federal Communications Commission (FCC) and subsequently proposed revisions by members of Congress. It will also discuss the Act's relation to standing Supreme Court precedent, connecting the removal of social media's "content platform" designation to government regulation of offensive speech. Section V will walk through potential disadvantages, drawing from classical liberalist theories to argue against such revisions.

Section VI, broken up into VI-A and VI-B, will examine two important counterarguments surrounding offensive speech's alleged unconstitutionality and on-balance detriments to society. It will rebut the ideas that freedom of speech harms vulnerable populations like children and that it violates the right to privacy guaranteed by existing Supreme Court precedent. Section VII, in the interest of protecting free speech, will synthesize the argument that the courts should avoid complete bans on content found to be offensive, instead following earlier precedent to allow potentially offensive speech to exist in the public square.

To follow, Section VIII will reconcile the established position on offensive speech with a different position on another category of speech: incitement of illegal conduct. The paper will draw from social theory and existing jurisprudence to argue why incitement—and other unprotected categories of speech like it—deserves different levels of scrutiny than offensive speech. Finally, Section IX will offer closing thoughts on the state of social media and offensive speech in modern society, emphasizing the necessity of government to protect the multiplicity of viewpoints that define American freedom, liberty, and diversity.

II. What's Offensive? A Look at Relevant Case Law

The landmark Supreme Court decision in *Schenck v United States*[13] was the first of its kind to hold certain kinds of speech to the same rigid standards as harmful conduct. That ruling upheld the Espionage Act of 1917, which prohibited any attempt to undermine U.S. war efforts by affirming Charles Schenck and Elizabeth Baer's convictions for distributing anti-draft leaflets during World War I. Justice Holmes, who authored the Court's opinion, here established the clear and present danger test, which determines if speech should be banned by examining its "proximity and degree" in order to ascertain whether it will "bring about the substantive evils that Congress has a right to prevent."[14] As the predominant precedent at the time, it distinguished speech protected by the First Amendment from unprotected speech that had a reasonable chance of causing action which might harm the common good.

Later, the Court's decision in *Chaplinsky v New Hampshire*[15] began to clarify the kinds of speech unprotected by the First Amendment by applying Justice Holmes' test. In this case, the Court affirmed Walter Chaplinsky's conviction under New Hampshire's Offensive Conduct law for "offensive, derisive, or annoying" comments he made to the city marshal while the marshal was walking "lawfully in any street or public place."[16] *Chaplinsky* set the precedent for fighting words, "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[17] Interestingly, Justice Murphy's decision also limited the First Amendment's protection from "the lewd," "obscene," and "profane," thereby expanding the government's ability to regulate speech beyond the *Schenck* precedent.[18]

Finally, in 1971, the Court's holding in *Cohen v California*[19] dealt directly with offensive conduct. In the events leading up to the appeal, 19-year-old Paul Cohen wore a jacket in the Los Angeles County Courthouse bearing an expletive

as part of a statement about the United States Selective Service System. Cohen was convicted for displaying offensive words in a public place under a California law enacted in 1872, nearly 100 years before the incident. Among other things, *Cohen* revealed why cases of offensive speech often have such contradictory precedent: the age of statutes. For example, the expletives written on Cohen's jacket could become more or less indecent as society's preferences change with time.

Upon appeal to the Supreme Court in 1971, the justices were tasked with deciding whether offensive conduct that did not directly inflict injury was protected under the First Amendment. By effect, the Court had to decide whether offensive speech like the words printed on Cohen's jacket would receive a different level of scrutiny than other categories of speech like obscenity, even though they did not consider the word printed on Cohen's jacket obscene by the standard set in *Roth v United States*.[20] Reversing the lower court, Justice Harlan wrote that the Supreme Court "cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[21] Therefore, *Cohen* set the precedent that the government may not regulate offensive speech since it does not "fall within one or more of the various established exceptions" to the First Amendment.[22]

However, the freedom of expression granted by *Cohen* was later restricted as the courts considered new mediums of communication, notably radio and television broadcasts. In *FCC v Pacifica*,[23] the FCC enforced 18 USC § 1464 (1948)[24] against the New York City FM radio station WBAI for broadcasting a segment that included George Carlin's comedy monologue titled "Filthy Words."[25] Before the Court was the question of whether the profane speech also fell within one of the established categorical exceptions to free speech like obscenity or fighting words, or whether the profane speech itself was to be considered unprotected. The Court narrowly concluded the latter, ruling in a five-

to-four decision that the broadcast was "indecent but not obscene" and allowing it to be regulated by the FCC.[26]

Notably, the FCC again used a decades-old law to take action against the Pacifica Foundation in 1978. Over time, expletives have become more common, as American literature used the seven dirty words from Carlin's monologue "28 times more often in the mid-2000s than the early 1950s."[27] Consequently, it is increasingly difficult to define unprotected speech as statutes fail to keep up with the social evolution of language.

The precedent established by *Pacifica* was nearly reexamined in *FCC v Fox Television Stations*,[28] which was also set to consider the FCC's ability to regulate offensive or expletive speech on television media after Fox aired a profane segment of the Billboard Music Awards. However, the Court did not address the constitutionality of the FCC's regulation because it first rendered the FCC's fines "unconstitutionally vague" under the Due Process Clause.[29]

III. The Modern Problem: The Rise of Social Media

While the Court has wrestled with the emergence of mediums like radio and television in the past, the more modern emergence of social media presents a unique problem. Described as everything from "important venues for users to exercise free speech rights protected under the First Amendment"[30] to a "breeding ground for malicious, abusive, and offensive communications,"[31] social media sites have come under intense scrutiny for their unprecedented ability to disseminate a wide range of information to mass quantities of people in seconds.

At the center of this controversy is whether social media companies should be considered "content platforms" or "content publishers." In *Pacifica*, the Court ruled that radio stations like WBAI were the former, making them liable for broadcasting unprotected content regardless of who authors it. If social media

companies are held to the same content publisher standard, they could also be regulated by a federal agency for content posted on their sites. However, if social media companies continue to be held to content platform standards, the only party liable for speech on their site would be the individual or organization that directly expressed the unprotected content. If a user posts offensive speech on a social media site, the classification of that site as a content platform or content publisher directly impacts which party bears the liability and succeeding regulation.

The leaders of American social media giants like Twitter and Facebook have publicly expressed the opinion that their sites should remain platforms, not publishers. In a September 2018 hearing before the Senate Select Committee on Intelligence, then Twitter CEO Jack Dorsey articulated that he views Twitter as "hosting and serving conversations," repeatedly categorizing the social media site as an online version of a "public square."[32] Similarly, in an April 2018 hearing before the Senate Commerce and Judiciary Committees, CEO Mark Zuckerberg noted that he considers Facebook "to be a platform for all ideas."[33] Even Snapchat came under recent scrutiny when CEO Evan Spiegel refused to acknowledge how Snapchat benefits from being classified as a platform. In a scathing 2017 op-ed published in Axios, Spiegel blasted other companies for fueling fake news and using algorithms to promote certain content while he touted Snapchat's revolutionary separation of "social" from "media."[34] However, many have categorized Snapchat as an equal part of the problem, especially as the platform's "Discover" news feed, which uses algorithms to prioritize specific content, has gained popularity. Still, the predominant consensus is that leaders of social media companies prefer the designation of platform rather than publisher.

On the other hand, many scholars and activists have recently called for social media companies to be statutorily reclassified as content publishers, not platforms. Many cite examples of recent social media policies, like a 2018 Twitter action that altered the visibility of certain content suspected to violate community

guidelines before such content was confirmed to be in violation. Twitter had exercised its authority to deprioritize certain speech without justification from precise content guidelines, thus removing a check on itself meant to prevent editorialization. Whereas a content platform must clearly defend any interference with which speech is displayed, a content publisher retains full discretion over their content prioritization algorithm. Twitter called its preemptive regulation of speech "proactive,"[35] but certain scholars argued that its "increased editorialization may push the content-moderation practices closer to the 'publisher' category than they were before."[36]

Some social companies have benefited from the advantages afforded to publishers. In 2018, Sonal Mehta, an attorney representing Facebook, "invoked publisher discretion to argue that Facebook's decisions about what to publish are protected under the First Amendment as a newspaper's or publishing house's would be."[37] Mehta argued in favor of comparing Facebook to a newspaper, which would be criminally liable for content in its published works. Her reasoning was simple: as a publisher, Facebook was allowed to decide when to give or cut off "long-term access to the site's huge amounts of valuable personal data" to third-party companies.[38] Still, when it came to the exercise of editorial discretion in the promotion of content, Zuckerberg told Congress that Facebook was merely a platform, not a publisher.[39]

The courts have struggled with this distinction since the early 1990s. In the 1991 New York District Court case *Cubby v CompuServe*,[40] the Court ruled that CompuServe, one of America's original "Big Three information services,"[41] could not be held liable for defamatory claims made against the plaintiff. The district court agreed with CompuServe's argument that it was "a distributor, and not a publisher," and that it therefore could not "be held liable for the statements."[42] An additional important note is that the district court based its

ruling on the condition that CompuServe "did not know and had no reason to know" of the defamatory statements made on its platform.[43]

Just four years later, New York constrained the precedent set in *CompuServe* to its factual basis with its ruling in the 1995 New York Supreme Court case *Stratton Oakmont v Prodigy*.[44] In this case, the Court found Prodigy Communications Corporation, another one of the Big Three information services, liable for offensive content on its site. The Court found,

> By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and "bad taste", for example, PRODIGY is clearly *making decisions as to content* (see, Miami Herald Publishing Co. v. Tornillo, supra), and such decisions constitute *editorial control*. (Id.) That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is compelled to conclude that for the purposes of Plaintiffs' claims in this action, PRODIGY is a *publisher* rather than a *distributor* [emphasis added].[45]

Prodigy, like CompuServe, did not publish self-created content. But to promote itself as a "family oriented computer network," Prodigy emphasized its "automatic software screening program" that "exercised editorial control over the

content of its computer bulletin boards."[46] Because it exercised this editorial discretion, the New York Supreme Court treated Prodigy like any other content publisher and found it liable. The fallout from *CompuServe* and *Prodigy* fueled the raging debate between the conflicting categorizations of internet media companies as platforms or publishers.

IV. The Congressional Response: The 26 Words that Created the Internet

To mitigate this tension, Congress passed the Communications Decency Act (CDA) as a part of the Telecommunications Act of 1996 nearly unanimously.[47] With proponents citing its ability to protect small, emerging online media services from lawsuits that discouraged the regulation of harmful content, the bill was signed into law by President Bill Clinton in February of 1996. In a statement now known as the twenty-six words that created the internet, Congress found that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[48] With the present emergence of social media sites, this code (Section 230 of the CDA) has been used to exempt companies like Twitter and Facebook from criminal liability for content created by individual users and posted to the platforms.[49]

Despite Section 230's ability to formalize the classification of social media sites as content platforms for the better part of two decades, its provisions have come under intense scrutiny as of late. Online social media companies sometimes remove content from their sites on the basis of offensiveness, much like Prodigy's actions in 1995. However, new technology complicates the debate beyond earlier judicial precedent. Far more often, social media sites use systems like Facebook's News Feed algorithm to deprioritize certain offensive content

rather than deleting it. These decisions about which content receives limited viewership on the site are typically based on community guidelines rather than on categorical exemptions to the First Amendment, and they often extend "much deeper than the law requires."[50] By allowing protected offensive speech to remain on the site while exercising editorial discretion over its level of visibility to users, companies like Facebook and Twitter effectively operate within a loophole of the publisher versus platform debate. Critics of Section 230 suggest that social media sites should be considered publishers in order to close that gap, thus allowing them to be regulated by the FCC like any newspaper or radio channel.

During the 116th Congress, several bills attempted to amend Section 230 in that way, clarifying "the liability protections interactive computer services receive for hosting or removing specific types of content." Some of these highly-popular proposals would have "allowed social media operators to be held liable for not removing objectionable content under certain conditions or in a timely fashion."[51] While none of them passed in that term, many more have already been introduced on both sides of the aisle in the 117th Congress, including the DISCOURSE Act[52] by Sen. Marco Rubio (R-FL) and the Protecting Americans from Dangerous Algorithms Act[53] by Sen. Ben Ray Luján (D-NM). Even FCC Chairman Ajit Pai released a statement[54] notifying the public that the commission would "move forward with a rulemaking" to clarify Section 230's meaning, increasing its regulatory power in the digital media industry.

Despite disagreement, the FCC maintains that it can extend its power in this way. Six days after Pai's statement, FCC General Counsel Thomas M. Johnson concluded that "the FCC has the authority to interpret all provisions of the Communications Act including amendments such as Section 230,"[55] citing earlier Supreme Court precedent. Johnson claims these decisions affirmed that (1) the FCC's rulemaking authority "extends to the subsequently added portions of the Act" like Section 230 and (2) the FCC may reasonably interpret "all

ambiguous terms in the Communications Act."[56] In this instance, Pai eventually backed down due to social, rather than legal, pressure.

By revising Section 230, the FCC would gain the authority to regulate what it deems to be offensive, expletive, and/or hateful speech. If social media sites are considered "publishers just like newspapers and broadcasters, just like radio and TV networks," the FCC can hold them to the *Pacifica* precedent.[57] Many scholars support such regulation, asserting that because algorithms permit certain speech to be "displayed front and center" without a user's "desire to initially see it," offensive speech on social media "can be regulated under the commerce clause."[58]

V. The Wrong Idea: Why Regulation Causes More Harm

However, while social media companies have increased their reach exponentially over previous decades, attempts to expand regulatory authority cause more harm than benefit. Whether or not the FCC assumes control of social media regulation through amendments to Section 230, existing restrictions on the expression of potentially offensive speech by social media companies themselves are already detrimental to the health of the public square. The reason is simple: some areas of speech do not require harsh regulation and censorship. And when we consider that social media "has functionally become our public square," the restriction of speech simply because it is considered offensive by the majority would constitute an interventionist government at best and oppressive majoritarianism at worst.[59]

For content deemed offensive rather than physically dangerous or otherwise unprotected by the First Amendment, freedom of expression along the lines of John Stuart Mill's "marketplace of ideas"[60] allows for healthy discussion of conflicting ideas and, consequently, permits the transformation of societal

norms in real-time, minus the legislative lag.[61] In this case, legislative lag refers to the time it takes Congress to redetermine what constitutes offensive speech based on society's norms.

Recently, studies have backed Mill's "marketplace of ideas" in contexts specific to offensive speech on social media. A December 2021 study examining the effects of "empathy-based counterspeech" on Twitter attempted to reduce instances of offensive speech by exposing those who use hate speech to opposing viewpoints as part of "empathy treatment" without banning their original posts.[62] The study concluded that "users assigned to the empathy treatment sent, on average, 1.3 fewer xenophobic tweets and 91.6 fewer total tweets, and were 8.4 percentage points more likely to delete the original xenophobic tweet."[63] Without the protection of the original offensive speech on social media platforms, these lasting results would not be achieved, as users whose messages no longer exist would never be exposed to counterspeech. In fact, anecdotal hypotheses suggest that if banned, these users would "disperse" their offensive speech rather than reduce it.[64] Therefore, it is far more effective to protect the offensive or expletive speech and expose it to the public square, thus allowing it to be combated by empathetic counterspeech from opposing perspectives.

Speech considered offensive, expletive, or otherwise ordinarily protected by the First Amendment should continue to roam the public square of social media. Weighing the importance of freedom of speech and expression with relatively low potential for social harm, these categories of speech should exist unregulated in the public.

VI. Examining Counterarguments

Naturally, the argument to generally allow offensive speech to exist in social media's public square is not without opposition. The following represent

two of the most cited reasons in favor of speech regulation on social media, as were established for radio broadcasting in *Pacifica*.

A. Protecting Children

Perhaps the most common argument in opposition to offensive speech is the importance of protecting the interests of children. In *United States v American Library Association*,[65] which found it constitutional to mandate public schools and libraries to block indecent material online, the Court established that the government has a compelling interest in specifically protecting children from such material. Fortunately, the current wording of Section 230 addresses this issue.

Section 230(d) establishes that an interactive computer service provider, upon entering into an agreement with a customer, shall "notify such customer that parental control protections are commercially available that may assist the customer in limiting access to material that is harmful to minors."[66] These parental controls are presently used to protect children, too: a 2018 study by Pew Research Center found that 52% of parents say they "at least sometimes use parental controls to restrict which sites their teen can access."[67] As a result, 90% of parents say they "are very or somewhat confident in their ability to teach their teen about appropriate online behavior."[68] Parental controls are thus an effective means of protecting children from offensive content while still allowing adults to view content protected by the First Amendment without undue governmental regulation.

The complete prohibition of offensive content for the sole purpose of protecting children would be unconstitutional, no matter how compelling the interest. This judicial theme was first established in *Erznoznik v City of Jacksonville*, which found that "censorship of the content of otherwise protected speech cannot be justified on the basis of the limited privacy interest of persons

on the public streets."[69] This precedent has been used to protect content from outright bans based on its harmful effect on specific populations. The theme in *Erznoznik* was then promulgated in *Stanley v Georgia*, where the Court ruled that a government interest "cannot, in every context, be insulated from all constitutional protections."[70] The Court explicitly applied this precedent to the case of protecting children on social media in *Packingham v North Carolina*.[71] Now, the government may not regulate otherwise protected speech on social media simply to further its interest in protecting children.

