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ARTICLES

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LETTER FROM THE EXECUTIVE EDITORS

Dear Reader,

On behalf of the Editorial Board and the Print Division, we are proud to present the Spring 2023 edition of the Columbia Undergraduate Law Review's Print Division. This publication is a true testament to and result of the hard work of our contributing authors, editing teams, and publishers. With that in mind, we are extremely excited to present the following articles.

"In a Time of Crisis: Massachusetts Eviction Courts During COVID-19" by Carol Wu from Tufts University is an article investigating the impact of pandemic-era housing policies on eviction court decisions.

In "Invest in Justice: Economic Considerations for Representative Juries," Christine Piazza from Columbia University looks at the obstacles faced by low-income Americans in participating on juries and assesses the effects of this systemic exclusion and looks at potential solutions to the problem.

In "From Dartmouth College to Citizens United: The Bounds of Corporate Personhood Under the Grant Theory," Matthew Jennings from Yale University dives into the world of corporate rights, using Grant Theory and the framework of Professor John Dewey to understand which rights are necessary for corporations.

In "The Next Military Revolution? The Legal Case for Lethal Autonomous Weapons," Ali Ansari from Stanford University makes a case for the usage of lethal autonomous weapons by assessing it with respect to the principles laid out by the Geneva Conventions.

In "Modernizing the Marketplace of Ideas," Eli Bak from George Washington University examines potential approaches to regulate social media companies in an effort to protect the First Amendment rights of users.

In "Social Media Platform Regulation: Assessing the Grounds for Common Carrier Status," Sophia Hlavaty from Stanford University explores the possibility of regulating social media companies under the common carrier doctrine and finds that content moderation is not expressive enough to receive full First Amendment protection.

In "Mandatory Arbitration in Employment: Precedents and Potential Solutions," Daniel Iskhakov from CUNY Hunter College tells the story of the Federal Arbitration Act, ranging from the different Supreme Court decisions that have affected it and the effects of this on workers, and explores different solutions that states could employ.

In "A Supreme Motivation: The Drivers of Senate Confirmation Vote Behavior from Bork to Jackson," Austin Goetz from Carnegie Mellon University analyzes the different factors that affect senators' voting behavior in Supreme Court confirmation votes, using a mix of quantitative analysis and legal argumentation.

In "The Treaty of Amity and the Power of International Law," Avery Lambert, Corinna Singer, Alexander Lacayo, Alyssa Wei, Inica Kotasthane, and Martina Daniel from Columbia University looked at the rulings and relations of the International Court of Justice after the U.S. withdrew from the JCPOA in 2018 and explored the potential future implications of the case.

We hope you enjoy these incredible articles written by undergraduate students from schools all over the country and edited by Columbia and Barnard students. We are incredibly proud and grateful for their dedication and work. Thank you for your support of the Columbia Undergraduate Law Review and our continued mission to publish undergraduate legal scholarship.

Sincerely,
Jinoo Kim and Shaurir Ramanujan
Executive Editors, Print

MISSION STATEMENT

The goal of the *Columbia Undergraduate Law Review* is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

SUBMISSIONS

The submissions of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must include a title and author biography (including name, college, year of graduation, and major).

iv) We accept articles on a continuing basis.

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The Treaty of Amity and the Power of International Law

Print Writing Program | Columbia University

Written and Edited by Avery Lambert, Martina Daniel, Inica Kotasthane, Alexander Lacayo, Corinna Singer, Alyssa Wei

Abstract

After the Trump administration withdrew from the Joint Comprehensive Plan of Action and reimposed sanctions against Iran in 2018, Iran appealed to the International Court of Justice, claiming that the US withdrawal and sanctions violated the 1955 Treaty of Amity, Economic Relations, and Consular Affairs between the two countries. The ICJ's preliminary rulings on the matter posited that it held prima facie jurisdiction, that Iran's claims were plausible, and that the lack of provisional measures created a potential for imminent risk to the Iranian people. The ICJ also rejected US objections to these preliminary rulings. These moves indicate the ICJ's move to legitimize itself as an apolitical, sensible court and to establish norms of humanitarian standards. However, this perception of the ICJ as a bulwark of international justice and global stability relies on continued US cooperation with the ICJ's rulings, which the ICJ has no actual means to enforce. How this case proceeds in the merits stage may thus shape the ICJ's ability to compel state actors in future disputes.

Origins of the 1955 Treaty of Amity and the current Iranian-US Treaty Dispute

In 2018, the Trump administration abruptly withdrew the United States from the Joint Comprehensive Plan of Action (JCPOA), otherwise known as the Iran Nuclear Deal, in a dramatic breakdown of Iran-US diplomatic relations.[1] In response, Iran appealed to the International Court of Justice (ICJ), arguing that the United States violated long standing international law.[2]

The basis for the Iranian challenge rests on the 1955 Treaty of Amity, Economics Relations, and Consular Affairs ("Treaty of Amity"), instituted to reaffirm friendly relationships between the United States and Iran and to strengthen diplomatic and economic ties. Signed in Tehran on August 15th, 1955, the treaty provided a legal framework for cooperative human affairs, trade, investments, and consular relations for more than forty years.[3] The Treaty of Amity is similar to other Friendship, Commerce, and Navigation (FCN) Treaties that the US has entered into, such treaties being a significant aspect of US diplomacy until the late 1960s, when the European Bilateral Investment Treaty (BIT) model was conceptually adopted.[4] The goal of FCNs is to provide "a legal framework for investment, economic and commercial discourse," creating a basis for trade interactions between the US and other negotiating nations.[5]

The Treaty of Amity is inextricably linked to the 1953 Coup in Iran and efforts to maintain resource and economic wealth amongst so-called Western powers.[6] When nationalist Mohammed Mossadegh became prime minister of Iran in March 1951, following the assassination of Ali Razmara, the National Front nationalized the Iranian oil industry.[7] The Mossadegh government hoped to establish national sovereignty by taking control of the oil industry from the Anglo-Iranian Oil Company (AIOC), thus minimizing Britain's influence on Iran's economy and politics. The US soon became involved in the nationalization law due to concerns that the Soviet Union could expand into Iran if the country were to wane in power as a result of nationalization of its oil industry.[8] Additionally, the US was concerned about its own oil interests in the Middle East. However, the Truman administration never stated that they wanted to undermine Mossadegh's government; instead, the official policy of the US was to support him.[9]

This narrative soon shifted when the Eisenhower administration took over in 1953 and decided to carry out a coup on Mossadegh and install Fazlollah Zahedi, a plan supported by the Shah. On August 19, 1953, the coup ousted Massadegh; Zahedi was announced as the new prime minister.[10] Two years later, the Treaty of Amity was signed by US President Eisenhower and Iranian prime minister Hossein Ala. The Treaty includes safeguards for nationals, companies, properties and enterprises for each country, systems of transfer, and freedom of commerce and navigation.[11] Specific emphasis was also placed on maintaining unity between the two nations: Article I of the treaty states, "There shall be firm and enduring peace and sincere friendship between the United States of America and Iran."[12] In the decades that followed, Iran underwent a revolution and drastic regime change, but the Treaty was never revoked. The result is a diplomatic dissonance in which American-Iranian relations often do not reflect the provisions agreed upon in 1955.

The current dispute between Iran and the US is rooted in long standing tension over the Iranian nuclear program and related sanctions. The JCPOA was drafted as an effort to alleviate such tensions, and facilitate a long term solution to Iran's economic woes and global national security concerns.[13] The agreement was enacted in 2015 between Iran, members of the UN Security Council, Germany, and the European Union, granting international sanctions relief to Iran under the condition of limiting its nuclear program. In 2018, the Trump administration announced US withdrawal, citing three key factors as justification: Iranian influence in Lebanon and Gaza, the denial of International Atomic Energy Agency access to Iranian military sites, and Iran's double violation of the JCPOA's water-heavy stockpile limits.[14] The US announced a two-stage plan to lay the groundwork for the re-imposition of sanctions: The first stage would begin on August 6, 2018, when the US would re-impose specific sanctions, through Executive Order, concerning metal trade, financial transactions, import of certain Iranian goods, and export of commercial passenger aircrafts. The second stage would then take effect on November 4, 2018 with the US re-imposing additional sanctions.

In response, Iran turned to the ICJ, challenging the legality of the US withdrawal and requesting the immediate alleviation of some US sanctions through provisional measures on the basis of human rights.[15] Article XXI(2) of the Treaty of Amity is a compromissory clause that lends jurisdiction to the ICJ in the event of a dispute.[16] This clause has been invoked by the ICJ in past cases, and has allowed the ICJ to establish precedent in the adjudication of disputes between Iran and the US. Article XXI(2) of the Treaty was again used as the basis of Iran's request, as cases involving the "interpretation or application" of the treaty "not satisfactorily adjusted by diplomacy" are under the jurisdiction of the ICJ, despite the US withdrawal from compulsory ICJ jurisdiction in 1986.[17] In *Alleged Violations of the 1955 Treaty of Amity,* the US was accused of violating the following: Article IV(1), fair and equitable treatment of nationals and companies and their property; Article VII(1), no restrictions on transfers of funds to or from the territories of the parties; Articles VIII(1), (2), and IX(2), favorable and reciprocal treatment of imports and exports; and Article X(1), freedom of commerce and navigation between each parties' territories.[18]

In order to enact provisional measures against the US before making a final decision on the case, the ICJ had to meet three conditions: prime facie jurisdiction, proven plausibility of the claim, and the potential of imminent risk to the Iranian people due to lack of provisional measures. First, the Court found that it did possess prime facie jurisdiction due to Article XXI(2) of the treaty, which gives the ICJ authority to settle disputes regarding the interpretation or application of the treaty, specifically on the applicability of national security exemptions.[19] Second, regarding the plausibility of Iran's claim, the Court stated that claims on the "impact of sanctions on trade in humanitarian goods and the safety of civil aviation" did not fall under the national security exception.[20] The US countered that humanitarian exemptions were already put in place, disregarding the threat to human rights that could arise from the sanctions. Third, the Court concluded that real and imminent risk was possible due to restricting the transport of crucial humanitarian goods and services, thus causing "irreparable prejudice."[21] The Court

ordered the US to immediately remove any of the damages done as a result of the re-imposed sanctions and ensure that food, medicine, aircrafts, and other humanitarian aid were able to reach Iran.[22] These provisional measures were ordered by the Court as a temporary measure as they continue to deliberate the merits of Iran's application.[23] The order, coming within months of US withdrawal from the JCPOA, was deemed a "great victory of the rule of law" by the Iranian foreign minister.[24] In response, the US Secretary of State Mike Pompeo announced the decision to terminate the treaty on October 3, 2018.[25] However, Article XXIII(3) of the treaty dictates that, following termination, the treaty remains in effect for one year which allows Iran to proceed with litigation in the ICJ.[26]

ICJ Jurisdiction, Case Admissibility, and Implications

The Court's Ruling on Preliminary Objections

For the *Alleged Violations* case to proceed to merits (ie. for the ICJ to make a judgment and settle the dispute), the ICJ needed to establish jurisdiction and address US objections. The US responded to the case with five objections directed toward the admissibility of Iran's claims and the jurisdiction of the ICJ: the subject-matter of the dispute, third country measures, objections on the basis of Article XX, Paragraph 1 (B) and (D), and abuse of process.[27] The court's reasoning on each of these is as follows:

The first objection is one of *ratione materiae* or subject-matter jurisdiction.[28] The US argued that the dispute was not over the Treaty of Amity, but over the JCPOA. If the "subject of dispute" was, in fact, the JCPOA, then the ICJ would have no jurisdiction. The court rejected this argument, noting that "legal disputes between sovereign States by their very nature are likely to occur in political contexts," and that although there was political motivation behind the United States' withdrawal from the JCPOA, the Treaty of Amity was still viable.[29]

The second objection, third country measures, is also one of subject-matter jurisdiction. The US claimed that – as most of the sanctions affected trade between "Iran and third countries, or between their nationals and companies" – the Treaty of Amity only applied to trading directly between the US and Iran.[30] The Court dismissed the objection, reasoning that it did not apply to all the measures challenged by Iran, and that the extent of US obligations must be determined in the merits stage.[31] The merits stage contends with "particular evidence and facts" of the case rather than "procedural grounds" such as jurisdiction.[32]

The third and fourth objections are based in the subparagraphs (b) and (d) of Article XX of the Treaty of Amity, allowing exceptions related to "fissionable materials," (including "by-products" and "sources") or "international peace" and "essential security interests."[33] The Trump administration levied exaggerated allegations against Iran for the continued enrichment of uranium, and objected to the Court stating that their withdrawal was based on the security threat resulting from an illicit Iranian nuclear program.[34] The US argued that these objections should be considered in the "preliminary" trial rather than in the merits stage on the basis that Iranian sanctions should be understood as part of the exceptions outlined in the Treaty, an argument that was rejected by the court, which subsequently moved to consider these questions as ones of merit.

Finally, the US challenged the admissibility of Iran's application under abuse of process. Related to the first objection, the US argued that Iran intended to use the ICJ and the Treaty of Amity as a front in order to respond to US action on the JCPOA.[35] The court responded with a conservative stance, stating that, based on precedent, it is "only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process" and states that there must be "clear evidence" of abuse of process.[36] While the majority of the court's decision hinges on moving forward from a preliminary stage to the merits of the case, the underpinnings of this move are fraught with implications of the role of the court in mediating international issues.

Implications of ICJ Rulings on US Objections

The most relevant precedent for the admissibility of the *Alleged Violations* case is based on the *Oil Platforms* and *Certain Iranian Assets* cases, both relating to the Treaty of Amity. In both cases, the ICJ upheld its own jurisdiction against preliminary objections toward *ratione materiae*, developing a precedent in which the Court adopts a broad authority to hear disputes regarding the treaty's interpretation.[37] This creates a particular imagining of the Court's role in relation to the political systems at play, choosing to focus "on what the applicant has requested of it" rather than to "infer the subject-matter of a dispute from the political context."[38] The decision to separate ICJ litigation from politics creates a legal hierarchy in which the binding diplomatic provisions of the Treaty of Amity supersede non-binding actions within geopolitics. Judge ad hoc Brower remarks upon the implications of this hierarchy in his partial dissent arguing inadmissibility on the basis that the case can compel US adherence to the non-legally binding JCPOA while Iran would have no obligation to do so.[39] Brower argues that the political context cannot be ignored: the violation of the JCPOA is ultimately what is at issue between the two parties, and by proceeding to merits, the US is on trial for actions beyond the scope of any codified law. Yet Brower stands alone, and the near unanimous decision to dismiss the US objection of an abuse of process indicates that the Court is inclined to resolve disputes squarely within the bounds of international laws such as the Treaty of Amity.

The ICJ's rejection of the US objections based on Article XX(b)(d) strengthens an active, hands-on approach to international jurisprudence and positions the Court above the political machinations of state actors. There was much political debate surrounding the legitimacy of the Trump Administration's claims that Iran violated the JCPOA, and an ICJ ruling in favor of the US objections would be tantamount to taking a political stance.[40] Rather than evaluating the merit of US claims, the Court would be accepting them as prima facie evidence and grounds for preliminary dismissal. The Court's rejection is thus an important step to protecting ICJ impartiality and preventing states from using political accusations to shirk international legal obligations.

By moving this trial to merits, the court doubles down on their method of legitimizing themselves by creating an image of an apolitical, sensible, and measured court. This legitimacy relies on countries subscribing to the international legal system. The ICJ's lack of enforcement powers means that they do not have the power to compel the United States to comply with a

potential ruling.[41] The dynamic between a strong international system and state autonomy in supranational governance is a hurdle that continues to threaten the legitimacy and strength of the ICJ. The participation of the US in the legal proceedings thus far is encouraging, but ultimately the question remains as to how effective ICJ action will be in changing the course of US-Iran tensions.

The Shifting Relationship Between the United States and the ICJ

The *Alleged Violations* case thereby illustrates the nuances of the global legal system by attempting to challenge the United States' outsized power within it. The ICJ expanded their jurisdiction against United States objections for a more constrained approach, relying on cornerstone precedents from the 1979 case *United States Diplomatic and Consular Staff in Tehran*.[42]

This case established many ideas foundational to the 2019 case, particularly with regards to US-Iran relations and the importance of upholding international legal norms, thereby acting as the 1979 counterpart to the 2019 *Alleged Violations* case.[43] The 1979 case related to the seizure of the US Embassy in Tehran and the taking of American diplomats and citizens as hostages, in which the US argued that Iran violated its obligations under the Treaty of Amity.[44] In the 1979 case and nearly every other case involving the United States and Iran, the ICJ utilized the foundational principles of the Vienna Convention. A cornerstone of international treaty law, the Vienna Convention was used to interpret the provisions of the Treaty of Amity such as the obligation to negotiate in good faith, the prohibition of the use of coercion, and procedures for withdrawing from or terminating a treaty.[45] In particular, the ICJ applied these principles to determine if Iran had violated its obligations under the Vienna Convention on Diplomatic Relations, stipulating that host states must protect diplomatic missions and their personnel.[46] The ICJ ruled in favor of the United States and ordered Iran to release the American hostages and provide assurance that such violations would not occur in the future.[47]

In the *Alleged Violations* case, rather than serving as the plaintiff and reaping the rewards of the ICJ decision, the United States stood as the defendant. The United States' objection to ICJ's jurisdiction in this case and determination that it would withdraw from the 1955 Treaty of Amity demonstrates how the ICJ is constrained by the will of global hegemons like the US, as the ICJ only possesses authority over legal disputes when the states involved voluntarily agree to its jurisdiction — otherwise only able to offer non-binding "advisory opinions."[48] The response by the United States underscores that which prevents the Court's comprehensive authority: the necessity for the consent of member states to ICJ rulings, even if consent conflicts with a state's view of its best interests.[49] This principle of consent requires that states agree to submit their disputes to the ICJ and accept its jurisdiction, without which, the ICJ cannot hear the case.[50] As demonstrated by the differing actions of the United States in 1979 versus 2019, global superpowers can choose to accept the jurisdiction of the ICJ when it favors them or to ignore the rulings when it does not.[51] While consent to the court's authority ensures the legitimacy of the ICJ's decisions and the support of relevant parties, it simultaneously permits certain states to take a selective approach when submitting to the rule of the ICJ and international laws.

This ability of powerful states to be selective in their approach to international law has come to define a United States' relationship to the Court characterized by American exceptionalism and a tendency to resist any international decision which conflicts with that of the United States government.[52] The United States reaction to *Alleged Violations* is resultant of this American approach to international law, the basis for which was provided in large part by *Nicaragua v United States*.[53] Nicaragua brought this case to the attention of the ICJ in 1984, arguing that the United States had violated international law by mining in Nicaraguan harbors and providing both economic and military support to the Contras, anti-communist rebels.[54] Although the ICJ ultimately ruled in favor of Nicaragua and ordered the United States to pay reparations, the United States refused to comply and argued that the ICJ lacked jurisdiction, a landmark decision which solidified the ability of the United States to violate international law and the rulings of the ICJ without confronting consequences.[55]

This was re-established nearly 20 years later in the *Oil Platforms* case of 2003, specifically in the context of relations between the United States and Iran.[56] Here, the ICJ held that the United States violated international law by seizing Iranian oil platforms in the Persian Gulf and interfering with Iranian trade, thereby underscoring the importance of state sovereignty and the principle of state immunity.[57] Ultimately, though, the United States again argued that the ICJ did not possess jurisdiction—this time due to Iran's lack of consent—and further stated that the United States' actions were justified as self-defense against potential Iranian attacks against US naval vessels.[58] The decision ultimately strained the United States' diplomatic relationship with Iran and demonstrated one of the most significant shortcomings of the international legal system: the lack of an enforcement mechanism, thereby preventing substantive or definitive repercussions for violating international law.[59]

The *Alleged Violations* case, alongside the ICJ's preceding legal history, possesses meaningful implications for the ICJ's jurisdiction, highlighting the problematic relationship between the Court and the United States. The United States' attitude of American exceptionalism results in a tendency to disregard the rulings of the ICJ. Due to a lack of an enforcement mechanism, the strength of the ICJ and its ability to resolve disputes between states is variable. Yet the cooperation of the US in the current proceedings, and indeed a more general trend in international litigation of compliance, seems to suggest that the ICJ and the international legal system possess some form of legitimized strength. The history of international jurisprudence attributes this to the critical importance of shared norms in the maintenance of international order and state accountability.

Provisional Measures and the Role of Normative Power in International Law

As the *Alleged Violations* case proceeds to merits, there remain multiple years of litigation ahead before a final judgment is handed down. Compared to the fast changing geopolitical and economic landscapes, the slow pace of ICJ proceedings will hinder the effect of the ruling. Even if the Court were to uphold Iran's initial application, the reimposed sanctions will have already extracted a costly toll.[60] US independence from ICJ authority will further diminish the real world impacts of the case. The weight of ICJ decisions are thus ambiguous and

are often deemed ineffectual or "toothless" by some in the international community. The *Alleged Violations* case is helping define the ICJ not as a legal enforcer but as the protector of shared global norms, including fundamental human rights.

Within three months of Iran's initial application, the ICJ ruled that it had prima facie jurisdiction to grant Iran provisional measures pursuant to the alleviation of sanctions related to humanitarian needs and the protection of human rights.[61] While continuing to deliberate on the veracity of aforementioned US objections based on Article XX, the Court deemed that such objections would not be applicable to the protection of the health and safety of Iranians.[62] The provisional measures included the removal of sanctions on medicine, food, and parts for the continued safety of aviation.[63] The Court deemed such measures necessary due to the "risk of irreparable prejudice" of US sanctions.[64] The separation of the provisional measures from case deliberations, and the rapidity of the Court's action, demonstrates the preeminent role of human rights within the ICJ.

The ordering of provisional measures underscores the centrality of normative power to the continuation and legitimacy of international law. A complex network of treaties, international agreements, and oversight mechanisms have developed in recent decades to regulate state action within the boundaries of shared norms. These include the rights established in the *Universal Declaration of Human Rights* (UDHR) and the *Draft Articles on Responsibility of States*. In regards to sanctions, supranational governance focuses on the protection of the impacts of economic coercion on the target population, and the protection of the rights to food and health as outlined in the *International Covenant on Economic, Social and Cultural Rights*.[65] International agreements are largely unenforceable, and rely on state cooperation within the global community, and realist critiques point to a fundamentally anarchic system in which norms are only followed when they suit state interests. Yet there exists a strong historical pattern of state compliance, suggesting that there is a reliance on international law to maintain order amongst states.[66] This order is maintained not through compliance mechanisms, but by a collective belief that states benefit from upholding the law's legitimacy: "the law is binding because it is the law."[67] Even in non-compliance exceptions, states rarely challenge international law itself but rather the veracity of their alleged violations. States wish to maintain the appearance of compliance with norms in order to remain party to the order such a normative international system provides. Thus the primary role of the ICJ, as the highest legal authority within the system, is to maintain the clear determinacy of international law and hold state actors normatively accountable.

In the *Alleged Violations* case, the ICJ utilized established global norms surrounding the human rights to health, medicine, and food to find US sanctions in violation of humanitarian standards, and as grounds for court-ordered provisional measures protecting Iranian citizens. The expediency of Court action sets precedent for the ICJ as a protector of human rights, with the ability to use international law to highlight non-compliance amongst member states. The strength of normative power within the international system gives the ICJ significant influence to foster diplomacy and hold even the most powerful states accountable for their actions.

Conclusion

The ICJ's ruling on US violations of the *1955 Treaty of Amity* will become one part of an ever-expanding debate concerning the strength of international law, and to what extent its deliberate disregard by state actors threatens the stability of the international system. This case plays an important role in establishing the preeminence of human rights in international economic disputes and determining the admissibility of economic coercion in the name of national security.

The Court's ruling in favor of Iran's request for provisional measures shows the international legal system's commitment to uphold fundamental human rights, and that participation in a cooperative global society requires a state to have some regard for the human impact of foreign policy. The court's rejection of US preliminary objections on the basis of Article XX (b)(d) further shows that international obligations are not easily avoided by national security diversions. These precedents are fundamental to the future of international jurisprudence as they limit the extent to which states, particularly those with a preponderance of military and economic strength, can impose their will through unilateral nondiplomatic action.

While the ICJ has affirmed its jurisdiction and is proceeding to the merits of the case, the strength of their decision, and indeed the stability of the international community, is up to the cooperation and continued commitment of state actors. If the Court ultimately decides that the US did violate various articles of the Treaty of Amity, the decision to lift sanctions still lies firmly in the hands of the US government. The abrupt US withdrawal from the JCPOA is an example of how unilateral action by world powers is difficult to control through the international legal system. The tenuous fabric of diplomacy that characterizes supranational governance is easily undermined if states such as the US choose to not cooperate with the rulings of the ICJ or to not remain party to international treaties.

The impacts of this ruling are thus not only contained to the ICJ decision itself but also the resulting actions taken by the contending parties. In particular, a US response in opposition to a potential ICJ ruling in favor of Iran weakens the legitimacy of international law, with other pending ICJ cases submitted on the basis of international agreements jeopardized by a precedent of state non-compliance. These cases include deliberations on the norms established in the Genocide Convention and the merits of the Russian invasion of Ukraine.[68] The 1955 Treaty of Amity is thus central to determining the influence of the ICJ in resolving international disputes and the extent to which national interests can overthrow codified diplomatic agreements.

Despite the shortcomings of the ICJ to enforce the pending decision, the provisional measures granted to Iran within the *Alleged Violations* indicate that this case has already strengthened the role of the ICJ as a protector of the international norms that govern geopolitics, including those of fundamental human rights. Regardless of the decision of the Court, it is critical that both parties submit to the jurisdiction established in the compromissory clause of Article XXI of the Treaty of Amity to maintain the legal authority of the ICJ, and by extension the normative power of international law. The future of the global diplomatic system relies on

the willingness of world powers like the United States to comply with shared norms and agreements that further international cooperation.

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[12] Ibid.

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[15] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.);* Provisional Measures, International Court of Justice (ICJ), 3 Oct. 2018.

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[27] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.);* Preliminary Objections, International Court of Justice (ICJ), 3 Feb. 2021.

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The Next Military Revolution? The Legal Case for Lethal Autonomous Weapons

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Abstract

The development of lethal autonomous weapons begs the question of how to internationally regulate their development. In this paper, I analyze the Geneva Conventions on their principles regarding weapons development and conclude that their usage would be legally acceptable, if not obligatory. I examine each of the four cardinal principles and compare their effectiveness in achieving said principle compared to current human soldiers.

I. Introduction

Throughout history, militaries have continually sought ways to outperform their rivals in pursuit of regional and even global dominance. The world has experienced several revolutions in military affairs (RMAs), defined as "major changes in the technologies required for prosecuting wars".[1] Military scholars consider Operation Desert Storm the most recent successful RMA due to the strategic emphasis on drone strikes, precision-guided munitions, and other remote technologies. With military strength and asymmetric advantages being of paramount importance, the pace of technological innovation begs the question: what will be the *next* revolution in military technology, and what are its legal implications?

In 2007, Professor of Artificial Intelligence and Robotics Noel Sharkey wrote a piece in *The Guardian* entitled "Robot Wars Are a Reality." This article not only introduced lethal autonomous weapons into popular culture for the first time but also sparked discussions about their legality. Using hypothetical scenarios such as "a little girl being zapped because she points her ice cream at a robot to share,"[2] Sharkey's article triggered widespread outcry against autonomous weapons. Over the next fifteen years, nearly 170 non-governmental organizations and twenty-nine nation-states have called for a ban on the study, development, acquisition, and adoption of all lethal autonomous weapons.[3] Reasons for such a ban generally fall into three categories: ethics, military consequences, and engineering feasibility.

Ethically, many scholars argue that employing autonomous robots in warfare dehumanizes conflict and irresponsibly grants non-living, non-human objects the power to take human life. From a military standpoint, experts believe these weapons could increase the likelihood and severity of warfare by enabling hacking of states' weapons, increasing the risk of robotic miscalculations, and providing opportunities for rogue states and terrorist groups to exploit them for violent purposes.[4] Lastly, numerous scholars question the feasibility of creating such robots, contending that accurate targeting and appropriate engagement are simply too complex. Nevertheless, it is crucial to examine the legality of these weapons should their development come to fruition. In this article, I will address a separate yet highly relevant question: are these robots legally permissible under international precedent? I will argue that lethal autonomous weapons can satisfy all the principles of the Law of Armed Conflict (LOAC), potentially even more effectively than human soldiers.