B. Safeguarding Privacy

Another widely cited objection is the right to be let alone, more colloquially explained as the right of an individual to not be bothered by offensive or expletive content in the privacy of their home. This doctrine was established in *Rowan v Post Office Department*, which upheld that persons "may request the Postmaster General to issue an order directing the sender and his agents or assigns to refrain from further mailings to the named addressee" if they no longer wish to be bothered by certain mailings.[72] In a similar vein, proponents of offensive speech regulation on social media argue that a user has the right to not be bothered by offensive content on their phones while in the privacy of their home.

However, these contexts are separated by critical differences. *Rowan* protected privacy because a homeowner cannot easily destroy their mailbox to prevent unwanted mailings. By contrast, a social media user can employ one of many available strategies to end their viewership of offensive content. Therefore, the right to privacy need not be protected by banning all potentially unwanted speech from all social media platforms.

VII. The Solution: Reclaiming Free Speech on Social Media

Thus, the courts should revert to the precedent set in *Cohen*,[73] referring at times to the dissent of Justice Brennan in *Pacifica*[74] and of the late Justice Ginsburg in *FCC v Fox Television Stations, Inc.*[75] in novel attempts to address content regulation on social media.

At its core, Justice Harlan's reasoning surrounding majoritarian rule in *Cohen* should continue to stand today. The prohibition of offensive words, whether in a courthouse or on social media, can "empower a majority to silence dissidents simply as a matter of personal predilections."[76] This majority empowerment is a natural result of banning speech given the subjective nature of offensive speech. Justice Harlan articulated that subjectivity in his decision, writing that "one man's vulgarity is another's lyric."[77] Speech considered perfectly acceptable by some people may be offensive to others and vice versa. Justice Ginsburg's dissent to the Court's opinion in *Fox* similarly concluded that "words unpalatable to some may be "commonplace" for others, or "the stuff of everyday conversations."[78] Without a unanimous interpretation of offensive or unpalatable speech, it is the majority that decides what is offensive and subsequently acts to restrict such speech from the public square.

Because oppressive majority rule can be detrimental to representation, the offense taken by a user of a social media site is a necessary side effect "of the broader enduring values which the process of open debate permits us to achieve," as Justice Harlan articulated in *Cohen*.[79] That value—protecting minority opinions—dates to the writing of the United States Constitution. Referring to factions, James Madison famously wrote that "ambition must be made to counteract ambition."[80] For many of the founding intellectuals, the diversity of

perspectives in the public square was and should continue to be the single most important factor in facilitating effective representation in such a large republic.

The advantages of allowing offensive content to enter the public square are clear in the protection of minority opinions against a tyrannical majority. Even the disadvantages can be mitigated when applied to the context of social media. The most important disadvantage, of course, is that viewers of offensive content will take offense, becoming annoyed or hurt because of the content they view. Justice Brennan makes note of this concern in *Pacifica*, accepting "without question" that "the privacy interests of an individual in his home are substantial," but still reasons that the potential harm is minimal.[81] As he explains in his dissent, any unwilling listener can easily "switch stations or flick the 'off' button" with little effort to end their offense. Such reasoning implicitly follows the precedent of *Cohen*, since it is just as easy—if not easier—to turn off a radio as it is to leave a courthouse. On social media, users can quickly unfollow, block, or mute the user publishing offensive content. At worst, they can turn off their phones or delete the social media application.

In sum, the protection of minority opinions far outweighs the momentary inconvenience a social media user experiences before they can end their viewing of a post. Therefore, while measures can be taken to increase the ease with which users can shield themselves from unwanted content, the content itself should not be banned from all willing and unwilling viewers.

VIII. Categorical Exemptions: Why Isn't All Speech Allowed?

Not all speech deserves to be disseminated on social media. While offensive speech carries little social harm and benefits Mill's ideal of a marketplace of ideas, other categories of speech have been historically

unprotected under the First Amendment. As Justice Brennan pointed out in his *Pacifica* dissent, "the Carlin monologue aired by Station WBAI does not fall within one of the categories of speech" that "is totally without First Amendment protection."[82] These categories—incitement, fighting words, true threats, speech integral to criminal conduct, and child pornography, among others—should continue to receive a lower level of scrutiny. Given the recent salience of these issues following the events of January 6, 2021, the following paragraphs will focus on the reconciliation of offensive speech's deregulation with incitement speech's regulation.

Incitement speech should continue to be regulated more than merely offensive or expletive speech for two reasons. First, it is uniquely pervasive. Given that a central purpose of incitement speech is to recruit new members to a violent cause, it is more likely to enter unsolicited into a person's home than offensive speech. Using the Aristotelian tools of ethos, pathos, and logos, inciters "have the ability to intuit the angry state of mind of the populace" then "adeptly direct the angry crowd towards thoughts of vengeance."[83] The words "populace" and "crowd" crucially imply that for incitement to be effective, it must pervade the hearts and minds of an entire audience, instilling anger and then focusing it toward a single cause. For these reasons, inciters often use strategies like "charisma" and "fear"[84] to encourage masses of people to mobilize.

This is problematic for two reasons. First, the Court has consistently regarded advocacy as the primary aspect of the incitement test; its landmark ruling in *Brandenburg v Ohio*[85] first examines whether the speech can be considered advocacy before considering its imminence and likeliness. Second, the unique pervasiveness of incitement speech violates the right to be let alone established in *Rowan*. Because a primary purpose of incitement speech is to reach the populace, the many strategies a user may employ to hide offensive content are unlikely to work against incitement speech. Thus, the high likelihood that

unwilling viewers of incitement speech on social media are still impacted by its pervasive techniques mandates its stricter regulation.

Second, its consequences are more severe. The effect of the physical harm caused by incitement speech is more drastic than the effect of individual persons taking offense to rude comments. The Court's decision in *Brandenburg*—which was later promulgated in and applied to *Hess v Indiana*[86] and *NAACP v Claiborne Hardware Co.*[87]—made clear that in order for speech to be classified as unprotected incitement, it must be "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action."[88] Such incitement speech has empirically been harmful and even deadly. Social science and economic research have shown that "inciting speech can contribute to crimes" even when it merely constitutes "a contributing factor and/or an enabling condition."[89] Thus, if speech published on social media meets the high legal threshold for incitement speech, it should not be immune to government regulation given the likely consequence of lawless action, including but not limited to that which involves physical harm.

IX. Conclusion

Decisions made by the executive, judicial, and legislative branches in the coming months or years about regulations imposed on social media promise to leave an important impact for generations to come. Given the current prevalence of hate speech, offensive words, and expletive phrases, the push to regulate social media is understandable. However, the long-term consequences of such majoritarian enforcement can be detrimental. From silencing minority opinions to banning speech that is perfectly acceptable to many members of the online population, government regulation of content on social media which resembles its regulation of content on radio or television creates more harm than good.

Even in Germany, a country known as one of the biggest advocates of government action that bans hateful and offensive speech from social networks, the effects of government policies are controversial. Most free speech scholars agree that such policies threaten freedom of expression globally, and even the strongest proponents of these policies cite statistics about the reduction of hate speech that are murky, at best.[90]

For social media, the debate between further bans on offensive speech and an extended realization of Americans' First Amendment rights will rest in the power of elected officials and appointed justices. Hopefully, the United States will continue to protect the public square, even though it looks a little different these day

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[13] *Schenck v United States*, 249 U.S. 47 (1919).

[14] *Ibid.*, 52.

[15] *Chaplinsky v New Hampshire*, 315 U.S. 568 (1942).

[16] *Ibid.*, 569.

[17] *Ibid.*, 572.

[18] *Ibid.*

[19] *Paul Robert Cohen v California*, 403 U.S. 15 (1971).

[20] *Samuel Roth v United States*, 354 U.S. 476 (1957).

[21] *Paul Robert Cohen v California*, 403 U.S. 15, p. 26 (1971).

[22] *Ibid.*, 24.

[23] *Federal Communications Commission v Pacifica Foundation*, 438 U.S. 726 (1978).

[24] Broadcasting Obscene Language, 18 USC § 1464 (1948).

[25] George Carlin. 1973. "Filthy Words." Transcript of speech broadcast on WBAI 99.5FM.

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[28] *Federal Communications Commission v Fox Television Stations, Inc.,* 613 F. 3d 317 (2012).

[29] *Ibid.,* 10.

[30] Valerie C. Brannon, "Free Speech and the Regulation of Social Media Content," Congressional Research Service, United States Library of Congress, March 27, 2019, https://sgp.fas.org/crs/misc/R45650.pdf.

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[43] *Ibid.*

[44] *Stratton Oakmont, Inc. v Prodigy Services Co.*, 23 Media L Rep 1794 (N.Y. Sup. Ct. 1995).

[45] *Ibid.*

[46] *Ibid.*

[47] Telecommunications Act of 1996, 104th Cong, 2nd sess., January 3, 1996, in Public Law 104-104.

[48] *Ibid.*, 101.

[49] One of the most famous District Court Cases involving Section 230 involved AOL, not Twitter or Facebook. *Zeran v AOL* included a defamatory posting on an internet site and the victim of the false defamation suing the site. Essentially, the Court ruled that "ISPs like AOL are not legally responsible for the defamatory postings of third parties," reasoning that "imposing such potential liability would chill free speech on the Internet."

For above, see: David L. Hudson, *Zeran v America Online, Inc. (4th Cir.) (1997),* The First Amendment Encyclopedia, Middle Tennessee State University, online at

https://www.mtsu.edu/first-amendment/article/613/zeran-v- america-online-inc-4th-cir (visited November 12, 2021).

Also see: Zeran v America Online, Inc., 129 F3d 327 (4th Cir. 1997).

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[51] Jason A. Gallo and Clare Y. Cho, *Social Media: Misinformation and Content Moderation Issues for Congress*, Congressional Research Service, United States Library of Congress, January 27, 2021, online at https://sgp.fas.org/crs/misc/R46662.pdf (visited November 16, 2021).

[52] S.2228, 117th Cong, 1st Sess (Jun 24, 2021), in https://www.congress.gov/bill/117th-congress/senate-bill/2228/text.

[53] S.3029, 117th Cong, 1st Sess (Oct 20, 2021), in https://www.congress.gov/bill/117th-congress/senate-bill/3029/text.

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[55] Thomas M. Johnson Jr, *The FCC's Authority to Interpret Section 230 of the Communications Act*, Federal Communications Commission, October 21, 2020, online at https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section- 230-communications-act (visited November 18, 2021).

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[58] George Mixon, "Not Your Father's Marketplace of Ideas: Hate Speech and the Fraudulent Marketplace of Ideas Created by Social Media," *Emory International Law Review* 34, no. 1 (2020).

[59] Richard A. Wilson and Molly Land, "Hate Speech on Social Media: Content Moderation in Context," *Connecticut Law Review* 52, no. 3 (2021): 1031–242.

[60] John Stuart Mill's "Marketplace of Ideas" described "a situation in which people speak and exchange ideas freely." The theory emphatically furthers that "all ideas must be allowed to be expressed freely in order to serve Mill's ultimate end: human progress," and that by allowing for the free expression of ideas, humans can develop their own opinions and become more informed using a diverse set of perspectives.

For above, see: Jill Gordon, "John Stuart Mill and the 'Marketplace of Ideas,'" *Social Theory and Practice* 23, no. 2 (1997): 235.

[61] Tihomir Jovanovski and Mehmed Muric, "The Phenomenon of Lag in Application of the Measures of Monetary Policy," Economic Research-Ekonomska Istraživanja 24, no. 2 (November 9, 2015): 154.

[62] Dominik Hangartner et al., "Empathy-Based Counterspeech Can Reduce Racist Hate Speech in a Social Media Field Experiment," *Proceedings of the National Academy of Sciences*, Dec 14, 2021.

[63] *Ibid.*

[64] *Ibid.*

[65] *United States v American Library Assn., Inc.*, 539 US 194 (Supreme Court of the United States 2003).

[66] Telecommunications Act of 1996, 104th Cong, 2nd sess., January 3, 1996, in Public Law 104-104.

[67] Monica Anderson, "How Parents Feel about – and Manage – Their Teens' Online Behavior and Screen Time", Pew Research Center, March 22, 2019, online at https://www.pewresearch.org/fact-tank/2019/03/22/how-parents-feel- about-and-manage-their-teens-online-behavior-and-screen-time/ (visited November 23, 2021).

[68] *Ibid.*

[69] *Erznoznik v City of Jacksonville*, 422 US 205, p. 205 (Supreme Court of the United States 1975).

[70] *Stanley v Georgia*, 394 US 557, p. 563 (Supreme Court of the United States 1969).

[71] *Packingham v North Carolina*, 137 S. Ct. 1730 (Supreme Court of the United States 2017).

[72] *Rowan v United States Post Office Department*, 397 US 728, p. 728 (Supreme Court of the United States 1970).

[73] *Cohen v California*, 403 US 15 (Supreme Court of the United States 1971).

[74] *FCC v Pacifica*, 438 US 726 (Supreme Court of the United States 1978).

[75] *FCC v Fox*, 556 US 502 (Supreme Court of the United States 2009).

[76] *Cohen v California*, 403 US 15, p. 21 (Supreme Court of the United States 1971).

[77] *Ibid.*, 25.

[78] *FCC v Fox*, 556 US 502, p. 546 (Supreme Court of the United States 2009).

[79] *Cohen v California*, 403 US 15, p. 15 (Supreme Court of the United States 1971).

[80] James Madison, *The Federalist Papers* No. 51 (New York, NY, 1788).

[81] *FCC v Pacifica*, 438 US 726, p. 764 (Supreme Court of the United States 1978).

[82] *Ibid.*, 763.

[83] Richard A. Wilson, *Incitement on trial: Prosecuting International Speech Crimes,* "The Social Science of Inciting Speech and Persuasion," 226, (Cambridge, UK: Cambridge University Press, 2017).

[84] *Ibid.,* 228–29.

[85] *Brandenburg v Ohio*, 395 US 444 (Supreme Court of the United States 1969).

[86] *Hess v Indiana*, 414 US 105 (1973).

[87] *NAACP v Claiborne Hardware Co.*, 458 U.S. 886 (Supreme Court of the United States 1982).

[88] *Brandenburg v Ohio*, 395 US 444, p. 447 (Supreme Court of the United States 1969). Historically, incitement speech has been held to a relatively high level of scrutiny, even though it is less protected by the First Amendment. In cases involving incitement, it must be decided that the speech may produce "imminent lawless action." This condition is sometimes prohibitively difficult to prove in the medium of social media, as online posts may resurface after months or years of inactivity to incite lawless action.

[89] Richard A. Wilson, *Incitement on trial: Prosecuting International Speech Crimes,* "The Social Science of Inciting Speech and Persuasion," 17, (Cambridge, UK: Cambridge University Press, 2017).

[90] Ada Modzelewska, *The Impact of the German NetzDG Law*, Researched by William Echikson, CEPS Project, Centre for European Policy Studies, November 30, 2018, online at https://www.ceps.eu/ceps-projects/the-impact-of- the-german-netzdg-law/ (visited December 7, 2021).

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Red Speech on the Docket: Free Speech and the Supreme Court in the Second Red Scare

Nicholas Fernandez | University of Pennsylvania

Edited by Lorelei Loraine, Avery Lambert, Yasmin Naji, Danielle Dorfman, Kendall Psaila, Melissa Yu

I. Introduction

By 1950, the Second American Red Scare was just beginning. The Soviet Union had drawn the Iron Curtain over half of Europe and developed its own atomic bomb, and the United States was at war with communism in Korea. American federal agents arrested Julius and Ethel Rosenberg for espionage and treason, accusing them of leaking nuclear secrets to the Russians. The infamous U.S. Senator Joseph McCarthy and other anti-communists claimed to have a list of "more than 200 subversive State Department employees" in a Wheeling, West Virginia speech. This assertion instilled terror in the masses by popularizing the idea of mass communist infiltration into the American government and society.[1] After this tumultuous year and a long trial and appellate process, *Dennis et al. v United States* (1951)[2] reached the Supreme Court. It was the case of eleven top members of the Communist Party of the USA (CPUSA) convicted for subversive speech under the 1940 Smith Act, which criminalized advocating for the overthrow of the government. It was not the first case of communist speech the Court heard, nor was it the last. A majority of justices upheld the convictions of the communist leaders in *Dennis* the year after, but this was hardly the end of the story. The Court moved back and forth between deference to Congress' expression constricting bills and pro-speech decisions into the early 1960s. *Dennis* became a landmark case in an unconventional way; it was remembered less for the applicability of its decision and more for the turbulent, "flip-flopp[ing]" jurisprudence of the Court in its wake.[3]

Revisionism itself was familiar to the mid-century Court. Less than two decades prior, for example, the Depression-era Court changed its interpretation of the Commerce Clause, moving from a restrictive view in *Schechter Poultry Corp. v United States* (1935)[4] to the expansive substantial effects doctrine in *Wickard*

v Filburn (1942).[5] This change was caused by a combination of extralegal political and contextual considerations and new appointments to the bench. Similarly, the Court's repeated "flip flop" over American communist First Amendment protections cannot be isolated to a single origin. Revisionism, extralegal forces, and the justices' individual philosophies all contributed to the Court's turbulent—sometimes deferential, sometimes pro-civil liberties—jurisprudence regarding communist speech. Although they made up a confusing jurisprudence for constitutional scholars of the time, these landmarks were important to the Court's future. Cases centered on communist speech like *Dennis* and *Yates v United States* (1957)[6] were crucial to the reasoning of cornerstone First Amendment cases in the later years of the Warren Court and beyond.