II. Background Information

In a legal discussion as novel as this, defining the relevant terms can be challenging. Scholars disagree on the definition of a lethal autonomous weapons system (LAWS) as much as whether they should be legal or not.[5] Establishing common understanding of what constitutes LAWS is crucial for treaty negotiations, but states gain a significant advantage by maintaining strategic ambiguity around their particular definition. For instance, China defines LAWS as a system characterized by its "lethality; autonomy […] 'absence of human intervention […] during the entire process of executing a task'; impossibility for termination; indiscriminate effect; and evolution […] 'the device can autonomously expand its functions and capabilities in *a way exceeding human expectations*'".[6] This definition appears problematic due to its narrowness; a

weapon that satisfies all these criteria may never materialize. The vagueness allows China to develop any weapon that does not possess all five characteristics combined, thereby legalizing numerous weapons that many experts would still deem problematic. For the purposes of this paper, I will define LAWS according to the leading United States directive: a weapon system capable of selecting and engaging targets without human intervention.[7] These weapons typically feature sensors and algorithms that allow them to identify and track potential targets and make decisions about when and how to engage those targets based on pre-programmed rules or criteria. To clarify, while a weapon such as an unmanned drone can fly independently but requires human control to carry out targeted airstrikes, LAWS can engage targets without direct human intervention. It is worth noting that this definition does not address all aspects of the debate, including the timeframe and scope of these weapons' reach, the degree of human intervention allowed in these weapons, and many other considerations.

The paper will examine three distinct yet interrelated questions concerning the legality of lethal autonomous weapons. (1) Do LAWS comply with the laws of armed conflict (LOAC) and its four primary principles? (2) Who would be accountable for potential errors made by LAWS? (3) What are the practical problems associated with a complete ban on LAWS? Through this analysis, I aim to shed light on how LAWS can be not only a suitable weapon for use in the 21st century, but perhaps the optimal weapon of choice according to legal doctrine.

III. Compliance with the LOAC

A. Legal Framework

The laws of armed conflict govern accepted military practices as well as prohibited weapons, tactics, and techniques of warfare. The portion of LOAC relevant to LAWS can be found in the 1949 Geneva Conventions, which seek to limit the damage from warfare. The four principles of *jus in bello* (the law of war)—necessity, proportionality, discrimination, and humaneness—are each enshrined in a different section of the Conventions. States are encouraged to follow them as per Article 36 of Additional Protocol 1 of the Conventions. Specifically, Article 36 dictates:

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.[8]

Several phrases seem to require further interpretation, such as "in some or all circumstances" or "any other rule of international law applicable," but, generally speaking, Article 36 recommends state-level weapons reviews for any new weapon being considered, though it lacks enforcement measures. However, because the Article does not establish a standardized review process with specific internal procedures, only a few states have implemented robust mechanisms for weapons reviews.[9]

B. Necessity

The principle of military necessity dictates that states may only use the degree of force necessary to further their cause in conflict. For example, carpet bombing a town of innocent

civilians for no purported military objective clearly violates this rule. While scholars such as Sharkey believe that LAWS will inaccurately apply excessive force, careful setting of maximum force limits will give LAWS situational understanding to determine what level of force is most appropriate, although more research is certainly required.[10] Some may respond by contending that LAWS will engage in needless conflict due to its inability to properly assess the danger of a situation. For instance, while LAWS may not need to exercise lethal force, it may perceive that a lowered level of force is justified in more situations than necessary via faulty algorithms. This argument, however, does not pertain to the principle of necessity as much as it does proportionality. In the next section, I will argue that this common critique misunderstands the way that LAWS operate and determine how much military force is proportional to the expected advantage.

C. Proportionality

The second principle of warfare, known as proportionality, states:

> Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.[11]

To clarify, while the principle of necessity focuses on limiting applied force to what is necessary to achieve a military objective, proportionality aims to balance the "incidental loss[es]" of individual attacks to the "direct military advantage anticipated." This is a difficult task for LAWS, as such decisions typically rely on the military commander's subjective judgment. The question arises: how can LAWS make such evaluations of attack in heated battle situations when humans cannot intervene in the decision-making process?

Although the implications of this argument seem to undermine the legal permissibility of LAWS, they can comply with this principle due to the quantitative nature of their calculations and their heightened ability to strategize in the moment. To do so, LAWS can approximate the incidental losses of attack as well as the direct military advantage. With respect to collateral damage, the military routinely uses a methodology called "Collateral Damage Estimation" to calculate the probability and magnitude of incidental damage in any given attack.[12] This quantitative process, already run by computers, can be carried out whenever LAWS perceive the potential need for force in a conflict situation. To weigh this value against the direct military advantage, military commanders can program what constitutes excessive collateral damage. Programmers could even set these values at extremely conservative ends to account for the advanced decision and spatial separation between human and machine. Therefore, whenever analyzing the use of force in a combat situation, LAWS appropriately calculate the estimated incidental damage and compares that value against its programmed value of excessive collateral damage. This quantitative assessment not only replicates the human thought process but arguably performs it better due to the test's strictly numerical and objective nature, removing potential prejudice, stress, and other external factors from the decision. While some may object on the grounds that LAWS cannot appropriately determine the value of non-military items such as

cultural artifacts, Rule 38 of customary international law specifically prohibits the targeting of cultural property unless "military necessity imperatively requires such a waiver".[13] With extensive knowledge of international humanitarian law, military doctrine, and ethical principles, LAWS will be able to make well-informed decisions in real time. In cases not addressed by explicit precedent, LAWS can incorporate context-aware algorithms to identify and avoid culturally significant targets or protected personnel, guided by the principle of minimizing collateral damage and prioritizing civilian protection.

Having established the mechanism by which LAWS maintain proportionality in their attacks, we should compare that performance against the current standard of human engagement. Several academics and members of the general public argue that the robot's lack of emotion renders it unable to empathize with other combatants, thereby making it prone to attack even in situations lacking necessity.[14] While LAWS think of the application of force as nothing more than a statistical evaluation, the human soldier seems to grant that decision a much greater weight and, thus, only uses it when the military advantage is that much greater than the collateral damage estimate. This analysis invokes the test of feasible precautions,[15] which requires force to be reasonably necessary and without alternative means of resolving the situation. Specifically, attacks must adhere to the test of feasible precautions with two goals: protecting civilians and identifying the target as a military objective.

On these grounds, however, LAWS outperform humans because their very lack of emotion, stress, and prejudice gives them objective standing when calculating what is precisely necessary.[16] Indeed, emotions often cloud human judgment, leading to impulsive decisions, increased aggression, or even hesitation in critical situations. LAWS, on the other hand, rely on data-driven decision-making, adhering to pre-programmed rules and guidelines that reflect international humanitarian law and ethical principles. The absence of emotions allows LAWS to make objective decisions that can lead to a more restrained and calculated use of force. In addition to "mental" capabilities, the fact that a robot has no need for self-defense allows it to prioritize mission success and adherence to international law rather than fear of personal harm. This advantage allows LAWS to engage in high-risk scenarios, reducing the risk to military personnel while still achieving critical military objectives. Thus, because detachment from self-preservation leads to more effective warfare, we must turn to the question of whether using such a weapon also leads to more ethical warfare.

D. Humaneness

The principle of humaneness encompasses several others, positing that militaries should not inflict unnecessary suffering on anyone affected by armed conflict. This principle finds support in the Martens Clause, as provided in Additional Protocol I of the Geneva Conventions, which states,

> "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience".[17]

Historically, the idea of minimizing suffering has led to the prohibition of specific weapons or military techniques deemed to be in violation of humane conduct. These prohibitions include the crossbow in 1139; the St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes of Weight of 1868; and several other weapons that seem to cause superfluous injury/unnecessary suffering (SI/US). In addition to SI/US, the Geneva Convention also expresses concern about weapons causing "widespread, long-term and severe damage to the natural environment".[18] Finally, the "principles of humanity" and the "dictates of public conscience" as provided by the Martens Clause serve as a defense against dehumanizing military conduct. These principles together form the basis for a common objection to LAWS; treating humans as statistics and allowing robots to kill humans represents an intrinsic violation of human dignity.

Generally speaking, this objection has two main flaws. First, LAWS do not inherently cause SI/US; the primary issue lies in their manner of engagement rather than the type of force they use. To that end, any LAWS that employs illegal weaponry, such as asphyxiating gasses, expanding bullets, blinding lasers, and the like would be prohibited—not as a consequence of the weapon's artificial intelligence programming but rather its method of employing force. Indeed, the most recent example of weapons prohibition, the Ottawa Treaty of 1997, banned only anti-personnel landmines (as opposed to all mines) due to their particularly indiscriminate nature, demonstrating that each weapon must be evaluated on a case-by-case basis for the individual damage inflicted. Second, regarding the manner of engagement, there is no clear interpretation of how the Martens Clause's principles or dictates apply to weapons prohibitions, nor is there a consensus on how to measure these principles. This ambiguity is reflected in the fact that no single interpretation of the humanity of AWS can be identified at the expert or public level.[19] Indeed, even commonly denounced weapons such as chemical weapons have been regarded as "the most humane weapons ever invented".[20] Given the ambiguous and ever-changing nature of the "principles of humanity", "dictates of public conscience" and public opinion, it seems implausible to assert that the Martens Clause outright prohibits any class of weapon, including LAWS. Therefore, only an analysis of the four cardinal principles of warfare should inform legal discussion, and the "dignity objection" does not provide strong grounds for a ban on LAWS.

E. Discrimination

The cardinal principle of armed conflict, as enshrined in customary international law as well as Article 48 of Additional Protocol I to the Geneva Conventions, states, "[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants".[21] The principle of discrimination poses the greatest risk to legalizing LAWS, mainly due to three concerns: weak machine perception, the frame problem, and buggy control software.[22]

First, weak machine perception posits that LAWS are fundamentally unable to understand a combat situation due to complex, variable environmental conditions. Examples of racism in machine-learning algorithms demonstrate the current lack of reliability in such algorithms, especially the 2015 incident of the Google Photos app mistakenly identifying a black couple as "gorillas".[23] Therefore, the robot's lack of situational discernment could deprive them of the

ability to gauge intentions, which is crucial when making life-or-death decisions. This seemingly unreliable detection measure is aggravated when considering that terrorists can employ deceptive techniques and take advantage of the inherent limitations of LAWS that humans do not share by concealing weapons, using civilians for hostile operations, or deploying technological countermeasures.

Second, the frame problem argues that a robot must be able to understand all the implications of its actions without having to write endless formulae to describe the effects. For instance, the robot must have an accurate framing of a situation to understand that if it shoots at an individual, a stray bullet could hit the propane gas tank behind the target, in turn killing numerous civilians. Coding the knowledge of foreseen consequences appears to pose a major challenge to making LAWS a reality and may prevent them from ever existing.[24]

Finally, these weapons require increasingly complex software managed by countless programmers, which could create the risk of the code being faulty or incomprehensible. Who would be responsible for reviewing the programming, and how is that information collected and protected?

Although these objections are strong in merit, they do not provide legal reasons for the prohibition of LAWS. Instead, they argue that current engineering and programming knowledge does not suffice to justify their deployment. Agreeing with this position in the status quo does not exclude the possibility of overcoming these fallibilities in the future. Creating such a reality requires the manufacturers to ensure that these systems are prototype-tested and placed in appropriate test bed environments until the engineers can guarantee a minimal chance of harm. Furthermore, the degree of distinction ability seems to depend on the circumstances of its deployment. While deployment in a civilian-dense population certainly requires a high degree of reliability in distinction, militaries can reasonably deploy LAWS in kill zones or remote areas cut off from the civilian population.[25] Under such circumstances, the condition of civilians not being allowed to enter said zones, which mirrors the thought process a human soldier would use, justifies the employment of force. As of now, feats of engineering have produced Joint Direct Attack Munitions (JDAMs) guided by GPS that could employ autonomous weaponry to search for individual targets and minimize collateral damage within an expected blast radius.[26] Of course, these possibilities rely on creating a comprehensive prototype-testing regime that ensures a low likelihood of harm.

IV. The Problem (?) of Accountability

Over the past ten years, reports estimate that 910 to 2,200 civilians were killed in overseas drone strikes from the United States,[27] which is a troubling piece of information due to the potential for an increase in unsanctioned activity from LAWS. With carte blanche authority over who lives and who dies, LAWS seem to have a lack of accountability during the decision-making process. Indeed, the autonomous weapon debate raises a highly pertinent question: who should be held responsible for the failings of a machine? In answering this question, two scholars have dominated the field in creating an argument for the "problem of many hands:" Andreas Matthias and Robert Sparrow. The many-hands problem dictates that autonomous weapons

create a responsibility gap in which there are too many people involved in LAWS to hold any accountable.[28] Specifically, there are four groups of people that hold responsibility: commanders who deploy LAWS, manufacturers, states, and potentially the robots themselves. Can any of these groups be held truly accountable?

Embracing Collective Responsibility

In individual interactions, it is clear to assign blame to a single person or co-conspirators. However, with numerous people involved in the development, acquisition, and deployment of LAWS, assigning responsibility may be impossible. Critics further add that keeping LAWS deployed over a longer time and greater space increases the degree of separation between the commander and weapon, which becomes especially problematic when the weapon cannot send data back (e.g., underwater/communication-jammed zones). However, it seems absurd to identify the failings of multiple individuals and deny responsibility for any of them, thereby complicating the problem of assigning blame for the actions of LAWS.[29] These systems are highly complex, and very few decisions are made on an individual basis. This notion of collective responsibility has been recognized by philosophers since the 1970s, and it better encompasses the scope of responsibility over the lifetime of an autonomous weapon.[30] [31] [32] In fact, collective responsibility appears regularly in legal contexts, including joint liability for financial obligations and cabinet unanimity in some parliamentary systems. Specifically, when identifying the failings of a robot in combat, it is possible to attribute that failure to one of three sources: the manufacturer as per product liability laws, commanders for irresponsibly deploying LAWS, or states for conspiring to approve or being negligent of LAWS that violate international law (more on robot responsibility below). This model ensures that responsibility is pinpointed on the relevant actor on a case-by-case basis, rather than placing an excessive focus on individual criminal liability. Indeed, a notion of collective responsibility encourages prospective mitigation of risk as well as retrospective justice in the case of clear violations of international law or state directives. Rather than cultivating a bystander culture, specifically writing in text which party is accountable for which potential failure creates stable norms that the relevant stakeholders can abide by.

One may object that the actions LAWS take are inherently unpredictable because commanders do not have control over the decisions of a fully autonomous weapon. Therefore, it may seem irresponsible to hold various agents accountable for an outcome that they could not have foreseen. However, this objection does not hold merit, as current legal precedent shows that predictability is not necessary for responsibility, as seen in cases as simple as pet behavior. Such a parallel can be attributed to the fact that domesticated animals do possess some capacity for autonomous decision-making, but humans do not grant these animals moral culpability for their actions. As a result, human owners can be held liable for the actions of pets even if the owner held no culpable intentions.[33] Applying the pet-liability model to LAWS, therefore, would entail human responsibility for the actions of LAWS even if the commander could not foresee every action LAWS take. I utilize such a model to explain why LAWS should not be considered morally culpable for their actions; moral responsibility, in general, requires giving oneself moral law as opposed to heeding injunctions from others. However, LAWS are specifically designed to

take certain actions based on predetermined programming that dictates the rules of war and ethical principles that it must follow.

Furthermore, recognizing that multiple groups can be simultaneously accountable emphasizes that there are several places for human intervention prior to the robot's employment of force. Between developers maintaining precise technical designs with highly specific operational parameters, commanders exercising sound judgment on using LAWS based on adequate situational awareness, and retaining human control to modify engagement criteria, states have sound control over the actions of LAWS. In this regard, parents teaching their children to drive serves as a legal parallel. Similar to the development phase, parents must first teach their child the fundamentals of driving in a safe environment away from the general public. If the parent has successfully taught their children to drive (as exhibited by completion of the driving test), then they are absolved of responsibility in the case of future accidents involving the child. Applying the parent-child driving analogy to LAWS, each step of the process–from developer to commander to monitor–creates an additional safeguard against robotic mistakes, and as a result, each of them can be held responsible based on retrospective analysis of the source of error.

The implementation of responsibility paradigms for LAWS demands a comprehensive regimen of clear guidelines and frameworks to cover their complex development, deployment, and use. These guidelines must assign responsibility to the relevant stakeholders, which are states, manufacturers, and appropriate military personnel. First, states must adopt and enforce legislation governing domestic use of LAWS and collaborate to develop an international treaty that regulates development, trade, and use of LAWS. Such a treaty ought to outline the conditions under which LAWS can be used, permissible degrees of autonomy, the scope and timeframe of these weapons' reach, and punishments for the purposeful killings of non-combatants. Moreover, manufacturers should be attributed responsibility for following through with established legal and ethical norms in the design and production of LAWS. To do so, states and industry must develop industry-wide standards, certification processes, and third-party audits to verify compliance. Industry standards ought to demand safety features such as kill switches and fail-safe mechanisms to minimize the risk of unintended consequences and terminate LAWS when appropriate. With regard to military personnel, robust training programs developed by the international community can be distributed among the relevant chains of command, establishing clear paradigms for accountability as well as appropriate protocols to respond to potential incidents involving LAWS. To ensure mutual compliance with these international standards, transparency requirements that mandate regular reporting and information-sharing should be introduced, with independent experts regularly reviewing and assessing LAWS' performance and risks. Finally, a vigorous system of sanctions must be established to deter non-compliance. The combination of these measures and more should foster cooperation, progress, and ethical standards in warfare.

V. Analyzing the Practical Grounds for a Ban

In the previous section, I presented the argument that LAWS comply with the principles of the Law of Armed Conflict. Despite this, numerous experts believe that a ban on deployment and even a moratorium on research regarding LAWS is essential for practical reasons. These include the risk of hacking, miscalculation, increased speed of conflict, and lowered thresholds for warfare. In this section, I discuss three reasons to oppose a legal ban on LAWS based on practical concerns: (1) terrorist groups and rogue states could exploit the ban and gain an asymmetric advantage against well-meaning nations, (2) a ban on lethal autonomous weapons could hinder commercial research into related technology, and (3) the ban might overlook specific use cases offering substantial humanitarian and defense benefits.

First of all, a ban on LAWS might create a security vacuum that terrorist groups and rogue states could exploit. By restricting their options, states inadvertently grant these actors the opportunity to develop, deploy, and utilize these weapons with impunity, thereby gaining an asymmetric advantage over state forces. This problem is unique to LAWS compared to nuclear weapons, genetic engineering, and other military technologies because artificial intelligence is widely accessible to the public.[34] Such an imbalance of power could significantly undermine international security, compromise states' ability to effectively counter terrorist threats, and potentially destabilize entire regions. Moreover, state-operated LAWS must adhere to international humanitarian law and ethical guidelines, while terrorists and other non-state actors would likely use these weapons with no regard for civilian casualties. Abandoning a technology that well-intentioned states know will be employed by terrorists leaves them vulnerable to more effective attacks and does not meaningfully prevent unlawful conduct.

Additionally, the widespread stigmatization of LAWS, fueled by various advocacy groups, raises concerns about how much technological development will be stifled by a complete ban on LAWS.[35] Indeed, some commentators characterize pro-ban rhetoric as "disingenuous propaganda that stigmatizes incredibly valuable AI research done by defense agencies–research that will have broad social and economic benefits".[36] Military research and development have led to innovations such as the internet, GPS, and smartphones; a widespread ban could discourage military research into a vast number of artificial intelligence applications,[37] which could be employed in LAWS or commercial applications. Consequently, there is a considerable risk of inhibiting research at the military level. In fact, the Korea Advanced Institute of Science and Technology was boycotted in 2018 by fifty-seven scientists from twenty-nine countries due to its collaboration with a defense company on "AI-based command and decision systems, composite navigation algorithms for mega-scale unmanned undersea vehicles, AI-based smart aircraft training systems, and AI-based smart object tracking and recognition technology" in fears of such technology being applied to LAWS.[38] With the existing high level of stigmatization, one can only imagine the intensified fear surrounding collaborations with military researchers or defense companies to innovate in meaningful areas for commercial application after the implementation of an international ban.

Last but not least, LAWS can serve numerous purposes that promote peace and harmony. As previously mentioned, one significant argument for a ban on LAWS stems from a general

objection to the idea of a robot taking a human life. However, even if one grants this premise, there are still many uses of LAWS that do not necessitate a robot engaging in offensive attacks. For example, LAWS can maintain peace during times of conflict using non-lethal force, thus serving the greater good and eliminating the risk of harm to human soldiers.[39] Furthermore, LAWS can revolutionize defense strategies by safeguarding sensitive territories and defending against hostile drones, missile attacks, or incursions by enemy forces. Targeted deployment of weapons with defensive objectives has proven to be at least somewhat effective in cases such as Israel's Iron Dome system.[40] Although not entirely autonomous, the Iron Dome demonstrates the potential for LAWS to provide reliable protection against missile attacks. Historically, the failure to consider alternative use cases can be seen in the 1997 Chemical Weapons Convention, in which a complete ban on chemical agents removed the ability for soldiers to use pepper spray. The elimination of a non-lethal option likely forced some combatants to default to lethal force instead when it was only necessary because of poorly tailored international law.[41] Thus, even if one remains opposed to LAWS, the conclusion of such opposition should not result in an outright ban that neglects specific situations where LAWS would offer immense benefits.

VI. Conclusion

In conclusion, the legal considerations surrounding LAWS present complex challenges for governments, legal scholars, engineers, and military experts. While research into LAWS should not be inherently subject to a ban, it is crucial to establish a balance between embracing technological advancements and ensuring legal oversight and ethical conduct. Numerous engineering solutions have been proposed, such as machines targeting machines, the implementation of an ethical governor, and even neural interfaces for a human to remotely control all aspects of LAWS.[42] Potential legal approaches include non-binding soft law recommendations and code of conduct instruments, which provide a framework for ethical behavior that can be flexibly modified and ultimately adopted by individuals and groups.[43] Indeed, states often favor these approaches, as they enable experts to create technologically informed frameworks for legal oversight and promote the future development of standardized review processes in the name of transparency and security. Many states, including France, Germany, and the United States, also publicly support transparency in weapons development and have endorsed non-binding political declarations to maintain the principle of humanity in future endeavors with artificial intelligence.[44]

As the development of LAWS progresses, the quality and potential applications of the technology will become clearer. Governments must be prepared to legislate accordingly, recognizing that LAWS are not inherently illegal and warrant careful study and guidance to ensure responsible use in the future. Collaboration between various stakeholders will be essential in navigating the legal, ethical, and practical dimensions of LAWS and shaping a future in which these technologies are integrated responsibly and effectively into modern warfare and defensive strategies

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Modernizing the Marketplace of Ideas

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Abstract

Social media platforms have replaced the physical public square as the hub for the marketplace of ideas in recent decades. However, the lack of First Amendment protections for users on social media platforms threatens the free exchange of ideas necessary for democracy to flourish. It is time for legal doctrine to adapt to the modern world. This article proposes two methods whereby social media companies could be prevented from restricting speech. Social media platforms can be classified as either designated public fora or common carriers. The former would afford more protections to the users, while the latter is more attainable given the origin of common carrier legislation. Either classification would prevent social media companies from discriminating between users and thus protect the marketplace of ideas.

I. Introduction

Among those unfamiliar with constitutional law, there is a common misconception that users of social media platforms are entitled to First Amendment protections, namely, freedom of speech. It is unsurprising that many Americans believe that there is or should be free speech on social media platforms, as they are the modern medium for the exchange of ideas and political discourse. These platforms have replaced the physical public squares, such as parks and sidewalks, as the center for the marketplace of ideas. The modern world's reliance on social media explains the misconception that there is a right to free speech.

This article aims to modernize the legal framework that protects the marketplace of ideas by arguing in favor of providing free speech protections on social media platforms. Despite their growing primacy as the new medium for popular discourse, our current legal framework offers no First Amendment protections to users. These protections are typically afforded to individuals only when the government is the actor restricting speech—not private actors such as social media companies. However, there is precedent that supports preventing private actors from infringing on the First Amendment rights afforded to individuals. Additionally, these established legal doctrines can similarly be applied to ensure free speech protections on private, social media platforms. Extending free speech protections to social media platforms would allow for a livelier and more robust democracy by preventing private companies from restricting speech in the new public square of the digital age.

Part two of this article articulates the reasons for focusing on social media platforms, the new public square, in particular. The vast scope of the digital world is reflective of similar complexities as the physical world. Just as there are hotly debated constitutional topics in the physical world, from abortion protections to affirmative action, the digital world is not free of constitutional protections. The legal doctrine used to analyze abortion rights is different from that of affirmative action. Similarly, different legal doctrines must be applied to different institutions of the modern digital era. And for the purposes of modernizing the legal doctrine that protects the marketplace of ideas, social media platforms are the center of discourse in the digital world, and thus demands further analysis of the relevant legal doctrine. As this article will illustrate, society has a tremendous reliance on social media as a channel of communication, from social dialogue to political discourse. Social media's importance as the public square in modern life forces consideration of the free speech protections afforded to speakers and listeners.

Part three argues in favor of free speech on social media platforms by highlighting the importance of an unfettered public square where the marketplace of ideas can thrive. Without free speech protections on social media, fringe viewpoints are forced into underground channels where they fester and become irrefutable. A lively marketplace of ideas requires a public space where ideas and opinions can be openly debated, ultimately allowing for the best idea or most truthful opinion to prosper.

Part four is the crux of this article, as it proposes two legal mechanisms whereby social media companies could be prevented from restricting speech. The first entails classifying the companies as public fora, specifically, designated public fora. The second entails classifying the

companies as common carriers. The former classification, as public fora, offers more protections to the user and puts content-based regulations under strict scrutiny. However, the latter classification, as common carriers, is more attainable given current precedent, but it offers less protection.

II. Social media platforms play the special role of public square in the modern digital era

First, it should be noted that this article seeks only to discuss freedom of speech as it relates to social media and the special role it plays in the digital world, not to cyberspace as a whole. This would be a much larger undertaking. The internet consists of many entities offering a multitude of different products and services. David Goldstone argues that "rather than simply inquiring whether cyberspace generally is a public forum, cyberspace should be understood to be more like a city, with numerous diverse forums."[1] The public forum of the digital world? Social media. A company that connects hundreds of millions of users via a social network has completely different functions from a company providing a service that allows users to collaboratively work on a shared document. Therefore, this article focuses specifically on the modern public square of the internet: social media platforms.

As the title suggests, this article intends to modernize the legal framework that protects the marketplace of ideas by offering a new legal framework based on existing precedent. In today's digital world, social media platforms are the specific aspect of cyberspace that most closely resembles the physical public square, where the free exchange of ideas occurs. Throughout the course of democracy, the public square has taken various shapes from the ancient Agora of Athens[2] and Forum Romanum of ancient Rome,[3] to the modern Hyde Park[4] and Central Park[5] where individuals can engage in open dialogue. In even more recent years, cell phone providers have played the role of public square.[6] They provide a forum where individuals can engage in dialogue without fearing censorship from private cell providers, as they are not allowed to discriminate who they sell plans to. However, throughout most of history, these public squares have been limited to physical spaces where people can congregate. With the expansion of social media as the hub of social interaction and discourse, it has taken over as the new public squares in the digital age.

With its exponential expansion, much of society relies upon social media as a primary source of information and political discourse, explaining its relationship with the marketplace of ideas. According to recent Pew surveys from 2016, 62 percent of Americans get news from social media, with 44 percent of Americans stating they use social media as a source of news often or sometimes.[7] Similarly, 69 percent of Americans ever use Facebook, 40 percent ever use Instagram, and 23 percent ever use Twitter.[8] Even though society never intended for social media to replace the physical public square as the center of the marketplace of ideas, it is undeniable that social media has developed in this manner. Accordingly, considering the importance of allowing for the unfettered exchange of ideas, opposition to regulating speech on social media has been on the rise. And Pew surveys show this growing concern with censorship, as approximately 73 percent of Americans believe that it is very or somewhat likely that social media platforms intentionally censor political viewpoints that they find objectionable, and 67

percent of Americans have no confidence or not too much confidence that platforms can determine which posts on their platforms should be labeled as inaccurate or misleading.[9] All of this is to say that Americans rely on social media for the exchange of information, just as they once relied on the person-to-person communication of information in the physical public square. For this reason, social media companies are the focus of this article's arguments, as they are the aspect of cyberspace that most closely resembles the public square.