II. A Brief History: The Supreme Court and Communist Speech

Dennis was not the justices' first encounter with communism or the questions it raised regarding the balance between national security and free speech. The October Revolution in 1917 sparked the First Red Scare in the United States, which culminated in government action on every level against labor, socialist, and communist groups. The Court joined the fray against communist and socialist speech, issuing rulings in cases such as *Schenck v United States* (1919)[7] and *Gitlow v New York* (1925).[8] In these cases, it established the clear and present danger test for legal speech and incorporated First Amendment free speech through the Fourteenth Amendment's Due Process Clause, respectively, in cases involving speech from so-called subversive groups. *Whitney v California* (1927)[9] was the first major case involving the speech of an American communist. The Court acknowledged Whitney's "moderate" stance in the CPUSA, urging members to "cast their votes for the party that represents their immediate and

final interests."[10] Even so, it sustained Whitney's conviction under California's criminal syndicalism law, arguing that free speech was not an "absolute right" and "threaten [organized government's] overthrow by unlawful means" was not protected.[11] The Supreme Court was unsympathetic to the cases of communist speech in the decades before *Dennis*.

In the 1930s and 1940s, the domestic threats of communism and speech supporting it were overshadowed by the Great Depression and World War II. The Court's docket filled with cases that questioned the constitutionality of various New Deal programs. They concerned the extent of Congress' commerce power and structural questions such as the delegation of congressional powers to the president. The Court struck down many New Deal programs earlier in the decade but changed course in what was termed the "switch in time that saved nine" after President Franklin D. Roosevelt's threats to "pack" new and existing seats on the noncompliant Court with his supporters. This deference to federal actions in the realm of commerce led the justices to consider new directions the Court should take in the future, with Chief Justice Harlan Fiske Stone writing in the famous Footnote Four of *United States v Carolene Products* (1938)[12] that the Court should apply strict scrutiny to actions that violated the Bill of Rights or the Fourteenth Amendment.[13] Essentially, Fiske proposed a new path for the Court, focusing less on federal governance and more on protecting civil liberties and rights in its future decisions. The Court gradually adopted this new direction over the coming years, including in the cases involving communists during the Second Red Scare and beyond.

During World War II, the Supreme Court heard several cases that considered national security at the expense of individual rights. Following the discovery of Japanese spy Takeo Yoshikawa, who provided crucial information to Japan that aided in their attack on Pearl Harbor, the justices became especially fearful of foreign intrusion. In *Ex Parte Quirin* (1942)[14], the Court denied

due process rights to several Nazi spies and saboteurs, allowing for their trial by military commission.[15] Perhaps the most infamous decision the Court handed down was *Korematsu v United States* (1944).[16] In this case, Justice Hugo Black argued for strict scrutiny in cases where government action singles out a specific race, yet he and the Court upheld the internment of more than one hundred thousand Japanese Americans loyal only to the stars and stripes. Attempting to avoid another Yoshikawa, the "imminent threat of sabotage and espionage" proved too worrisome to the Court to protect the liberty of thousands of innocent Japanese American civilians.[17] When the country was overcome by a fear of enemy infiltration, the Court was willing to forgo civil liberties in the interest of national security.

The end of World War II and the confirmation of a new chief justice brought no reprieve from this fear as the Cold War began. The descent of the Iron Curtain, the Soviet Union's development of the atomic bomb, the Berlin Airlift, and the arrest of twelve top CPUSA members characterized the tumultuous first two years of Chief Justice Vinson's tenure.[18] The Vinson Court, which included many of the same justices from the previous Depression-era and wartime courts, held similar trepidations about foreign infiltration. Instead of ethnic intrusion, however, the new threat was an ideological invasion. American communists and anti-communists fought their war with words, making First Amendment free speech particularly important in the Second Red Scare. Courts across the nation often turned to the constitutional provisions of First, Fifth, and Fourteenth Amendment free expression and due process, whether it be applied to CPUSA meetings, the dissemination of communist doctrine, or mandatory loyalty oaths.

Some of the first cases the Vinson Court heard regarding communist speech were related to loyalty oaths required by law in a variety of situations, such as *American Communications Association v Douds* (1950).[19] In this case, the Court upheld the anti-communist loyalty oath that the Taft-Hartley Act required

of union leaders. Chief Justice Vinson justified his ruling with the typical national security rationale, but he also supported it with Congress' post-New Deal commerce power. He argued that because communist infiltration into U.S. labor unions could obstruct interstate commerce, the Taft-Hartley oaths were permissible. The freedoms in the Constitution depended "upon the power of the constitutional government to survive," and the justices perceived the threat of international communism too grave to ignore.[20]

The Vinson Court decided *Douds* as the Second Red Scare moved into full swing. Just three months before the announcement of the decision, then-unknown U.S. Senator McCarthy delivered his infamous speech in Wheeling, West Virginia in which he disingenuously claimed to have the names of hundreds of communist State Department employees.[21] At the same time, Soviet spies in the Manhattan Project were discovered and arrested, including the Rosenbergs, who were detained just two months after the *Douds* decision. Senator McCarthy's rise and the spies' trials transformed fringe notions of communist infiltration of the government into a dominant national hysteria, infecting the general public and the government.

The protracted trial of eleven top members of the CPUSA, appealed to the nation's highest Court in *Dennis*, accompanied these early Cold War shifts. The accused communists were initially convicted under the 1940 Smith Act—not for advocating or attempting to incite violence, but for intending to "organize as the Communist Party of the United States" that would *eventually* "advocate the overthrow and destruction of the Government of the United States."[22] The accused were on trial not for proactive communist endorsement, but for planning to arrange propagation. The trial lasted nine grueling months wherein the defendants used a Marxist "labor defense," acting as their own counsel and straying from proper procedure to the anti-communist trial judge's dismay. Despite the prosecution's disinterest in showing that the

defendants' speech posed an "imminent" danger, a necessary element for conviction, the jury, directed by a judge biased against the defendants, still found all the accused guilty.[23] After the convictions were sustained at the Circuit Court, the defendants appealed their case to the Supreme Court. The Court ignored the specific speech of the petitioners, however, instead addressing the constitutionality of the Smith Act itself. To Chief Justice Vinson, the "inherent nature" of the Communist Party was more than enough to meet the "danger" requirement of the Holmes-Brandeis clear and present danger test.[24] Justice Vinson ignored the "present" requirement, arguing that the government "must not wait until the putsch is about to be executed" to act in self-preservation.[25] Libertarian Justices Black and William Douglas were the only dissenters in *Dennis,* asserting that it was clearly an instance of "prior censorship," a long-unconstitutional type of censorship that prevents speech before it happens that had been recently reaffirmed as unconstitutional in *Near v Minnesota* (1937).[26] The two justices also contended that the government did not prove that the Smith Act was compatible with the clear and present danger test.[27] Nonetheless, *Dennis* was the Court's stamp of approval for the derogation of inalienable free speech in the Second Red Scare.

Dennis was decided at the zenith of anti-communist hysteria, though the panic began to wane in subsequent years, especially after the execution of the Rosenbergs and the end of the Korean War. For one, Senator McCarthy disgraced himself on national television when he exposed himself as a fraud during April 1954 Senate hearings on communist infiltration into the U.S. Army, harshly implicating service members as communists without evidence. The Senate censured him just a few months later.[28] In addition, new justices found their way onto the bench, including Chief Justice Earl Warren in 1953 and Justice William Brennan in 1956, who both contributed to a pro-civil liberties shift away from previous Supreme Courts. The Warren Court burst onto the national stage with one of the most lauded decisions in American

history, *Brown v Board of Education of Topeka, Kansas* (1954)[29], cementing this new Court's willingness to uphold the rights enshrined in the Constitution.

On June 17, 1957, a day that was later coined "Red Monday," the new Warren Court applied this pro-rights stance to communist speech in several landmark decisions. *Yates v. United States* (1957) was arguably most important because it acted as a soft reversal of *Dennis* and dealt with the conviction of several CPUSA leaders under the Smith Act. In this instance, the Court ruled that the statute of limitations had expired for Smith Act prosecutions of members of the Communist Party, since the party was created in 1945 and the law lapsed in 1947.[30] Justice John Marshall Harlan II specifically delineated the difference between "advocacy of abstract doctrine" versus "advocacy of forcible action," where the former is protected by the First Amendment, and the latter is not.[31] Essentially, the Court's decision severely weakened the Smith Act, making it nearly impossible to prosecute communists under it. *Watkins v United States* (1957)[32] dealt with the limited inquiry authority of the House Un-American Activities Committee (HUAC), where the committee found Watkins in contempt for not answering its questions. The Court ruled in favor of Watkins, finding that the First Amendment guaranteed "the right to engage in political expression and association" and that the contempt charge on Watkins was an unconstitutional abridgment of this liberty.[33] *Watkins* limited HUAC's investigative power and the comparable *Sweezy v New Hampshire* (1957)34 limited state legislatures in the same way.[35]

Although the Red Scare had ended, the nation was hardly over its fears of communist infiltration, causing a belligerent national response to the Red Monday decisions. Many people in Congress saw the Court's actions as counter to national security, and several McCarthyite congressmen introduced anti-court bills aimed at severely limiting the Supreme Court's jurisdiction in Red Monday's wake. None passed, but the turmoil was enough to

convince Justices Felix Frankfurter and Harlan to defect, resulting in multiple 5-4 decisions supporting government actions against communists.[36] *Scales v United States* (1961)[37] stood directly in contrast to the decision in *Yates;* the Court sustained the conviction of a CPUSA member through the Smith Act, ignoring First Amendment challenges since those matters were "settled in *Dennis.*"[38] However, in the same term as S*cales*, the Warren Court overturned the Smith Act conviction of a communist in *Noto v United States* (1961)[39] due to the "insufficiency of the evidence as to illegal Party advocacy."[40] The Court's inconsistency regarding "subversive" speech during the 1950s is evident, but how and why did the Court seemingly suspend *stare decisis,* the authority of legal precedents, in this decade?

III. Righting Past Wrongs

One of the key reasons why the Supreme Court switched for the first time exemplifies the Court's inconsistent record on the free speech of communists in the 1950s from *Dennis* to *Yates*. Based on the aftermath of *Dennis,* the writings of the justices before *Yates,* and the *Yates* decision itself, it is clear that by 1957, the Court believed it had erred. A switch like this was hardly unprecedented in the twentieth century. For example, in the early 1940s, the Court had upheld a requisite flag salute in schools to the objection of the nation's Jehovah's Witnesses in *Minersville v Gobitis et al.* (1940).[41] Just like in *Dennis,* First Amendment rights were superseded on the "basis of national security:" Justice Frankfurter argued that the existence of the government was dependent on teaching patriotism in "the formative period in the development of citizenship" in children.[42] The Court's decision in *Gobitis* provoked a "mass assault" on Jehovah's Witnesses, subjecting members of the faith to mob violence and persecution due to a perception of the group as anti-patriotic.[43] In a subsequent change in decision, the Court overturned *Gobitis* in *West Virginia*

State Board of Education v Barnette (1943)[44]; Justice Robert Jackson wrote that the "very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities."[45] The key struggle in *Gobitis* and *West Virginia v Barnette* is the same as *Dennis* and *Yates*: national security versus liberty. The first case in each set favors national security, whereas the latter decision favors civil liberties. The chronology of events is also similar. The nation viewed the Supreme Court's first decision as a judicial blessing for persecution against Jehovah's Witnesses in *Gobitis* and suspected communists in *Dennis*. The federal government then charged 135 suspected communists through the Smith Act, waging a "legal war on the CPUSA" through the decision in *Dennis*.46 It appeared to many as though the Court had assented to the greater anti-communist crusades that transpired in the era of McCarthyism, showing individuals like Senator McCarthy that the Court would not stand against the crusade. Senator McCarthy, HUAC, and the Justice Department were free to make accusations of communism wildly and convict any CPUSA or socialist party members through the Smith Act.

In his dissent in *Dennis,* Justice Douglas declared that the Court's decision placed the nation on a dangerous road to civil liberties, and within a few years, a majority of the Court was in agreement.[47] After Senator McCarthy's Army hearings and his eventual censure, the nation began to regard *Dennis* as an embarrassment in the same way that opinions of *Gobitis* soured in its wake.48 McCarthyist practices within the State Department made "fools of the United States" to its allies in Europe. The senator's accusations against members of the Army and his censure lent to the decline of hysterical anti-communist measures that transpired in the *Dennis* decision's wake. By 1957, the "fall of the man [McCarthy] tainted the 'ism' (McCarthyism) that he had come to represent" in the eyes of many Americans, including members of the Supreme Court.[49] For example, Justices Frankfurter and

Harlan had their clerks research possible ways to "rein in a war on the CPUSA they believed had gotten out of hand."[50] The addition of these two justices to the ranks of Douglas and Black, the two dissenting votes in *Dennis,* as well as new civil libertarians such as Chief Justice Warren and Justice Brennan, set up a majority bloc of the Court in favor of free speech in future cases dealing with American communists. The Court recognized the folly of *Dennis* and was prepared to ameliorate that mistake as it did to *Gobitis* in *West Virginia v. Barnette.*

The decision in *Yates* weakened *Dennis* without fully reversing it. Justice Harlan's majority opinion curtailed future communist prosecutions and protected free speech. He specifically removed *Dennis* as justification for Smith Act prosecutions fueled by anti-communist hysteria, writing that the "Government's reliance on this Court's decision in *Dennis* is misplaced."[51] He then established that teaching the abstract doctrine is not under the purview of the Smith Act and is protected by the First Amendment. This decision in *Yates* "severely weakened the FBI's role of investigating suspected Communist Party members," making Smith Act convictions nearly impossible and reaffirming the Court's dedication to protecting minority speech.[52] While the Court didn't fully overturn *Dennis,* as it did with *Gobitis* in *West Virginia v Barnette,* the comparison is still valid. Decisions in cases like *Sweezy* and *Watkins* further supported the idea that Red Monday itself was the Court's planned repudiation of unchecked investigation and prosecution of suspected CPUSA members. However, unlike *West Virginia v Barnette*, the Court did not firmly stick to its correction in *Yates,* quickly switching back to the government's side in subsequent terms. Red Monday was the Warren Court's "crackdown on the effects of the Red Scare," a stand against McCarthyism and the witch hunts as well as a near overruling of *Dennis*.[53] Revisionism, though, wasn't the only thing on the justices' minds.

IV. "At its Most Frigid" and Beyond

The justices' awareness of extra-judicial circumstances was another important factor explaining their flip-flopping jurisprudence over communist speech. Following the New Deal and President Franklin D. Roosevelt's proposed "court-packing plan," the subsequent Supreme Courts were cognizant of the political circumstances and consequences of their decisions. The Vinson Court took shape in the early days of the Cold War, and its subsequent jurisprudence often reflected events that added to the perceived growing danger of the USSR and communism. Before Vinson's appointment, Europe had split in half and the first years of his tenure were affected by major geopolitical moments such as the Berlin Blockade and Soviet acquisition of the atomic bomb. Domestic events, such as President Harry Truman's executive order establishing government loyalty programs and the arrest of twelve top members of the CPUSA, also contributed to a growing fear of communist infiltration.