Many have begun acknowledging social media platforms as the new public squares. Most notably, the Supreme Court asserted in *Packingham v North Carolina* that "social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind" and prohibiting access to social media platforms "bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the *modern public square*, and otherwise exploring the vast realms of human thought and knowledge."[10] This signals the Court's willingness to explicitly label and treat social media companies as the modern public square. Similarly, the deputy director of American Civil Liberties Union's National Security Project, Patrick Toomey, referred to Twitter as a "*digital public square*," in reference to *Twitter v Taamneh*.[11] Twitter's founder, Jack Dorsey, believed that "many people use Twitter as a *digital public square*,"[12] and its new owner and CEO, Elon Musk, declared that "Twitter has become the *de-facto town square*."[13] Whether or not social media companies were created with the intention of becoming a hub for the marketplace of ideas, they now function as such.

Because of this function, it must now be considered how legal doctrine can be applied since social media companies are still privately owned. As the invention of cyberspace represents a major societal evolution, so too must the relevant legal doctrines evolve. This is often a tricky process, requiring the courts to mold old doctrines and precedents to apply to these constantly changing technologies and situations. Using preexisting case law rather than developing new doctrines can allow for a more natural development that ensures a solid foundation for the framework, however, the novelty of cyberspace often makes it difficult or even impossible to apply old precedents. Prior precedent may apply in certain circumstances but not in others, leading to confusing or ambiguous rules that can make consistency difficult. Thus, how free speech is protected, legally, must be considered.

Considering the breadth of the internet, as discussed, it is important to focus narrowly on the application of free speech protections to social media companies rather than over-generalize. Attempting to generalize and discuss the application of free speech to cyberspace as a whole would likely create many inconsistencies, because cyberspace is so encompassing and complex. Since it is best to focus narrowly on a specific aspect of cyberspace, this article will focus on the modern conception of the public square in cyberspace: social media.

III. Social media platforms should be prevented from restricting the content of speech

The concept of the 'marketplace of ideas' originated hand-in-hand with the First Amendment. It is a concept that is core to this nation and the existence of democracy. The concept was first articulated by Justice Holmes in his dissent in *Abrams v US* in 1919, where he

argued in favor of the "free trade in ideas," and insisted that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[14] This initial articulation has become a cornerstone of American democracy, with some insisting that the *Abrams* dissent is "to First Amendment law what Genesis is to the Bible."[15] The specific phrasing of the 'marketplace of ideas' was not used until Justice Brennan's concurrence in *Lamont v Postmaster General* in 1965, where he argued that the First Amendment protects the ability to *hear* ideas as much as it protects the ability to *express* ideas: "it would be a barren marketplace of ideas that had only sellers and no buyers."[16] He admits that although the First Amendment does not specifically outline this right, it is implied by the Bill of Rights protections of all "personal rights necessary to make the express guarantees [of the First Amendment] fully meaningful."[17]

Although the specific phrase was not articulated until the twentieth century, the concept of protecting the unfettered communication of ideas dates back to John Stuart Mill of the nineteenth century. Mill's *On Liberty* expresses his opposition to suppressing even the most contentious speech. Stifling speech, he argues, leads the speech to fester underground until it radicalizes society, so it is better to allow it to be aired freely so that it can be confronted in public and dissuaded.[18] Specifically, Mill outlines that "if the opinion is right, [society is] deprived of the opportunity of exchanging error for truth: if wrong, [society] lose[s], what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."[19] He asserts that "all silencing of discussion is an assumption of infallibility," which is much more damaging to society than combatting falsity with truth.[20] Suppressing speech causes more harm than good.

John Stuart Mill, Justice Holmes, and Justice Brennan all outline the concept of the marketplace of ideas, but none does a better job of highlighting its importance to American ideals than Justice Brandeis in his concurrence of *Whitney v California* in 1927, where he examines the intentions of the founders in establishing the First Amendment:

> They knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.[21]

The marketplace of ideas is essential for the growth of democracy. The public square provides a place where ideas beneficial to democracy can be disseminated and supported, and where harmful ideas can be contested and refuted in public so that they fail to gain traction. By preventing harmful ideas from being openly discussed and debated, society risks losing the opportunity to prove those ideas wrong. And therefore, the suppression of these ideas only makes them a greater danger to democracy.

The danger of limiting speech on social media platforms is evident in the rise of fringe social media sites such as Parler, Truth Social, Telegram, and others. These platforms are being created in response to the suppression of speech on larger social media platforms such as Twitter and Facebook. Whether or not the suppression of speech appears justified, such as to prevent the spread of misinformation or hatred, it leads suppressed individuals to congregate and fester in fringe echo chambers that reinforce already held beliefs rather than refute harmful ideas. Even though recent surveys show that very few Americans get their news from fringe sources such as Parler and Truth Social,[22] these sources can still be dangerous because of the lack of alternative viewpoints. By upholding First Amendment protections on all social media platforms, fringe ideas would not be censored and individuals would not feel the need to establish new social media platforms that create these dangerous echo chambers.

IV. Social media companies can be compelled not to restrict speech

There are two methods whereby social media companies could be compelled not to restrict speech and uphold First Amendment protections on their platforms: classification as designated public fora or common carriers. Rather than proposing a new legal doctrine, this article seeks to apply old precedents to the novelty of social media. Specifically, social media platforms can be categorized as either public fora or common carriers in order to prevent them from limiting the speech of users.

A. Categorization as public fora

a. The legal doctrine for public fora was created to protect the public square

When picturing a public square, the places that first come to mind are those where people gather to engage in political discourse or to express their opinions—such as public parks and sidewalks. Even if they are unfamiliar with constitutional law, most Americans still understand that these places are afforded high levels of free speech protection. For most, public squares and public parks represent the same democratic ideal of the marketplace of ideas.

The Court had ruled in favor of these protections, long before the legal doctrine for public fora was established. In 1939, the Court held in *Hague v Committee for Industrial Organization* that "use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[23] The ruling in *Hague* was further reaffirmed by courts in various decisions regarding free speech in public places until the legal framework for public fora was eventually articulated.[24]

The phrase "public forum" was first coined by Harry Kalven in 1965 when he "re-examin[ed] the concept of the public forum implicit in the earlier cases" and reflected on "the problems of speech in public places" as handled by the Court.[25] Although up until that point, the Court and society had implicitly acknowledged the existence of public forum protections, they had never been explicitly established. It took until 1972 for the Court to use the term in an opinion, when it ruled that "selective exclusions from a public forum may not be based on content alone,"[26] however there was no explanation for what qualified as a public forum. The doctrine of public fora that is used today was envisioned by the Court in the 1983 decision of *Perry Education Association v Perry Local Educators' Association* where "the Court identified

three types of fora: the *traditional public forum*, the *public forum created by government designation*, and the *nonpublic forum*."[27] Generally, the Court determined "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'"[28]

Traditional public fora are places such as streets and sidewalks, "which by long tradition or by government fiat have been devoted to assembly and debate."[29] In these places, the government "may not prohibit all communicative activity,"[30] and content-based restrictions are held to strict scrutiny standards: "it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[31] Content-neutral restrictions are held to intermediate scrutiny standards, meaning that "the State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[32] This provides the highest level of First Amendment protection possible, allowing the marketplace of ideas to thrive and preventing government interference in speech.

Designated public fora are places such as university meeting facilities,[33] school board meetings,[34] and municipal theaters,[35] where the government is obligated to uphold the same First Amendment protections as in traditional public fora; however, the government is not obligated to keep the fora open.[36] Therefore, these places are temporarily designated by the government as public fora and are offered the exact same protections as those granted to traditional public fora. Unlike traditional public fora, however, the government is able to close designated public fora.

Limited public fora are a subset of the designated public fora classification, but they can be "created for a limited purpose such as use by certain groups or for the discussion of certain subjects."[37] The Court has ruled, however, that "any access barrier must be reasonable and viewpoint neutral."[38] This enables public fora to be established for purposes such as student groups[39] or school board business[40] in order to allow only a specific group of people, while still preventing content-based restrictions.

Nonpublic fora refer to all public property "which is not by tradition or designation a forum for public communication."[41] The Court has long held that the "state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated,"[42] and therefore, the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[43] Government-owned property such as airports[44] and polling places,[45] for which there is not by tradition or designation a forum for public communication, are allowed to have restrictions on speech.

Traditional, designated, and limited public fora afford speakers with free speech protections. These are the protections that are currently lacking on social media platforms. Social media companies are currently allowed to regulate speech and censor information at will. Classifying social media platforms as public fora would extend to users the same protections that are afforded to speakers in public parks and sidewalks.

b. The legal doctrine for public fora can be applied to social media platforms

As clearly outlined in the First Amendment[46] and in the Court's decision in *Perry*,[47] public forum protections only prevent the government, not private companies, from infringing on free speech. However, there are various court precedents that allow for the application of the public forum doctrine to private companies—enough precedent to justify categorizing social media platforms as designated public fora.

There are two functions that a private company can fulfill to be considered a public forum. First, when a private company serves a public function governmental in nature, it can be treated as a government actor and thus restricted under the public forum doctrine.[48] Second, when a private company's activities are inextricably entangled with the government.[49] In essence, "the focus is on 'whether private property serves as the functional equivalent of a public forum.'"[50] And in order to determine whether private property serves that purpose, the courts have used several factors including "the nature, purpose, and primary use of the property; the extent and nature of the public invitation to use the property; and the relationship between the ideas sought to be presented and the purpose of the property's occupants."[51]

This standard has been used to categorize as public fora private parks,[52] company towns,[53] private railway terminals,[54] private sidewalks,[55] and, most notably for the purposes of this article, common areas in private shopping malls.[56] Only a couple decades prior to the boom of the internet, the California Supreme Court held that "shopping centers to which the public is invited can provide an essential and invaluable forum for exercising [speech and petition] rights."[57] The common areas of shopping malls are open to the public and allow people to congregate and exchange thoughts and ideas, and, therefore, serve a public function governmental in nature, similar to a public park or sidewalk. They provide a forum wherein people can freely engage in the marketplace of ideas. Although the US Supreme Court's decision was a matter of state statute, namely, whether the California Constitution had violated the Taking Clause—that is, whether the state constitution allowed for private property to be taken for public use without just compensation[58]—the logic used by the California Supreme Court that deemed the common areas of shopping malls as public fora can still help inform subsequent rulings. The Court's decision in *Pruneyard Shopping Center v Robins* upheld the California Supreme Court's ability to designate the common areas of shopping malls as public fora, and it determined that this designation did not violate the Taking Clause.[59] Although there are several exceptions to the public fora doctrine where private companies can be classified as public fora, such as the previously mentioned private parks and company towns, the common area of shopping malls is most relevant to social media platforms.

The same reasoning that is used to designate the common areas of shopping malls as public fora can be applied to social media platforms. Social media platforms and common areas of shopping malls share several characteristics: "both are open to the public at large; both provide common areas for people to meet and converse; and both can provide platforms for raising public consciousness, if access is permitted."[60] Social media platforms, like common areas of shopping malls, are open to the public without restrictions. Just because one place exists

in the physical world and the other exists in the digital world does not mean that their function is not the same. This difference does not take away from the similarities that justify social media platforms being classified as public fora. Of course, a shopping mall might close temporarily just as a social media platform might disable its features from time-to-time, justifying its classification as a designated public forum rather than a traditional public forum. Nonetheless, social media platforms serve the function that a public park or sidewalk once served as a public square, and "from the perspective of speakers, listeners, and viewers, the privatized Internet remains like a public park."[61] Despite being on private property, the platforms still serve a function governmental in nature, just as a common area of a shopping mall does.

Classifying social media platforms, such as Twitter or Facebook, as designated public fora would hold content-based restrictions to strict scrutiny standards and content-neutral restrictions to intermediate scrutiny standards, while still allowing the platforms to freely open and close as necessary. If the platforms were classified as traditional public fora, then the platforms would be forced to remain open around the clock. Although treating social media platforms as public fora would protect free speech, it still gives the companies the right to moderate unprotected speech, such as obscenity, fighting words, and defamation, just as the government moderates unprotected speech in physical public fora. Treating these platforms as public fora would prevent companies from placing content-based restrictions on speech on their platforms and ensure a vibrant marketplace of ideas.

The adoption of this classification has, nonetheless, received some opposition.[62] Some insist that allowing private social media platforms to be classified as public fora would blur the line between public and private. These assertions ignore the importance of the Court's application of this doctrine *solely* to private companies performing public functions governmental in nature. It is not a carte blanche for the courts to infringe on the rights of private companies, but rather a doctrine intended to protect the public from the overstep of private companies that are clearly providing a service that is governmental in nature. This distinction cannot be overlooked or trivialized to invoke the argument that it would allow the government to control private companies. As this article argues, classifying social media platforms as public fora would not be a radical change that would undermine the private sector's independence from government intrusion, but rather it would be a logical progression of legal doctrine supported by the various aforementioned precedents.

B. Categorization as common carriers

a. The legal doctrine for common carriers is better suited for private companies

Classifying social media platforms as public fora would give the highest level of free speech protections to users; however, it is more realistic that they would be classified as common carriers. The common carrier doctrine has a much longer history in this nation's legal tradition and is intended to be applied to private companies—as opposed to the public fora legal doctrine which is intended to be applied to the government and only applies to private companies in a few unique scenarios as mentioned previously.

The current definition of "common carrier" emerged in 1710, when it was determined that "any man undertaking for hire to carry the goods of all persons indifferently" was a common carrier.[63] The legal definition established by the Communications Act of 1934, specifies common carriers as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy,"[64] and the Act prevented them from engaging in "unjust or unreasonable discrimination."[65] The definition has remained unchanged since 1934,[66] and so has the statute preventing common carriers from discriminating against customers.[67]

Although the definition provided by statute is broad, there are two main channels by which a company can be designated as a common carrier. A company can gain common carrier status if they have monopolistic tendencies,[68] or if they are "affected with a public interest."[69] In essence, to be considered a public utility, a company must be of public concern or public service, as outlined in *CompuServe* citing the Ohio Supreme Court.[70] In other words, to be a common carrier, a company must be monopolistic or essential to society. The district court asserted that "as a general matter, the public possesses a privilege to reasonably use the facilities of a public utility,"[71] which reinforces the nondiscriminatory nature of common carriers. As the following section will outline, social media companies meet these criteria to be classified as common carriers.

b. The legal doctrine for common carriers can be easily applied to social media platforms

Just as the courts have regulated certain transportation and communication companies as traditional common carriers,[72] such as railroad companies, airlines companies, telecommunication companies, and internet service providers, they should similarly regulate social media platforms as common carriers. Justice Thomas' concurrence in *Biden v Knight First Amendment Institute at Columbia University* perfectly demonstrates this relationship:

> In many ways, digital platforms that hold themselves out to the public resemble traditional common carriers. Though digital instead of physical, they are at bottom communications networks, and they "carry" information from one user to another. A traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way. And unlike newspapers, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader public.[73]

Justice Thomas uses this standard in his determination of Facebook as a common carrier, despite questioning the public concern and public service standard due to its overly broad nature.[74] He suggests both its resemblance to traditional common carriers (public service), as mentioned above, and its market share (public concern) as relevant factors.[75] Social media platforms clearly provide a public service, as outlined by the court in *CompuServe*. As previously discussed, social media platforms have replaced the physical public square as the medium for the marketplace of ideas in the digital age, and, therefore, it is justified as "an essential good or service to the general public."[76] And since social media media has become the public square of the digital

world and only a relatively few social media platforms dominate the overall market share, there is justifiably a public concern.[77]

If classified as a common carrier, social media companies would not be able to discriminate between users.[78] This would prevent companies from engaging in viewpoint-discriminatory censorship and thus prevent them from making determinations on the factuality or correctness of comments or posts on their platforms. Just as UPS and FedEx cannot refuse to ship books from "extremist" publishers due to their common carrier status,[79] social media companies would not be able to censor "extremist" speech on their platforms. As Justice Thomas suggests, common carrier status would limit social media platforms' right to exclude users.[80] Contrary to this suggestion, the common carrier status would give the companies *more* latitude in restricting speech than public forum status would.

Under a public forum designation, the platforms would need a compelling and narrowly tailored interest when enforcing content-based restrictions on speech, due to the strict scrutiny standard. Whereas a common carrier designation would only require the platforms to have a reasonable justification, which is a much lower level of scrutiny in the eyes of courts.

Therefore, if the courts find that there is not enough supporting precedent to classify social media platforms as designated public fora, the common carrier classification is an acceptable alternative. Although it does not provide as strict legal protections, common carrier designation is designed for companies such as social media platforms that provide a public service and are of public concern, and thus there is no reason not to categorize social media platforms as such. The lesser standard of protection that common carrier status affords is still much better than the lack of protections currently afforded to users.

V. Conclusion

Ensuring an open public square where society can gather to share thoughts and ideas is essential to a healthy democracy. Over the past several decades during the emergence of the digital world, the public square has shifted from physical parks and sidewalks to virtual social media platforms. It is time for legal doctrine to catch up to this change and ensure free speech protections on social media platforms. As this article proposed, there are two main channels by which the courts could enforce this change. Both would increase the free speech protections afforded to users; however, they have different costs and benefits. First, social media platforms can be categorized as designated public fora. This would provide the highest level of free speech protection possible, while allowing for social media companies to open and close as necessary. Second, social media platforms can be categorized as common carriers. This has the most supporting precedent, as the common carrier designation was created for private corporations that provide a public utility rather than a government actor. Therefore, public fora classification would afford more protection but has less supporting precedent, while common carrier classification would afford less protection but has stronger supporting precedent. Both designations would provide more protections than are currently offered to users of social media platforms, and both would ensure a more vibrant and healthy marketplace of ideas.

[1] David Goldstone, "A Funny Thing Happened on the Way to the Cyber Forum: Public vs. Private in Cyberspace Speech," 69 *University of Colorado Law Review* 1, 10 (1998).
[2] Nima Darouian, "Accessing Truth: Marketplaces of Ideas in the Information Age," 9 *Cardozo Public Law, Policy, and Ethics Journal* 1, 4 (Fall 2010), citing Jo Thornton and Jessica Pegis, *Speaking with a Purpose: A Practical Guide to Oral Advocacy* at 27 (Emond Montgomery Publications, 2005) ("It was in the Athenian Agora that Socrates would meet with people to debate ideas through a process of asking questions, and then questioning the answers, until a general agreement could be reached.").
[3] Daniel Park, "Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values," 45 *Gonzaga Law Review* 113, footnote 2 (2009/2010), citing "The Roman Forum," Archaeology Expert, https://www.archaeologyexpert.co.uk/TheRomanForum.html, (last visited Aug. 29, 2009) ("The classic example is the great Roman forum. The forum is described as 'the central heart and business hub of the ancient city [of Rome]. From this communal gathering area all manner of life and livelihood accumulated. Those in commerce, trade, and general business to those in politics, plays, and prostitution all gathered in the Roman Forum where religious cult practices and the administration of justice were dispensed side by side.'").
[4] Ibid, citing "Hyde Park History and Architecture," The Royal Parks, http://www.royalparks.org.uk/parks/hyde_park/history.cfm, (visited April 9, 2023) ("A more modern example is London's Hyde Park where 'since 1872, people have been allowed to speak at Speaker's Corner on any subject they want to.'").
[5] *Hague v Committee for Industrial Organization*, 307 US 496, 515 (1939) ("The privilege of a citizen of the United States to use the streets and ***parks*** for communication of views on national questions may be regulated in the interest of all… but it must not, in the guise of regulation, be abridged or denied." Emphasis added.).
[6] Eugene Volokh, "Treating Social Media Platforms Like Common Carriers?" 1 *Journal of Free Speech Law* 1 377, 379 (2021) (As Volokh describes, cell phone providers are common carriers: they cannot discriminate between who they sell phone plans to. This is one of the protections that I suggest be applied to social media companies. Volokh explains that "Verizon can't cancel the Klan's recruiting phone number, even if that number is publicly advertised so that Verizon can know how it's being used without relying on any private information.").
[7] Carrie Blazina and Elisa Shearer, "News Use Across Social Media Platforms 2016," *Pew Research Center*, May 26, 2016, online at https://www.pewresearch.org/journalism/2016/05/26/news-use-across-social-media-platforms-2016/ (visited April 9, 2023).
[8] Brooke Auxier and Monica Anderson, "Social Media Use in 2021," *Pew Research Center*, April 7, 2021, online at https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/ (visited April 9, 2023).
[9] Emily Vogels, Andrew Perrin, and Monica Anderson, "Most Americans Think Social Media Sites Censor Political Viewpoints," *Pew Research Center*, August 19, 2020, online at https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/ (visited April 9, 2023).
[10] *Packingham v North Carolina*, 137 S. Ct. 1730, 1737 (2017) (emphasis added); *see also Packingham v North Carolina*, 137 S. Ct. 1730, 1737 (2017), citing *Reno v American Civil Liberties Union*, 521 US 844, 870 (1997) ("These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'").
[11] "Groups Urge Court to Protect First Amendment-Protected Speech on Twitter and Other Online Platforms from Overbroad Moderation," ACLU, December 6, 2022, online at https://www.aclu.org/press-releases/aclu-and-partners-warn-supreme-court-about-dangers-suppressing-free-speech-online (emphasis added) (visited April 9, 2023).
[12] *Open Hearing on Foreign Influence Operations' Use of Social Media Platforms (Company Witnesses)*, 115th Congress 19 (2018) (Statement of Jack Dorsey), online at https://www.intelligence.senate.gov/sites/default/files/hearings/CHRG-115shrg31350.pdf (emphasis added).
[13] John Naughton, "Elon, Twitter is not the town square - it's just a private shop. The square belongs to us all," *The Observer*, May 1, 2022, online at https://www.theguardian.com/commentisfree/2022/may/01/elon-twitter-is-not-the-town-square-its-just-a-private-shop-square-belongs-to-us-all (emphasis added) (visited April 9, 2023).
[14] *Abrams v United States*, 250 US 616, 630 (1919) (Holmes dissenting).
[15] Rodney Smolla, "The Meaning of the "Marketplace of Ideas" in First Amendment Law," 24 Communication Law & Policy 437 (2019).
[16] *Lamont v Postmaster General*, 381 US 301, 308 (1965) (Brennan concurring).
[17] Ibid.

[18] Lawrence Olson, "Mill*: On Liberty*," PSC 2106: Major Issues of Western Political Thought II (class lecture, The George Washington University, Washington, D.C., February 9, 2022).
[19] John Stuart Mill, *On Liberty*, Project Gutenberg, 13, online at https://www.gutenberg.org/files/34901/34901-h/34901-h.htm; *id.,* at 43 (This is further supported by *On Liberty*: "In order more fully to illustrate the mischief of denying a hearing to opinions because we, in our own judgment, have condemned them, it will be desirable to fix down the discussion to a concrete case… It is the undertaking to decide that question for others, without allowing them to hear what can be said on the contrary side. And I denounce and reprobate this pretension not the less, if put forth on the side of my most solemn convictions. However positive any one's persuasion may be, not only of the falsity, but of the pernicious consequences—not only of the pernicious consequences, but (to adopt expressions which I altogether condemn) the immorality and impiety of an opinion; yet if, in pursuance of that private judgment, though backed by the public judgment of his country or his contemporaries, he prevents the opinion from being heard in its defence, he assumes infallibility. And so far from the assumption being less objectionable or less dangerous because the opinion is called immoral or impious, this is the case of all others in which it is most fatal.").
[20] Ibid, 31.
[21] *Whitney v California,* 274 US 357, 375 (1927) (Brandeis concurring) (This claim is further supported by the prior sentences in Justice Brandeis' concurrence: "They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. *They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth*; that without free speech and assembly discussion would be futile; that with them, *discussion affords ordinarily adequate protection against the dissemination of noxious doctrine*; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject." Emphasis added.).
[22] Tiffany Hsu, "News on Fringe Social Sites Draws Limited but Loyal Fans, Report Finds," *New York Times*, October 6, 2022, online at https://www.nytimes.com/2022/10/06/technology/parler-truth-social-telegram-pew.html (visited April 9, 2023).
[23] *Hague*, 307 US at 515 (1939) (*Hague* further affirmed that free speech cannot be abridged or denied in the public square under the guise of regulation in the interest of all: "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all… but it must not, in the guise of regulation, be abridged or denied.").
[24] *See also People v Kieran*, 6 Misc. 2d 245, 255 (New York County Court, 1940) ("It would seem of necessity to follow from the decisions of the Supreme Court [in *Hague*] that the right of peaceable assembly and the right to communicate thoughts and discuss questions upon the public streets is a right which may not be denied or abridged by ordinance prohibiting the same or may not be denied or abridged in advance by requiring a permit to exercise such right upon the theory that its exercise may obstruct traffic or tend to breach the peace"); *see also Cox v New Hampshire*, 312 US 569, 574 (1941) ("As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."); *see also People v Solomonow*, 56 Misc. 2d 1050, 1051 (New York Supreme Court, 1968) ("The Supreme Court stated [in *Hague*]: 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the street and parks for communication of views on national questions may be regulated in the interest of all; it is also absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.'"); *see also Badoni v Higginson*, 638 F.2d 172, 179 (Tenth Circuit 1980) (The court uses *Hague* to justify that there is "no basis in the law for ordering the government to exclude the public from public areas to insure privacy during the exercise of First Amendment rights.").
[25] Harry Kalven Jr, "The Concept of the Public Forum: Cox v Louisiana," 1965 *The Supreme Court Review* 1, 3 (1965).
[26] *Police Department of Chicago v Mosley*, 408 US 92, 96 (1972).
[27] *Cornelius v NAACP Legal Defense & Educational Fund*, 473 US 788, 802 (1985), citing *Perry Education Association v Perry Local Educators' Association*, 460 US 37, 45 (1983).
[28] *United States v Grace*, 461 US 171, 172 (1983), citing *Perry,* 460 US at 45.
[29] *Perry Education Association v Perry Local Educators' Association*, 460 US 37, 45 (1983).

[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Usma Sohail Ashraf-Khan, "The Government's Power to Block on Twitter: A First Amendment Analysis," 46 *Rutgers Law Record* 161, footnote 87 (2019), citing *Widmar v Vincent*, 454 US 263, 267 (1981).
[34] Ashraf-Khan, "The Government's Power to Block on Twitter," footnote 87, citing *Madison Joint School District v Wisconsin Employment Relations Commission*, 429 US 167, 174 (1976).
[35] Ashraf-Khan, "The Government's Power to Block on Twitter," footnote 87, citing *Southeastern Promotions, Ltd. v Conrad*, 420 US 546, 555 (1975).
[36] *Perry,* 460 US at 46 ("Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.").
[37] *Perry,* 460 US at footnote 7.
[38] *Christian Legal Society Chapter of the University of California v Martinez*, 561 US 661, 679 (2010).
[39] *Perry,* 460 US at footnote 7, citing *Widmar*, 454 US 263.
[40] *Perry,* 460 US at footnote 7, citing *Madison Joint School District*, 429 US 167.
[41] *Perry,* 460 US at 46.
[42] *United States Postal Service v Council of Greenburgh Civic Associations*, 453 US 114, 129 (1981), citing *Greer v Spock*, 424 US 828, 836 (1976); *see also International Society for Krishna Consciousness v Lee*, 505 US 672, 678 (1992), citing *United States Postal Service*, 453 US at 129 and *Greer*, 424 US 828 (In deciding whether airports should be classified as public fora, the Court reaffirmed that it is "well settled that the government need not permit all forms of speech on property that it owns and controls.").
[43] *Perry*, 460 US at 46, citing *United States Postal Service*, 453 US at 129.
[44] *International Society for Krishna Consciousness*, 505 US at 680 ("Thus, the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity. Nor can we say that these particular terminals, or airport terminals generally, have been intentionally opened by their operators to such activity; the frequent and continuing litigation evidencing the operators' objections belies any such claim.").
[45] *Marlin v DC Board of Elections and Ethics*, 236 F.3d 716, 719 (DC Circuit 2001) ("The forum here, the interior of a polling place, is neither a traditional public forum nor a government-designated one. It is not available for general public discourse of any sort… [and therefore] polling places are non-public fora.").
[46] United States Constitution Amendment I (The First Amendment only prevents the government from prohibiting free speech and expression: "***Congress*** shall make no law… abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Emphasis added.).
[47] *Perry*, 460 US at 45 (*Perry* outlines that the State cannot limit speech: "in these quintessential public forums, the ***government*** may not prohibit all communicative activity." Emphasis added.).
[48] *Evans v Newton*, 382 US 296, 299 (1966) ("That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.").
[49] Goldstone, 20, citing *Burton v Wilmington Parking Authority*, 365 US 715, 725 (1961).
[50] *Park Management Corporation v In Defense of Animals*, 36 Cal. App. 5th 649, 664 (California 1st District Court of Appeal 2019), citing *Van v Target Corporation*, 155 Cal. App. 4th 1375, 1383 (California 2nd District Court of Appeal, 2007).
[51] *Park Management Corporation*, 36 Cal. App. 5th at 664, citing *Van*, 155 Cal. App. 4th at 1384.
[52] *Evans*, 382 US 301 ("The service rendered even by a private park of this character is municipal in nature.").
[53] *Marsh v Alabama*, 326 US 501, 506 (1946) ("Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.").
[54] *In re Hoffman*, 67 Cal. 2d 845, 851 (California Supreme Court 1967) ("In this respect, a railway station is like a public street or park. Noise and commotion are characteristic of the normal operation of a railway station. The railroads seek neither privacy within nor exclusive possession of their station. They therefore cannot invoke the law of trespass against petitioners to protect those interests.").
[55] *In re Lane*, 71 Cal. 2d 872, 878 (California Supreme Court 1969) ("Certainly, this sidewalk is not private in the sense of not being open to the public. The public is openly invited to use it in gaining access to the store and in leaving the premises. Thus, in our view it is a public area in which members of the public may exercise First Amendment rights.").