The Cold War grew colder from 1950 to 1951 with the aforementioned arrest of the Rosenbergs amplifying fears of communist infiltration into government and McCarthy's Wheeling speech beginning the communist witch hunt in earnest. Members of the government and prominent cultural figures like novelist Thomas Mann and actor Edward Robinson fell victim to HUAC prosecutions and blacklisting.[54] Even icons such as actress Lucille Ball were not immune from the anti-communist wrath of the crusade.[55] At the same time, the United States entered the Korean War against China and the Soviet Union-backed communist North Korea in June 1950. For the first time, American soldiers were directly engaged in combat with their nation's communist foes, crystallizing fears of the ideology's spread around the globe and infiltration into the United States. In times of war, the Supreme Court tends to be deferential to government actions predicated on

national security. This is exemplified in cases like *Schenck v United States,* where the Court upheld the Espionage Act conviction of a socialist for handing out pamphlets claiming the draft was unconstitutional during World War I because it posed a "clear and present danger."[56] Another major example of this phenomenon was the infamous decision in *Korematsu v United States,* allowing for the internment of nearly all Japanese Americans during World War II. Despite Justice Black's novel establishment of racial classifications being "immediately suspect," setting strict scrutiny as the standard for racial distinctions in law, a majority of the Court found that the internment of Japanese Americans was within Congress' and President Roosevelt's war powers.[57] However, this is not to say the Court always defers, as no state of emergency fully supersedes the principle of limited government. Cases like *Ex Parte Milligan* (1866)[58], which preserved the right to a writ of habeas corpus when civilian courts are open during the Civil War, demonstrate this continued adherence. Nevertheless, the Korean War, along with the domestic ideological war against communism, created a wartime setting that was felt throughout the nation and implored the Court to act accordingly. The war, in addition to other domestic occurrences, constituted the "present pressures, passions, and fears" placed on the Vinson Court during decisions like *American Communications Association v Douds* and *Dennis,* affirming drastic government measures to root out communist subversives and protect the nation.[59] In the throes of the Second Red Scare, the Cold War was, as historian David Ray Papke put it, "at its most frigid."[60]

Red Scare attitudes were at the heart of *Dennis,* from the initial arrest and trial court proceedings to the handing down of the Supreme Court's decision. The Justice Department arrested the twelve CPUSA national board members as part of FBI Director J. Edgar Hoover's desire of "nothing less than the destruction of the Party," irrespective of the actual subversive activities they had taken part in or advocated for.[61] As for the trial, the presiding

judge, Harold Medina, reflected fears of communist infiltration quite often, in his disdainful "stormy relationship" with the defense as well as in his writings about the case. Judge Medina noted that he felt so overly suspicious throughout the trial that he avoided looking at the visitors in the gallery "for fear that communist hypnotists would seek to manipulate him."[62] Clearly, the zenith of the Red Scare caused hysteria to sway the judiciary at the trial level. At the highest Court in the nation, the approach to the proceedings were not different. Chief Justice Vinson wrote the decision in *Dennis,* inflating the threat of the CPUSA by arguing that the domestic Communist Party was "highly disciplined" and "rigidly controlled."[63] The issue with these characterizations is that they magnify the waning fortitude of a declining CPUSA. With the beginning of the Cold War came increasingly negative opinions on communism in the United States, discrediting the party and resulting in greatly diminished membership by the defendants' 1948 arrest. Their prosecution was the equivalent of the "government [using] a sledgehammer to squash a gnat," as historian Arthur Sabin puts it.[64] Since the party's membership diminished and many political figures around the nation discredited the group, the CPUSA truly posed little threat to the republic. Not only was the danger posed by the party officials' speech not imminent, but it also was not particularly clear considering the unlikelihood of their words harming national security. The "sufficient danger" that Chief Justice Vinson discussed is the product of Red Scare anxieties greatly enhancing any actual hazards the CPUSA may have presented. Justice Frankfurter had the fear of communist infiltration on his mind as his concurring opinion considers the "security against foreign danger" aspect of *Dennis* at length. This thought was in spite of the relative incapacity of the Party to endanger the nation through advocacy, which it hadn't even begun doing in *Dennis*.[65] Justice Black's dissent also demonstrates the Court's awareness of the hysteria, where he exclaimed that "present pressures, passions and fears"

dominated the decision in *Dennis*. Still, he hoped that when the hysteria subsided, "this or some later Court [would] restore the First Amendment liberties to…where they belong in a free society."[66]

Nevertheless, the hysteria was still running strong throughout the nation and the decision was initially met with an outpouring of public support. Following the guilty verdict, Judge Medina received more than 60,000 letters of support lauding the judge for the "service he had rendered his country" by exposing the communists' "criminal conspiracy."[67] The nation offered similar congratulations to Chief Justice Vinson while the two dissenters, Justices Black and Douglas, became key targets for criticism in the coming years as they continued to reject Red Scare policies. In 1953, Justice Douglas stayed the execution of the infamous Rosenberg couple. He acknowledged the hysteria sweeping the nation and argued that it had also "touched off the Justices," explaining what he perceived to be a disregard for the Bill of Rights.[68] The Supreme Court vacated the stay during a special session. On the same day that Douglas issued his decision, a congressman introduced a resolution for his impeachment, charging him with treason and describing him as a "knave unworthy of the high position he holds." Douglas later wrote that he felt as though he had become a "leper whom people avoided," being de facto blacklisted for his dedication to the Constitution.[69]

After a few years, circumstances began to shift as the Red Scare waned. The Korean War ended with an armistice in 1953, McCarthy lost popularity following his censure, the nation's attention shifted to the civil rights movement, and a new chief justice led the Court. Even so, anxieties about communism had not subsided. After the Supreme Court limited sedition authority of the federal government in *Pennsylvania v Nelson* (1956)[70], allowing only the national government to investigate and try suspected communists, many congressmen voiced their displeasure by proposing anti-court bills.[71] A disgraced Senator McCarthy

even claimed that the only possible explanation for the Court's decision in *Pennsylvania v Nelson* was that some "secret, but very powerful Communist" influence controlled the nation's judiciary.[72] Nonetheless, by 1957, the justices felt less concerned about possible "adverse reaction" to their decisions and felt the need to uphold civil liberties following *Brown v Board of Education*.[73] The Warren Court issued four major decisions on Red Monday, siding with defendants against government action and citing the First Amendment in decisions like *Yates* and *Sweezy*. The moment Justice Black yearned for in his *Dennis* dissent had arrived, though it did not last for long.

The days following Red Monday were perhaps some of the most trepidatious in the Supreme Court's history. Some of Congress and the press, still in the throes of communist hysteria, engaged in "militant opposition" to the Court following its decisions on Red Monday.[74] None of the subsequent anti-court bills made it to President Eisenhower's desk, and, since the congressional response to Red Monday was so unpopular, many anti-Court congressmen lost their seats in the 1958 election.[75] The event nevertheless shook some members of the Court, particularly the newcomers to the civil liberties bloc. Several defected and ruled in favor of the government in cases involving communists, abrogating First Amendment rights of unpopular communists to protect the Court from external threats. Justice Frankfurter was a central figure in this flip-flop; he constantly contextualized the political and extralegal circumstances of cases in the interest of protecting the institution of the Court.[76] He was always "fearful the Court would injure itself" and believed this to be the case in the aftermath of *Yates*.[77] Despite denouncing the actions of governmental organizations like HUAC, Frankfurter ultimately pushed him to side with the government in future cases involving communist speech to preserve the Court's authority.[78] The political circumstances surrounding these communist speech cases weighed heavily on the minds of the justices, but context and revisionism

were not the only two factors influencing the Court's ever-changing stance in the 1950s.

V. Judicial Philosophy and Changing the Guard

Seven justices, all with different political and philosophical convictions, vacated the bench and were replaced between 1949 and 1959, altering the Court's jurisprudence. Many members of the Vinson Court were New Deal appointees that practiced judicial restraint. Following the judicial rejection of the First New Deal, Franklin D. Roosevelt ensured that the Court's new members were more conciliatory to government action, appointing jurists who were unlikely to obstruct his legislation. Truman followed in Roosevelt's footsteps in appointing Fred Vinson to lead the Supreme Court in 1946, who was the model of judicial restraint. He had advocated for it as a congressman before his time on the bench; he introduced Roosevelt's 1937 court-packing bill to the House of Representatives in response to the Supreme Court's disruption of New Deal legislation.[79] He made judicial restraint a cornerstone of his approach as chief justice, and "largely favored executive and legislative interests" throughout his tenure.[80] As part of the Vinson Court's "zealous effort to maintain the authority of the national government," the Court upheld the anti-communist loyalty oaths in *American Communications Association v Douds*.[81] Chief Justice Vinson explicitly stated in his decision in *Dennis* that the power of Congress to protect itself from "armed rebellion is a proposition which requires little discussion."[82] Vinson ignored the "present" or "imminent" element of established free speech tests and simply accepted the fact that the government retains a near-unquestionable right to its self-defense. Furthermore, when the case of the Rosenbergs was appealed to the Supreme Court, Vinson and his allies denied certiorari, wanting to have "nothing to do with such a potentially explosive issue."[83] In doing so, they again avoided controversy and deferred to the executive branch.

Vinson and his associates' judicial restraint can also be confirmed statistically: the Vinson Court was the twentieth-century Supreme Court least likely to nullify federal or state laws, representing only 3% of total federal laws overturned and only overturning six state and local ordinances per term.[84] In contrast, however, Vinson's successor Earl Warren oversaw a Court that was one of the most likely to overturn laws from any level of government.[85] The new Warren Court was, therefore, much more likely to challenge and overturn laws against communist expression.

The departure of Chief Justice Vinson and Justice Jackson, both advocates of judicial restraint, and the arrival of their replacements, supporters of broad civil liberties Earl Warren and John Marshall Harlan, marked the shift in the Court. Its philosophy moved from judicial restraint to activism in the new Warren Court. Prior to his time on the Court, Warren demonstrated himself to be a "consistent and vigorous supporter of the Bill of Rights" during the California Constitutional Convention he oversaw as the state's governor.[86] He ensured that every provision of his state's new constitution was designed with basic rights in mind.[87] Warren approached his chief justiceship in the same manner, ruling on cases through a liberal civil libertarian lens and often taking stands against government actions he saw as unconstitutional. Harlan was also a civil libertarian, demonstrated by the majority opinion he wrote in *Yates,* in which he argued that the teaching of "abstract doctrine is within the protection of the First Amendment," as well as in later free speech cases like *New York Times v Sullivan.*[88] Unlike Warren, however, Harlan often took a judicial restraint approach.[89] In addition, as the Red Monday cases were being heard, the Senate confirmed liberal and judicial activist Justice Brennan's appointment to the Supreme Court. Before his confirmation, Brennan had been openly critical of Red Scare hysteria, stating that the actions of organizations like HUAC were "reminiscent of the Salem witch hunts."[90] Senator McCarthy attempted to stop his confirmation, arguing that Brennan would be "likely to harm

our efforts to fight Communism," but Brennan was nonetheless confirmed.[91] These additions to the Supreme Court moved its collective philosophy toward judicial activism over issues involving fundamental rights, contributing greatly to the Red Monday flip.

On the other hand, the legal philosophies of Frankfurter and, again, Harlan, lent to the Court's post-Red Monday switchback toward deference. Justice Frankfurter, an occasional advocate for civil liberties, was more than ready to "sacrifice First Amendment rights on the altar of judicial self-restraint."[92] He occasionally worked against the Smith Act and anti-communist hysteria, for example when he sided with the majority in the Red Monday cases, but after major congressional backlash his devotion to judicial restraint and deference to the other branches meant that he had to relent.[93] Harlan, Frankfurter's "closest intellectual ally," defected from the liberal bloc of Warren, Brennan, Douglas, and Black and sided with the Court's conservatives in communist speech cases in subsequent terms.[94] For example, in *Barenblatt v United States*, the Court found that HUAC did not violate the First Amendment by holding a University of Michigan professor in contempt for refusing to respond to questions in a hearing. Harlan spoke for the majority, deferring to Congress' "wide power to legislate in the field of Communist activity […] and to conduct appropriate investigations in aid thereof," citing Vinson's opinion in *Dennis*.[95] However, Harlan and Frankfurter's switch did not herald exclusive support for the government. As previously noted, Harlan and Frankfurter joined the rest of the Court to overturn the conviction of an accused communist in *Noto,* though they circumvented the First Amendment argument for a claim of insufficient evidence. Nevertheless, the changes in the justices' personal legal philosophies throughout the early Cold War contributed to variations in the Court's free speech decisions in that era.

VI. Conclusion

The addition of new justices with different philosophies, the changing national climate, and simple realizations of past mistakes can all explain all decisions of the Supreme Court, or any other judicial body. Further, *Noto v United States* was not the last free speech and subversion case the Court heard. The Warren Court, as well as the Burger, Rehnquist, and even Roberts Courts, continued to rule on free speech regarding groups deemed subversive. Free speech has remained an important issue that the Court has continued to grapple with, continuously evolving the meaning of the First Amendment throughout the decades since the 1960s. In addition, even if the Court flipped back and forth following *Dennis* and *Yates,* both were still important to the Warren Court's decision in *Brandenburg v Ohio* (1969)[96], which overturned the conviction of a Ku Klux Klan member under Ohio's Criminal Syndicalism Act and established the protective "imminent lawless action" test.[97] Both cases are discussed at length in the *per curiam* decision in *Brandenburg v Ohio,* especially in the concept of abstract doctrine, showing that the constant change yielded some helpful debate for future Courts to consider when deciding First Amendment cases. Even in *Brandenburg*, multiple factors contributed to the decision, including a national climate for rights expansion as well as new liberal judicial activists like Justice Thurgood Marshall gaining the liberal bloc the majority. In the decades following these cases on communist speech, the Supreme Court continued to hear cases involving subversive group speech in cases like *National Socialist Party of America v Village of Skokie* (1977)[98] and others. In the end, the outcome of all of the Supreme Court's cases, not only those involving free speech, depends on a host of factors including the justices' philosophies, extra-judicial and international circumstances, as well as a desire to right past wrongs. Understanding the interaction of these factors is important

to the comprehension of previous decisions by legal historians as well as understanding how the Court makes decisions today. The justices do not simply rule according to their philosophies in every instance; they also consider the actions of Congress and the White House in response to their decision and balance revising past mistakes against the principle of precedence. While some might point to these external factors as evidence that the Court is not as independent as Alexander Hamilton contended in Federalist no. 78, it should be understood that judicial independence is not the same thing as judicial isolation. The justices must always weigh their personal philosophies with external pressures, both for the preservation of the Supreme Court itself and of constitutional liberty.

[1] Michal R. Belknap, *The Vinson Court: Justices, Rulings, and Legacy,* (Santa Barbara, CA: ABC-CLIO, Inc., 2004), 22.
[2] 341 U.S. 494 (1951).
[3] Elizabeth J. Elias, "Red Monday and its Aftermath: The Supreme Court's Flip-Flop over Communism in the late 1950s," *Hofstra Law Review* 43, no.1 (2014), 207.
[4] 294 U.S. 495 (1935).
[5] 317 U.S. 111 (1942).
[6] 354 U.S. 298 (1957).
[7] 249 U.S. 47 (1919).
[8] 268 U.S. 652 (1925).
[9] 274 U.S. 357 (1927).
[10] Howard Gillman, Mark A. Graber, and Keith E. Whittington, *American Constitutionalism Volume II: Rights and Liberties,* (New York: Oxford University Press, 2016), 335.
[11] Ibid., 333.
[12] 304 U.S. 144 (1938).
[13] Howard Gillman, Mark A. Graber, and Keith E. Whittington, *American Constitutionalism Volume II*, 383.
[14] 317 U.S. 1 (1942).
[15] Arthur H. Garrison, *Supreme Court Jurisprudence in Times of National Crisis,* 136.
[16] 323 U.S. 214 (1944).
[17] Arthur H. Garrison, *Supreme Court Jurisprudence in Times of National Crisis, Terrorism, and War: A Historical Perspective,* (Plymouth, UK: Lexington Books, 2011), 218.
[18] Originally, twelve members of the party were arrested, but the trial of one accusee was separated due to poor health. Hence, the trial and Supreme Court landmark *Dennis et al. v United States* refers to the convictions of the remaining eleven members. Arthur J. Sabin, *In Calmer Times: The Supreme Court and Red Monday,* (Philadelphia: University of Pennsylvania Press, 1999), 39.
[19] 399 U.S. 382 (1950).

[20] Ibid.
[21] Michal R. Belknap, *The Vinson Court,* 22.
[22] Martin H. Redish, *The Logic of Persecution: Free Expression and the McCarthy Era,* (Stanford, CA: Stanford University Press, 2005), 81.
[23] Ibid., 87.
[24] Justice Holmes designed that test in *Schenck v United States,* where speech that presented a "clear and present danger" was not protected by the First Amendment.
[25] Ibid., 91.
[26] 283 U.S. 697 (1931).
[27] 341 U.S. 494 (1951).
[28] Michal R. Belknap, *The Vinson Court,* 22.
[29] 347 U.S. 483 (1954).
[30] Arthur H. Garrison, *Supreme Court Jurisprudence in Times of National Crisis,* 179.
[31] 354 U.S. 298 (1957).
[32] 354 U.S. 178 (1957).
[33] Ibid.
[34] 354 U.S. 234 (1957).
[35] Michal R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties,* (Westport, CT: Greenwood Press, 1977), 244.
[36] Robert M. Lichtman, "McCarthyism and the Court: The Need for 'an uncommon portion of fortitude in the judges," *Journal of Supreme Court History* 39, no.1 (2014), 122.
[37] 367 U.S. 203 (1961).
[38] Ibid.
[39] 367 U.S. 290 (1961).
[40] Ibid.
[41] 310 US 586 (1940).
[42] Ibid.
[43] Howard Gillman, Mark A. Graber, and Keith E. Whittington,

American Constitutionalism Volume II, 420.
[44] 319 U.S. 624 (1943).
[45] Howard Gillman, Mark A. Graber, and Keith E. Whittington, *American Constitutionalism Volume II*, 422.
[46] Michal R. Belknap, "Why *Dennis v. United States* is a Landmark Case," *Journal of Supreme Court History* 34, no. 3 (2009), 291.
[47] Dennis et al. v. United States, 341 U.S. 494 (1951).
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International Human Rights Law: A Case Study of the Persecuted Baha'i Community in Iran

Rooha Hagharmehdiabadi | The University of Texas at Austin

Edited by Lorelei Lorraine, Elissa Kim, Ali Alomari, Irie Sentner, Wena Teng, April Wang, Grayson Hadley, Shaurir Ramanujan

Abstract

This article examines the persecution of the Bahá'í community in Iran since the 1979 Islamic Revolution in the context of growing human rights norms and law, discussing both the potential and shortcomings of international human rights instruments in creating favorable outcomes for religious minorities. Conventional frameworks for the study of the impact of human rights, namely the top-down and bottom-up approach, are used to analyze the extent to which Iran's status as a signatory of the International Covenant on Civil and Political Rights (ICCPR) has 1) shifted state policy, and 2) endowed civil society with a new language and tool to push towards compliance. Pertaining to this study is the political system of Iran and its highly repressive society which create barriers to both top-down implementation of treaty provisions at the legal and institutional level and the bottom-up diffusion of norms through civil society activity. Making mandatory the First Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR) is discussed as the most viable solution for creating a new avenue through which states are pushed towards compliance.

In 2011, the Iranian government was asked in its third reporting cycle for the International Covenant on Civil and Political Rights (ICCPR) to provide clear steps the state is taking to protect the Bahá'ís—the largest non-Muslim religious minority in Iran[1]—against "arbitrary detention, false imprisonment, confiscation and destruction of property, denial of employment and Government benefits and denial of access to higher education."[2] The state replied that under its constitution, all people enjoy the same level of protection and that "there are no exceptions to the rule."[3] The report concluded that "in the Islamic Republic of Iran, no one has been arrested or prosecuted merely on the basis of being a follower of Bahá'ísm."[4] By then, the political, economic, and social repression of Bahá'ís by the Iranian regime had been documented by organizations such as the Bahá'í International Community[5] and Amnesty International who, in the same reporting cycle, called on Iran to "end the persecution of members of ethnic and religious minorities, including of the Bahá'í community."[6] Despite evidence of Iran violating at least nine ICCPR articles in its treatment of the Bahá'ís,[7] the Human Rights Committee could only provide recommendations of measures Iran should take to improve its human rights record by the next reporting cycle, which took place nearly 10 years later.

Iran's ability to outright deny the persecution of Bahá'ís, its inconsistent reporting to the Human Rights Committee, and the persistence of economic, political, and social discrimination of Bahá'ís in Iran—which some scholars view as so extreme that it amounts to preconditions of genocide and ethnic cleansing[8]—points to a larger weakness of the international human rights system, namely its lack of enforcement mechanisms to ensure the protection of rights upon treaty ratification.[9] Since a country's status as a signatory of a human rights treaty does not translate to immediate protection of those rights, we must examine its ability to produce favorable outcomes for religious minorities facing persecution. Though the case of the Bahá'ís in Iran is the focus of this study, state repression of religious minorities is neither unique to Iran—Bahá'ís face persecution in Yemen as well[10]—nor perpetuated solely against the Bahá'ís. The persecution of Christians in Sudan, Pakistan, and Nigeria[11] as well as the persecution of Muslims in Myanmar, India, Israel, and the United States[12] are all contemporary issues relevant to this discourse. Interestingly, since its adoption in 1966, the ICCPR has been ratified by 172 of the 193 UN member-states; the treaty clearly states that every individual has "the right to freedom of thought, conscience and religion," which includes "freedom to have or to adopt a religion

or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice[,] and teaching."[13] The harsh blasphemy laws of Pakistan that allow the sentencing of Christian converts to death[14] or the targeting, abuse, and torture of Muslims in Guantanamo Bay following the attacks of 9/11, without being formally charged or given a trial,[15] are all in clear violation of multiple clauses of the ICCPR. Why does religious persecution, the systematic mistreatment of a religious group through social, political, and economic marginalization, persist in these countries despite their status as signatories to the ICCPR?

There exists a vast amount of scholarship on the merits and shortcomings of the current international human rights system, with two distinct approaches to the function of human rights treaties arising: top-down and bottom-up. The top-down approach reflects the implementation of a treaty at the institutional level; it expects, for example, a country to incorporate the clauses of a newly ratified human rights treaty into its legal system. The bottom-up approach emphasizes the norm-setting capacity of human rights treaties; it may examine, for example, how the ratification of a treaty equips civil society organizations, NGOs, and other non-state actors organizing for change at the local, national and international levels, with new tools and language to fight for their cause at the grassroots level. In this paper, the persecution of Bahá'ís in Iran will be examined through these two lenses, attempting to both counter the skepticism of top-down studies, forward by scholars such as Eric Posner, and give a realistic account of bottom-up mechanisms, evident in the writings of Beth A. Simmons and Emilie M. Hafner-Burton. Additionally, this study will focus specifically on Iran's commitments under the International Covenant on Civil and Political Rights (ICCPR) for the following reasons: (1) the treaty was ratified by Mohammad Reza Shah in 1975,[16] raising important questions about the succession of obligations to the new Islamic Republic which did not willingly sign or ratify it; (2) the treaty provides the widest range of protection for Bahá'ís, through both positive rights such as article 18 (freedom of religion) and negative rights such as article 7 (prohibition of torture) and article 9 (prohibition of arbitrary arrests), and (3) due to the extent of rights outlined in the ICCPR, an adjustment to the treaty's design—namely making mandatory the first optional protocol on the acceptance of individual complaints procedures—will result in more immediate protection of rights for Bahá'ís of Iran. Before diving into the specific case of the Bahá'ís, the two major

approaches to the function of international human rights instruments will be discussed, as they are central to this study.

Top-Down vs. Bottom-Up

With human rights violations often being of such urgent nature, the top-down approach is generally favored in scholarship on international human rights law, as it expects states to make immediate institutional and judicial changes that comply with the obligations listed in the treaty. In this approach, scholars measure the success of human rights treaties by the treaty's ability to seep into the state's legal system upon ratification, looking at any changes to statutes and even to the nation's foundational texts such as its constitution in favor of new rights outlined in the treaty.[17] Using distinct methods of qualitative and quantitative research, scholars in this camp measure the removal of barriers to the protection of human rights, whether judicial, political or institutional. Such measures often produce obstacles to efficacy, because the actual implementation of treaties—which include both positive and negative rights—requires strong state capacity. It also requires state willingness to work towards these significant changes, which the system fails to incentivize; unlike multilateral trade agreements, where compliance translates to favorable economic outcomes and the lack thereof creates serious financial losses, human rights treaties are not designed to offer any tangible reward or punishment. These realities further feed into the notion that the human rights system is failing in achieving its main objective: "to promote and protect human rights and fundamental freedoms of individuals or groups."[18] After all, nearly 80 percent of all UN member-states have signed and ratified at least four of the nine major human rights treaties,[19] yet human rights violations persist daily in the same countries that are supposedly committed to protecting those rights.[20] Eric Posner, an American law professor, is a significant contributor to debates on the ineffectiveness of international human rights law. He advocates for the complete disbandment of the system which he sees not only as a failure but also as a tool for ideological imperialism – similar to the hubris of economic development. When bringing to question the effectiveness of human rights treaties, Posner asks "Why do more than 150 countries (out of 193 countries that belong to the UN) engage in torture? Why has the number of authoritarian countries increased in the last several years? Why do women remain a subordinate class in nearly all countries of the world?"[21] Given that The Convention Against Torture (CAT) has 173 state parties and The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) boasts an impressive 189

state parties,[22] the criticisms raised by Eric Posner are not entirely fallacious. Other scholars argue the system's lack of hard enforcement power undermines international law more generally. As one scholar concluded, "the main effect of the universal human rights movement will be a seriously diminished credibility for international law."[23]

Beth A. Simmons, a notable international relations scholar with a plethora of publications on the inception and implications of the international human rights system over the past decades, proposes a different approach to the study of human rights: one that centers its focus around civil society and grassroots processes such as social movements, community-based activism and even a mass shift in thinking. Such movements are set in motion, or strengthened, by a seemingly performative act such as the ratification of a human rights treaty.[24] This bottom-up approach takes into consideration the myriad of ways in which a treaty, once ratified, will legitimize the claims of civil society organizations and provide a new language for persecuted groups to voice their demands for better treatment. Essentially, the true power of human rights treaties lies in their ability to seep into society and establish new norms that later become the basis for change at the institutional and judicial level. Another notable scholar in this camp, Emilie M. Hafner-Burton, argues that it is irrational to expect immediate, institutional changes—such as the eradication of torture, end to authoritarian regimes, and others outlined by Posner—from a system that is not designed to produce such results. The lack of enforcement power built into the international human rights system—meant to preserve what one scholar calls "the delicate balance of international relations based on sovereignty"[25]—allows member states to sign on to legally-binding human rights treaties without facing any punishment or breach of their sovereignty as they violate the rights outlined in that treaty. For many states with poor human rights records, these treaties are viewed as a costless opportunity to gain respect on the global stage by seeming sympathetic to the cause of human rights; upon ratification, countries are nonetheless pulled into a process that is slowly setting new norms of behavior and standards.

The case of the Bahá'ís in Iran can be studied through both a top-down lens, investigating whether Iran's membership in the ICCPR has led to any shifts in the country's legal system and policy, as well as a bottom-up lens, studying the new avenues of advocacy created through ICCPR membership for international organizations to appeal to human rights to pressure Iran to change its behavior.

Before delving into these discussions, however, a historical overview of the persecution of Bahá'ís is overdue.

Persecution of Bahá'ís in Post-Revolutionary Iran

The Bahá'ís are the largest religious minority in Iran, with an estimated 300,000 members currently living in the country.[26] The religion was founded in 1844 during the Qajar Dynasty and has a history of persecution under both Qajar and Pahlavi rule, mainly by the clerical establishment who saw the Faith's growing popularity as a threat to its power.[27] Since the overthrow of Mohammad Reza Shah in 1979, and the subsequent establishment of an Islamic Republic under Ayatollah Ruhollah Khomeini,[28] Bahá'ís have faced persecution "tantamount to systematic genocide."[29]

Fundamental teachings of the Bahá'í Faith are critical to understanding the Islamic clerical establishment's fierce opposition to the Bahá'ís. Without delving into contentious theological discussions, the general interpretation of verse 33:40 of the Qur'an is that Prophet Muhammad is the "seal of all Prophets,"[30] making Baha'u'llah's claim to prophethood after Muhammad heretical in the eyes of Iran's fundamentalist clergy, who justify their persecution of the Bahá'ís on this basis[31] despite making mainly non-religious accusations against the Bahá'í community.[32] Other teachings, such as the equality of men and women, compulsory education, progressive revelation, and independent investigation of truth—reflected in the Bahá'í Faith's lack of professional religious leaders—as well as the fact that the Bahá'í pilgrimage site is located in Haifa, Israel[33] have all made the Bahá'ís a target of Khomeini's government.

Since 1979, more than 200 Bahá'ís have been executed, and hundreds more imprisoned and tortured on charges of "espionage" and "propaganda against the regime." The gruesome images of Dr. Masih Farhangi's corpse released after his execution in Tehran, with the words "Against Islam" written on his right leg,[34] are part of the collective memory and trauma of Iranian Bahá'ís, many of whom lost family members to Khomeini's campaign of mass-arrest and execution in the early 1980s. The execution that raised the most international concern was that of Mona Mahmudnizhad, 16 years of age at the time of her hanging in Shiraz[35] along with nine other Bahá'í women. On May 23rd, 1983, a month prior to Mona's execution, a statement released by the White House urged the halt of Bahá'í killings in Iran;[36] "I strongly urge other world leaders to join me in an appeal to the Ayatollah [Knomeni]and the rest of Iran's leadership not to implement the sentences that have been pronounced on these innocent people," said Reagan in

the statement.[37] However, the sentences were carried out, despite international pressure, and even though Mona's death violated not only the religious freedom clause of the ICCPR but also article 6(5)'s explicit ban of the use of the death penalty, for persons under 18.[38]

In addition to summary arrest, torture, and execution, Bahá'ís have been cut-off from economic, political, and social progress, a process informally initiated by the state since the onset of the Revolution but officially adopted in its 1991 secret Memorandum.[39] The Memorandum was prepared in secret by the order of Ayatollah Ali Khamenei and later publicized in the 1993 report by UN Special Representative Reynaldo Galindo Pohl. It called for the treatment of Bahá'ís in a way that "their progress and development shall be blocked," including the denial of positions of influence to Bahá'ís, even stating that "employment shall be refused to persons identifying themselves as Bahá'ís." The Memorandum provided conclusive evidence that the persecution of Bahá'ís was state-sanctioned and systematic. It also violated several articles of the ICCPR, namely article 18 on religious freedom and article 26 on equal protection under the law, which states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[40]

Since 1979, Bahá'í institutions have been dissolved, homes robbed, properties confiscated, places of worship destroyed, and cemeteries desecrated. "Bahá'ís have no civil rights. They cannot hold government jobs, enforce legal contracts, practice law, collect pensions, attend institutions of higher learning, and openly practice their faith."[41] The humiliating expulsion of all Bahá'í professors, university students and government employees was accompanied by the outrageous ruling of Khomeini that Bahá'ís did not have any right to government payments and that they "must repay everything they had earned or received from the government throughout their working lives."[42] Official fatwas issued circa 2010 by the six Grand Ayatollahs of Iran make the position of the government on "Baha'ism" clear, with a unanimous decision that the Bahá'í Faith is "misguided and perverse," that Bahá'ís are "najis [unclean]," and that the propagation of the Bahá'í Faith is "Haram." The Supreme Leader, Ayatollah Ali Khamenei, encourages people to "keep away altogether from this perverse and misguided

sect" while Ayatollah Nouri Hamadani rules that Bahá'ís "are even more Najis than dogs."[43]

Although the killing of Bahá'ís has tremendously decreased since 1987—a shift facilitated in part by the international pressure put on Khomeini's government both by The Reagan administration[44] and the Human Rights Council, which placed Iran under Procedure 1503 scrutiny in 1980 and appointed a Rapporteur to investigate claims of human rights abuse[45]—scholars such as Camillia R. Brown[46] have examined the potential for genocide. Brown states, "the history of the religion's persecution, taken together with the regime's current scheme, lays bare a sophisticated and multi-faceted process to destroy the Bahá'í community that is tantamount to genocide."[47] Mirroring Brown's concern is The Sentinel Project's report in 2010, which concluded that "the threat of genocide to Iranian Bahá'ís remains high and may only be awaiting the right trigger event, such as a foreign military strike or serious internal challenge to the regime."[48] Such grave concerns point to a failure of the international human rights system in protecting Iranian Bahá'ís against religious persecution, which persists to this very day. Evidently, a discussion of the ICCPR, its function, and Iran's commitments under the treaty as they relate to the case of the Bahá'ís is necessary.

Iran and the International Covenant on Civil and Political Rights (ICCPR)

In June 1975, while facing global backlash for his harsh repression of political dissidents,[49] Mohammad Reza Shah's government ratified the ICCPR.[50] In early 1975, Amnesty International had raised concerns about Reza Shah's brutal repression of political dissent by the use of torture, arbitrary arrests, and mass imprisonments,[51] calling Iran "one of the worst violators of human rights in the world."[52] In the next three years, the Shah attempted to remedy his reputation of human rights abuse, for example by releasing 257 political prisoners in 1977, a month prior to the scheduled visit of the International Red Cross, Amnesty International, and the International Commission of Jurists to Iran in order to give recommendations for improvements.[53] Though these performative changes were far from the full realization of the Pahlavi state's commitments under the ICCPR, political opposition groups nonetheless operated more freely, ultimately leading to the Shah's overthrow in 1979.

Khomeini never disputed the succession of the Shah's multilateral treaty agreements to the new regime. In fact, he "paid the Shah's debt and collected what outsiders owed the shah's government,"[54] indicating a clear acceptance by

the new government of the previous regime's financial responsibilities. Additionally, the three main theories of treaty succession—negativist (developed from 1978 Vienna Convention's "clean slate" theory),[55] universalist, and modern hybrid[56]—all bind the new Islamic Republic to the human rights agreements ratified under the Shah. "Until Iran formally denounces the multilateral human rights agreements, the agreements continue to bind it."[57]

Why has the Islamic Republic chosen to remain a member-party of the ICCPR, considering many of its articles implicate the regime? After all, the new government has terminated other international agreements, for example denouncing two articles of the unilateral Treaty of Friendship with the Soviet Union.[58] The Iranian government's need to gain legitimacy both on the global stage and in the eyes of its electorate, which have grown more disillusioned with the new regime, provides part of the answer. The diplomatic cost of remaining a state-member is arguably significantly lower than pulling out of the treaty completely; with the treaty acting as a shield, Iran is able to continue committing human rights abuses while looking sympathetic to the cause of human rights on the world stage. The reality, however, is much more intricate, perfectly captured in what Emilie Hafner-Burton and Kiyoteru Tsutsui call "the paradox of empty promises:"[59] Nation-states commit themselves to legally binding human rights treaties often without the intention or the incentive to comply, in turn providing non-state actors with the tools to force movement towards compliance. The Islamic Republic's superficial commitment to the ICCPR is an empty promise for Bahá'ís who continue to face political, social and economic marginalization for their religious beliefs. The paradox is the processes kicked into motion, such as civil society activism, empowered by the language and mission of the ICCPR as well as mechanisms of the Covenant itself that open new avenues of change. These processes have the potential to push Iran towards compliance, however slowly.