[56] *Robins v Pruneyard Shopping Center*, 23 Cal. 3d 899, 902 (California Supreme Court 1979) ("In this appeal from a judgment denying an injunction we hold that the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution.").
[57] *Robins*, 23 Cal. 3d at 910.
[58] United States Constitution Amendment V (The Fifth Amendment states that "nor shall private property be taken for public use, without just compensation.").
[59] *Pruneyard Shopping Center v Robins*, 447 US 74, 83 (1980) ("Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Takings Clause. There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center.").
[60] Goldstone, 20.
[61] Steven Gey, "Reopening the Public Forum–From Sidewalks to Cyberspace," 58 *Ohio State Law Journal* 1535, 1619 (1998).
[62] Mary Franks, "Beyond the Public Square: Imagining Digital Democracy," 131 *Yale Law Journal* 427, 431 (2021) (Mary Franks argues that invoking the public fora doctrine would be "a radical departure from traditional First Amendment doctrine and state-action doctrine more broadly… [and] collapsing the public/private distinction would not just have consequences for tech companies, but for all private actors, and it would lead to absurd and troubling results."); Jacob Kosakowski, "Delete and Repeat: The Problem of Protecting Social Media Users' Free Speech from the Moderation Machine," 55 *Suffolk University Law Review* 65, 85 (2022) (Jacob Kosakowski similarly argues that notwithstanding the Court's clarification that the public forum doctrine "only includes private enterprises performing ordinary governmental functions or exercising normal municipal powers… the increasing privatization of public life blurs the distinction between private property and public function.").
[63] Howard Cobb, "What is and What is Not Unlawful Discrimination by Common Carriers," *Historical Theses and Dissertations Collection*, Paper 356 (1896), citing *Gisbourn v Hurst*, 1 Salk. 249, 250, 91 Eng. Rep. 220, 220 (1710).
[64] Communications Act of 1934, Title I § 3, Pub. L. No. 73-416, 48 Stat. 1064 (1934).
[65] Communications Act of 1934, Title II § 202, Pub. L. No. 73-416, 48 Stat. 1064 (1934) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.").
[66] 47 USC 153.
[67] 47 USC 202.
[68] Christopher Yoo, "The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy," 1 *Journal of Free Speech Law* 463, 467 (2021), citing *Virgin Islands Telephone Corporation v Federal Communications Commission*, 198 F.3d 921, 925 (DC Circuit, 1999) ("the FCC has sometimes considered whether a firm 'has sufficient market power to warrant regulatory treatment as a common carrier.'").
[69] *Munn v Illinois*, 94 US 113, 130 (1877), citing *De Portibus Maris*, I Harg. Law Tracts, 78 (Lord Chief Justice Hale) ("Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. Their business is, therefore, 'affected with a public interest,' within the meaning of the doctrine which Lord Hale has so forcibly stated.").
[70] *Compuserve Inc. v Cyber Promotions*, 962 F. Supp. 1015, 1025 (Southern District of Ohio, 1997), citing *A & B Refuse Disposers, Inc. v Board of Ravenna Township Trustees*, 64 Ohio St. 3d 385, 388 (Ohio Supreme Court, 1992) (The court determined that "CompuServe's network, Internet access and electronic mail services are simply not essential to society," and thus determined that it did not qualify for common carrier status. Nonetheless, their framework still holds, even if CompuServe did not meet the framework at the time of its ruling: "the determination of whether an entity is a "public utility" requires consideration of several factors relating to the "public service" and "public concern" characteristics of a public utility… The public service characteristic contemplates an entity which devotes an essential good or service to the general public which the public in turn has a legal right to demand or receive… The second characteristic of a public utility contemplates an entity which conducts its operations in such manner as to be a matter of public concern, that is, a public utility normally occupies a monopolistic or ogopolistic position in the relevant marketplace.").
[71] Ibid, 1025.

[72] *Biden v Knight First Amendment Institute at Columbia University*, 141 S. Ct. 1220, 1223 (2021) (Thomas concurring) ("There is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers.").
[73] Ibid, 1224.
[74] Ibid, 1223 ("This latter definition of course is hardly helpful, for most things can be described as 'of public interest.'").
[75] Ibid, 1224 ("The analogy to common carriers is even clearer for digital platforms that have dominant market share. Similar to utilities, today's dominant digital platforms derive much of their value from network size… The Facebook suite of apps is valuable largely because 3 billion people use it."); *Compuserve Inc.*, 962 F. Supp. at 1025 (CompuServe was determined to not satisfy the public concern criterion because the "defendants estimate[d] that plaintiff serves some five million Internet users worldwide" which was not enough to justify monopolistic tendencies. *CompuServe* was decided in 1997, when the Internet was still young and developing. Today, social media platforms such as Twitter and Facebook are capable of satisfying the public concern criterion because of the scope of their audience.).
[76] *Compuserve Inc.*, 962 F. Supp. at 1025.
[77] "Social Media Fact Sheet," *Pew Research Center*, April 7, 2021, online at https://www.pewresearch.org/internet/fact-sheet/social-media/ (visited April 9, 2023).
[78] 47 USC 202.
[79] Volokh, "Treating Social Media Platforms Like Common Carriers?" 379.
[80] *See Biden*, 141 S. Ct. at 1225 ("If the analogy between common carriers and digital platforms is correct, then an answer may arise for dissatisfied platform users who would appreciate not being blocked: laws that restrict the platform's right to exclude.").

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A Supreme Motivation: The Drivers of Senate Confirmation Vote Behavior from Bork to Jackson

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Abstract

In recent years, the confirmation process of Supreme Court nominees has been more consistently polarized than any other time in our country's history. This study attempts to answer the research question of what factors influence Senators' Supreme Court confirmation voting behavior by examining the trends of the Supreme Court confirmation processes starting from Robert Bork — the starting point for the trend of a contested Supreme Court nomination process. This study utilizes logistic regression analysis to examine a unique data set containing information on senators' party relation to the president, public opinion poll data regarding the nominee, a judicial polarity score for the nominee, the year of the confirmation vote, and the senators' vote to confirm or reject the nominee for the confirmation hearings of Robert Bork to Ketanji Brown Jackson. Through the methods utilized above, I find that the president's party in relation to the senator and the public support for a nominee have a significant, positive effect on the probability of a vote to confirm a Supreme Court nominee while the polarity level of a nominee at the time of the confirmation vote has a significant, negative effect on the probability of a vote to confirm a Supreme Court nominee.

I: Introduction

The confirmation hearing of Ketanji Brown Jackson marks yet another contested Supreme Court confirmation in the modern judicial era. This era is rife with political polarization, which has seeped into the judicial stage, and recent Supreme Court confirmation processes have become even more split than before. Starting with President Ronald Reagan's nomination of Robert Bork for the Supreme Court, an era of increasingly split confirmation votes has made Supreme Court appointments more contested than ever, with four confirmation processes being split closely for votes (the confirmations of Barrett, Kavanaugh, Gorsuch, Thomas), and only one unanimous confirmation vote (the confirmation of Kennedy). This spike in polarized Supreme Court confirmation voting leads one to ponder: what factors influence senators' Supreme Court confirmation voting behavior? This research question is both relevant and important, as it helps identify which factors explain senators' Supreme Court confirmation votes in a highly polarized time in American history. It then takes a legal approach by analyzing how three foundational legal documents, Article III Section 1 of the United States Constitution, the Advise and Consent Clause, and Federalist No. 78, have shaped the confirmation process, and most importantly, the definition of qualifications of Supreme Court nominees and their relation to the qualifications found in the study. This study examines three theoretical variables' explanatory power in the context of senators' Supreme Court confirmation votes: senators' party relation to the president, public opinion poll data regarding the nominee, and a judicial polarity score for the nominee. I do this by testing three hypotheses using logistic regression modeling and a unique dataset containing information on the confirmation hearings for 14 different Supreme Court nominees from Robert Bork to Ketanji Brown Jackson. The first hypothesis poses that *senators who share the same party as the president are more likely to confirm a justice*. The second hypothesis is *if the percent public approval is higher, senators are more likely to confirm a justice*. The third hypothesis is *if the justice is more neutral, senators are more likely to confirm a justice*. The study then re-examines the early foundational American legal definitions and scholarship to analyze how these variables align with judicial qualifications outlined by the founders' themselves as well as early senators.

II: Legal Interpretation

When considering the concept of judicial qualifications for Supreme Court nominees, one must first look at the requirement stated in the United States Constitution. Article III, Section 1 of the United States Constitution elaborates upon this: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office".[1] This requirement is quite vague, and unlike the Constitution's mention of the qualifications for the President, the Constitution names no specific qualifications for Supreme Court justices other than the concept of "good behavior", which the writers failed to elaborate upon and can thus be up to extensive interpretation. Thus, the qualifications for a justice of the Supreme Court are constitutionally undefined and are thus up to the interpretation of senators themselves.

This possession of a flexible interpretation of qualifications for a President's nominees of the Supreme Court is born out of the Advice and Consent Clause of the United States Constitution (Article II, Section 2, Clause 2): "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[2] This clause is imperative to the Supreme Court confirmation process, as it allows the Senate to confirm or deny a President's nominee to the Supreme Court through a two thirds vote. This gifts the Senate with a tremendous amount of balancing power over the judicial branch from both a political and legal perspective, as the political leanings of the nominees that are selected to the Supreme Court may have a direct impact on both Supreme Court decisions and a change in federal or state laws that follow these Supreme Court decisions, such as the overturning of Roe V. Wade in 2022.[3]

In order to obtain a better idea of the qualifications that the writers of the Constitution intended for Supreme Court justices to have, it is important to look to Federalist No. 78 in which Alexander Hamilton claims that "it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community."[4] Therefore, the writers of the Constitution very well could have expected justices to have the character to maintain an unwavering sense of judgement in the face of a varying political environment. Additionally, Hamilton states "hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge."[5] It can be inferred from this statement that the writers of the Constitution also desired Supreme Court justices with the necessary experience to perform their duties, which seems to relate to the Senate's consideration of judicial experience when considering Supreme Court nominees. In the modern Supreme Court confirmation environment, however, the qualifications of Supreme Court justices have shifted from this emphasis on experience and educational qualifications to ideological qualifications. Senators now emphasize factors such as the party of the president as well as the ideological leanings of a Supreme Court nominee, which is a drastic contrast from the prioritized qualifications of Supreme Court nominees in the past, and most notably before the nomination of Robert Bork.

From the beginning of American history, Supreme Court nominees have been rejected on political grounds from time to time, although to a much less frequent extent than in today's polarized environment. George Washington even fell victim to this phenomenon after his Supreme Court nominee, John Rutledge, a former Associate Justice, was rejected as a nominee to replace John Jay as Chief Justice of the Supreme Court primarily based on political matters.[6]

Similarly, throughout the eighteenth and nineteenth centuries, there were several disagreements in regard to Supreme Courts nomination processes over the views of the nominees.[7] The nomination of Robert Bork marked an even more extreme shift in the perceived qualifications of Supreme Court nominees in the eyes of senators. Robert Bork was a highly conservative nominee who was picked by President Ronald Reagan to replace Justice Lewis Powell after his retirement in 1987.[8] In the eyes of many senators, Bork was an extremely polarizing conservative figure which led to Senator Ted Kennedy to decry Reagan's nomination within forty minutes of Reagan's announcement to pick Bork.[9] After an extremely intense confirmation hearing that droned on for a month, Bork's nomination was rejected with 58 votes to reject and 42 votes to confirm.[10] This process was extremely close to a party-line vote, as only six Republicans votes to reject Bork and two Democrats voted to confirm; and moreover it was the largest margin of rejection in U.S. history.[11] Additionally, this pattern of party-line confirmation voting continued after Bork, as senators' view of qualifications for Supreme Court nominees shifted from experience, education, and ethics to ideology and party. Thus, Bork's confirmation process marked a historical shift in the prioritized qualifications that senators considered when voting to confirm or reject Supreme Court nominees, and this shift continues to display itself in modern confirmation processes in the United States. While qualifications for Supreme Court nominees were constitutionally undefined centuries ago (as shown in Article III, Section 1) senators over the years have sculped their own ideas of what qualifications should or should not be for Supreme Court nominees, which has led to this markedly sharp shift that we have seen in the modern era.

III: Hypotheses, Data, and Approach

This paper's main goal is to explore three potential qualifications (or motivators) senators might prioritize during a Supreme Court confirmation vote, observe their predictive power, and, most importantly, examine their relationship to the key Articles of the Constitution as well as to the societally relevant Federalist No. 78. Each hypothesis being tested examines part of the theoretical motivations for senators regarding Supreme Court confirmation voting. The first hypothesis is that *senators who share the same party as the president are more likely to confirm a justice*. This hypothesis is meant to test the strength of the theoretical motivation of both party affiliation as well as the president. However, there are certain cases in which other motivations for a senator during a confirmation vote will outweigh the motivation of party affiliation and the president. For example, West Virginia Senator Joe Manchin voted to confirm Justice Brett Kavanaugh's nomination, despite not sharing a party with the president who nominated him.[12] In Manchin's case, he was facing a difficult reelection battle in his conservative home state of West Virginia, and thus needed to vote for Kavanaugh to appeal to his constituency for the sake of reelection, a motivation which weighed more than the motivation of party affiliation.

The second hypothesis is *if the percent public approval is higher, senators are more likely to confirm a justice*. The primary motivation of reelection is directly tied to the public opinion. This hypothesis also examines whether senators are more beholden to party and president or to the public during a Supreme Court confirmation vote when being compared to the

first hypothesis. The example of Senator Manchin can be referred to once again to reveal that senators do in fact rely on the motivation of pleasing their constituency when voting to confirm or reject a Supreme Court nominee.

The third hypothesis is *if the justice is more neutral, senators are more likely to confirm a justice*. This hypothesis relies on the logic of the median voter theorem to determine if more neutral nominees are more likely to receive more confirmation votes than a polarized nominee. The median voter theorem states that politicians (who are motivated by reelection) often choose to appeal to the median voter to garner as much support for their decisions as possible. In the case of Supreme Court confirmation voting, a more neutral Supreme Court nominee would appeal to the median voter more than a polarized nominee. For a senator attempting to gain reelection, a vote for a less partisan nominee would be a safer bet than a vote for a polarized one. Thus, the median voter theorem being tested in this hypothesis could explain Supreme Court confirmation voting behavior by examining if senators select nominees who are more politically neutral, which arguably relates to Federalist No. 78's promotion of politically unbiased Supreme Court nominees whose loyalty to the Constitution comes before their political beliefs.

It is important to note that all three hypotheses can indeed be true. By testing all three hypotheses, this study does not attempt to show that one motivation exists while the others are absent. Rather, it would show that some qualifications serve as stronger motivators of Supreme Court confirmation voting behavior than others. If all three hypotheses tested are equally strong, then it reflects a much more complex theoretical environment in which senators simultaneously cling to a variety of different qualifications when deciding whether to confirm a Supreme Court nominee. By testing the strengths of the theoretical confirmation motivations of senators, a clearer picture of Supreme Court confirmation vote behavior can be painted.

The variables examined in this study are meant to test the three hypotheses covered above. The first variable whose effect on confirmation votes is being studied is whether the president shared the party with the voting senator. This variable is referred to as the president same party (PSP) variable and tests the prediction power of a shared party status with the nominating president. As mentioned in the theory section above, the corresponding hypothesis is *senators who share the same party as the president are more likely to confirm a justice*. This variable is binary and is coded as a 1 if the senator and president are in the same party and a 0 if the senator and president do not share the same party. This variable was collected from the United States Senate archives. However, some of the parties of the senators could only be revealed through an analysis of two dated newspaper articles from the New York Times and the LA Times.[13]

The second variable whose effect on confirmation voting behavior is being studied is the public opinion or support for a nominee at the time of the confirmation vote, referred to as public opinion support (or POS). The corresponding hypothesis is *if the percent public approval is higher, senators are more likely to confirm a justice.* Additionally, this variable is the percent national public approval of a Supreme Court nominee at the time of the confirmation vote and is measured as a continuous variable on a scale from 0 to 100. The data for this variable was

collected from Gallup polls which measured percent public support a Supreme Court nominee at the time of the confirmation vote.[14] It is important to note that there were no POS polls for three of the nominees (Kennedy, Souter, and Breyer). Only 11 of the nominees studied will have this data.

The third variable being studied is the judicial polarity score used to examine the median voter theorem logic in the context of Supreme Court confirmation vote behavior. This variable corresponds to the third hypothesis: *if the justice is more neutral, senators are more likely to confirm a justice*. The polarity score being used is the Judicial Common Space Score (referred to as JCS) created by Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, and Chad Westerland. This score takes many factors into consideration such as the NOMINATE Common Space Scores and the Martin-Quinn scores to determine the polarity of a judicial figure.[15] This study utilizes the JCS score from the year of the confirmation vote in order to measure the justice's polarity *at the time of the confirmation vote.* This ensures that the polarity of the justice at the time of the vote is being studied and prevents any loss of accuracy due to a change of a justice's polarity or JCS score during their time on the Supreme Court (if confirmed). It is important to note that Robert Bork and Ketanji Brown Jackson were never previously acting Supreme Court justices and thus never had a measured JCS score for the year of his nomination. To account for this, I substituted Bork and Jackson's JCS score as a court of appeals judge as this would still serve as an accurate reflection of their polarity. Since the main concern is the distance from 0 (the neutral point) for this analysis, the analysis will use the absolute value of JCS. This will ensure that polarity regardless of direction will be measured, with nominees closer to 0 being the more neutral justices. The raw JCS scores for all the nominees tested from most liberal to most conservative are shown in figure 1 below:

Figure 1

Justice	JCS Score
Sotomayor	-0.441
Kagan	-0.399
Jackson	-0.32
Breyer	-0.023
Ginsburg	0.026
Kavanaugh	0.319
Souter	0.419
Barrett	0.429
Gorsuch	0.442
Roberts	0.512
Alito	0.524
Kennedy	0.529
Thomas	0.688

Bork	0.692

The final variable being recorded is the year of the confirmation vote. This variable is not being studied. However, it was included to account for the change in the time of the confirmation voting procedures. This is done to achieve a more accurate and time-conscious result.

The dependent variable being recorded is the senator's confirmation vote. This variable is binary and is thus coded as a 1 for a vote to confirm and a 0 for a vote to reject the nominee. The data for this variable was collected from the United States Senate archives.[16]

In this study, I will be using a multiple logistic regression model to test for the predictive power of these variables on confirmation voting behavior. A logistic model is the most appropriate method to model a binary dependent variable. Furthermore, I will not be using a probit model for this study since the probit model uses the cumulative distribution function of a standard normal distribution. This will not be appropriate for this study, as there are only 14 nominees within the dataset. Additionally, a logistic regression model is the method by which this study can model the impact of the respective independent variables on the dependent variable as a probability. The figures shown in the results section will also include robust standard errors when plotting the effect of the independent various variables.

IV: Results

The results from the multiple logistic regression are shown in table 1 below:

Table 1:

	Dependent variable:
	Confirm/Reject Vote
President Same Party	5.636***
	(0.335)
Public Opinion	-0.025***
	(0.006)
Judicial Common Space	-5.272***
	(0.678)
Year	-0.080***
	(0.011)
Constant	162.610***
	(21.719)
Observations	1,400
Log Likelihood	-344.559
Akaike Inf. Crit.	699.118
Note:	*p**p***p<0.01

Hypothesis 1: Senators who share the same party as the president are more likely to confirm a justice.

From the results in this table, the president same party variable has a significant impact on the probability of vote confirmation and rejection. When PSP = 1, the logarithmic odds of a vote to confirm increases dramatically, specifically by 5.636. There is a dramatic increase in logarithmic odds between PSP = 0 and PSP = 1. When PSP = 1, the standard error is very low, but when PSP = 0, the standard error is much higher. Based on the theory outlined above, this would indicate that the president having the same party as the voting senator is a significant motivation and predictor of a senator's behavior during a Supreme Court confirmation vote. However, when the president and senator do not share a party, the increased standard error would indicate that there is more variation in the probability of confirmation or rejection. For example, a Republican senator would vote for a Republican president's nominee, but a Democratic senator is not completely guaranteed to vote against the Republican president's nominee. This can be true in the reverse direction as well, indicating that other motivations may be at play for senators who are not the same party as the nominating president.

Hypothesis 2: If the percent public approval is higher, senators are more likely to confirm a justice.

As shown from the results in table 1, the public opinion variable also has a significant effect on the probability of a senator's vote to confirm or reject a nominee. For a unit of increase in percent public support for a nominee, the logarithmic odds of a vote to confirm decrease by 0.024. However, as mentioned above, there were three nominees who did not have public opinion support data available (Kennedy, Souter, and Breyer). A second multiple logistic regression model was run to see if removing these outliers changes the effect of public opinion support in the model. The results of this model are shown in table 2 below:

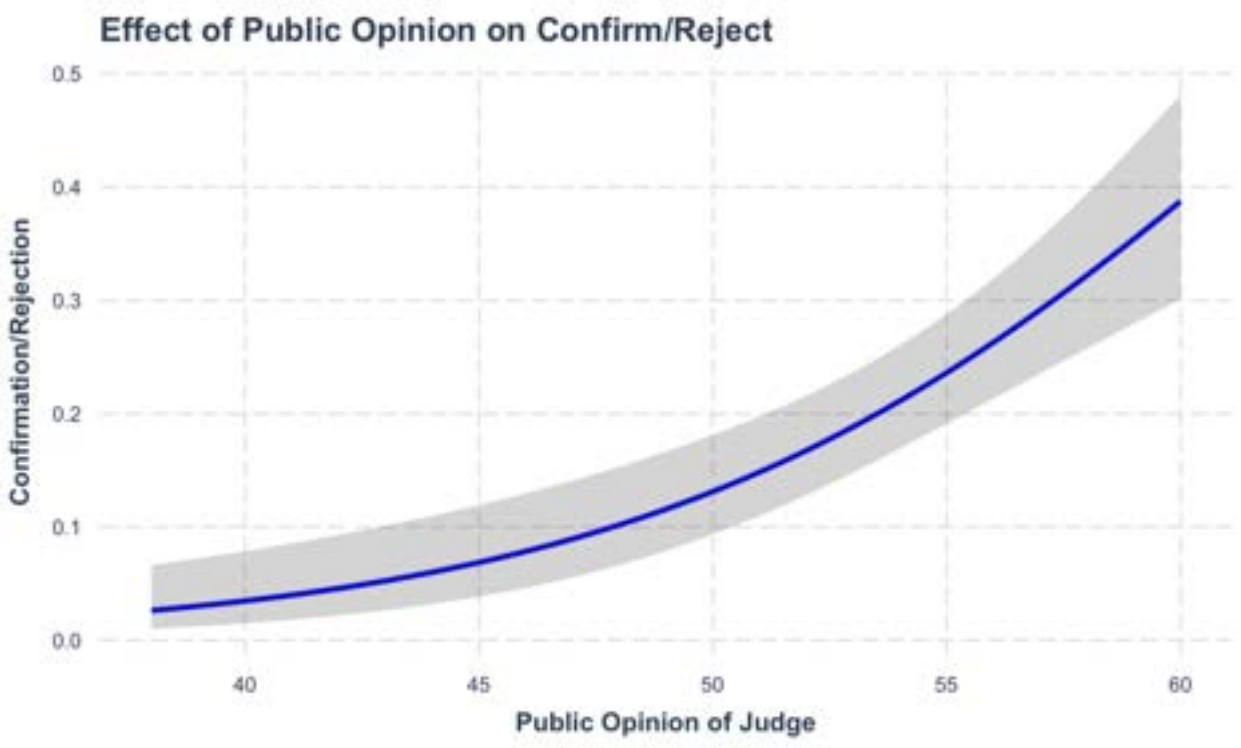
Table 2:

	Dependent variable:
	Confirm/Reject Vote
President Same Party	6.390***
	(0.401)
Public Opinion	0.143***
	(0.023)
Judicial Common Space	-7.181***
	(1.010)
Year	-0.084***
	(0.014)
Constant	162.418***
	(27.612)
Observations	1,100

Log Likelihood	-232.230
Akaike Inf. Crit.	474.460
Note:	*p**p***p<0.01

In this model with the outliers removed, the effect of public opinion remains significant, but the coefficient becomes positive. A unit increase in percent public support results in the logarithmic odds of a vote to confirm increasing by 0.143. This can be visually confirmed by the figure 3 below:

Figure 3

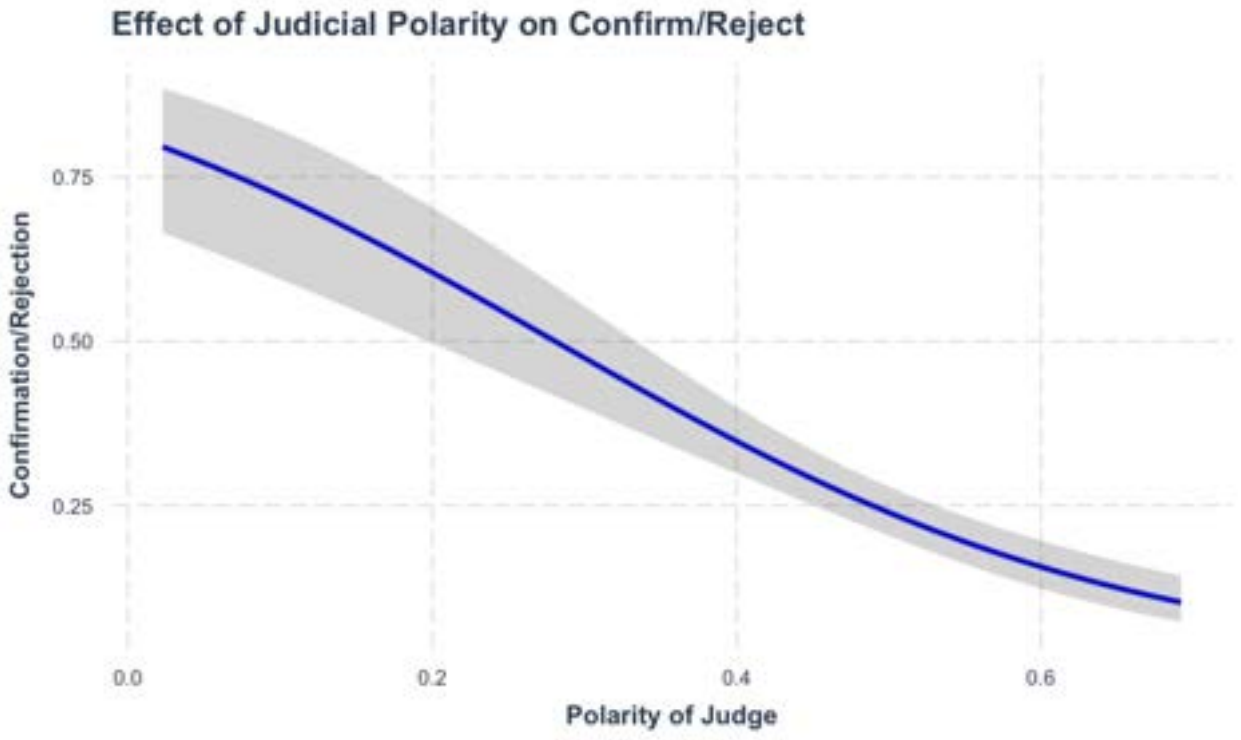


Upon examining this plot, the effect of public opinion support on the probability of a vote to confirm increases exponentially at higher levels of percent public opinion support. The robust standard errors in this plot are inconsistent, which has significant theoretical implications. At lower levels of public opinion support, the variation in the probability of confirmation is much less than at higher levels of public opinion support. This shows that a higher public opinion percentage is not necessarily the strongest motivation for senators' Supreme Court confirmation voting behavior.