The Case of Bahá'ís in Iran: A Top-Down and Bottom-Up Analysis

In its 1993 Concluding Observations—after expressing serious concern for the plight of Bahá'ís "whose rights under the Covenant [ICCPR] are subject to extremely severe restrictions"[60]—the UN Human Rights Committee urged Iranian authorities to study its recommendations "with a view to adopting necessary legal and practical measures to ensure the effective implementation of all the provisions of the Covenant."[61] Nearly twenty years have passed, and there has not been any evident shift in Iran's jurisprudence or political structure in favor of the Bahá'ís;

"the institutionalization of discrimination has not been substantially altered,"[62] and the provisions of the 1991 Secret Memorandum, which set the state's official policy on "the Bahá'í question,"[63] continue to be in effect to this day. Members of the Bahá'í faith are still banned from working for the government,[64] worshiping publicly,[65] and attending university,with religious affiliation continue to remain a question on university applications, the four options being Islam, Judaism, Christianity and Zoroastrianism.[66] Bahá'ís continue to be routinely arrested, interrogated, and imprisoned for common charges of "espionage" and "propaganda against the Islamic Republic."[67] The Bahá'í community is denied the ability to administer its affairs; as opposed to a clergy system, Bahá'í affairs are governed through an electoral system. Without the ability to establish this system in Iran, informal local and national bodies guided the community with limited resources; but, in 2009, all Bahá'í administrative arrangements—already ad hoc and informal in operation—were declared illegal by Iran's Prosecutor General, Ayatollah Qorban-Ali Dorri-Najafabadi.[68] By that time, seven members of an ad-hoc body leading the affairs of Bahá'ís in Iran at the national level had been detained for months, and after "an unfair trial in which no evidence was presented against them,"[69] they were each given a 20-year sentence on charges pertaining to their work in Bahá'í administrative roles (10 years) and alleged involvement in activity that undermined the security of the state (10 years). Their sentences were reduced a few months later to 10 years after the appeals court ruled that there was no basis for the national security charges, upholding charges related to Bahá'í administration.[70] The Bahá'í Seven—also known as "Yaran"—all served their decade long sentence despite mounting international pressure such as the U.S Department of State's press statement condemning their detention[71] and Heiner Bielefeldt calling for their release in 2013, reminding the Iranian government that "as a party to the International Covenant on Civil and Political Rights, it cannot distinguish between favoured and un-favoured groups as far as freedom of religion is concerned."[72]

The Iranian constitution, officially adopted in December of 1979, does not list the Bahá'ís as a recognized religious minority group—with article 13 granting that status *only* to Christians, Jews and Zoroastrians.[73] As Heiner Bielefeldt, the UN Special Rapporteur on freedom of religion or belief, noted in 2016, "the Bahá'ís have always been a marginalized and vulnerable group devoid of proper legal protections because Iran's constitution does not officially recognize them as religious minorities."[74] This, in turn, has led to a complete lack of political

representation for the Bahá'ís. hile Zoroastrians, Jews, Armenians and Assyrians are granted a specific number of seats in the *majlis* (parliament),[75] Bahá'ís are not. Additionally, any new laws passed to expand the rights of religious minorities in Iran automatically exclude the Bahá'ís; for example, in 2003, the Iranian parliament passed a bill allowing equal compensation in blood money for religious minorities, but a court later ruled that Bahá'ís do not benefit from this legislation.[76] Evidently, the use of the term "religious minority," both in legislation and in Iran's reports to the Human Rights Committee, refer only to *recognized* groups. The sheer absence of Bahá'ís from the constitution has also led to the inability of human rights lawyers to appeal to this central document of the Republic to fight legal battles in domestic courts.

Top-down reform—at the institutional and legal level—is a difficult feat in Iran, because the Islamic Republic's political system concentrates great power in the hands of the Supreme Leader (*faqih*) and the Guardians Council (*shora-ye negahban*), neither of which are elected by the public.[77] The Guardian Council, which reports directly to the Supreme Leader,[78] vets presidential candidates;. Since the election of the last reform president, Khatami (1997-2005)—who loosened cultural restrictions in favor of "individual liberties, free expression, [and] women's rights,"[79] even unofficially relaxing some restrictions on Bahá'ís[80]—the council's pool of acceptable candidates has taken a serious shift toward *usul-garas* (hardliners). The Council is also vested with the power to veto any legislation it deems contradictory to the Sharia, making Khatami's liberal parliament unable to produce lasting changes in the system.[81] Evidently, there are serious structural barriers to reform and the implementation of ICCPR provisions at the legal and institutional level. Despite the Human Right Committee's push for such changes, there is no evident reform in Iran's legal system to facilitate the protection of Bahá'ís or, at minimum, provide some recognition for their existence as a religious minority in the constitution.

Bottom-up attempts to push Iran toward treaty compliance are varied, but civil society's scope of influence is limited "because of the highly restrictive operating environment of the Islamic Republic."[82] In 2007, Shirin Ebadi, an Iranian lawyer and Nobel Peace Prize winner, stated that "human rights discourse is alive and well [in Iran] and civil society considers it the most powerful framework for achieving sustainable reform," referring to a growing acceptance and adoption of human rights norms and language. Additionally, as Akbarzadeh, research professor of Middle East and Central Asian politics at Deakin University,

argues, "there are qualitative indications of a growing domestic culture that supports human rights in Iran,"[83] evident in the One Million Signatures Campaign, launched in 2006 to demand an end to discriminatory laws against women. Though Iran is not a signatory of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)—because Khatami's bill proposing treaty ratification was vetoed by the Guardian Council, which deemed it "incompatible with Islam"[84]—the One Million Signatures Campaign adopted the language of human rights more generally. The Campaign's petition statement reads: "The Iranian government is a signatory to several international human rights conventions, and accordingly is required to bring its legal code in line with international standards. The most important international human rights standard calls for the elimination of discrimination based on gender, ethnicity, religion, etc."[85] The petition ends with a call for reform of existing laws "based on the government's commitments to international human rights conventions."[86] This appeal to international human rights law by a grassroots campaign, which gained traction and collected thousands of signatures through door-by-door campaigning,[87] counters cynical claims that human rights are tools of cultural imperialism by the West and that they are "perceived as an alien ideology in non-Western societies."[88] Evidently, Iranian civil society increasingly favors using human rights language to frame its demands.

This is also reflected in the Bahá'ís' demands for equal rights and better treatment. In the past decade, two major campaigns intended to raise awareness of Iranian Bahá'ís' lack of access to higher education have gained popularity: Education Under Fire and Education Is Not A Crime (#NotACrime). Both campaigns began with the release of documentaries that shed light on the persecution of Bahá'ís, focusing on Bahá'í students who are denied entrance to public universities, many of whom study at the underground and informal Bahá'í Institute for Higher Education (BIHE).[89] *Education Under Fire*, the documentary underpinning the campaign of the same name and directed by Jeff Kaufman in collaboration with Amnesty International, was first screened in 2011 in a few universities in the U.S. before being released on DVD. The film presents the exclusion of Bahá'ís from higher education, the mass raids of Bahá'í homes in 2011, and the routine arrest and imprisonment of BIHE students and instructors not only as cruel but as a violation of Iran's commitments under international human rights law. Twenty seconds into the documentary, Article 26 of the Universal Declaration of Human Rights is cited as granting everyone the right to

an education,[90] strengthening Amnesty International's demand for the protection of the human rights of Bahá'ís. In the documentary, Elise Auerbach, an Iran Specialist at Amnesty International USA, states that "the Iranian government is very sensitive to international pressure [and] it's very conscious of its public image around the world, and that's why it's very important for human rights activists to take action."[91] Like many other human rights activists involved in this work, Auerbach believes that bringing public attention to the persecution of Bahá'ís is a tool that must be utilized to shatter Iran's public image, ultimately pressuring the government to change its treatment of the Bahá'ís.

The Education Is Not A Crime campaign employs a similar strategy of raising awareness as a means of creating international pressure on the Iranian government to change its policies. In addition to filmmaking, the campaign uses public murals around the world to broadcast its message.[92] The campaign was launched in 2014 with the documentary *To Light a Candle* directed by Iranian-Canadian journalist Maziar Bahari, who became intimately familiar with the persecution of Bahá'ís when he was arrested for his journalistic activity following the 2009 Green Movement and shared a cell with Bahá'ís in Tehran.[93] The #NotACrime Campaign frames education as the most basic human right, but unlike Education Under Fire, it does not engage heavily with human rights discourse. Since 2017, the campaign has encouraged sympathetic supporters to paint hundreds of murals around the world in an attempt to raise awareness and help communities resonate with the Bahá'ís' cause through their own unique struggles. For example, in Harlem, a neighborhood in New York City, many Black artists and activists who contributed their skills and time to the campaign have connected the exclusion of Bahá'ís from public life to America's history of segregation.[94] In a trailer for the film *Changing the World, One Wall at a Time* (2017) shared on the campaign's website, a gentleman commenting on the campaign's murals in Harlem says, "One of the things that is striking, it sounds like the same experience of my ancestors as slaves and them being denied a right to an education." The message of the Education Is Not a Crime Campaign, universal and easily recognizable, allowed it to gain momentum across the world in a short span of time. In early 2020, however, the campaign's activity came to a halt without an explanation.

Two lessons are evident from the examples above. First, campaigns attempting to remedy the situation of the Bahá'ís tend to start and grow outside of Iran. While campaigns such as Education Is Not A Crime operate freely in the

West, there are clear restrictions and risks that discourage activists from forming such campaigns inside Iran; for example, many women's rights activists have been arrested and interrogated for their work with the One Million Signatures Campaign.[95] Second, although there are, at times, appeals made to international human rights law as a way of framing Bahá'í persecution as a treaty violation, the ICCPR is not heavily present in this discourse. Given that Bahá'í students are still barred from attending university in Iran, the contributions of these campaigns are not the enactment of policy change but rather reflected in their roles as non-state actors who "serve to break the state monopoly on information, standard-setting, and norm creation, even if it does not usher in a new era of democratic international politics."[96]

A Call for Change: ICCPR's First Optional Protocol

The protection of the human rights of Bahá'ís in Iran, as outlined in the provisions of the ICCPR, necessitates improved mechanisms of enforcement. Special human rights treaty bodies use three prescribed methods to monitor the protection of human rights in signatory states: inter-state complaints, state reports, and individual complaints.[97] Inter-state complaints are rarely filed as states "consider the process too susceptible to political manipulation,"[98] preferring instead to voice their condemnation of a country's human rights violations in public statements. State reports are important tools for holding human rights violators accountable, but Iran's reporting cycles remain inconsistent and the reports submitted to the Human Rights Committee continue to outright deny Bahá'í persecution. Still, state reports are the only mechanism currently used to monitor Iran's human rights record as it pertains to the ICCPR because individual complaints require state consent to allow individuals to submit reports of alleged human rights violations to be heard by UN treaty bodies. State consent is given by the adoption of the ICCPR's First Optional Protocol, which Iran has not adopted.

Making the First Optional Protocol to the ICCPR mandatory for all member-states of the Covenant would create an effective avenue of change for Bahá'ís in Iran who are currently denied fair trials in domestic courts. Article 2 of the Optional Protocol requires individuals to submit a complaint to the treaty body only after having "exhausted all available domestic remedies," which is an easy feat for Bahá'ís in Iran, as domestic means of bringing about change are almost nonexistent. Cases of Bahá'ís being denied legal counsel, public trials, written documentation of their verdict, and other court documents, including alleged evidence of accusations made against them, are commonplace. The UN Working

Group on Arbitrary Detention has documented such trials, which do not "meet the guarantees for a fair trial established by international law."[99] In its 2008 communication to the Iranian government, the working group brought to attention the cases of 14 detained or imprisoned Bahá'ís, one of which was Mr. Forouzan:

> Mr. Mohammad Isamel Forouzan, from Abadeh, was originally arrested in May 2007, when he was questioned about Bahá'í teaching activities. On 11 November 2007, he was sentenced to one year's imprisonment and 10 year's exile from Abide for spreading propaganda against the Government for the benefit of foreign Governments. Mr. Forouzan undertook serious efforts to secure an attorney but was unsuccessful in obtaining legal counsel. He was given notice only a day and a half before his appeal hearing. When he raised this point with the judge, his request for additional time was denied and his sentence was conveyed orally. Despite his explicit request, he was not permitted to see or to receive a copy of the court order.[100]

The cases of the other 13 include similar unfair practices in court, with the working group concluding that these detentions are "consistent with a pattern of harassment, intimidation, expulsions from universities, confiscation of property and even persecution" and recommending that the government should "take the necessary steps to remedy the situation of these persons in order to bring it into conformity with the provisions enshrined in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights."[101] It is evident that Bahá'ís do not have access to the domestic means of addressing violations of their human rights, making them ideal candidates for the submission of individual complaints under ICCPR's First Optional Protocol.

How is the First Optional Protocol any different from the ICCPR's reporting cycle which allows the Human Rights Committee to inquire directly about the situation of the Bahá'ís? After all, the filing of individual complaints does not endow treaty bodies with enforcement power, such as warranting means of financial and diplomatic punishment on that country. Additionally, as Allen states so plainly, Iran is an "amoral government,"[102] meaning it is not affected by moral appeals or a tarnished image on the world stage. "Only adequate sanctions," he claims, "will force Iran to comply with its international obligations,"[103] and the fact that human rights treaty bodies cannot impose sanctions on non-compliant member states Allen's claims paint a rather bleak picture of the future.

The Iranian government does, however, value maintaining a positive public image, which is reflected in its response to the 2004 visit of six UNESCO judges responding to international complaints about the educational exclusion of Bahá'ís. During that year's university application cycle, many Bahá'í students were allowed to participate in the examination period by the removal of religious affiliation from their exam results.[104] Consequently, eight Bahá'í students were accepted into several public universities but decided not to attend in solidarity with the hundreds of Bahá'ís who were denied. Their acceptance was nonetheless stressed to the UNESCO judges by Morteza Nourbakhsh, the director of the "Ideological Select Section" of the Iranian Educational Evaluation Organisation, who claimed the continued existence of religious affiliation on transcripts was "not about the religion of the applicant, but the religion on which they wished to be examined." In doing so, he denied the rejection of Bahá'ís from universities based on the religion disclosed in their application.[105] Additionally, Iran has a serious stake in maintaining a positive image, because the world's perception of its human rights track often directly translates to Iran's financial and diplomatic loss or gain. For example, Khatami's reform era was met with a positive response from world leaders and organizations: the UN removed Iran from its list of human rights abusers, Britain revamped full diplomatic relations with Iran, President Clinton loosened the U.S.'s economic embargo, and the World Bank lent Iran $232 million for medical infrastructure.[106] The reversal of Khatami's reform projects during Ahmadinejad's presidency, and the grave human rights violations of 2009 that followed, caused Iran serious financial and diplomatic loss in the post-reform era, marking a clear correlation between strides toward human rights-focused reform and tangible monetary and diplomatic benefits from international organizations and world leaders.

It is in this context that the individual complaints procedure can produce positive outcomes for the Bahá'í community by allowing individual Bahá'ís to submit their case directly to the ICCPR treaty body—which has the obligation under its rules of procedure to provide interim protection (in the form of monitoring and direct requests made to the state) for the individual while the admissibility of the case is in review.[107] Once the case is admitted and the committee, after allowing the state to provide comments, has made a decision, the state party can be tasked with remedying the situation by providing redress and reparations, which in recent years have expanded in definition to include "public investigation to establish the facts, bringing the perpetrators to justice, retrial,

guarantees of non-repetition [and] law amendments."[108] Additionally, there is a follow-up procedure which allows the individual to directly respond to state updates and grants the rapporteur the ability to request meetings with representatives of the state.[109] The circulation of information in the follow-up procedure, unlike the initial process of case review and decision-making, is public.[110] Though the individual complaints procedure of the ICCPR is by no means completely effective at remedying and preventing human rights violations, the features discussed above force Iran to respond directly and promptly to accusations made against it and, depending on the decision, to provide some form of redress and reparations while continuing to be monitored by the special rapporteur in the follow-up procedure.

Since the inception of the individual complaints procedure, treaty bodies have progressively grown in capacity, currently able to process thousands of complaints each year.[111] An increase in the number of cases admitted to the ICCPR treaty body facilitated by the proposal above follows the more general trend of increasing capacity as more individuals vindicate their rights at the international level and is unlikely to create substantive hurdles in processing. Additionally, there is a growing trend of states accepting limits to their sovereignty in order to engage with international law, as Simmons observes.[112] Thus, the expansion of monitoring procedures of human rights treaties is well within the bounds of established norms. Although states will not accept outright intervention or the imposition of sanctions by UN treaty bodies, mandating the individual complaints procedure is a small intrusion of state sovereignty that is likely to be embraced and has the potential to push Iran towards compliance with its ICCPR obligations, granting the persecuted Bahá'í community some legal protections.

Conclusion

Although the current international human rights system actively creates new avenues of advocacy for civil society and embeds a new language in the discourse for equal rights for religious minority groups, it lacks the hard power to punish non-compliant states. The system's ability to properly investigate human rights violations is limited to allow states to maintain near complete sovereignty while engaging with international human rights law, which has not been designed to disrupt the delicate balance of the international system but to diffuse new norms and expectations of state behavior through soft power. This, however, has not translated into the realization of the human rights of Bahá'ís in Iran, who

continue to face arbitrary arrest, imprisonment, lack of higher education, the inability to work in the public sector and worship publicly, despite Iran's legally binding obligations under the International Covenant on Civil and Political Rights (ICCPR).

Both top-down and bottom-up analysis point to barriers to the implementation of ICCPR provisions and norms. Top-down reform is limited by the political structure of Iran, with two major undemocratic institutions—namely the Supreme Leader and the Guardian Council—posing serious barriers to change. Bottom-up reform is also a difficult feat due to the highly restrictive environment in which activists and NGOs operate. In this context, a change to the design of the ICCPR, namely making its First Optional Protocol (OP1) on individual complaints legally binding on all signatory states, is necessary to foster favorable outcomes for Bahá'ís and other persecuted religious minorities. Through OP1, Bahá'ís, who routinely face unfair trials in domestic courts, can appeal directly to the ICCPR's treaty body and, with a somewhat rigorous follow-up procedure in motion, push Iran toward compliance with its treaty obligations. In an ideal world, ratification of a human rights treaty by a member state would reflect the state's full commitment to protecting the rights outlined in the treaty. However, with a clear disconnect between ratification and action, the protection of vulnerable groups like the Bahá'ís requires a shift in treaty design to open up new avenues of change.

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How Roe v Wade Failed Us: An Examination of the Right to Abortion in Post-Roe Case Law

Julia Shimizu | Barnard College

Edited by Charles Huang, Ryan Fortani, Madison Garrett, Trey Greenough, Ava Mortier, Sebastian Pallais-Aks, Alyssa Wei, Mia Xing

Abstract

Motivated by the passage of the Heartbeat Act in Texas, and the overruling of the right to abortion in *Dobbs v Jackson*, this paper seeks to examine why it has proven so difficult to uphold the right to abortion as framed in *Roe v Wade.* The paper argues that *Roe*'s failure to secure the right to abortion stems from: (1) the rhetoric of the Court; (2) the usage of the "viability" standard to define a legal abortion; (3) the treatment of the fetus and the pregnant person as separate entities; and (4) the usage of a privacy legal framework to grant the right to abortion. Ultimately, I argue that post-*Roe* rulings not only follow the flawed framework employed in *Roe* but also disproportionately restrict the right and access to abortion for marginalized people, such as low-income people, people of color, people with disabilities, and gender nonconforming people.

Introduction

In 1972, *Roe v Wade* granted Americans the constitutional right to abortion, reshaping the court's interpretation of the right to privacy and the due process clause of the 14th amendment. The ruling was the culmination of a two year legal battle that began when Jane Roe challenged the constitutionality of a Texas law that made abortions illegal with the exception of health concerns to the pregnant person. For fifty years, the Supreme Court recognized the right to abortion for birthing people in the face of continuous attacks by anti-abortion legislation at the state level, as exemplified by rulings as *Webster v Reproductive Health Services* and *Planned Parenthood v Casey, and Women's Health, et al. v Jackson*. In 2022, efforts to restrict abortion rights were successful and the Supreme Court's decision in *Dobbs v Jackson* overruled the right to abortion previously established in *Roe*.

Motivated by the passage of the Heartbeat Act in Texas and the judicial challenges to the right to abortion, this paper seeks to examine why it has proven so difficult to uphold the right to abortion as framed in *Roe v Wade.* I begin this paper with historical background on the issue of abortion in the United States. I show that abortion bans are relatively recent in American history. Then, I move to my examination of *Roe v Wade*. From such examination, I find that *Roe* was limited in its intent and framing of the right to abortion. I argue that *Roe*'s failure stems from four main aspects: (1) the rhetoric of the Court that privileges the interests, opinions, and experiences of the physician over the pregnant person; (2) the usage of the "viability" standard to define a legal abortion; (3) the treatment of the fetus and the pregnant person as separate entities; and (4) the usage of a privacy legal framework to grant the right to abortion. in post-*Roe* Supreme Court cases, namely *Webster v Reproductive Health Services, Planned Parenthood v Casey*, *Whole Women's Health v Jackson*, and *Dobbs v Jackson Women's Health Organization*.

Background

1. The criminalization of abortion

The criminalization of abortion in the United States is a fairly recent phenomenon that dates back to the mid-nineteenth century. During the colonial period, Americans relied on English common law which used "quickening," the moment when the pregnant woman could feel the fetus moving, as evidence of livelihood.[1] Once "quickening" was detected, abortion was classified as a "great misprision," but there is no evidence of the criminalization of abortion prior to

this classification.[2] In fact, some scholars, and even the majority opinion in *Roe*, question whether "post-quickening abortion was ever firmly established as a common law crime."[3] Most importantly, a pregnant person would unlikely feel the "quickening" of the fetus "before the sixteenth week of pregnancy," showing that Colonial America and the early decades of the United States were more tolerant of abortion than later statutes.[4]

In the mid-nineteenth century, there was a significant wave of anti-abortion statutes passed by the states that recognized the legal personhood of fetuses, referring to a fetus as an "unborn child." [5] In the same year that the Fourteenth Amendment was ratified, more than eighty percent of the states had passed such statutes criminalizing abortion.[6] By 1986, two-thirds of the anti-abortion statutes eliminated the quickening standard, applying an equal punishment to whoever sought an abortion.[7]

The mid-nineteenth-century statutes that criminalized abortion were largely supported by physicians, specifically the American Medical Association (AMA). Doctors were motivated by concerns over maternal health, the belief that the procedure was harmful and dangerous, and morality — the idea that fetal development occurs in a continuum and should be protected even prior to "quickening."[8] However, some historians, such as James Mohr and Leslie Reagan, claim that the AMA's anti-abortion crusade was heavily motivated by physicians' fear of losing "professional power" to other health care providers who also performed abortions, such as homeopaths and midwives.[9] In fact, physicians asserted their authority in the nineteenth-century anti-abortion movement by being the only ones who could legally perform abortions.[10] Once the anti-abortion statutes successfully passed state legislatures, they gained significant power over reproductive practices—a legacy that continues until this day.[11]

Additionally, the socio-cultural landscape of the late-nineteenth century was a key factor in the wave of antiabortion statutes passed at the time. A then-recent wave of immigration and the casualties of the Civil War threatened white Anglo-Saxon political domination in the North.[12] Given that middle-class Anglo-Saxon women were believed to be getting abortions, anti-abortion statutes were necessary to secure the continued reproduction of Anglo-Saxons and, thus, their political control and cultural dominance over the nation.[13]

Lastly, although abortion was illegal during the nineteenth and most of the twentieth century, women did not stop terminating their pregnancies. Therapeutic abortions were legal forms of abortions performed by medical practitioners whose

legality depended on a medical justification by the doctor— and opinions varied largely across hospitals.[14] At the time, abortions were mainly available to women that had the necessary resources, such as money to pay for and access to a physician willing to perform the procedure.[15] Women who did not have those resources had to resort to unsafe abortion conditions, either performed by third parties or self-induced, which in many cases led to health complications or death.[16]

2. The decriminalization of abortion

Despite the criminalization of abortion in the nineteenth century, women continued to seek abortions and the procedures developed into a socially acceptable method of birth control and topic of conversation in both the private sphere, such as with friends and family, and in the semi-private sphere, such as with doctors, nurses, and pharmacists.[17] Between the 1910s and the 1930s, there was a rise in the enforcement of criminal abortion laws, and arrests rose for self-performing abortion or providing abortion services, with prosecutors threatening and even arresting physicians.[18] There was an overwhelming focus on prosecuting abortion cases that involved the death of the pregnant person to draw attention to "the dangers of abortion."[19] Eighty-six percent of the abortion cases ruled by the Supreme Court of Illinois between 1870 and 1940 involved deaths, showing the state's effort to enforce criminal abortion laws.[20] The crackdown on abortion between the nineteenth century and the 1930s shows how the state employed the law to enforce a preferred sexual behavior for women, especially middle-class and unmarried women. The rise in enforcement activity can be attributed to a growing need to reinforce conformity to gender norms, such as "requiring men to marry the women whom they impregnated" and taking financial responsibility for the child, or punishing deviant sexual behavior, for instance women who got pregnant out of wedlock.[21]

In the 1930s, the number of abortions increased significantly due to the socio-political changes brought by the Great Depression. During the Depression, the number of marriages declined due to the financial instability of American families and the growing demand for women to be employed.[22] While white women resorted to physician abortion providers and abortion clinics, low-income and Black women still relied mostly on self-induced abortion methods.[23] Simultaneously, the broadening of factors used as justifications for "therapeutic abortions" during the Depression, such as one's socioeconomic status and illness, led to a rise in abortions across the nation.[24] The increase in abortions and the

popularization of abortion clinics and contraceptives were followed by an increase in clinic raids and criminal trials in the 1940s.[25] Between the 1940s and the 1950s, a new crackdown restricted access to safe and legal abortions across the country.[26]

The increase in the enforcement of anti-abortion laws was one of many factors that led to the eruption of the pro-abortion movement in the 1960s. Women grew frustrated with regulations and physicians became less tolerant of working in a state of vigilance due to law enforcement pressures.[27] Additionally, changing economic structures, such as the increase in women's participation in the workplace required more reproductive control.[28] Lastly, the political climate of the 1960s, a decade of revolution and social justice movements, further facilitated the feminist movement's mobilization, which was instrumental to the legal battle for the legalization of abortion.

Two events stand out in the pathway toward the right to abortion granted in *Roe v Wade* in 1973. First, and perhaps most importantly, is the decision of *Griswold v Connecticut*[29] in 1965. In *Griswold*, the Supreme Court conferred the Constitutional right to privacy and affirmed that the right to marital privacy protected a woman's right to access contraceptives. Later, the Supreme Court held that such a right encompassed the right to abortion in *Roe*. Second, a group of five women lawyers challenged New York States's criminal abortion legislation. Their argument reframed abortion as a women's issue rather than focusing on the criminality of the medical professional performing the procedure.[30] No decision was rendered in the lawsuit since New York's legislature responded by legalizing abortion. However, the shift in perspective gained significant traction in the pro-abortion movement and provided the socio-political landscape from which *Roe v Wade* would emerge.

Literature Review

Jane Roe—a pseudonym used to protect the identity of Norma McCorvey—was a pregnant single woman in Dallas, Texas that wished to have an abortion "performed by a competent, licensed physician, under safe, clinical conditions."[31] Roe was unable to terminate the pregnancy because Article 1196 of the Texas Penal Code prohibited any abortion except when medically advised to save the life of the mother.[32] Therefore in 1970, Roe took legal action against the district attorney of Dallas, Henry Wade, claiming that Texas' criminal abortion laws were unconstitutional due to their infringement upon her right to privacy protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[33] *Roe v*

Wade reached the Supreme Court, which ruled all Texas abortion statutes unconstitutional.[34]

Roe v Wade's majority opinion privileges the opinion of the physician over the pregnant person's autonomy. The rhetoric employed by the Court is relevant because it provides an important framework for understanding how law perceives birthing people's legal personhood and rights. In "The Rhetoric of Roe v. Wade: When the (Male) Doctor Knows Best," Katie Gibson argues that the majority opinion in *Roe* employed a "doctor knows best" philosophy that placed women outside the decision making process by characterizing them exclusively as passive patients.[35] The opinion of the Court in *Roe* is to a large extent a catalog of the medical-legal history of abortion. Justice Blackmun cites Soranus of Ephesus, whom he calls "the greatest of the ancient gynecologists," and Hippocrates, "the Father of Medicine," and examines the medical attitudes toward abortion and technological advancement of the procedure.[36] By setting "medicine as the ultimate arbiter," the Court grounds the right to abortion on medical opinion and technology.[37] Thus, in privileging male-dominated medical history in the opinion of *Roe*, the Court has neglected women's history, opinions, and stories on abortion.

The right to abortion as presented in *Roe* does not legally affirm women's reproductive autonomy. Appropriately doing so would have accounted for women's lived experiences, socioeconomic condition, will, and freedom. Instead, as founder of the International Reproductive Rights Research Action Group Rosalind Petchesky argues, women's right to abortion as defined in Roe is grounded on "medical necessity," which is intertwined with the eugenic ideal that only women who are "fit" should bear children and that poor, while mentally or physically disabled women should not.[38] The strong emphasis on the medical aspect of abortion shows the state's attempt to regulate reproduction through medical authority.

The decision in *Roe v Wade* further diminishes reproductive autonomy through the ambiguous standard of viability it uses for defining a legal abortion. From an early stage, the criminalization of abortion in the United States has relied on how available technology identifies human life. The quickening laws in common law granted the fetus legal rights once it moved inside the womb. *Roe*'s viability standard grants the fetus legal rights once it is "potentially able to live outside the mother's womb, albeit with artificial aid," which is at about seven months.[39] Similar to quickening, the concept of viability is arbitrary and

unreliable when defining the right to abortion. Due to improvements in medical technology since *Roe v Wade*, a fetus can now survive outside the womb at an earlier stage.[40]Thus, so long as the right to abortion is granted based on how available technology can define life, it will allow for legal challenges against *Roe*.

The Court in *Roe* presents the fetus as separate from the woman, erasing the natural dependency of the former on the latter and putting in contention the legal personhood of the fetus and pregnant person. Fetal personhood refers to the legal framework that considers "the fetus a separate unborn person, rather than a part of the woman carrying the fetus," meaning the fetus acquires separate legal rights from the pregnant person prior to birth.[41] In ruling that the right to abortion is not absolute in *Roe*, the Court presented the interests and rights of the woman and the fetus as separate and even competing. As Justice Blackmun puts it: "it is reasonable and appropriate for a State to decide that at some point in time another interest, that of the health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly."[42]

According to Justice Blackmun, while the mother's right to privacy trumps the rights of the fetus and allows her to have an abortion if she wishes, "at some point in time" the legal rights of the fetus trump those of the woman. Justice Blackmun's terminology is imprecise, and that decision is made on purpose as the Court clearly states that it does not seek to define when life begins.[43]However, such an imprecise threshold in *Roe* presents the fetus as a person, or a potential person, erasing the inherent biological and developmental dependency of the fetus on the mother. Instead, Justice Blackmun presents the fetus and mother as independent biological beings with separate legal rights. In doing so, the framework employed by the Court in *Roe v Wade* allowed for fetal personhood statutes to be passed in state legislatures across the nation.

Lastly, basing *Roe v Wade* on the right to privacy is insufficient to secure the right to abortion and to realize women's reproductive rights and autonomy. Women, as well as African and Indigenous Americans, were not part of the founding of legal institutions in the United States. White cisgender men designed the American legal system, defined who could be part of the body politic in "we the people," and have benefited from their legal, political, social, and economic dominance.[44] Under white cis-male dominance, the privacy framework used in *Roe* privatizes the issue of abortion and is unfit to secure and realize the right to abortion for all birthing people in two ways.

First, by placing abortion in the private sphere, *Roe* neglects the political and socio-economic conditions that affect the decision to seek or not seek an abortion. A "pro-choice" stance on abortion ignores how capitalism and white supremacy constrain the resources available to women of color, low-income women, women with disabilities, and gender non-conforming birthing people.[45] Moreover, it ignores the history of forced abortion and sterilization experienced by women of color, which the eugenics movement promoted to exert population control. The emphasis on women's individual freedom of choice marginalizes birthing people who are systemically denied the resources necessary to realize such a right. Thus, abortion was legal but inaccessible to many due to barriers like "expense, location, shortage of services, and violence."[46]

Second, by recognizing the right to abortion under privacy law, *Roe* discharges the state as the responsible entity for realizing birthing people's reproductive rights. As MacKinnon puts it, the privacy framework "ideologically undermines the state intervention that might provide the preconditions for its meaningful exercise."[47] For example, the Hyde Amendment blocked Medicaid funding for abortion services with a few exceptions, such as if the pregnancy poses a health risk to the mother or is the product of rape or incest.[49] Due to the Hyde Amendment's restriction of federal funds to subsidize abortion, birthing people who rely on Medicaid have extremely limited abortion coverage in thirty-four states, especially low-income people and people of color.[50] Thus, the Amendment is an example of how conferring the right to abortion but not securing the access to reproductive health neglects the needs of birthing people, especially low-income people.

In addition to the issue of funding and having access to abortion services, the legal protection of the right to abortion does secure the realization of such a right to birthing people. As Petchesky states, abortion's "legality assures women neither material means nor moral support and political legitimation in their abortion decisions."[51] Thus, framing the issue of abortion as a matter of privacy vis-à-vis government intervention overlooks the state's responsibility to realize the right to abortion for birthing people and the sociopolitical barriers they face when deciding to get an abortion. To democratize the right to abortion would mean holding both federal and state governments accountable for making abortion services equitably accessible to all birthing people, regardless of identity (gender, race, income, ability, religion, ethnicity, etc) and legal status (such as for incarcerated people and undocumented immigrants).

Analysis

Roe v Wade has failed birthing people by not granting the absolute right to abortion. As proposed by the above examination, *Roe*'s failure stems from four main aspects: (1) the rhetoric of the Court that privileges the interests, opinions, and experiences of the physician over the pregnant person; (2) the usage of the standard of "viability" to define a legal abortion; (3) the treatment of the fetus and the pregnant person as separate entities; and (4) the usage of a privacy legal framework to grant the right to abortion. These four main criticisms to *Roe* provide the analytical framework for my examination of abortion case law in the post-*Roe* era. To illustrate that the Court continues to rely on the flawed framework of *Roe* and that it has progressively encroached on women's right to abortion since, I focus on four Supreme Court cases: *Webster v Reproductive Health Services* (1989), *Planned Parenthood of Southeastern Pennsylvania v Casey* (1992), *Whole Woman's Health et al. v Jackson* (2021), and *Dobbs v Jackson Women's Health Organization* (2022).

1. *Webster, Attorney General of Missouri et al. v Reproductive Health Services et al.*

In *Webster v Reproductive Health Services*,[52] abortion providers in the state of Missouri challenged a statute that affirmed that life begins at conception, granting fetuses "the same rights enjoyed by other persons." Additionally, it required that a viability test be performed prior to an abortion and imposed an "informed consent" provision. The Missouri statute also prohibited the allocation of public funds toward abortions and prevented employees from performing or assisting with the procedure.[53] The plaintiffs sued based on the right to privacy and women's right to abortion as posed in *Roe*.[54] In 1989, the Supreme Court examined the preamble, the prohibition of using public facilities and funding for abortions, and the viability test requirement of the Missouri act.[55]

The Supreme Court failed to protect birthing people's legal personhood by blocking them from contesting the constitutionality of Missouri's preamble. The preamble of the Missouri act pushes for fetal personhood by arguing that "[t]he life of each human being begins at conception."[56] Appellees claimed that the preamble is "an operative part of the act," and that by defining when life begins it puts forth the preconditions for legal abortion and even affects the access to intrauterine contraceptives.[57] The Court abstained from deciding the constitutionality of the preamble and rejected the notion that the preamble is "abortion-neutral," siding with Missouri.[58] In *Webster*, the Court decided against

protecting birthing people's right to abortion and legal personhood. Instead, it chose a rhetoric of silence when the state of Missouri pushed for fetal legal personhood.