Hypothesis 3: If the justice is more neutral, senators are more likely to confirm a justice.

As shown in the results of table 1, the JCS variable also has a significant effect on senators' Supreme Court confirmation vote behavior. A unit increase in the absolute value of JCS results in the logarithmic odds of a vote to confirm decreasing by 5.272. This is once again confirmed visually in figure 4 below:

Figure 4



The standard errors are very inconsistent across JCS values, which also has important theoretical implications. At higher levels of polarity indicated by the JCS variable, the senator is much more likely to reject the nominee and the variation in the probability of confirmation is much less at these higher levels of polarity. However, the closer the polarity indicator approaches 0, the standard errors increase even as the probability of confirmation increases. This indicates that a less polarized nominee is not guaranteed to be confirmed. Thus, Hamilton's assertion regarding the extreme importance of loyalty to the constitution in the face of a noisy political environment as a qualification for a Supreme Court nominee has not been followed as closely by the Senate in the modern American legislative era as the founding father may have hoped, yet it has still been a consideration in the minds of senators nonetheless when it comes to the more politically polarized nominees.

Through these results, it can be shown that party affiliation and the president's party is the most significant qualification for senators during Supreme Court confirmation vote. But as mentioned above, this is primarily the case for when the parties are the same, rather than different. This seems to be the case with both the public opinion support variable and the JCS variable as well. To provide more nuance, it would be more accurate to say that the senators' Supreme Court confirmation voting behavior is affected by being in the same party as the president, a low level of percent public support for a nominee, and if a nominee is highly polarized. For all three variables, the effects on the confirmation or rejection of a nominee are high but are also conditional. This is in line with the case studies that have been referenced, as Senator Manchin indicates that when PSP = 0, it doesn't indicate that he would surely vote against the Republican president's nominee. As for an example of judicial polarity, Kagan,

Kavanaugh, and Barrett have high JCS scores and were more polarized nominees, which led to a more contested confirmation vote. In conclusion, these results reveal that it is not a question of whether one variable is a more significant motivation than the other, but rather what conditions make senators prioritize one motivation over another during a Supreme Court confirmation vote.

In the increasingly contested Supreme Court confirmation environment, this study has added theoretical and empirical clarity to an essential process in the American political institution. The policy implications of this research are important, as it demonstrates the power of senators' party affiliation motivations as well as their tie to the party of the president. This information can be used to inform policy makers, and especially presidents themselves, so that they are able to select Supreme Court nominees that are most likely to pass, thus saving a president from the potential political and legislative embarrassment of having their nominee rejected by the Senate. It is imperative, however, that future research is conducted to examine other variables such as the precent of home state support for a Supreme Court nominee or the polarity of the rest of the Supreme Court at the time of the vote. It would also be useful to examine this data by including the future Supreme Court confirmation proceedings that occur as well to paint an even clearer picture of the new confirmation environment America is encountering.

V: Conclusion

The findings of this study provided much needed insight into the individual power of these various qualifications of Supreme Court confirmation voting behavior. The president same party variable showed itself to be a powerful predictor when the party is shared with the senator. Its strength as a motivator wanes when the party of the senator and president is not shared. The percent public support has also shown to be a significant qualification, with lower levels of public approval for a nominee enticing senators to reject the nominee to please the public. Finally, senators have been shown to stray from more polarized nominees, which satisfies the median voter theorem.

After being granted permission by both the Advice and Consent Clause to confirm a Supreme Court nominee (as selected by the President) as well as Article III, Section 1 of the United States Constitution to interpret qualifications as they please, senators have indeed sown the seeds for a Supreme Court confirmation process based on ideology and party rather than education and experience over the course of American history. However displeasing this may seem to some, due to the vague nature of the Constitution's language, no alternative interpretation can be made to refute the current confirmation process chosen by the senators, as the only explicit and undeniable fact is that they and they alone have the power to select the qualifications of the nominees they select.

Senators' behavior, as shown through this study, may occasionally coincide with Federalist No. 78 through the JCS variable. When Supreme Court nominees were at the far ends of either side of the political spectrum, senators were more likely to agree with Alexander Hamilton's ideological view of what major qualification Supreme Court nominees should possess should they be nominated to walk the steps of the Supreme Court. However, when

nominees are more politically neutral, senators seem to listen to Federalist No. 78's advise less. As a nominee becomes more like Hamilton's ideal Supreme Court candidate (in at least one sense), senators appear to turn their attention elsewhere in favor of other qualifications.

The modern Supreme Court confirmation environment is much different than it was in the past. Both party and ideology have begun to outpace more traditional judicial qualifications more drastically as considerations during a confirmation vote. Senators have several self-chosen motivating factors (or qualifications) such as party affiliation, the president, their constituency, and the nominee's polarity to consider when voting to confirm or reject a nominee to the Supreme Court. But what both this study and paper does not prove is that the modern Senate has broken the rules of the Constitution. From the power bestowed upon them by the contents of Article II to the flexibility gifted to them by the rules in Articles III, our contemporary senate, as well as a polarized Supreme Court confirmation voting process, is here to stay.

[1] U.S. Const. art. III, § 1.
[2] U.S. Const. art. II, § 2, cl. 2.
[3] Roe v. Wade, 410 U.S. 113 (1973).
[4] Alexander Hamilton, "The Federalist No. 78, [28 May 1788]," National Archives and Records Administration (National Archives and Records Administration).
[5] Ibid.
[6] Charles Warren, *The Supreme Court in United States History* (1926), pp. 124-27.
[7] Russell L. Weaver, "Advice and Consent" In Historical Perspective." *Duke Law Journal*, vol. 64, No. 8, May 2015, pp. 1717-1753.
[8] Ilya Shapiro, "The Original Sin of Robert Bork," Cato.org (CATO Institute, September 9, 2020).
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Sheryl Gay Stolberg and Nicholas Fandos, "Collins and Manchin Will Vote for Kavanaugh, Ensuring His Confirmation," The New York Times (The New York Times, October 5, 2018).
[13] "Supreme Court Nominations (1789-Present)," U.S. Senate: Supreme Court Nominations (1789-Present), March 1, 2022; Linda Greenhouse, "Bork's Nomination Is Rejected, 58-42; Reagan 'Saddened,'" The New York Times (The New York Times, October 24, 1987); "Senate Rejects Bork, 58-42 : Six Republicans Bolt Party Ranks to Oppose Judge," Los Angeles Times (Los Angeles Times, October 23, 1987).
[14] "Supreme Court," Gallup.com (Gallup, January 18, 2022), https://news.gallup.com/poll/4732/supreme-court.aspx.
[15] L. Epstein et al., "The Judicial Common Space," *Journal of Law, Economics, and Organization* 23, no. 2 (January 2007): pp. 303-325.
[16] "Supreme Court Nominations (1789-Present)," U.S. Senate: Supreme Court Nominations (1789-Present), March 1, 2022.

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Social Media Platform Regulation: Assessing the Grounds for Common Carrier Status

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Abstract

The unprecedented power that social media platforms wield over individual expression and integral channels for public discourse presents new threats to democracy. Spurred on by recent Florida and Texas laws, this paper assesses the possibility of regulating social media companies under the common carrier doctrine, an approach that Justice Thomas brought to center stage in his solo concurrence in *Biden v Knight First Amendment Institute* (2021). Common carriage would require the platforms to host all lawful content, similar to how railroads and telephone companies must offer service on a non-discriminatory basis. A number of courts and scholars present a three-pronged argument against common carrier classification: the platforms (1) may not possess monopoly status; (2) have not held themselves out as serving the entire public; and (3) exercise constitutionally protected expressive editorial discretion. The purpose of this paper is to cast doubt on each prong. The paper finds that monopoly status is not a necessary prerequisite and that platforms have classified themselves as neutral conduits in certain situations. Using tests of expressiveness formalized by Supreme Court judicial precedent, the paper then demonstrates that content moderation is not sufficiently expressive to receive full First Amendment protection. Whether common carrier status ought to be imposed is a question beyond the scope of this paper. However, the results offer a path forward by illuminating that lawmakers have the grounds to consider the common carrier approach of online speech regulation.

Introduction

In the immediate aftermath of the January 6, 2021, insurrection at the U.S. Capitol, several of the largest social media platforms permanently suspended the accounts of then-President Donald Trump—a move termed the "Great Deplatforming"—due to the risk that he would incite further violence. The power of the private sector to silence a sitting President and his followers resurrected essential questions about the state of freedom of expression in the Internet era. In particular, the debate over who should regulate speech on social media demands urgent attention. The First Amendment prevents the government from making laws "abridging the freedom of speech, or of the press." However, by the state action doctrine, the Constitution and its protection of rights does not apply to private actors.[1] Government intervention in private social media companies thus appears at first blush to conflict with First Amendment doctrine. However, the problem is that these digital platforms wield unprecedented control over individual expression and integral channels for public discourse. Twitter famously restricted the distribution of a *New York Post* story about Hunter Biden's laptop three weeks before the 2020 presidential election. Facebook blocked a *New York Post* story about the potential origins of SARS-CoV-2 in a Chinese lab, despite insufficient evidence proving otherwise, and a story about the luxurious properties of a Black Lives Matter co-founder.[2] These flagrant incidents of information suppression subverted the national commitment to "the principle that debate on public issues should be uninhibited, robust, and wide-open," which the Court spoke of in *New York Times Company v Sullivan.*[3] Effective self-government depends upon an informed citizenry. A threatened system around freedom of expression jeopardizes the democratic processes that animate America's founding purpose.

The emergence of the internet has presented new challenges to freedom of expression, and it remains unclear how best to safeguard that right online. In a dissent from the Court's decision to block Texas law HB-2, Justice Samuel Alito wrote, "it is not at all obvious how our existing precedents, which predate the age of the internet, should apply to large social media companies."[4] Though a proposal to let the government determine the speech rules activates First Amendment anxieties, it is not without roots in established legal thinking. Justice Anthony Kennedy's majority opinion in *Turner Broadcasting System, Inc. v Federal Communications Commission*[5] observed, "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."

This understanding was reflected at the hearing of the Senate Select Intelligence Committee, which had been investigating Russian meddling in the 2016 presidential election, when Senator Diane Feinstein told the representatives from Facebook, Google, and Twitter—today's "critical pathway[s] of communication"—that "[y]ou've created these platforms. And now they're being misused. And you have to be the ones to do something about it. *Or we will*" (emphasis mine).[6] Recent laws from Texas and Florida, coupled with Justice Clarence Thomas's concurrence in *Biden v Knight First Amendment Institute at Columbia University*[7], have brought

to the forefront the possibility of the government regulating social media companies under the common carriage doctrine. Common carriers, such as telephone companies and the postal service, are obligated to serve all comers without discrimination. Such an approach would require the online platforms to host all users and lawful content, capacity permitting. While the must-carry argument has gained increasing traction internationally, especially in Brazil and Germany, a widespread view persists among a number of United States courts that social media companies engage in constitutionally protected expressive editorial discretion which precludes the common carrier categorization.[8]

The Eleventh Circuit applied this reasoning in *NetChoice v Moody*[9] to strike down a Florida law, SB 7072, that sought to impose carriage mandates. Judge Kevin Newsom wrote that because "social-media platforms exercise—and have historically exercised—inherently expressive editorial judgment, they aren't common carriers, and a state law can't force them to act as such unless it survives First Amendment scrutiny."[10] Against the current of academic literature affirming that dominant position, the central argument of this paper is that the content moderation performed by internet platforms is a complete departure from the established understanding of expressive editorial decision-making. This paper proceeds in two Parts. Part I examines, in brief, the relevant cases and frequently offered interpretations of FCC guidelines to clarify when the law authorizes the classification of communications entities as common carriers. Part II recovers the history of editorial discretion in the United States and the expression-action distinction to illustrate that the First Amendment only protects inherently expressive conduct. Part II then argues that editorial decision-making is an unpersuasive analogy, for social media content moderation is not inherently expressive nor the company's own speech. The real-world implication is that this finding lends credence to the common carrier approach of online speech regulation.

I. A Brief History of Common Carriage

The origins of common carriage trace back to English common law. Certain professionals, such as ferrymen, innkeepers, and wharfingers, belonged to occupations that were conceived as having a "public calling."[11] Common law placed peculiar duties on those with "public callings," such as the requirement to serve, upon reasonable demand, all persons without discrimination.[12] The duty to serve "all comers" underlies the common carrier concept. By the mid-1800s, a standard in the United States, first clearly enunciated by Justice Joseph Story, had developed recognizing a person as a common carrier when he exercises the carriage of goods as a "public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*."[13]

To interpret modern common carriage operations, Professor Adam Candeub at the Michigan State University College of Law proposed the framework of a "regulatory bargain," bundle of carrots and sticks.[14] Regulated industries, particularly those that are critical to the nation's transport and communications infrastructure, tend to hold a concentration of economic power. To ensure the effective delivery of public goods, the government prohibits these

industries from discriminating in service and charging unreasonable rates. In return, the industries enjoy certain government-granted privileges, such as greater protection from antitrust laws and the relief from liabilities that result from the nature of the product transported, rather than the fault or negligence of the carrier.[15]

The railroads became the first common carriers in the United States with the passage of the 1887 Interstate Commerce Act.[16] However, by the turn of the century, the common carrier concept was no longer exclusive to transportation infrastructure. Rather, calls to regulate telegraph companies as common carriers were met with increasing endorsement as concerns grew over the market consolidation under the Western Union Telegraph Company's alignment with the *Associated Press*.[17] Proponents for regulation argued that the alliance between a main distributor of knowledge and a powerful news-gathering agency would disrupt the free flow of information in ways that were antithetical to American democracy. In 1894, the Supreme Court found in *Primrose v Western Union Telephone Company*[18] that telegraph companies "resemble railroad companies and other common carriers, in that they are instruments of commerce; and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination." The first communications common carrier laws thus forced telegraphs to "operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor or against any person, company, or corporation whatever."[19] The burgeoning telephone industry, while in the service of carrying messages instead of goods, was likewise subject to common carrier obligations under the Mann-Elkins Act of 1910.[20]

The Communications Act of 1934 endowed the newly created Federal Communications Commission (FCC) with the responsibility to regulate broadcast and common carriers. Title II of the Act regulates common carriers engaging in interstate communications. Section 202 forbids communications common carriers from making "any unjust or unreasonable discrimination" in the provision of services and from subjecting "any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."[21] However, the Act does not provide much guidance on the definition of a common carrier: "the term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio in interstate or foreign radio transmission energy … but a person engaged in radio broadcasting shall not … be deemed a common carrier."[22] The work of discerning a set of criteria from such "circularity" and "uncertainty" has given the courts particular difficulty.[23] For example, in *Nebbia v New York*[24], the Court abandoned the long-recognized "affected with a public interest" test because it was "not susceptible of definition." This essay does not purport to offer a new definition. However, a study performed *infra* of the relevant precedents illuminates that the Court does not apply common carrier regulation to entities that exercise expressive editorial discretion. Imposing must-carry duties does not infringe upon First Amendment rights when there is no intrusion into the entity's own expression and if a reasonable person will not misconstrue mere carriage as an endorsement of the speech.

Before proceeding, it seems imperative to first review the current legal structure in place that guides the content moderation policies of internet platforms. The First Amendment is not the

sole guarantor of the freedom of expression. Section 230 of the Communications Decency Act of 1996 has been called "the most important law protecting internet speech."[25] The law's particular significance derives from its shielding of internet platforms from liability for third-party content. Prior to Section 230, a New York court held in the 1995 case *Stratton Oakmont, Inc. v Prodigy Services Company*[26] that online bulletin boards engaging in "editorial control" could be held liable as a publisher of the third-party content. The decision was in line with the tradition of treating disseminators with editorial discretion, such as newspapers, as legally responsible for their publication decisions. In contrast, common carriers, such as television service providers, cannot exercise editorial discretion and thus are not held liable for carried content.[27] However, the perverse incentive structure that emerged from *Stratton Oakmont* discouraged internet platforms from moderating content, even obscene material, to receive immunity.[28] Section 230 was enacted to address that challenge. Under Section 230(c)(1), "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."[29] At the same time, Section 230(c)(2) protects "good faith decisions to block or remove" unsavory content.[30] Taken together, the two provisions afford internet platforms the benefits associated with common carriers and traditional publishers (liability relief and editorial rights, respectively) without imposing any of the burdens (the duty to serve all comers without discrimination and liability for editorial decisions, respectively).[31] In the language of Candeub's analogy, Section 230 is all carrots without government-provided sticks.

II. The Case for Social Media Common Carrier Status

There are three distinct rationales upon which authorities base their argument against common carrier classification. The platforms (1) do not have the necessary monopoly power, (2) do not hold themselves out as serving the entire public, and (3) engage in constitutionally protected editorial discretion. This essay finds that the first criteria is largely irrelevant to the essence of the common carrier concept and should not command the authority of a settled standard. As to the other two components, later analysis challenges those conclusions.

A. Against the Monopoly Condition

The use of common carrier regulation to mitigate the effect of monopoly power has a solid grounding in precedent. The study of the idea behind rate regulation laws began over two hundred years ago with Sir Matthew Hale, who wrote in his treatise *De Portibus Maris*, "if the king or a subject have a publick wharf, unto which all persons that come and unlade or lade their goods for the purpose, because they are wharfs only licensed by the queen… or because there is no other wharf in that port" then the "wharf and crane and other conveniences are affected with a publick interest, and they cease to be *juris privati* only."[32] In other words, English common law required wharf owners with a legal or natural monopoly to provide nondiscriminatory service with reasonable rates to the public. Colonists transported Hale's model to America along with the system of common law, and to this day, some courts and scholars maintain that monopoly is the prerequisite for common carriage regulation. Indeed, Brett Kavanaugh, as a D.C. circuit

judge, wrote in a dissent that "absent some market dysfunction," the imposition of net-neutrality rules on Internet Service Providers would prove unconstitutional.[33]

Whether social media companies are monopolies is "not an easy question," as Richard Epstein, the Laurence A. Tisch Professor of Law at NYU School of Law acknowledges, yet the question is an unnecessary undertaking for the present purpose as there is no monopoly requirement in the FCC's definition.[34] An examination of the drafting history reveals that the FCC contemplated only including monopoly common carriers under the Act: "there may be an additional element to common carrier which is economic in nature … The question then is whether the common carrier concept may legitimately be understood to contain some element of essentiality or monopoly."[35] However, the drafters eventually chose not to enshrine an answer to that question. Such an absence implies the authorization of a common law approach to determining the indispensable qualities of a common carrier. Therefore, a faithful reading of the Act leads to the result that monopoly power is not a necessary precondition. The concrete reality buttresses this reading, as many public buses and airlines are common carriers, despite the existence of numerous competitors.[36]

The corollary is that the presence of monopoly status is not by itself sufficient to legitimize common carrier classification. The appellees in *Turner*[37] had attempted to reason that "the must-carry provisions are nothing more than industry-specific antitrust legislation." The Court repudiated a similar vein of thinking in the 1986 case *City of Los Angeles v Preferred Communications, Inc.*, by stating that cable television activities "plainly implicate First Amendment interests."[38] Monopoly status does not automatically confer less than the full protection of First Amendment rights. More specifically, *Miami Herald Pub. Co. v Tornillo* made clear that economic market power does not diminish editorial rights.[39] Thus even if we operate under the assumption that social media companies are monopolies, the decision of whether to apply common carrier regulation and compel the hosting of all lawful content must consider factors beyond market structure. The crucial question is whether imposing common carrier status violates the platforms' First Amendment rights. Two factors, the "holding out" provision and the nature of the content moderation decisions, help assess that question.

B. "Holding Out" and Indiscriminate Service

Whether an entity holds itself out as serving clientele on a nondiscriminatory basis is widely cited as the most basic characteristic of a common carrier. The U.S. Court of Appeals for the D.C. Circuit held in *National Association of Regulatory Utility Commissioners v Federal Communications Commission*[40] that "the primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking 'to carry for all people indifferently.'" At the outset, it is essential to make a fundamental distinction. Importantly, carriers that offer services for a limited group of people are still common carriers. The *NARUC I* court found that "a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users."[41] Therefore, the precise language of leading MIT academic Ithiel de Sola Pool best captures the "holding out" provision: "A common carrier is required to make its facilities

available to *all comers* on a nondiscriminatory basis" (emphasis mine).[42] The language distinguishes between "all comers" and the entire public, as by common dictionary definition, "all comers" is anyone who affirmatively chooses to take part in an activity.

The distinction outlined in *NARUC I* rejects the argument, postulated by Andrei Jaffe, that requiring users to sign a Terms of Service is a form of discrimination irreconcilable with common carrier status.[43] To reiterate, online platforms can still be common carriers even though they offer services of possible use to a fraction of the population: the users. Therefore, if the platforms are common carriers, their obligation is to offer services to all "potential users," or "all comers," in a nondiscriminatory way. To be a "user" or a "comer," an agent must choose to take part in the platform. That is only possible when the agent signs the Terms of Service. Thus, if common carrier status is imposed, social media companies need only to hold themselves out to indiscriminately make available their services for those who signed the Terms of Service, and thus affirmatively sought out those services by creating an account. After all, the users are the clientele that the platforms serve.

NARUC II expanded on the test formulated by the *NARUC I* court by adding a second prong. *NARUC II* found that holding-out implicitly required a carrier to let customers "transmit intelligence of their own design and choosing."[44] While subsequent judicial decisions have lessened the weight of the "transmission" prong, the assertion that platforms do not "hold themselves out to the public as neutral conduits" undergirds the argument against common carrier regulation.[45] However, this assertion forgets that the platforms have self-presented as passive transmitters of information.[46] During the House Judiciary Committee's antitrust hearing, Facebook CEO Mark Zuckerberg affirmed that Facebook's "goal is to offer a platform for all ideas," and Colin Stretch, then-Facebook's General Counsel, reiterated the neutral conduit framing in a published response to allegations of viewpoint discrimination.[47] Greg Marra, a software engineer behind Facebook's news feed algorithm, said in a 2014 interview with the *New York Times*, "we try to explicitly view ourselves as not editors … we don't want to have editorial judgment over the content that's in your feed."[48] These statements reinforce the neutral conduit framing in the public consciousness. The overall effect is that courts, such as the Eleventh Circuit, should not be too hasty with dismissing common carrier regulation under the two-prong *NARUC II* test. Platforms have expressly classified themselves as neutral conduits when the situation calls for it. That advertising encourages consumers to trust that the platforms will transmit "all ideas" on an equal basis and that their services are available to whoever seeks.

A separate argument has emerged that points to the ability of platforms to discriminate among posts as evidence against common carrier status. However, the entire thrust of that argument hinges upon the categorization of content moderation as expressive editorial discretion. If such behavior—the promoting and taking down of posts—is found to be non-expressive, then the platforms' content moderation can be subject to government regulation, thus establishing the grounds for common carriage. Platforms contend that the imposition of common carriage would result in the hosting of users and content with which they disagree. If the platforms do not make

expressive editorial decisions, then their concern, while certainly legitimate, does not prohibit the government from imposing common carriage.

Indeed, the historical record provides concrete examples of the government requiring common carriers to treat equally the people they seek to exclude. In *Mitchell v United States*[49], the Court found that the racial segregation of passengers on trains violated the Interstate Commerce Act, even though the discrimination was in accordance with state laws. Chief Justice Charles Evans Hughes, delivering the opinion of the court, wrote that the Act "says explicitly that it shall be unlawful for any common carrier subject to the Act 'to subject any particular person…to any undue or unreasonable prejudice or discrimination in any respect whatsoever.'"[50] It is the "duty" of a carrier to "provide equality of treatment."[51] Chief Justice Hughes' emphasis on "duty" brings to mind *Railroad Company v Lockwood*[52], which held that common carriers could not waive their traditional duty to exercise "care and diligence" toward customers: "[I]f a carrier stipulate not to be bound at the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment. And to assert that he may do so seems almost a contradiction in terms." Likewise, social media platforms cannot abdicate the essential nondiscrimination duty they would assume if designated as common carriers.

C. Against the Expressive Editorial Discretion Argument

This paper has taken the time to rehearse the background of common carriage to emphasize that the classification depends primarily on the "nature" of the services that the platforms provide, rather than market dynamics or other extraneous forces.[53] In litigation, the platforms assert that their service, the curation of disseminated material, lies within the ambit of editorial discretion. We arrive back, then, at the original predicament on which the remainder of the paper will focus. Do social media platforms engage in constitutionally protected "expressive editorial judgment" like a newspaper when they moderate content? As Judge Newsom underscored *supra*, the affirmative answer, that platforms exercise inherently expressive editorial judgment, is the cornerstone upon which the argument against common carrier status rests. If removed, the argument, like any architectural structure, would struggle to remain held together.

1. Initial Problems With the Newspaper Analogy

The Court has not definitively moved toward affirming that the law should regulate social media companies like newspapers. *Packingham v North Carolina*[54] was one of the first cases about the First Amendment and the internet that the Court heard. The ruling invalidated a North Carolina law which prohibited registered sex offenders from accessing commercial social networking websites with minors. In the majority opinion, Justice Kennedy referred to the websites as the "modern public square."[55] Indeed, social media platforms, like the public square in its heyday, are the "most important places" for the encounter and exchange of views.[56] The literal meaning of Justice Kennedy's phrasing, however, is that social media platforms should be treated as public forums, not newspapers. Under First Amendment public-forum doctrine, companies would become "state actors … severely limited in the actions that they could take to restrict either speakers or speech on their sites."[57] This paper is concerned with an inquiry into

the possibility of common carrier status; the examination or justification of public forum regulation is beyond the scope. Instead, the discussion about *Packingham* serves to highlight how the Court has chosen not to advance the editorial framework, thus opening the door to alternative interpretations.

To begin, Euguene Volokh and David Falk are among the nation's leading First Amendment scholars who have attempted to explicate the mechanics of the newspaper analogy. Commentators have clamored around the model that Volokh and Falk proposed in a white paper commissioned by Google. They wrote that internet platforms are "analogous to newspapers and book publishers that convey a wide range of information."[58] That claim then equates search results with editorial publications because both are the result of decisions about how to "rank and organize content" and "what should be presented to users."[59] In other words, editorial judgment for internet platforms includes decisions over which material to allow and how to arrange the selected content on the site. Thus, the paper concludes that the content moderation of internet platforms merits the same First Amendment protection as newspapers and publishers, "which blocks the government from dictating what is presented by the speakers or the manner in which it is presented."[60]

The analogous relationship, as presented by Volokh and Falk, suffers from three fundamental flaws. The first is the assertion that internet platforms should be treated as publishers because both "convey a wide range of information."[61] Heather Whitney, writing for the Knight First Amendment Institute, argued that "actions convey a wide range of information… Yet we certainly do not think that whenever people act, they are analogous to newspaper editors under the First Amendment and that their actions are therefore covered as speech."[62] Thus, the act of conveying information is not a sufficient justification for the protections accorded to newspapers.

The second unsatisfactory claim is that First Amendment protection is present when a speaker, such as Google, makes "many judgments about how to design algorithms that produce and rank search results that—in Google's opinion—are likely to be most useful to users."[63] The basic definition of an algorithm is "a set of step-by-step procedures, or a set of rules to follow, for completing a specific task or solving a particular problem."[64] As such, algorithms are not only implemented by computer programs. Retail product placement choices, influenced by manager judgements, likewise "rank and organize content."[65] However, stores are not considered newspaper editors under the First Amendment; the distinction implies not all conduct that conveys information through an algorithm is a form of speech.[66] *United States v O'Brien*[67] rejected the view that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Instead, the Court "extended First Amendment protection only to conduct that is inherently expressive."[68] Thus the third flaw is the assumption that the analogous relationship grants online platforms First Amendment protection, without testing whether content moderation embodies conduct that is inherently expressive—the direction we now turn.