Webster exemplifies the Supreme Court's continuing failure to protect the legal personhood, interests, and desires of birthing people by upholding *Roe's* treatment of the fetus and pregnant person as separate entities. In its majority opinion, the Court emphasizes the framework provided in *Roe* that lays the state's obligation to protect both the health of the mother and the fetus, referred to as "the potentiality of life," when deciding to regulate abortion.[59] Similar to *Roe*, the Court continues to have a limited understanding of birthing people's right to privacy and autonomy in relation to abortion. This narrow conceptualization is restricted mostly to their physical health and does not account for the political, social, and economic preconditions that lead to deciding to interrupt a pregnancy. The Court's fixation on fetal legal personhood exceeds its concern for pregnant persons, who bear the economic burden of viability testing, thereby upholding the neglectful and discriminatory rhetoric of *Roe*.

Webster further weakens the right to abortion by loosening the viability restrictions of *Roe*. The majority opinion in *Webster* refutes *Roe*'s trimester framework, which required a woman to have the unrestricted right to abort a fetus prior to viability. As stated by Justice Rehnquist, "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."[60] The Supreme Court's opinion in *Webster* further encroaches on the right to abortion because it found that the state's interest to defend fetal life extends through the entire pregnancy. In doing so, little space remains for the consideration of the pregnant person's life—given that both lives are put in contention under *Roe*'s framing.

Lastly, the Supreme Court opinion in *Webster* supports the state's neglect in realizing the right to abortion by siding with Webster in Missouri's restriction on public funding for nontherapeutic abortions. Justice Rehnquist claims that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government may not deprive the individual."[61] The Court's view of the state's responsibility to both secure and realize constitutional rights is conservative and limited. The Court fails to realize that denying the absolute right

to abortion keeps birthing people in vulnerable situations, whether social or economic, from achieving their full reproductive autonomy.

2. *Planned Parenthood of Southern Pennsylvania et al. v Casey, Governor of Pennsylvania, et al.*

In *Planned Parenthood v Casey*,[62] five abortion clinics, a physician, and a class of doctors brought a lawsuit against the Pennsylvania Abortion Control Act, which required informed consent and a twenty-four-hour waiting period prior to an abortion, necessitated parental consent for minors, and demanded that married women sign a statement saying they notified their husbands. The Supreme Court's majority opinion by Justice O'Connor ruled that a woman's right to choose before a fetus achieves viability should occur "without undue interference from the State," and that the state can regulate abortions after the fetus achieves viability and has an interest in both "protecting the health of the mother and the life of the fetus."[63] At the time, *Casey* represented the most prominent legal challenge to *Roe v Wade*, given that the Court reexamined and reaffirmed *Roe*'s central holdings based on the doctrine of stare decisis, a legal principle under which courts adhere to precedent when making their decisions.[64]

Though *Casey*'s "undue burden" standard could have further protected the right to abortion, it instead allowed for greater subjectivity and led to the passing of additional, greater restrictions. In *Casey,* the Court defines an "undue burden" as "a state regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[65] The standard is highly subjective and unreliable to define the right to abortion. The "undue burden" could have expanded the meaning to include carrying an unwanted pregnancy beyond the scope of physical health. Furthermore, it missed the opportunity to account for potential mental health implications of undesired pregnancy, the financial costs of childrearing and childbirth, the implications on one's career and life plans, and ultimately how an unwanted pregnancy violates birthing people's reproductive autonomy and agency.

Instead, the subjectivity of the "undue burden" standard has increased the liberty of legislators and justices to encroach on birthing people's right to abortion. As previously argued in this paper's examination of *Roe*, the trimester framework was problematic. Similar to the "quickening laws" of the nineteenth-century, the trimester framework relies on the technology available at the time and supports a "doctor knows best" rhetoric that erases the interests and experiences of birthing people. Despite its problematic nature, the trimester

framework was legally less subjective and more protective of the right to abortion than the "undue burden" standard introduced in *Casey*.

Beyond the subjectivity of the "undue burden" standard, issues in the intent of adopting such a standard and the rhetorical choices used to define it show the Court's failure to protect and advance the right to abortion in *Casey*. The intent of the Court in adopting the "undue burden" standard in *Casey* appears to be to limit the right to abortion. There is extensive evidence in the majority opinion in *Casey* that the Court was concerned with how the trimester framework went too far in defending the right to abortion to the point that it failed to protect fetal rights. For example, the Court claims that "the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision."[66] Additionally, the Court states that "a structural mechanism by which the State may express profound respect for the life of the unborn are permitted."[67] Lastly, the Court fails to recognize that the twenty-four-hour waiting period required by the Pennsylvania statute would impose a burden on women, even in light of the District Court's compelling argument that it would burden low-income women and women who live far from the abortion clinic.[68]

From such passages, we observe the Court's insistence on introducing a standard that leads to greater respect and protection of fetal rights. The Court falls short of providing an explanation of what is a "substantial obstacle" to and "undue burden" on the individual that seeks an abortion. In fact, the Court even supports legislation "designed to persuade her to choose childbirth over abortion," and sees no implication on how medical and political *persuasion* violates the woman's autonomy and right to choose.[69] Therefore, the Court utilizes the "undue burden" standard to defend fetal legal personhood and to extend fetal rights from the standards presented in *Roe,* which consequently infringes on birthing people's legal personhood and right to abortion.

Furthermore, the rhetorical choices employed by the Court's opinion in *Casey* show how it privileges the legal personhood of the fetus over the pregnant person. The Court writes in *Casey* that "the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."[70] Such rhetorical choices imply that "the State's interest" refers to the state's interest in protecting fetal rights. With such a rhetorical structure, the Court aligns the state with the fetus and presents the "woman's constitutionally protected liberty" in opposition to the interest of the state. Similar to the rhetoric employed in *Roe,* the court presents the fetus and the

pregnant person as separate entities and places their rights in contention, here subject to reconciliation. Thus, *Casey* carries the legacy of *Roe* that implicitly privileges the legal rights of the fetus over the woman's legal rights.

The upholding of the informed consent provision of the Pennsylvania Abortion Control Act by the Supreme Court in *Casey* dismisses a pregnant person's agency and autonomy when choosing an abortion. The informed consent provision mandates that "at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child."[71] For example, *Casey* claims that statutes that show the state's "preference for childbirth over abortion" are founded on its legitimate right to protect fetal life.[72] The Court continues to uphold the "doctor knows best" rhetoric from *Roe* and supports the state's right to defend fetal life prior to viability. Additionally, the Court does not recognize that the power dynamic between the doctor and the patient allows the doctor to influence the woman's decision to abort or not, especially in a society that widely reprehends abortion on moral and religious grounds and subjects abortion-seeking individuals to harassment and even violence.

In fact, the increase in anti-abortion legislation following *Casey* supports that the informed consent provision encroaches on the right to abortion. Following the decisions of *Webster* and *Casey*, the number of abortion restrictions on a state level increased significantly in the 1990s and early 2000s. The rise in anti-abortion laws led to a decrease in the number of legal abortions, an estimated 22.22 percent between 1990 and 2005, due to the higher costs incurred by women in light of public funding restrictions for abortions and informed consent legislation.[73] Following *Casey,* state legislatures expanded on the original doctrine of informed consent to enforce mandatory ultrasounds and "fetal pain" pamphlets.[74] Informed consent in the context of abortion and as upheld in *Casey* is an example of "patronizing laws" that cast women as "less capable of understanding the potential outcomes than patients in other medical contexts."[75] I argue that the informed consent provision is beyond patronizing: it subjects them to persuasion by the state and the doctor to not get an abortion, even if that opposes their original desire, and it violates birthing people's self-determination and bodily autonomy.

3. *Whole Woman's Health, et al. v Jackson, Judge, District Court of Texas, 114th District, et al.*

In *Whole Woman's Health v Jackson*,[76] abortion providers brought a pre-enforcement lawsuit against S.B. 8, also known as the Texas Heartbeat Act, which prohibited physicians from knowingly performing or inducing an abortion if a fetal heartbeat is detected, as early as six weeks of pregnancy. S.B. 8 puts forth an enforcement mechanism that relies on "private civil actions," meaning anyone who is part of the government of Texas such as "a district or county attorney, or an executive or administrative officer or employee of this state" can penalize any person who "knowingly engages in conduct that aids or abets the performance or inducement of an abortion" after a fetal heartbeat is detected[77]. The Supreme Court dismissed the petitioner's ability to file suit against the state-court clerk,state-court judge, and Texas Attorney General Paxton.[78]

The dismissal of the most prominent portions of the lawsuit in *Jackson* shows that the Supreme Court continues to follow a conservative view on the right to abortion. The mechanism of S.B. 8 purposefully dodges judicial review because it puts private persons, and not the state, as enforcement entities. In doing so, the state of Texas sets a vigilante scheme against women and other birthing people. In this example, the law is both violent, forcing a pregnant person to carry their pregnancies even in the pre-viability stage, as well as not liable to judicial retaliation by transferring its enforcement to the actions taken by private citizens.

The Court's decision to not enforce constitutional rights on a state level shows its neglect of the right to abortion. In her dissent, Justice Sotomayor recognizes *Whole Woman's Health v Jackson* goes beyond the scope of the case filed by petitioners: "the dispute is over whether States may nullify federal constitutional rights by employing schemes like the one at hand. The Court indicates that they can, so long as they write their laws to more thoroughly disclaim all enforcement by state officials. This choice to shrink from Texas' challenge to federal supremacy will have far-reaching repercussions."[79] In fact, the Supreme Court must hold states accountable for respecting constitutional rights such as the right to abortion. Such neglect by the Court is in itself a form of violence—it allows states to force pregnant people to carry unwanted pregnancies and to continue to encroach on birthing people's reproductive freedom and autonomy.

Jackson's majority opinion shows that the Court has failed to expand its understanding and protection of the right to abortion despite continuous attempts and victories by the anti-abortion movement. Justice Gorsuch disagrees with Justice Sotomayor's opinion, claiming that "many paths exist to vindicate the

supremacy of federal law."[80] His statement erases the responsibility and role of the Supreme Court in protecting constitutional rights. In fact, Justice Gorsuch's argument ignores the reality of birthing people in the United States, who have had their right to abortion corroded since *Roe*. As Justice Sotomayor states, "new permutations of S.B. 8 are coming. In the months since this Court failed to enjoin the law, legislators in several States have discussed or introduced legislation that replicates its scheme to target locally disfavored rights … Although some path to relief not recognized today may yet exist, the Court has now foreclosed the most straightforward route under its precedents. I fear the Court, and the country, will come to regret that choice."[81]

The Supreme Court's inaction vis-à-vis *Whole Woman's Health v Jackson* illustrates the ultimate neglect for the right for birthing people to abort. It exemplifies how the Court has failed to address the new mechanisms states have put forth to limit the right and access to abortion while evading responsibility. Since *Roe*, the Court has not evolved its understanding of birthing people's reproductive autonomy and agency. In fact, it has become more conservative and less protective of the constitutional right to abortion it once seriously recognized.

4. *Dobbs v Jackson Women's Health Organization*

In 2022, almost 50 years after *Roe*, the Supreme Court overruled *Roe* and *Casey* and the constitutional right to abortion. In case *Dobbs v Jackson Women's Health Organization*,[82] the court deliberated the constitutionality of Mississippi's Gestational Age Act, which restricted abortions at fifteen weeks of pregnancy. The plaintiffs argued that the constitutional right to abortion is grounded on the Fourteenth Amendment and previously established in *Roe* and *Casey*, rendering Mississipi's Act unconstitutional.[83] The majority opinion disagreed, and the Court expressed that "stare decisis is not an inexorable command" because "some of the Court's most important constitutional decisions have overruled prior precedents," citing *Brown v Board of Education*.[84] More specifically, in Justice Thomas's concurring opinion, he states that "we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*," calling for potential review and revision to due process decisions that granted the right to contraception, the right to engage in private and consensual sexual acts, and the right to same-sex marriage.[85]

Informed by the previous analysis of how *Roe* failed to protect the fundamental and absolute right to abortion, the Supreme Court's majority opinion in *Dobbs* is no surprise. If anything, the steady erosion of the constitutional

protection to abortion in post-*Roe* abortion case law hinted at theoverturning of *Roe v Wade*. Perhaps even more concerning but beyond the scope of this paper is Justice Thomas's concurrence in *Dobbs*, which raises concerns for many unenumerated privacy and liberty rights protected under the Due Process Clause.

Conclusion

In conclusion, my analysis of case law on abortion post-*Roe* shows that the Supreme Court has repeatedly enforced a framework on abortion that does not privilege the interests, opinions, and experiences of women and other birthing people. The Court has erased the natural dependency of the fetus on the pregnant person, which favored the legal personhood of a fetus over a pregnant person. It has framed abortion in terms of the right to privacy and freedom, which ignores the preconditions leading to the decision to abort. In doing so, the Court has marginalized low-income birthing people, birthing people of color, and birthing people with disabilities. Furthermore, in the past fifty years, the Court has grown more conservative and less protective of the constitutional right to abortion. It has failed to adapt its understanding of the right to abortion to developments in technology as well as its response to the innovative mechanisms of new anti-abortion statutes. The Court has either stuck with the framework used in *Roe*, which had already failed to grant birthing people absolute reproductive autonomy, or further limited the scope of the right to abortion. Most recently, the Supreme Court overturned *Roe* and *Casey*, revoking the constitutional right to abortion. In doing so, the Court revokes birthing people's rights and access to safe reproductive healthcare.

Fundamentally, to solve the historical legal issues with the right to abortion as posed in *Roe*, the Supreme Court should have conceded the absolute and fundamental right to abortion. In doing so, the Court should have privileged the opinion, interests, and experiences of women and birthing people and seen the fetus as a part of the pregnant individual, not a separate entity. By recognizing the absolute right to abortion, the Court would no longer have to deal with the technological implications of the standard of "viability" to define a legal abortion. Ultimately, to realize the right to abortion for all birthing people, regardless of gender, race, income, and ability, the Court should hold states responsible for providing accessible abortions.

1. Linton 1989, 228
2. Linton 1989, 228; Sauer 1974, 54
3. Witherspoon 1985, 30
4. Sauer 1974, 54
5. Witherspoon 1985, 70
6. Ibid, 33
7. Ibid, 35
8. Kunnins and Rosenfield 1991, 362–363
9. Reagan 1997, 10
10. Ibid, 14
11. Ibid, 14
12. Beisel & Kay 2004, 499
13. Ibid.
14. Packer and Gampell 1959, 447
15. Garrow 1998, 834
16. Rosenbaum 2019
17. Reagan 1997, 20–22
18. Ibid, 116–120
19. Ibid, 116
20. Ibid, 116
21. Ibid, 131
22. Ibid, 132–134
23. Ibid, 137–138
24. Ibid, 145
25. Cassidy 1998, 4
26. Reagan 1997, 190
27. Cassidy 1998, 4
28. Cassidy 1998, 3; Reagan 1997, 195
29. 381 US 479 (1965)
30. Stearns 1988, 2
31. *Roe v Wade*, 410 U.S. 113, 120 (1973)
32. Ibid, 119
33. Ibid, 120
34. Ibid, 166
35. Gibson 2008, 313
36. *Roe v Wade*, 410 U.S. 113 (1973)

37. Gibson 2008, 316–319
38. Petchesky 1984, 290
39. 160, 410 U.S. 113 (1973)
40. Beck 2009; Robertson, 2011
41. Brown 2005, 90
42. 159, 410 U.S. 113 (1973)
43. Ibid, 113
44. MacKinnon 1284, 1991
45. Smith 127, 2005
46. Fried 2000, 178
47. MacKinnon 1311, 1991
48. Hyde Amendment, Pub. L. 94-439, title II, Sec 209, Sept. 30, 1976, 90 Stat. 1434
49. Planned Parenthood
50. Salganicoff et. al, 2021
51. Petchesky xxiv, 1990
52. 501, 492 U.S. 490 (1988)
53. Ibid.
54. Ibid, 502
55. Ibid, 504
56. Ibid.
57. Ibid, 506
58. Ibid, 507
59. Ibid, 516
60. Ibid, 519
61. Ibid, 491
62. 833, 505 U.S. 833 (1992)
63. Ibid, 834
64. Ibid, 834
65. Ibid, 877
66. Ibid, 875
67. Ibid, 877
68. Ibid, 886
69. Ibid.
70. Ibid, 876
71. Ibid.

72. Ibid.
73. New, 2011
74. Paulk 88, 2013
75. Ibid. 90
76. 1, 595 U.S. ___ (2021)
77. Texas S.B. 8
78. 3, 595 U.S. ___ (2021)
79. Ibid. 10
80. Ibid. 15
81. Ibid. 12
82. 1, 597 US ___ (2022)
83. Ibid.
84. Ibid. 4
85. Ibid. 3

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