2. Defining Inherently Expressive Conduct

Thomas Emerson, widely recognized as the leading First Amendment scholar of his generation, formulated an inescapably relevant expression-action distinction that is the starting point for efforts to theorize about the type of conduct that must receive the full guarantees of the First Amendment. The premise of his seminal work, *Toward a General Theory of the First Amendment*, is that freedom of expression is an end in itself, a social good that assures individual self-fulfillment, the attainment of truth, political participation, and a balance between stability and change in society.[69] To Emerson, the problem is how to reconcile freedom of expression with competing values and interests. Tests that legitimize restrictions on freedom of expression to attain other social objectives, such as the *ad hoc* balancing test, must be put aside as obsolete, as they are without guiding doctrine and make light of the purpose of the First Amendment.[70] Emerson instead proposed the expression-action distinction, which maintains that expression must receive full protection, but permits the government to advance other social interests by curtailing action.[71] Conduct must possess to a substantial degree the "essential qualities" of expression to avoid the possibility of government-imposed restraints.[72] Emerson places the responsibility on the courts to work out the crucial "line of demarcation" between expression and action, as well as to ascertain which element is most dominant in situations where both are present.[73]

The Supreme Court confronted the expression-action distinction in *Spence v Washington*. On May 10, 1970, Harold Ormand Spence constructed a large peace symbol out of black tape and superimposed it to both sides of his American flag which he hung upside-down out of his dorm room at the University of Washington in Seattle. Police officers seized the flag and Spence was convicted for violating a Washington improper-use statute that prohibited placing "any word, figure, mark, picture, design, drawing or advertisement of any nature" on the United States flag and "expos[ing] to public view any such flag."[74] The Supreme Court of Washington affirmed the conviction, rejecting the appellant's position that the improper-use statute was invalid under the First and Fourteenth Amendments. In 1974, the Supreme Court reversed. The Court held that the improper-use statute, as applied to the defendant, impermissibly infringed upon constitutionally protected speech.[75]

In the decision, the Court first acknowledged that the appellant had sought to convey a message. During the trial, Spence testified that he was protesting the Vietnam War and the Kent State shootings: "I felt that there had been so much killing and that this was not what America stood for. I felt that the flag stood for America, and I wanted people to know that I thought America stood for peace."[76] Thus the Court's next step was to determine whether the appellant's expression was "sufficiently imbued with elements of communication" to fall under the First and Fourteenth Amendments.[77] The *per curiam* opinion noted that the appellant engaged in communication, not through printed or spoken words, but through instinctively understood symbols that occupied a prominent place in the American imagination.[78] The context—the recent devastations in Cambodia and Kent State University—helped further clarify the meaning of the symbols.[79] Therefore, the conduct amounted to protected speech because "an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was

great that the message would be understood by those who viewed it."[80] *Texas v Johnson* formalized the *Spence* analysis into a classic two-part test. Expressive conduct is sufficiently expressive for First Amendment protection when there is (1) an intent to convey a particularized message and (2) a great likelihood that the message would be understood.[81]

Under the second prong, the Court has insisted that conduct must draw on a common language, a vocabulary of recognized symbols, to communicate an idea. This implicit requirement extends from the 18th and 19th century practice of treating symbolic expression as the same as verbal expression. Beyond restricting published defamatory statements, libel law from that period also included "pictures, signs, and the like," such as burning effigies; painting a man with horns; and hanging wool and lighting lanterns near a house, which signaled, respectively, that the inhabitant was a wool thief or part of a brothel.[82] These early courts perceived that popular symbols convey messages with the same effect as written words. In modern times, symbols of significance figured prominently in the cases where the Supreme Court found and protected expressive conduct, such as the 1931 *Stromberg v California* (red flag) and the 1969 *Tinker v Des Moines Independent School District* (black armbands) cases.[83] Moreover, in *Barnes v Glenn Theatre, Inc.*[84], which concerned nude dancing, Justice Antonin Scalia questioned in his dissent whether the conduct "is what the Court has called 'inherently expressive,' or what I would prefer to call 'conventionally expressive.'" Scalia's comment represents the summation of the developments enumerated by this paragraph. Conduct relies on convention—accepted images and ways of behaving—to express a message that has a high likelihood of being understood.

The Court had the opportunity to sharpen the expression-action distinction in *Rumsfeld v Forum for Academic and Institutional Rights, Inc.* (2006). The case involved a coalition of law schools with members who objected to the military's "don't ask, don't tell" policy banning homosexuals from service. In 1995, Congress passed the Solomon Amendment, which denied federal funding to higher education institutions that prevented military recruiters the same access to campus and students as other employers. The law schools argued that the law violated the First Amendment because it dictated the content of their speech.[85] In a unanimous decision, the Supreme Court upheld the constitutionality of the Solomon Amendment, citing that it regulates conduct, not speech.[86] Chief Justice John Roberts, delivering the opinion, wrote that "unlike flag burning, the conduct regulated by the Solomon Amendment is not inherently expressive" as the different hospitality extended to military recruiters was "expressive only because the law schools accompanied their conduct with speech explaining it."[87] Without the appended explanation, an observer who witnesses military recruiters interviewing off campus "has no way of knowing" whether the "law school is expressing its disapproval of the military, all the law school's interview rooms are full" or if the decision to interview elsewhere was of the recruiters' own volition.[88] Thus the First Amendment does not necessarily extend protection to conduct that is made expressive by accompanying speech.

3. Tests for Expressiveness in the Context of Social Media

Taking into account the distinction that took shape out of a substantial body of relevant decisions, it is clear that Judge Newsom of the Eleventh Circuit omitted a rigorous test for expressiveness before pronouncing that content moderation was inherently expressive editorial discretion. He instead applied a method of reasoning severed from established tradition. Rather than invoke the two-part test that emerged from *Spence* and its progeny, Newsom chose a contrary standard that the Eleventh Circuit fashioned in *Holloman v Harland* (2004): "in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message."[89] The move to protect "*some* sort of message" loses sight of the premises that formed the foundation for the Supreme Court's judgements.[90] As *O'Brien*, *Spence*, and *Rumsfeld* identified, a "limitless variety" of conduct could purpose to express some idea.[91] Yet the mere intention to express something does not confer upon the action the status of protected expressive conduct. The categorization demands the fulfillment of other requirements, namely that the conduct is "sufficiently imbued with elements of communication" and there exists a great likelihood that "the message would be understood by those who viewed it."[92]

The "some sort of message" emerged from the widespread confusion about an often-quoted passage in *Hurley v Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*[93]: "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." Yet the *Spence* Court did not define a "particularized message" as one that was narrow and succinctly articulable. In fact, the dictionary synonyms of "particularized," such as "specify" or "detail," bear no resemblance to "narrow" or "succinctly articulable." Since there is a possibility that the *Hurley* Court did not interpret the "particularized message" as the *Spence* Court did, it seems appropriate, or even imperative, to deal with the ambiguity by reconciling the two tests, rather than rejecting one outright. The Sixth Circuit in *Blau v Fort Thomas School District* and the Ninth Circuit in *Kaahumanu v Hawaii* made the correct decision to leave the *Spence* test intact while clarifying that a "particularized message" need not be "narrow" or "succinctly articulable," thus preserving the fundamental requirement that the conduct is "sufficiently imbued with elements of communication."[94] On the other hand, the Eleventh Circuit erred in acting without temperance by completely dismissing the "particularized message" threshold and extending protection to what has long been cast outside of the First Amendment's protection—conduct that conveyed a generalized and vague idea, or "*some* sort of message."[95] Absent from Judge Newsom's opinion is an explanation that rationalizes the decision to subordinate the older approach to a new criterion that betrays the intention of the Supreme Court.

A second major problem in Judge Newsom's analysis is the inherent contradictions, for rather than expressing "some sort of message," the platforms claim their content moderation expresses a specific message: the norms stressed in the Terms of Service and Community Standards. The opinion supplies a few examples. YouTube strives to create a "welcoming

community for viewers" and thus "prohibits a wide range of content, including spam, pornography, terrorist incitement, election and public-health misinformation, and hate speech.'"[96] Twitter advances its goal of ensuring "all people can participate in the public conversation freely and safely" by "removing content, among other categories, that it views as embodying hate, glorifying violence, promoting suicide, or containing election misinformation.'"[97]

However, even under this way of thinking, content moderation does not meet the conditions set forth in *Rumsfeld*. The content moderation decisions are only made comprehensible by explanatory speech—the written Terms of Service and Community Standards—and are thus not inherently expressive. A message was more easily discernible in *Tornillo* and *Hurley* as there was a visible "discrete set of decisions," that is, the newspaper op-ed page and the parade lineup, respectively.[98] Candeub found that *Hurley* in particular placed emphasis on the importance of discrete expression in cases with particular messages that were ambiguous. The painting, music, and Jabberwocky verse each were examples of "specific, discrete expression."[99] In contrast, social media users do not have access to the billions of posts and thus the full picture of editorial decisions.[100] As such, without the written policies, there is little reason to believe that users would grasp the overall message conveyed through content moderation. For instance, Judge Newsom wrote that shadow-banning would likely "communicate a message to a reasonable user who knows that she follows a particular poster but doesn't see the poster's content, for instance, in her feed or search results."[101] But shadow-banning a poster is not an inherently expressive type of content moderation.[102] Without an accompanying explanation, a user "has no way of knowing" whether the poster was shadow-banned or simply chose not to post content.[103] In fact, the user would more likely presume the latter, given that it is more conventional behavior. The accompanying speech is required for a user to understand with a high degree of certainty the reasoning behind content moderation decisions.

It is also difficult for users to grasp the messages communicated by platforms when the grounds for certain content moderation decisions are unclear. Most major platforms remove content that is classified as "misinformation." Yet, Chloe Wittenberg, a doctoral candidate at MIT, and Adam Berinsky, a professor also at MIT, acknowledge that "scholarly notions of what constitutes misinformation often differ significantly across works and across disciplines."[104] Facebook itself admitted in its Community Standards that there is "no way to articulate a comprehensive list" of what falls under misinformation.[105] Similarly, in 2018, Zuckerberg announced that the "algorithms would favor non-news content shared by friends and news from 'trustworthy' sources, which his engineers interpreted—to the confusion of many—as a boost for anything in the category of 'politics, crime, tragedy.'"[106] The "confusion of many" illustrates that it was not easy for users to understand the messages conveyed by Facebook algorithms. Without Zuckerberg's explanatory speech, users were unable to comprehend that the algorithms were amplifying material from "trustworthy" sources. Lastly, the so-called Twitter Files brought to light the inconsistent motivations that drove highly publicized content moderation decisions,

such as the suppressed Hunter Biden story. Twitter employees wrote that they "struggled to understand the policy basis for marking this as unsafe" and questioned whether the company can "truthfully claim that this is part of the policy."[107] The Twitter Files confirmed that content moderation can serve as an enforcement apparatus that embodies efforts to advance community norms and eliminate unpopular speech. A decision thus possesses a plethora of potential messages; the wide range of possibilities obfuscates meaning. For example, was a user removed "at the behest of a political party" or because they violated the Community Standards?[108] When content is blocked via direct message, is it because the material is an extreme case, like child pornography, or because the restriction is necessary to achieve political objectives, as in the case of Hunter Biden?[109] The overall result is that content moderation is not inherently expressive because it is not at all obvious what message the action intends to convey.

Up to this point the framework for assessing whether online platforms exercise expressive editorial discretion has been the *Spence* two-part test and relevant case law. This paper found that the platforms did not meet their burden of proving that the content moderation decisions had sufficient communicative elements. A reasonable user would face difficulty when attempting to understand the message communicated in the absence of accompanying speech, and even with such explanations, the reality that surfaced in the wake of the Twitter Files implies rhetoric conceals contradictory ambitions. Therefore, it is unlikely that the user would easily discern the reasoning behind content moderation decisions. In order to comprehend the full implausibility of the editorial analogy, however, it is necessary to survey two more perspectives in the argument: (1) compelled hosting would not intrude into the platform's own speech, and (2) the inner workings of platform technology support common carriage regulation.

4. Compelled Hosting and Speech Intrusion

The Supreme Court has protected editorial discretion when the publication decisions express the editors' own views. The *Tornillo* Court struck down a Florida right-of-reply statute as an impermissible "intrusion into the function of editors" because it "penalized the newspaper's own expression" by "forcing the newspaper to disseminate opponents' views."[110] In *Pacific Gas & Electric Company v Public Utilities Commission of California*[111], the Court found unconstitutional the Commission's order that required PG&E's monthly newsletter to allocate the extra space for a public interest group that disseminated messages hostile toward PG&E. "The danger," wrote Justice Powell, was that the "appellant will be required to alter its own message as a consequence of the government's coercive action."[112]

On the other hand, in a unanimous decision, the Court in *PruneYard Shopping Center v Robins*[113] ruled that the privately owned mall could not exclude the students collecting signatures for a petition. The PruneYard's First Amendment claim failed because the shopping center was open to the public and "the views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner."[114] For example, the shopping center could disavow association with the petition by putting up signs that explained the students were communicating their own ideas.[115] The first two cases differed from *PruneYard* in that the newspaper and newsletter expressed the speakers' own message. As

such, *Hurley* observed that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[116] In contrast, the hosting requirement did not infringe on the PruneYard's First Amendment rights as the mall's own expression was not compromised.

In *Turner*, the Court affirmed the permissibility of common carrier regulation when the must-carry requirement does not alter the speaker's own message. *Turner* upheld Sections 4 and 5 of the 1992 Cable Television Consumer Protection and Competition Act that required cable television systems to set aside a specific percentage of channels for the free transmission of local commercial and public broadcast stations. The Court concluded that *Tornillo* and *Pacific Gas* were inapposite for two reasons. First, the must-carry rules for cable television were content neutral, whereas the right-of-reply statute exacted a "content-based penalty" that could have a chilling effect on the press.[117] The neutrality also meant the must-carry regulation did not confer privileges to certain viewpoints, as was the case in *Pacific Gas*, and thus would not trigger the "kind of forced response…antithetical to the free discussion that the First Amendment seeks to foster."[118] Second, the must-carry requirement was not an intrusion into the message of the cable operators as cable viewers were unlikely to assume that "the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."[119]

The logic that guided the *Turner* decision likewise applies to online platform common carrier regulation. The allure of common carrier regulation is that the must-carry requirement is content neutral; indeed, the insurance against viewpoint discrimination is a main selling point. Moreover, according to Section 230, the transmission of third-party content is not the platform's own speech. Courts, such as the United States Southern District of New York, have recognized that platforms do not express a particular message through transmission: "there are many reasons that someone might retweet a statement; a retweet is not necessarily an endorsement of the original tweet, much less an endorsement of the unexpressed belief system of the original tweeter."[120] The platforms also made explicit that the carried material is not their speech. For example, the Twitter Terms of Service states, "We do not endorse…any opinions expressed via the Services."[121] Before an Italian court, Google argued that they "should not be held liable for terms that appear in autocomplete as these are predicted by computer algorithms based on searches from previous users, not Google itself."[122] Facebook also emphasized that the content moderation decisions were not its speech. When then-Chairman of the Senate Commerce Committee John Thune brought to the forefront a report that alleged Facebook excluded conservative political news from the highly visible "Trending Topics" section, Facebook "immediately launched an investigation to determine if anyone violated the integrity of the feature."[123] Facebook's reaction—the willingness to enhance the neutrality of the platform—implies that the management did not want to encode their political preferences into the algorithm. "The company wanted to make clear that its rankings were not its speech," wrote Whitney.[124] Thus the editorial discretion of platforms does not warrant the same First Amendment protection extended in *Tornillo* and *Pacific Gas*. Outside of litigation, the platforms

have made public efforts to not portray themselves as speakers "intimately connected with the communication advanced," meaning most observers would not conclude that the compelled content was the platforms' own message.[125]

5. Technology Constraints

The online platforms also do not suffer the constraints that the courts pointed to in decisions that defeated a variety of claims for compelled hosting. The right-of-reply statute in *Tornillo* inflicted an economic penalty on the newspaper by "imposing additional printing, composing, and materials costs and by taking up space that could be devoted to other material the newspaper may have preferred to print."[126] Since newspapers cannot "proceed to infinite expansion of its column space" to accommodate all replies, editors were inclined to withhold controversial coverage that would bring the statute, and its additional costs, into play.[127] Therefore, enforcement of the statute would impoverish the marketplace of ideas and jeopardize the freedom of the press.[128]

On the other hand, social media platforms dwell in the "vast democratic forums of the Internet" and have the infinite bandwidth to support all comers.[129] For platforms, the requirement to host compelled content is not an economic penalty of the same gravity as that in *Tornillo*. It is true that the transmission of more controversial speech may deter advertisers—such is the case in Elon Musk's Twitter takeover.[130] However, the loss of revenue from companies is not sufficient to claim the abridgement of First Amendment rights. The PruneYard center may have faced decreased revenue if consumers felt petitioners were unwelcomed additions to the shopping experience. Yet the Court did not even think this fact was worthy of consideration in the decision, as the shopping center, and the platforms, could disavow relations to the speech by posting signs that clarified the content was there only due to the command of law.

Conclusion

Slighting the restraints of precedent, the Eleventh Circuit displayed the widespread tendency to assert that the inherently expressive editorial discretion of online platforms undermined claims for common carrier regulation. This reinterpretation attempted to deconstruct the analogy. It uncovered that content moderation is not inherently expressive and does not convey the platforms' own message. The implication of these findings is that online platforms do not fall under the types of entities to which the Court extends First Amendment editorial privilege—neutral must-carry requirements would not intrude into the platforms' own speech. This paper also rejected the monopoly prerequisite to further open the door to common carrier regulation. Under common carriage, platforms are obligated to indiscriminately serve all comers (the users). While common carriage prevents viewpoint discrimination, several disturbing ramifications would arise, such as the compelled hosting of content in the lawful-but-awful category.[131] Racist monologues, extreme pornography, and celebrations of genocide, among other morally offensive examples, would be protected and disseminated. The task of this paper was not to formulate a novel model for regulation; it was to read against the grain and assess the grounds for common carriage. While this paper finds support for common carriage, courts and commentators cling to their long dependence on the editorial analogy.

This paper thus poses the question: if freedom of expression is essential for American democracy to flourish, why do we tolerate restrictions on speech levied by private actors? Justice Oliver Wendell Holmes wrote that the Constitution "called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters." Where is the creative impulse that has emboldened the country since its founding to actualize audacious visions? Where is the boldness to stand up for our heritage of promised freedoms and envision new regulatory possibilities? In these calamitous times, citizens wait for the courts to draw on the depth of the American spirit—the great imagination, the inextinguishable idealism—to affirm now and forever the freedom of expression.

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[2] Eugene Volokh, "Treating Social Media Platforms Like Common Carriers?," *Journal of Free Speech Law*, August 25, 2021, 395-396.
[3] 376 U.S. 254 (1964).
[4]Justice Alito, *NetChoice, LLC, DBA NetChoice, et al. v Ken Paxton, Attorney General of Texas - On Application to Vacate Stay*, 3, May 31, 2022.
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[6] Heather Whitney, "Search Engines, Social Media, and the Editorial Analogy," Knight First Amendment Institute at Columbia University, last modified February 27, 2018.
[7] *Biden v Knight First Amendment Institute at Columbia University*, 593 U.S. ____ (2021) (Thomas, concurring).
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[9] *NetChoice, LLC v Moody*, 34 F.4th 1196 (11th Cir. 2022).
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[11] Eli Noam, "Beyond Liberalization II: The Impending Doom of Common Carriage," Columbia University, last modified March 15, 1994.
[12] Adam Candeub, "Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230," *Yale Journal of Law & Technology* 22 (2020): 403.
[13] Angela J. Campbell, "Publish Or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies," *The North Carolina Law Review* 70, no. 4 (April 1, 1992): 1120.
[14] Candeub, "Bargaining for Free," 398.
[15] Ibid, 408 - 412.
[16] Campbell, "Publish Or Carriage," 1120.
[17] Menahem Blondheim, "Rehearsal for Media Regulation: Congress Versus the Telegraph-News Monopoly, 1866-1900," *Federal Communications Law Journal* 56, no. 2 (March 2004): 305.
[18] 154 U.S. 1 (1894)
[19] Genevieve Lakier, "The Non First-Amendment Law of Freedom of Speech," *Harvard Law Review* 134, no. 7 (May 2021): 2320.
[20] Campbell, "Publish Or Carriage," 1121.
[21] Communications Act of 1934, 47 U.S.C. § 202.
[22] Ibid, 3.
[23] *National Association of Regulatory Utility Commissioners v FCC*, 533 F.2d 601, (D.C. Cir. 1976).
[24] 291 U.S. 502 (1934).
[25] Jason Kelly, "Section 230 is Good, Actually," Electronic Frontier Foundation, last modified December 3, 2020.
[26] 1995 WL 323710.
[27] Ibid, 296.
[28] Andrei Gribakov Jaffe, "Digital Shopping Malls and State Constitutions," *Harvard Journal of Law & Technology* 33, no. 1 (Fall 2019): 279.
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[30] Ibid.
[31] Candeub, "Bargaining for Free," 422.
[32] Richard A. Epstein, "The History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable Rates and Nondiscrimination Rates," *Journal of Supreme Court History* 38, no. 3 (January 21, 2014): 346.
[33] Keller, *Who Do You Sue?*, 19.
[34] Matthew Feeney, "Are Social Media Companies Common Carriers?," Cato Institute, last modified May 24, 2021.
[35] United States Federal Communications Commission, *Federal Communications Commission Reports* (U.S. Government Printing Office, 1980), 365.
[36] Noam, "Beyond Liberalization," Columbia University.
[37] 512 U.S. 622 (1994).
[38] Campbell, "Publish Or Carriage," 1112.
[39] Ashutosh Bhagwat, "Do Platforms Have Editorial Rights?," *Journal of Free Speech Law*, August 25, 2021, 128.
[40] *National Association of Regulatory Utility Commissioners v FCC*, 533 F.2d 601, (D.C. Cir. 1976).
[41] Ibid.
[42] Ithiel de Sola Pool, "Government Regulation in the Communications System," *Proceedings of the Academy of Political Science* 34, no. 4 (1982): 122, JSTOR.

[43] Jaffe, "Digital Shopping," 277.
[44] Campbell, "Publish Or Carriage," 1125.
[45] Feeney, "Are Social," Cato Institute.
[46] Whitney, "Search Engines," Knight First Amendment Institute at Columbia University.
[47] Ibid; Letter by Colin Stretch, "Response to Chairman John Thune's letter on Trending Topics," May 23, 2016.
[48] Whitney, "Search Engines," Knight First Amendment Institute at Columbia University.
[49] 313 U.S. 80 (1941).
[50] Ibid, 80, 95.
[51] Ibid.
[52] 84 U.S. 357 (1873).
[53] Campbell, "Publish Or Carriage," 1120.
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[55] Ibid, 8.
[56] Ibid, 10.
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[58] Eugene Volokh and Donald Falk, *First Amendment Protection for Search Engine Search Results*, 27, April 20, 2012.
[59] Ibid, 11, 14.
[60] Ibid, 27.
[61] Ibid, 27.
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[63] Volokh and Falk, *First Amendment*, 5.
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[65] Whitney, "Search Engines," Knight First Amendment Institute at Columbia University.
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[67] 391 U.S. 367 (1968).
[68] 547 U.S. 47 (2006).
[69] Thomas I. Emerson, "Toward a General Theory of the First Amendment," *The Yale Law Journal* 72, no. 5 (April 1963): 878.
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[71] Ibid, 881.
[72] Ibid, 917.
[73] Ibid 938, 917.
[74] 418 U.S. 405 (1974) *(per curiam).*
[75] Ibid, 406.
[76] Ibid, 408.
[77] Ibid, 409.
[78] Ibid, 410.
[79] Ibid, 410.
[80] Ibid, 410-411.
[81] 491 U.S. 397 (1989).
[82] Eugene Volokh, "Symbolic Expression and the Original Meaning of the First Amendment," *Georgetown Law Journal*, September 2008, 9-11.
[83] Adam Candeub, "Editorial Decision-Making and the First Amendment," *Journal of Free Speech Law*, September 1, 2022, 21-22.
[84] 501 U.S. 560 (1991).
[85] 547 U.S. 47 (2006).
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] 370 F.3d 1252, (11th Cir. 2004).
[90] Ibid.
[91] 391 U.S. 367 (1968).
[92] 418 U.S. 405 (1974) *(per curiam).*

[93] 515 U.S. 557 (1995).
[94] *Blau v Fort Thomas Public School District*, 401 F.3d 381, (6th Cir. 2005); *Kaahumanu v Hawaii*, 682 F.3d 789, (9th Cir. 2012).
[95] 370 F.3d 1252, (11th Cir. 2004).
[96] *NetChoice, LLC v Moody*, No. 12355, 26 (11th Cir. 2021).
[97] Ibid, 27.
[98] Candeub, "Editorial Decision-Making," 18.
[99] Ibid, 23-24.
[100] Ibid, 23.
[101] *NetChoice, LLC v Moody*, No. 12355, 35 (11th Cir. 2021).
[102] Candeub, "Editorial Decision-Making," 1. Shadow-banning is when a platform deliberately reduces the visibility of a poster's content, unbeknownst to that poster and other users.
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[104] Chloe Wittenberg and Adam Berinsky, "Misinformation and Its Correction," in *Social Media and Democracy*, ed. Nathaniel Persily and Adam J. Berinsky (Cambridge University Press, 2020), 165.
[105] Meta, "Misinformation," Meta Transparency Center.
[106] Chris Hughes, "It's Time to Break Up Facebook," *New York Times* (New York), May 12, 2019.
[107] Matt Taibbi (@mtaibbi), "Twitter Files (Part I)," Twitter, December 2, 2022.
[108] Ibid.
[109] Ibid.
[110] 418 U.S. 241 (1974); 475 U.S. 1 (1986).
[111] 475 U.S. 1 (1986).
[112] Ibid, 1, 16.
[113] 447 U.S. 74 (1980).
[114] Ibid, 74, 75.
[115] Ibid, 74, 87.
[116] 515 U.S. 557 (1995).
[117] 512 U.S. 622 (1994).
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[119] Ibid, 622, 655.
[120] *Flynn v Cable News Network, Inc.*, Civil Action 21 Civ. 2587 (GHW) (SLC) (S.D.N.Y. Oct. 22, 2021).
[121] "Terms of Service," Twitter.
[122] Whitney, "Search Engines," Knight First Amendment Institute at Columbia University.
[123] Letter by Stretch, "Response to Chairman."
[124] Whitney, "Search Engines," Knight First Amendment Institute at Columbia University.
[125] 515 U.S. 557 (1995).
[126] 418 U.S. 241 (1974).
[127] Ibid, 241, 257.
[128] Ibid, 241, 257.
[129] 521 U.S. 844 (1997).
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[131] Keller, *Who Do You Sue?*, 13.

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Mandatory Arbitration in Employment: Precedents and Potential Solutions

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Abstract

The past three decades have seen an explosion in the use of arbitration clauses in both consumer and employment contracts by corporations in what has been called an "arbitration epidemic."[1] The presence of these clauses forces plaintiffs seeking to sue companies to instead have their claims determined in compulsory, binding arbitration. Arbitration is a form of private conflict resolution, where disagreements are heard and decided by an arbitrator instead of a judge. After decades of Supreme Court precedents that broadened the application of the Federal Arbitration Act[2], pre-employment mandatory arbitration agreements have become ubiquitous. These contracts are a "take-it-or-leave-it" condition for employment and mandate that wage theft, discrimination, and other statutory claims are resolved in arbitration. Pre-employment mandatory arbitration has had devastating consequences for workers: they are less likely to file claims against their employer,[3] win cases less frequently,[4] and win smaller awards.[5]

This paper will map the Supreme Court precedents that shaped arbitration, charter the evolution of the federal policy of preemption, illustrate the disastrous effect this practice has had on workers, and explore different solutions that states have at their disposal to counter this epidemic.

History of Arbitration Until *Moses Cone* and *Southland*

Secular arbitration[6] in the Anglophone world originates from English common law in the Middle Ages where it was used between merchants to adjudicate commercial disputes outside the royal courts; by the 1800s, arbitration became entrenched as the leading form[7] of private dispute resolution.[8] Early arbitration tribunals were established by merchant guilds and composed of experts in the trade who applied the norms of conduct and practices of the trade as their source of law.[9] Arbitration was commonly used by merchants in the colonial United States, with the future President George Washington even serving as an arbitrator.[10] However, post-independence, the practice fell out of favor until the early 20th century, because arbitration was viewed with hostility by the legal establishment and its decisions were non-binding.[11] The latter was a result of the doctrine of revocability, which views an arbitrator as an agent produced by two parties acting jointly; thus, the agency of the arbitrator could be revoked by either party at any point in the arbitral proceedings.[12] One party could refuse to arbitrate and the other party could do nothing to prevent the claim from being taken up in the civil court system.

This anti-arbitration paradigm began to shift as arbitration became more institutionalized with the passage of state and federal Arbitration Acts. National attitudes on arbitration began to change with the New York Arbitration Act of 1920, which was drafted and lobbied for by the New York Chamber of Commerce and the American Bar Association's (ABA) Committee on Commerce, Trade, and Commercial Law.[13] The Act reformed state law to make arbitration agreements binding and enforceable. Less than a year later, the ABA drafted the Federal Arbitration Act ("FAA"), emulating the language of the New York law, which was introduced to Congress in 1922 and became law in 1925. [14] The goal of the FAA was to circumvent the complications and costs associated with civil litigation by establishing an alternative that allows expedited settlement of disputes and make agreements to arbitrate "valid, irrevocable, and enforceable."[15] A year after the FAA was passed, the American Arbitration Association (AAA) was formed to advance arbitration by creating uniform rules. Today, almost half of the arbitration clauses found in employment contracts designate the AAA as the provider of arbitration services.[16]

The core philosophy underpinning the enactment of the FAA was business self-regulation. This was explicitly written into the original wording of the Act:

> " 'Maritime transactions', as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but ***nothing herein contained shall apply to contracts of employment of seamen, railroad***

> ***employees, or any other class of workers engaged in foreign or interstate commerce***."[17] (emphasis added)

This provision indicates Congress's intent for the FAA to apply to matters of maritime, interstate, and foreign commerce (drawing powers from the Commerce Clause of the Constitution), but very clearly indicates that employment contracts would be exempt from the scope of the Act. The legislative intent of the FAA was explicitly against including arbitration provisions in consumer and labor contracts, because they arise between parties of unequal bargaining power. During a subcommittee hearing in 1923 on passage of the FAA, Senator Thomas J. Walsh expressed concerns that contracts containing arbitration clauses could be used "on a take-it-or-leave-it basis to captive customers or employees."[18] The Senator was assured by supporters of the FAA that it was not intended to apply to such situations.[19] The exemption from arbitration for "workers engaged in…interstate commerce" was narrowly defined in a series of cases that will be explored later in the article, slowly evolving the FAA into the powerful statute it is today. Thus, the FAA until the late 20th century applied only to commercial disputes, not to labor or consumer disputes.

The rest of the FAA lays out the core tenets of contemporary arbitration: arbitration is binding, compulsory, and cannot be successfully appealed to the civil court system without demonstrating clear procedural deficiencies. Chapter 10 outlines the only four bases under which a federal court can vacate an arbitral award:

(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[20]

Even in cases of misinterpretations of fact, law, or contract in arbitration proceedings, the arbitrator's ruling stands. These provisions indicate that an arbitral award is vacated in very limited circumstances, so there are few instances in which judicial reversal of the arbitration process can occur. Thus, the FAA creates a system of conflict resolution almost completely free from judicial review.

Labor Arbitration: History and Disambiguating from Mandatory Arbitration

It is important to distinguish mandatory arbitration from another form of arbitration common in employment that is not based on the FAA: grievance arbitration. Before the Supreme Court's broad reinterpretation of the FAA, grievance arbitration was the primary form of labor arbitration. The practice found widespread use by organized labor in unionized workplaces during World War II as an alternative to using strikes to pressure employers during disputes.[21] During the war, the National War Labor Board was created to arbitrate labor disputes in exchange for unions agreeing not to strike, since strikes would disrupt war production. Following

the war, the passage of the Taft-Hartley Act of 1947 solidified this transition by declaring a federal policy favoring arbitration.[22] Collective bargaining agreements ("CBA") typically contain a grievance procedure to resolve disputes over the application or interpretation of the CBA with the final step being arbitration through a mutually selected third-party arbitrator. The enforceability of arbitration provisions in CBAs comes from §301(a) of the Labor Management Relations Act, which gives federal courts jurisdiction to enforce the provisions.[23] By the mid-1950s, more than 90 percent of CBAs contained a binding arbitration provision.[24]

Before the Supreme Court reinterpreted the FAA, a trio of cases in 1960, *Steelworkers v American Manufacturing Co*,[25] *Steelworkers v Warrior & Gulf Navigation Co*,[26] and *Steelworkers v Enterprise Wheel & Car Corp,*[27] commonly known as the Steelworkers Trilogy, laid down broad principles governing labor arbitration. First, the Court concluded that "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself,"[28] thus any disagreements between unionized labor and management are arbitrable. This view arose from the idea that the unionized workplace is self-regulating and that the "collective bargaining agreement is an effort to erect a system of industrial self-government."[29] Second, the Court established grievance arbitration as the preferred method of dispute resolution and that "arbitration is the substitute for industrial strife."[30] Third, it established that arbitration agreements were enforceable on the basis of a presumption of arbitrability, a principle that was later applied to arbitration under the Federal Arbitration Act. Fourth, it established that judicial review of an arbitrator's decision is extremely limited.

There is a very clear distinction between grievance arbitration under a collective bargaining agreement (CBA) and mandatory arbitration under a pre-employment condition unilaterally imposed by an employer. Beyond the shared use of the term "arbitration" and procedural similarities, the two forms of dispute resolution have drastically different power dynamics. Grievance arbitration is grounded on the CBA negotiated between the employer and a union that includes union representation throughout the process. It can also include other specifically-negotiated procedures, such as paid time off for employees during arbitration proceedings, arbitrator selection procedures, and a multiple-level grievance appeals process.[31] By comparison, mandatory arbitration from pre-employment contracts is "take-it-or-leave-it," since the arbitration agreements are unilaterally imposed as a condition of employment mandated by the employer. Non-unionized workers under the FAA arbitration regime must arbitrate on the employer's terms without the benefit of union representation.

This power imbalance is exacerbated by the fact that neither the FAA nor other laws create a regulatory framework for arbitrator qualifications or selection. The two big players in the field are the American Arbitration Association ("AAA") and the Judicial Arbitration and Mediation Service ("JAMS"), which together are designated as arbitrator providers in about 70 percent of employment arbitration agreements.[32] A "*repeated player effect*" has emerged as a result, where arbitrators favor the party that is more likely to produce repeated business.[33] Since an individual employee likely will not produce any repeated business, arbitrators tend to favor

employers. The New York Times conducted a report where of the arbitrators they spoke to "41 arbitrators each handled 10 or more cases for one company between 2010 and 2014."[34] Additionally, under grievance arbitration, workers not only benefit from the union's institutional support in arbitration proceedings, but also from the fact that the union is more intimately aware of the intricacies of arbitration, including which arbitrators to avoid, the rules of the forum, and access to more information.[35] In addition, the union has access to more evidence and information relevant to issues in an arbitration proceeding than an individual employee. In grievance arbitration, the arbitrator must determine issues between two players of relatively the same experience and bargaining power and where the "repeated player effect" cannot affect the proceedings.

Supreme Court Precedents: Expanding the FAA's Scope Generally

The Supreme Court began to redefine the Federal Arbitration Act in the 1980s by making it more broadly applicable. This paradigm shift began with *Moses H. Cone Memorial Hospital v Mercury Construction Corp*.[36] The case arose from a planned renovation at a hospital to create a new wing. The hospital signed a contract with the contractors, Mercury Construction, that contained an arbitration clause, but the contract with the architect hired for the project did not have one. The architect had the authority to attempt to mediate contractual disputes between the two parties within 10 days, after which they would submit the dispute to binding arbitration. After a conflict arose surrounding the cost of the final portion of the project, litigation was filed in both state and federal courts by the hospital against Mercury and the architect. One of the primary questions the courts had to consider was whether state courts could compel arbitration under the FAA. The Supreme Court ruled that, "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Arbitration Act."[37] Thus, *Moses Cone* created a broad presumption of arbitrability using terms almost identical to the language used in the Steelworkers Trilogy.

One year later, the FAA was further expanded following *Southland Corp v Keating*.[38] In *Southland*, multiple 7-Eleven franchisees sued their parent corporation at the time, alleging breaches of contract. Their franchise agreements contained arbitration clauses, but California Franchise Investment Law required judicial resolution of disputes pursuant to the statute, thereby waiving the arbitration clause. Thus, the primary question before the Supreme Court was whether the FAA applied to contracts executed under state, not federal law. The Court ruled: "In enacting section 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration…To confine the Act's scope to arbitrations sought to be enforced in federal courts would frustrate what Congress intended to be a broad enactment." [39]

Moses Cone and *Southland* along with *Dean Witter Reynolds Inc v Byrd*[40] are known as the Second Arbitration Trilogy, in reference to the Steelworkers Trilogy, because of the role they

played in the federalization of arbitration law.[41] In no uncertain terms, the Supreme Court found that in enacting the FAA, Congress declared arbitration a matter of federal policy, and accordingly instructed lower courts to err in favor of arbitration of disputes whenever an arbitration clause exists. The *Southland* decision also expanded the FAA to form the basis for preempting state regulation of arbitration, something that will be explored in later sections.

In the aftermath of the Second Arbitration Trilogy, state courts attempted to narrow the scope of the FAA using its ambiguous language. The "contracts…involving commerce" clause in the FAA was interpreted as requiring interstate commerce to have actually occurred for the arbitration clause to be applicable.[42] For example, in *Allied-Bruce Terminix Companies v Dobson,*[43] the Alabama Supreme Court denied arbitration because of a state statute invalidating arbitration clauses in contracts and found that the FAA is only applicable if the parties "contemplated substantial interstate activity" when entering a pre-dispute arbitration agreement. Since the case revolved around a termite extermination contract, the Alabama Supreme Court ruled that the transaction was local and lacked substantial interstate character. The US Supreme Court overturned the Alabama Supreme Court's decision stating that the interstate commerce language in Section 2 should be read to extend as broadly as the limits of Congress' power under the Commerce Clause. The overruling of Alabama's restriction on arbitration highlights the development of a doctrine of federal preemption based on the FAA.

Up until this point, the FAA had been applied to contractual disputes only, because of the precedent set in *Wilko v Swan*,[44] which found that statutory claims involving the Securities Act of 1933 were not amenable to arbitration. However, in *Mitsubishi Motors v Soler Chrysler-Plymouth*,[45] the Supreme Court ruled that a commercial arbitration clause was broad enough to include statutory antitrust counterclaims. The underlying dispute was between Mitsubishi Motors, a car manufacturer, and Soler, a car distributor in Puerto Rico, who had distribution and sales procedure agreements that contained a clause requiring arbitration of disputes in Japan. Soler began to underperform and asked Mitsubishi to allow them to ship excess inventory to Latin America and the continental United States, a common practice at the time given the slowing market. Mitsubishi refused and the agreement was terminated, prompting Mitsubishi to sue for breach of their sales procedure agreement. Soler countersued for violations of the Sherman Antitrust Act, stating that Mitsubishi acted in bad faith to kill their business with the goal of replacing them with an in-house distributor. Mitsubishi then filed a motion to compel arbitration. The Supreme Court ruled: "[we] find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims." The Court then elaborated: "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[46]

Thus, the decision in *Mitsubishi* opened the doors for the arbitration of statutory claims in addition to contractual claims. This precedent got expanded to other specific statutory claims in subsequent years, including securities fraud,[47] age discrimination,[48] and RICO[49] claims. *Wilko* was explicitly overturned in *Rodriguez de Quijas v Shearson/American Express Inc*.[50] These

Supreme Court decisions laid the groundwork for the pervasiveness of arbitration clauses by making arbitration broadly applicable and allowing most statutory claims to be disputed in arbitration, but it took another set of more recent Supreme Court cases to expand arbitration to employment contracts.

Supreme Court Precedents: FAA and Employment Contracts

While the legislative intent of the FAA was fairly explicit in §1 that employment contracts were excluded from its purview, a series of Supreme Court cases extended the application of the FAA well beyond what was originally intended. *Gilmer v Interstate/Johnson Lane Corp*[51] was the earliest employment case before the Supreme Court that applied the FAA. Gilmer was required by his employer to register with certain agencies, including the New York Stock Exchange (NYSE), as a condition for employment as a securities representative. The NYSE registration application contained an arbitration clause for disputes regarding the representative's employment or termination thereof. After the petitioner's employment was terminated at age 62, he filed a charge with the Equal Employment Opportunity Commission ("EEOC") and a suit alleging violation of the Age Discrimination in Employment Act ("ADEA"). The Supreme Court relied on earlier precedents allowing for arbitration of statutory claims, particularly *Mitsubishi*, and the lack of language in the ADEA precluding arbitration, to rule that Gilmer's ADEA claim had to be arbitrated.

However, *Gilmer* was not technically an employment case, because the arbitration clause was in his contract with the certifying agency, not his contract with his employer, so the Court did not consider it a "contract of employment" for the purposes of FAA section 1 exclusion. Section 1 explains that the employment contracts of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" were excluded from arbitration under the FAA. Following *Gilmer*, numerous lower federal court decisions made that leap themselves and used the precedent in *Gilmer* to allow arbitration arising from arbitration clauses found in conventional employment contracts. By 1995, courts had begun requiring arbitration of discrimination, including discrimination on the basis of race,[52] sex,[53] religion,[54] and national origin,[55] ERISA,[56] and the federal Employee Polygraph Protection Act[57] claims.[58] However, a circuit split emerged because not all circuits embraced such a narrow interpretation of Section 1. A decade after *Gilmer*, the Supreme Court ruled that general employment contracts can be arbitrated in accordance with the FAA in *Circuit City Stores Inc v Adams*.[59] In *Circuit City*, Saint Clair Adams, an employee at Circuit City, sued his employer for discrimination in California state court. However, his employment application with Circuit City (an example of a pre-employment agreement) contained a clause agreeing to arbitrate all claims arising from his employment with Circuit City. The Supreme Court narrowly interpreted the Section 1 exemption to apply to exclusively transportation workers. *Circuit City* thus opened the floodgates by allowing the enforcement of arbitration clauses in all non-transportation employment contracts.

Despite this expansion of the FAA to employment contracts, its impact was narrowed in *EEOC v Waffle House Inc.*[60] In *EEOC v Waffle House*, Eric Baker suffered a seizure at work and was subsequently fired by his employer, Waffle House. All Waffle House employees sign a pre-

employment agreement containing an arbitration clause. Baker filed a discrimination charge with the EEOC alleging violations of the American with Disabilities Act ("ADA"). The EEOC filed suit seeking injunctive relief as well as victim-specific remedies, such as backpay, reinstatement, and punitive and compensatory damages for Baker. In response, Waffle House attempted to have the suit compelled to arbitration. The case reached the Supreme Court partly because there was a split between the Second and Sixth Circuit regarding whether a mandatory arbitration agreement precludes the EEOC from seeking victim-specific relief.[61]

In *Waffle House*, the Supreme Court held that the arbitration agreement did not bar the EEOC from pursuing enforcement action, including victim-specific relief, because the EEOC was not a party to the contract and thus cannot be subject to it. The Court also made clear that public agencies are not subject to the FAA: "the FAA does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty's choice of a judicial forum."[62] In this case, the EEOC had independent statutory authority under Title VII of the Civil Rights Act to bring suit in federal court. Court cases after *Waffle House* applied this reasoning to other executive agencies, such as the US Department of Labor in a case where it sued an employer for violations of the Fair Labor Standards Act on behalf of an employee who had signed an arbitration agreement.[63] Thus, *EEOC v Waffle House* provides a pathway for employees who were forced to sign pre-employment agreements with mandatory arbitration clauses to secure relief in the judicial system through executive agencies, like the EEOC and analogous state and municipal human rights agencies.

Supreme Court Precedents: FAA and Class-Action Lawsuits

In addition to the Supreme Court applying the FAA to pre-employment contracts, two other important cases upheld the practice of coupling arbitration clauses with class-action waivers. A class-action is a type of "representative action" lawsuit where one or more plaintiffs file a lawsuit on behalf of a larger group, or "class," of which they are a member. All members of the "class" share an identical interest in the alleged wrong committed by the defendant. A class-action waiver provision restricts the person from filing a class-action against the other party. When coupled with arbitration clauses, employees are precluded from both individual and collective legal action against their employer, instead being required to resolve the dispute in arbitration. Thus, if an employer commits wage theft against all of its employees, each employee would have to individually arbitrate their claim.

The first case was *AT&T Mobility LLC v Concepcion*.[64] The case arose out of a consumer dispute against AT&T for deceptively advertising that the company's wireless plan came with free cell phones, which eventually became a federal class-action lawsuit. AT&T's consumer agreement contained a mandatory individual arbitration clause. Lower federal courts ruled that under California state law, the class-action waiver in the arbitration clause was unconscionable and unlawfully exculpatory, based on the California Supreme Court decision in *Discover Bank*.[65] The Supreme Court reversed the lower courts finding that the FAA preempts state laws prohibiting class-action waivers. The "savings clause" in Section 2 of the FAA states:

> "A written provision…to settle by arbitration. . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*" (emphasis added).[66]

This section was meant to make arbitration agreements unenforceable if they are contrary to generally applicable contract defenses, since the goal of the FAA was to "place arbitration agreements upon the same footing as other contracts."[67] States have tried to exercise their power to restrict unscrupulous contract practices to regulate arbitration, such as the California law preempted in this case. In *AT&T v Concepcion*, the Supreme Court substantially narrowed the "savings clause" by clarifying that state laws interfering with the accomplishment of the FAA's goals (that is, a "liberal federal policy favoring arbitration") are preempted by the FAA. The decision relied on the ruling in *Perry v Thomas,*[68] which established that arbitration-specific doctrines could not be used to invalidate arbitration agreements and are preempted by the FAA. The precedent in *AT&T v Concepcion* is a powerful example of how the broad judicial interpretation of the FAA has preempted state laws curtailing or regulating arbitration. Following this case, arbitration clauses increasingly became paired with class-action waivers.[69]

The second Supreme Court decision involving enforceability of class-action waivers under the FAA was *Epic Systems Corp v Lewis*.[70] The case was a consolidation of three separate cases dealing with claims under the Fair Labor Standards Act: *Epic Systems Corp v Lewis*, *Ernst & Young LLP v Morris*, and *National Labor Relations Board v Murphy Oil USA Inc.* All three cases grappled with the same two questions: (1) how the FAA and National Labor Relations Act ("NLRA") interact, and (2) if an employer can require employees to sign individual arbitration clauses as a condition of employment. Individual arbitration clauses prevent employees from pursuing claims against an employer as a class, instead requiring claims "pertaining to different employees to be heard in separate [arbitration] proceedings."[71] Section 7 of the NLRA protects the rights of employees to engage in certain forms of collective action, including "other concerted activities for the purpose of collective bargaining or other mutual aid or protection.[72] The Seventh Circuit and Ninth Circuit thus ruled in *Lewis v Epic Systems Corp*[73] and *Ernst & Young LLP v Morris*,[74] that bringing a class action lawsuit against an employer, despite having signed an employment contract containing a class-action waiver, was a protected concerted activity under the NLRA, and that the arbitration agreement was thus rendered unenforceable under the FAA's "savings clause". However, the Fifth Circuit ruled against the National Labor Relations Board in *Murphy Oil USA Inc v NLRB*[75] finding that the NLRA did not override the FAA based on the "savings clause," causing a circuit split.

In *Epic Systems Corp*, the Supreme Court ruled that arbitration clauses requiring individual arbitration and prohibiting class action lawsuits are enforceable regardless of protections in the NLRA, because the language of the NLRA is primarily concerned with collective bargaining and organizing, not dispute resolution or collective action in court or arbitration. The Court applied prior case law holding that when the FAA is in conflict with other federal statutes the FAA takes precedence: "this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes[76]…reject[ing] every such effort

to date…we have made clear that even a statute's express provision for collective legal actions does not necessarily mean that it precludes 'individual attempts at conciliation' through arbitration."[77] A year following *Epic Systems*, in *Lamps Plus Inc v Varela*,[78] the Court ruled that an arbitration clause presumes individual arbitration unless explicit language in the clause states to the contrary, all but completely eradicating class arbitration.[79]

The precedents in *AT&T Mobility* and *Epic Systems* set up a consistent problem with trying to regulate arbitration: without explicitly amending the FAA, legislation can be circumvented since the FAA has consistently been allowed to preempt state law and shape the scope of other federal statutes.

Grievance Arbitration Supreme Court Precedents: *Gardner* and *14 Penn Plaza*

Although CBAs contain grievance procedures that culminate in arbitration, what occurs when a union member wants to pursue statutory claims in court? This question was explored in *Alexander v Gardner-Denver Co*,[80] where the Supreme Court ruled that arbitration under a CBA did not preclude an employee from filing a claim regarding a Title VII violation. The case arose when Harrell Alexander Sr, an employee at Gardener-Denver and member of the United Steelworkers union, was discharged for what he alleged was racially discriminatory reasons. He filed a grievance under the CBA alleging a violation of Title VII of the Civil Rights Act, but the arbitrator found that his termination was for cause. The Court, citing the Steelworkers Trilogy, held that the specialized competence of arbitrators in the "law of the shop" makes them ill-equipped to protect Title VII rights and the informality of arbitral proceedings is inappropriate for resolving Title VII issues. It concluded that: "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can be best accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective-bargaining agreement and his cause of action under Title VII."

The decisions in *Gardner* and *Gilmer* created a tension about whether an employee's rights to a federal judicial forum with respect to statutory claims could be waived by the employee's labor union, causing a circuit split. This tension was acknowledged in *Wright v Universal Maritime Service Corporation*,[81] but the Supreme Court did not resolve it until *14 Penn Plaza LLC v Pyett*,[82] where the Court found that unions can waive the statutory rights of the employees it represents. In *14 Penn Plaza LLC*, three employees, Steven Pyett, Thomas O'Connell and Michael Phillips, working for 14 Penn Plaza and members of the Service Employees International Union (SEIU) Local 32BJ were reassigned to janitorial work, a position typically reserved for new hires and with substantially lower pay and poorer working conditions. All three employees were over the age of 50 and believed that age discrimination by their employer was responsible for their reassignment. The union filed three grievances alleging a violation of the CBA. One of the grievances was filed alleging a violation of the anti-discrimination clause asserting that the three employees were discriminated against based on their age. During arbitration, the union withdrew the age discrimination grievance and the arbitrator subsequently denied the other two claims. The employees then filed age discrimination complaints with the EEOC, all of which were dismissed. Following its investigation, the EEOC

issued them a right-to-sue letter and the employees filed a federal lawsuit against their employer. In response, the company filed a motion to dismiss and to compel to arbitration.

The Court of Appeals applied a widely-used[83] legal distinction between mandatory arbitration agreements signed by the employee directly affected by the agreement, which are governed by the FAA and a line of Supreme Court cases represented by *Gilmer*, and CBAs signed by a union representative, which are governed by the NLRA and a line of Supreme Court cases represented by *Gardener*.[84] This distinction arises from the Supreme Court's decision in *Gilmer*, which highlighted that "an important concern [for the *Gardner-Denver* line of cases] was the tension between collective representation and individual statutory rights, a concern not applicable to the present case."[85] In *14 Penn Plaza*, the Supreme Court rejected this demarcation, stating in no uncertain terms: "Nothing in the law suggests [such] a distinction."[86] The Court also ruled that because the arbitration clause may be present in the CBA as a result of a "bargained-for exchange," where the provision was included in return for concession from the employer, the court may not interfere with the agreement. The decision overturned *Gardener*, articulating that it "rested on a misconceived view of arbitration that this Court has since abandoned."[87] Thus, the decision in *14 Penn Plaza* upheld that a CBA waiver of a union member's right to bring statutory claims in federal court is enforceable. In the legacy of *14 Penn Plaza*, even unionized workers can be restricted from taking claims to courts by arbitration clauses.

Ramifications of Mandatory Arbitration

As a result of the aforementioned Supreme Court decisions, mandatory arbitration clauses have become an incredibly powerful tool for corporations: they can be included in virtually every employment contract, preclude class-actions, cover almost every type of civil claim, and avoid the costs of defending against statutory claims before judges and juries. It should be no surprise that mandatory arbitration has become ubiquitous. Pre-employment arbitration jumped from 2 percent of the workforce in 1992 (a year after *Gilmer*) to 56 percent in 2017, so more than 60 million US workers cannot pursue legal claims against their employer in court.[88] The practice is substantially more common at large corporations: in firms with at least 1,000 employees, 65.1 percent of workers are subject to mandatory arbitration clauses.[89] A survey found that from 2012 (one year after *AT&T Mobility LLC*) to 2014 the inclusion of class-action waivers in mandatory arbitration agreements by employers increased from 16 percent of workers to 43 percent.[90] It is estimated that in the aftermath of *Epic Systems*, more than 80 percent of private sector, nonunion workers have forced arbitration clauses with collective-action waivers in their employment contracts (almost 90 million workers).[91] Because of the increased ubiquity of these clauses and the devastating effect they have had on worker's rights, they have been termed modern "yellow dog contracts."[92] The omnipresence of mandatory arbitration agreements is a testament to how the Supreme Court's FAA decisions have promoted the spread of conditioning employment with mandatory arbitration clauses. Mandatory arbitration, moreover, is inadvertently applied in a gendered and racialized manner since it is more common in low-wage workplaces and in industries with disproportionate numbers of black, immigrant, and women workers.[93]

The effects of mandatory arbitration in employment are already being felt. Mandatory arbitration clauses have had a claim-suppressive effect. A staggering 98 percent of workers abandon their claim when faced with arbitration as their only legal recourse.[94] The claim-suppression is driven in part by the fact that attorneys are almost twice as likely to not accept a case if the claim is covered by a mandatory arbitration clause.[95] Attorneys are substantially less likely to invest time and resources in a case or represent a prospective client on a contingency-fee basis.[96] The claim-suppressive effect is further exacerbated by the increasing trend of arbitration clauses to include requirements for the losing party to pay the winning party's cost. Thus, a worker might lose a wage theft case and in addition to not getting their missing wages, will also have to pay the employer's attorney fees, creating an additional cost deterrent. In 2019, mandatory arbitration helped employers pocket more than $9.2 billion in wage theft from workers earning less than $13 per hour.[97]

Employees also tend to be less successful in arbitration partly because of the speed, cost effective nature of arbitration and the avoidance of judges and juries that helped it first become popularized. Corporations write the arbitration clause entirely, so they are able to design it in ways that benefit them.[98] For example, arbitration clauses often contain constrictive procedural rules that shorten statutes of limitations, limit the extent of discovery, alter burdens of proof, and limit the time parties can use to present their case.[99] With judicial review of arbitration proceedings highly restricted, arbitration creates a system stacked against workers. The trial win rate for employees in mandatory arbitration is only 21.4 percent compared to 36.4 percent in federal court and 57 percent in state court.[100] Even when employees do win cases in arbitration, the damages are substantially higher in the civil court system. Mean damages were 6.1 times higher in federal court ($143,497) compared to mandatory arbitration ($23,548) and 13.9 times higher in state court ($328,008).[101] Employees with claims in mandatory arbitration cases also tend to have higher incomes than employees in litigation cases.[102] Given that employees in low-wage workplaces are disproportionately subject to mandatory arbitration, this difference is particularly startling and indicates that mandatory arbitration is less accessible for lower income workers.

Possible Solutions

The clearest solution to the current arbitration epidemic is for Congress to amend the FAA. This has already happened recently with the signing into law of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act in March 2022. The new law prevents employers from compelling arbitration for disputes alleging sexual assault or sexual harassment and pre-dispute arbitration agreements and joint-action waivers for these claims are no longer valid or enforceable.[103] There is other proposed legislation in Congress. The bill that has come closest to passing is the Forced Arbitration Injustice Repeal Act, which would prohibit mandatory arbitration for employment, consumer, civil rights, and antitrust claims against a corporation. The House of Representatives passed the bill twice in 2019 and 2021, but the bill has died in Senate committees both times. Another bill, the Restoring Justice for Workers Act, focuses specifically on mandatory arbitration in pre-employment arbitration agreements,

reversing the precedent from *Epic Systems* and prohibiting mandatory arbitration agreements in employment disputes. The bill was introduced into the House in 2021 and is currently in committee.

The chance that Congress will pass one of these bills in the near future seems slim. This increases the salience of state-level solutions. Unfortunately, states are incredibly limited in how they can regulate arbitration subject to the FAA, because most attempts will be invalidated by the courts under the doctrine of federal preemption. Several states have tried to void certain types of arbitration agreements with little success. New York, for example, enacted CPL7515 in 2018 that voided agreements to arbitrate sexual harassment and discrimination claims (4 years before Congress amended the FAA to do the same). New York state[104] and federal court[105] cases both found that CPLR 7515 was preempted by the FAA. As mentioned in an earlier section, the "savings clause" in the FAA states that state law defenses applicable to all contracts can render an arbitration agreement unenforceable. These defenses include fraud, duress, and unconscionability, which have been the focus of state attempts to regulate arbitration. For example, *AT&T v Concepcion* dealt with a California state law that found class action waivers unconscionable. As *AT&T v Concepcion* demonstrates, the Supreme Court only allows these state law defenses in very narrow instances, further limiting the ability of states to regulate mandated statutory arbitration. In *Kindred Nursing Centers, L. P. v Clark*[106]*,* the Supreme Court further limited states in regulating arbitration by establishing the "equal-treatment principle". The "equal-treatment principle" states that courts must place arbitration agreements on equal footing with other contracts and cannot create legal rules that exclusively apply to arbitration. Even laws that do not overtly discriminate against arbitration are preempted: "The Act thus preempts any state rule that discriminates on its face against arbitration or that covertly accomplishes the same objective by disfavoring contracts that have the defining features of arbitration agreements."[107]

How far the doctrine of federal preemption goes was recently determined in the legal challenge to California's Assembly Bill No. 51 (AB 51). AB51 prohibited "a person from requiring any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision…of statutes governing employment as a condition of employment, continued employment, or the receipt of any employment-related benefit".[108] The law effectively outlawed employers from requiring arbitration agreements as a condition for employment. Under AB51, an employee must voluntarily enter into an arbitration agreement with their employer and cannot be retaliated against for refusing. AB 51 attempted to circumvent FAA federal preemption by regulating employer behavior prior to an employment agreement being reached, not regulating the interpretation or formulation of arbitration agreements, by criminalizing only contract formation. Thus, an arbitration agreement executed in violation of this law would have still been enforceable, making the law theoretically compliant with Supreme Court precedent. This resulted in the oddity that an employer subject to criminal prosecution for requiring an employee to enter into an arbitration agreement could nevertheless legally enforce that agreement.

AB51 was challenged in *Chamber of Commerce of the U.S., et al. v Bonta, et al*,[109] where the Ninth Circuit ruled that it was preempted by the FAA for two reasons. First, AB51 was designed to impede the formation of arbitration agreements and violated the "equal-treatment principle". Although it does not expressly bar arbitration agreements, AB51 was found to discriminate against arbitration by targeting its defining characteristics and prohibiting certain non-negotiable terms, such as waiving the right to a judicial forum or to bring a class-action, as a condition of employment. Second, by criminalizing mandatory arbitration agreement formation, it "inhibits a party's willingness to create an arbitration contract, [which] stands as an obstacle to the purposes of the FAA."[110] Thus, there appears to be a consensus among the circuit courts that the FAA preempts a state rule that discourages or prohibits forming an arbitration agreement, so states should instead focus on discouraging the practice through other means.[111]

For example, state and city governments can attempt to utilize their procurement powers to prohibit corporations doing business with the government from using pre-employment arbitration agreements. An example of the use of procurement powers is the Franken Amendment to the 2009 Department of Defense appropriations bill. The amendment bans providing more than $1 million in federal funding to a contractor or subcontractor that mandates arbitration agreements for its employees for Title VII and sexual harassment and assault claims.[112] Thus, the Franken Amendment is not a regulation of arbitration, but rather an exercise of procurement powers, because it only prohibits employers doing business with the government from requiring mandatory arbitration agreements concerning certain claims. If the corporations want to require these claims to be arbitrated, they can simply choose to not do business with the federal government. The Franken Amendment does have limitations because corporations doing business with the government must very narrowly exclude only certain claims from arbitration, so other claims can still be included under a mandatory arbitration agreement.[113] However, because there have not been any attempts by states to emulate the Franken Amendment, it is difficult to predict whether it would be subject to preemption. This use of procurement powers could possibly skirt federal preemption, while still discouraging the practice of mandatory arbitration.

Another tactic to target flagrant labor violations is addressing the under-resourcing of state and federal agencies, especially since *EEOC v Waffle House* provides them with the unique ability to pursue claims in court. For example, Maine and Massachusetts, two of the states with the highest shares of workers subject to mandatory arbitration, both have over 150,000 workers per state wage-and-hour investigator and over 13,000 businesses per investigator.[114] If state and federal agencies both used their full current enforcement capacity to exclusively target low-wage employers who use forced arbitration, they would only be able to recover 5 percent of stolen wages.[115] Thus, if we want any hope of fighting labor violations in the current legal landscape, state and federal agencies must receive substantially higher funding.

States and localities must also focus on empowering agencies, to fully enforce existing employment rights statutes. Pursuant to *EEOC v Waffle House*, states and localities can grant agencies with powers equivalent to the EEOC to bring litigation on behalf of workers subject to

pre-employment arbitration rules. There is room for state/private enforcement solutions that work within this model. Attorneys general can increase their use of *parens patriae* actions. Under the doctrine of *parens patriae*, the state can bring lawsuits on behalf of its residents when the suit implicates the state's interests in the health, comfort, and welfare of its citizens. Attorneys general can use *parens patriae* actions while relying on contingent-fee law firms for the day-to-day prosecution of these cases with the attorney general maintaining full control of key decision-making.[116] In this set-up, an attorney general can ambitiously scale up public enforcement without affecting the agency's budget. However, corporations can attempt to circumvent this by including waivers for *parens patriae* suits by a public enforcer in their mandatory arbitration clauses as they have tried with PAGA waivers. There are few examples of this model being employed in practice, so it is difficult to assess its possible ramifications. There are also serious limitations to depending on state and local agencies for pursuing claims on behalf of workers, since they are susceptible to regulatory capture by wealthy and powerful interests.

California has been at the forefront of the fight against the Supreme Court's FAA jurisprudence and the state's Private Attorneys General Act ("PAGA") can serve as a case study for how states can try to use *EEOC v Waffle House* as means for statutory claims to be determined in court despite the application of a mandatory arbitration clause. PAGA was enacted in 2004, two years after *EEOC v Waffle House*, and authorizes an "aggrieved employee on behalf of himself or herself and other current or former employees" to file lawsuits against their employer to recover civil penalties for violations of California's labor code even if they themselves were not personally affected.[117] The focus of PAGA lawsuits is not the recovery of lost wages, but specifically to recover civil penalties. The first violation is $100 per employee per pay period, but subsequent violations increase to $200 per employee per pay period. 75 percent of these penalties go to the California Labor and Workforce Development Agency and the other 25 percent are distributed among the aggrieved employees. Thus, PAGA suits are complementary, not duplicative, to workers pursuing individual claims seeking compensatory damages in either arbitration or litigation. Because this is a type of *qui tam* claim[118], PAGA lawsuits are considered law enforcement actions by the state since they are filed on behalf of the California Attorney General (and thus should be protected by *EEOC v Waffle House*). A PAGA claim can function as a representative lawsuit since the aggrieved employee filing the claim also stands in for other aggrieved employees, thus allowing PAGA suits to skirt class-action waivers while still allowing workers to functionally engage in class action.

A PAGA claim was upheld in *Iskanian v CLS Transportation Los Angeles LLC*,[119] where the California Supreme Court ruled that representative claims filed through PAGA are not preempted by the FAA: "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the state, which alleges directly or through its agents-either the Agency or aggrieved employees-that the employer has violated the Labor Code."[120] The court in *Iskanian* also upheld the prohibition against waivers of representative PAGA claims in

arbitration agreements arguing that the logic of *Concepcion* does not apply and the waivers are contrary to public policy and harm the state's interests in enforcing its labor regulations. Lastly, *Iskanian* found that individual and representative PAGA claims are indivisible, because a PAGA claim represents all claims of labor violations committed by an employer. *Iskanian* remained precedent and was affirmed by the Ninth Circuit[121] with the Supreme Court denying certiorari.

However, in *Viking River Cruises, Inc. v Moriana*,[122] the Supreme Court dealt a large blow to PAGA as an effective state means for circumventing federal preemption based on the FAA. First, the Court rejected the distinction under *Iskanian* between representative and individual PAGA claims. Second, it found that individual PAGA claims can be compelled to arbitration, because the employee has agreed to arbitrate their claims against the defendant individually. Third, it concluded: "PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding…Moriana would lack statutory standing to maintain her non-individual claims in court, and the correct course was to dismiss her remaining claims."[123] Thus, the Court found that representative PAGA claims do not have a statutory basis in cases where an employee has signed a mandatory arbitration agreement. The Court also upheld *Iskanian's* prohibition on wholesale waivers of PAGA claims in employment contracts.

The holding in *Viking* has already been used to shutdown PAGA claims in *Johnson v Lowe's Home Centers*[124] where the federal Eastern District of California applied *Viking River* to require arbitration of an individual PAGA claim and dismissed the representative PAGA claim for lack of standing.[125] However, it is important to note that unlike other federal preemption cases, *Viking* did not find that the state statute was in conflict with the FAA, only overturning *Iskanian*'s indivisibility rule, thus affirming states' authority to address the underenforcement of state regulations posed by mandatory arbitration through their own enforcement tools.

Supreme Court Justice Sotomayor provided a roadmap moving forward in her concurring opinion, where she highlighted that the statutory language of PAGA, not the FAA, presents a barrier to the adjudication of "non-individual" PAGA claims. California's legislature can amend PAGA to allow employees who do not have an individual claim to PAGA as a result of a mandatory arbitration agreement to bring representative PAGA suits.[126] *Viking* indicates that state laws creating *qui tam* enforcement mechanisms can be powerful tools that are able to skirt FAA federal preemption. In 2020, a similar law to PAGA was enacted in Colorado under which a workplace whistleblower can bring civil action against the employer on behalf of the state. Importantly, the Colorado law defines whistleblowers as "a worker with knowledge of an alleged violation of this article 14.4, or the worker's representative".[127] Since the statute also deputizes workers' organizations, they are unlikely to be covered by arbitration provisions, so even if the FAA preempts the law, they will be able to bring claims to court. If California adopts similar statutory language into PAGA by expanding its definition of "aggrieved parties," representative PAGA suits can be brought without conflicting with *Viking*.

Although it would not resolve the core problems associated with mandatory arbitration, states can also pass legislation mandating reporting of specific information about arbitration

proceedings. This would allow lawmakers and the public to better understand the ramifications of mandatory arbitration. A problem arising from arbitration is that, unlike litigation in public court, arbitration proceedings are conducted outside the public eye. The private nature of arbitration complicates empirical research on its effects. The aforementioned findings on arbitration are some of the only research available in the literature. Some level of transparency has been achieved as a result of state laws that require arbitration providers, like JAMS and AAA, to publicly disclose certain information about the disputes they arbitrate. For example, the California civil code requires arbitration providers to disclose for each arbitration proceeding: the type of dispute, name of non-consumer party, prevailing party, size of the claim and award, disposition of the dispute, how many occasions the non-consumer party has previously used the arbitrator, and the income bracket of the employee in employment cases.[128] It is clear how the information from these kinds of mandated disclosures can help facilitate future research on the effects of arbitration on consumers and employees, so other states should pass similar legislation requiring disclosure from arbitration services providers.

Mass Arbitration

Another tactic has been employed by worker advocates in the aftermath of *Epic*: mass arbitration as an alternative to class action lawsuits. Under this strategy, plaintiff firms collectively file thousands of arbitration claims against employers at once, forcing the corporations to pay millions of dollars in arbitration fees. There was one instance where a company received over 12,000 arbitration demands; since the initial filing and arbitrator fees cost around $1,500 per demand, the company had to pay over $18 million in just initial fees.[129] By overburdening the employer's legal counsel and costing the corporation millions, employees are also able to secure greater settlement leverage. Mass arbitration has been facilitated by highly-capitalized plaintiffs' firms who can cover the costs to initiate the arbitration proceedings as they do in class action litigation.[130]

In 2019, over 5,000 DoorDash drivers filed arbitration claims with the AAA alleging violations of the Fair Labor Standards Act and the California Labor Code by misclassifying them as independent contractors.[131] DoorDash was forced to pay almost $12 million in fees. The next day, DoorDash updated its contractor agreement, which changed the arbitrator provider from the AAA to the International Institute for Conflict Prevention & Resolution (CPR). Subsequently, the CPR launched a new claims protocol and procedure the "Employment-Related Mass-Claims Protocol," borrowing from bellwether trials used in federal courts, where if thirty or more claims are filed against the same corporation and are of nearly identical nature, 10-20 randomly selected cases will be decided first as test cases, after which the claims will go to mediation with the awards from the test cases to guide the process. If a resolution is not reached in mediation among all parties, the case can be refiled in court or proceed to arbitration. In an ironic reversal, DoorDash attempted to have the claims resolved in a class-action settlement, but the plaintiffs' firms filed to compel arbitration, which the judge upheld. DoorDash ended up paying more than $85 million in individual settlements to 35,000 of its DoorDash and Caviar drivers.[132] Similar mass arbitration actions have been taken against Uber (12,501 demands) and Postmates (5,274

demands) for worker misclassification claims and Chipotle (2,814 demands) and Buffalo Wild Wings (391 demands) for wage-and-hour claims.[133]

Unmistakably, corporations are recognizing the danger of mass arbitration and are responding accordingly to mitigate the threat it poses. In 2021, Amazon replaced its mandatory arbitration provision from its terms of service altogether with a clause stating, "any dispute or claim relating in any way to your use of any Amazon service will be adjudicated in the state or federal courts in King County, Washington, and you consent to exclusive jurisdiction and venue in these courts," after facing 75,000 arbitration demands from Echo users.[134] Most recently, this corporate mobilization against mass arbitration can be seen with a recent U.S. Chamber of Commerce report, which harshly criticized mass arbitration and called on arbitration providers to change their rules and fee structures, particularly advocating for bellwether arbitration like the CPR, to disincentivize the practice and reduce plaintiff firms' leverage.[135] The report paints plaintiff firms as predatory and abusing a system that otherwise works for both consumers/employees and corporations.

The power of mass arbitration can also be enhanced in wage-and-hour cases with "public enforcers…[obtaining] in court a liability determination that can serve as a predicate for the application of nonmutual offensive collateral estoppel in subsequent one-on-one arbitrations by employees."[136] In this arbitration-enabler model, attorney generals obtain liability verdicts or concessions of wrongdoing by a corporation, thereby making the claims filed under mass arbitration more winnable for law firms. This model, however, would require the AAA, JAMS, and other large arbitration service providers to adopt rules regarding the *res judicata* effect[137] of public liability judgements.[138]

Conclusion

Arbitration arose out of the Federal Arbitration Act as a form of alternative commercial dispute resolution that resolved claims with informality, speed, and finality. In the past three decades, Supreme Court jurisprudence has created an arbitration regime that is a clear perversion of the legislative intent of the FAA and that has unequivocally ensured that state attempts to constrict arbitration will be preempted. A majority of workers in the US are now forced to resolve claims of wage theft, predatory practices, employee discrimination, and other labor violations through individual arbitration, instead of the civil court system. Arbitration is stacked against workers: workers are less likely to win, win lower damages, and are more reluctant to pursue a claim at all. Mandatory arbitration agreements immunize bad corporate actors from being held accountable for their predatory practices. Tackling this epidemic is a matter of utmost public policy, but outside of amendments to the FAA passed through Congress, states are limited in their ability to regulate arbitration. The best option for states is to empower and fund state and city agencies to pursue litigation on behalf of employees subjected to mandatory arbitration clauses modeled on *EEOC v Waffle House*, enact legislation that allows for *qui tam* enforcement mechanisms, utilized their procurement power to refuse to do business with companies that mandate mandatory arbitration, and force greater transparency in the arbitration process.

[1] Katherine Stone and Alexander Colvin, "The Arbitration Epidemic," *Economic Policy Institute* (December 7, 2015): 7, https://www.epi.org/publication/the-arbitration-epidemic/.
[2] Federal Arbitration Act ("FAA"), 9 USC §§ 1-16 (1925).
[3] Cynthia Estlund, "The Black Hole of Mandatory Arbitration," *North Carolina Law Review,* 96 no. 679 (March 1, 2018): 698, http://scholarship.law.unc.edu/nclr/vol96/iss3/3.
[4] Stone and Colvin, 20.
[5] Ibid, 21.
[6] Arbitration first arose from religious institutions, with the Beit Din (Jewish rabbinic courts, translated to "houses of judgment") resolving civil disputes between Jews for thousands of years and with this tradition continuing with Islamic Sharia courts and Catholic religious courts. See, Broyde, M, "The Rise of Religious Arbitration in America: American Arbitration Law, Jewish Batai Din, Protestant Peacemaker Panels, and Islamic Sharia Court Reviewed," *Studies in Judaism, Humanities and the Social Sciences*: Vol. 3 (2018), for how the Federal Arbitration Act has been used to facilitate religious arbitration in the United States.
[7] As compared to other forms of alternative dispute resolution, particularly mediation and Med-Arb (an interim form of mediation and arbitration).
[8] Kyriaki Noussia, "The History, Importance and Modern Use of Arbitration," *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law* (Berlin, Germany: Springer, 2010): 13.
[9] Katherine V.W. Stone, "Rustic Justice: Community and Coercion Under the Federal Arbitration Act," *Cornell Law Faculty Publications* 1602 (March 29, 2018): 971, https://doi.org/10.31228/osf.io/6g7e3.
[10] Noussia, 13.
[11] Ibid.
[12] Stone, 975.
[13] Stone and Colvin, 7.
[14] Ibid.
[15] FAA, 9 USC § 2 (1925).
[16] Alexander Colvin and Mark Gough, "Comparing Mandatory Arbitration and Litigation: Access, Process, and Outcomes," *Final Report to Sponsor: The Robert L. Habush Endowment of the American Association for Justice*, (April 2, 2014): 35, http://digitalcommons.ilr.cornell.edu/reports/60.
[17] FAA, 9 USC § 1 (1925).
[18] *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395, 414 (1967) (Black, J., dissenting).
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[20] FAA, 9 USC § 10 (1925).
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[23] See, *Textile Workers v Lincoln Mills*, 353 US 448 (1957).
[24] Stephen Hayford, "The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration," *Berkeley Journal of Employment and Labor Law* 21, no. 2 (2000): 525.
[25] *Steelworkers v American Manufacturing Co*, 363 US 564 (1960).
[26] *Steelworkers v Warrior & Gulf Navigation Co ("Warrior")*, 363 US 574 (1960).
[27] *Steelworkers v Enterprise Wheel & Car Corp*, 363 US 593 (1960).
[28] *Warrior*, 363 US 574 (1960).
[29] Ibid.
[30] Ibid.
[31] Karla Gilbride, "'Forced' Is Never Fair: What Labor Arbitration Teaches Us about Arbitration Done Right-and Wrong," *Economic Policy Institute* (May 30, 2019), https://www.epi.org/blog/forced-is-never-fair-what-labor-arbitration-teaches-us-about-arbitration-done-right-and-wrong/.
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[35] Gilbride.
[36] 460 U.S. 1 (1983)
[37] Ibid at 24
[38] 465 U.S. 1 (1984)
[39] Ibid at 10-12
[40] 470 U.S. 213 (1985)
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[44] 346 U.S. 427 (1953)
[45] 473 U.S. 614 (1985)
[46] Ibid at 625
[47] *Shearson/American Express Inc. v McMahon*, 482 U.S. 220 (1987)
[48] *Gilmer v Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)
[49] *Genesco, Inc. v T. Kakiuchi & Co., Ltd*., 815 F.2d 840, 844 (2d Cir. 1987) (same)
[50] 490 U.S. 477 (1989)
[51] 500 U.S. 20 (1991)
[52] See *Maye v Smith, Barney, Inc.* 897 F. Supp. 100 (S.D.N.Y. 1995).
[53] See *Scott v Farm Family Life Ins. Co.,* 827 F. Supp. 76 (D. Mass. 1993) (pregnancy discrimination)
[54] See *Williams v Katten, Muchin & Zavis*, 837 F. Supp. 1430 (N.D. Ill. 1993) (race, sex, and religious discrimination)
[55] See *Albert v NCR Co.*, 874 F. Supp. 1328 (S.D. Fla. 1994) (sex, race, and national origin discrimination)
[56] See *Pritzker v Merril Lynch, Pierce, Fenner and Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993)
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[62] *EEOC v Waffle House, Inc.,* 534 U.S. 279 (2002), 9.
[63] *Scalia v CE Security LLC et al*, 21-CV-00057 (AMD) (RLM) (E.D.N.Y. Aug. 25, 2021)
[64] 563 U.S. 333 (2011)
[65] See, *Discover Bank v Superior Court*, 36 Cal. 4th 148, 113 P. 3d 1100 (2005)
[66] 9 U.S. Code § 2
[67] *Scherk v Alberto-Culver Co.*, 417 U. S. 506 (1974) (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924))
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[70] 584 U.S. ___ (2018)
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[72] 29 U.S.C. § 157
[73] 823 F.3d 1147 (7th Cir. 2016)
[74] 834 F.3d 975 (9th Cir. 2016)
[75] 808 F.3d 1013 (5th Cir. 2015)
[76] Including the Sherman Act, Clayton Act, RICO, and the Securities Acts of 1933 and 1934.
[77] *Epic Systems Corp. v Lewis*, 584 U.S. ___ (2018), 16.
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[80] 415 U.S. 147 (1974).

[81] 525 U.S. 70 (1998)
[82] 556 U.S. 247 (2009)
[83] See *Fayer v Town of Middlebury*, 258 F.3d 117 (2d Cir. 2001) for the precedent establishing the distinction on the Second Circuit.
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[98] See *Volt Information Sciences, Inc. v Board of Trustees*, 489 U.S. 468 (1989), where the Court upheld that the FAA does not require any particular set of procedural rules and that the arbitration agreement can detail the rules under which the arbitration will be conducted.
[99] Stone and Colvin, "Arbitration Epidemic," 4.
[100] Ibid, 20.
[101] Ibid, 21.
[102] Ibid, 37.
[103] 9 USC § 402(a)
[104] *Newton v LVMH Moët Hennessy Louis Vuitton Inc*., No. 154179/2019 (NY Sup. Ct. July 10, 2020)
[105] *Gilbert v Indeed, Inc*., 513 F. Supp. 3d 374 (SDNY 2021)
[106] 581 U.S. ___ (2017)
[107] Ibid.
[108] California Government Code § 12953
[109] No. 20-15291 (9th Cir. Feb. 15, 2023)
[110] Ibid. 23
[111] See *Saturn Distrib. Corp v Williams*, 905 F.2d 719, 723 (4th Cir. 1990) and *Sec. Indus. Ass'n v Connolly*, 883 F.2d 1114, 1123-24 (1st Cir. 1989) for concurrent sister circuit decisions.
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[115] Baran and Campbell, "Forced Arbitration Helped Employers," 7.
[116] Myriam Gilles, "The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans," 86 no. 5 *Fordham Law Review* 2223, 2232 (2018) .
[117] California Labor Code 2699(a)
[118] A *qui tam* claim refers to when a private citizen brings an action against a person or company on behalf of the government (thus the government is considered the plaintiff). If the action is successful, the private citizen receives a share of the award.

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[122] 596 U.S. ___ (2022)
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[137] *Res judicata* prevents a party from relitigating a claim that has been subject to final judgment in a previous lawsuit.
[138] Ibid, 2236.

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From Dartmouth College to Citizens United: The Bounds of Corporate Personhood Under the Grant Theory

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Abstract

From its first consideration in *Dartmouth College v Woodward* (1819), the legal concept of corporate rights has been a topic of much discussion at the Supreme Court. Alongside this consideration, three ethical theories of corporations have emerged to describe the appropriate role of government control over corporate enterprise: the grant, association, and natural entity theories. While striking a balance between corporate speech rights and Congress' power to govern, the Court has come dangerously close to endorsing the natural entity theory in its *Citizens United v FEC* (2010) ruling. This paper will interrogate which rights are necessary, and thus constitutionally granted, to corporations under John Dewey's framework for right-and-duty bearing unit.

Introduction

Since the earliest days of Supreme Court litigation, the inception and independence of corporations have constantly been a point of contention. This issue has pervaded the courts for good reason: it is central to the public's expectation for government-mandated corporate regulation and public welfare standards. Interrogation of the morals of corporations also persists: Should corporations have a responsibility to contribute to the "general welfare" of America?[1] Should they be endowed with certain rights and privileges distinct from other persons under the law? The history of this concept in America, known as corporate personhood, is one characterized by centuries of debate. Three theories of corporate personhood—grant, association, and natural entity—have often been leveraged to respond to these questions with divergent answers. While considering the merits of this legal framework, the Supreme Court has found itself torn over the legitimacy and breadth of corporations as legal persons. Court precedent in this area has waxed and waned throughout the past, often diverging on fundamental elements of the legal status of corporations. This precedent has been established in practically every era of American history, namely: the Founding, in *Trustees of Dartmouth College v Woodward* (1819); the Gilded Age, in *Santa Clara County v Southern Pacific Railroad Company* (1886); the American Century, in *First National Bank of Boston v Bellotti* (1978); and today, in *Citizens United v Federal Election Commission* (2010).

This paper will examine the legal intersection of these three theories with Supreme Court precedent to discern how corporations are granted certain rights while being incorporated as a matter of the law. These rights, under the grant theory of corporate personhood, should not include the right to political speech. Rather than following the framework established in *Citizens United* in which the Court erred by stretching the rights of corporations, the Court should adopt the measured corporate rights approach underscored by Justice Rehnquist in his *Bellotti* dissent. In turn, this interpretation of corporate personhood would best align with the values of the Friedman Doctrine and Aristotelian virtue ethics.

Theory and Case Law of Corporations

There are three dominating theories that seek to describe corporate personhood and the subsequent rights and privileges of corporations. Grant theory emphasizes corporations as a concession from the State. Most directly, this theory applies to the early inception of corporate bodies when they were created out of charters granted by a state to achieve a specific end—usually one that served to benefit a common public purpose.[2] As a result, this theory lends itself well to government regulation. Existing as "artificial being[s]," corporations were purposefully confined to the governing structure and articulated purpose within a charter, which was achieved through close negotiation "between private interests and the state."[3] (Internal quotations omitted). This intimate relationship between private enterprise and public government, however, lent itself to corruption. In one instance, a New Jersey railroad company was incorporated with monopolistic control over the state's market in exchange for "giving a substantial amount of stock to the state."[4] This vulnerability for corrupt practices served as motivation for lawmakers to allow for incorporation independent of negotiation with state legislatures.[5] Thus, the direct

concessions made by states were no longer necessary to establish a corporation, and the grant theory fell from popularity.

The alternative theories—association and natural entity—each allow corporations broader independence and increasingly limited regulation. Association theory (or, nexus of contracts) is founded on the principle that groups of individuals form corporations through a number of contracts.[6] As such, this idea emphasizes remediating conflicts through traditional contract-based legal processes. This effectively reduces the importance of fiduciary duty and increases the independence of corporations from government regulation by resting, in part, on the free enterprise protections enumerated by the Constitution's Contract Clause.[7] Alternatively, natural entity theory is the most extreme in its emphasis on corporate independence and suggests that corporations are "natural persons" with associated rights and privileges.[8] As opposed to the association theory, whereby corporations are understood to be an intangible idea brought together by contracts, natural entity theory posits that corporations themselves are individuals.[9] This personification implies that corporations, like humans, must be endowed with unalienable rights and therefore hold the ability to exercise those rights as they so choose.

The grant, association, and natural entity theories can be used to better understand the evolution of case law addressing corporate personhood. From as early as 1819, the Supreme Court has been tasked with disentangling the relationship between corporations and the government. In *Trustees of Dartmouth College v Woodward*, the State of New Hampshire attempted to interfere with the charter of Dartmouth College.[10] The State attempted to dissolve the charter of Dartmouth, a privately funded institution of higher learning established prior to the founding of the United States, in favor of creating a state university. The Supreme Court found that this private interference was at odds with the Contract Clause, which holds that no State should pass a law "impairing the Obligation of Contracts."[11] In doing so, the Court recognized that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."[12] As such, a corporation enjoys the rights bestowed upon it by the State, like "immortality" (*i.e.* a corporation does not "die" in the same way a natural person would) and the ability to "hold property without the perplexing intricacies."[13] These concessions by the State, negotiated directly with legislatures at the time, began to demarcate the crucial divide between two types of persons: legal persons and natural persons. The ruling in *Dartmouth College* is fundamental to understanding how corporations maintain a degree of legal independence. But how, if at all, does this legal individualism differ from that of a natural person?

Less than seventy years later, corporate personhood again found itself before the Court, though this time in a markedly different fashion. In *Santa Clara County v Southern Pacific Railroad Company* (1886), a California county attempted to collect inappropriately high taxes from a railroad company.[14] The Court sided with the corporation, holding that the county wrongly included the value of a fence and failed to deduct mortgage payments from the sum owed. While the exact questions before the Court involved issues of tax law, the relevant precedent was recorded before the decision was even laid out. The Court famously refused to

hear oral arguments over whether Fourteenth Amendment protections should extend to corporations due to a stated consensus that they "[were] all of the opinion that it does." Proponents of natural entity theory latch on to this statement as evidence for their rebuttal of grant and association theory. While these three theoretical frameworks had yet to be conceived at the time of *Santa Clara*'s ruling, advocates point to this statement by the Court to underscore how the individualism central to the natural entity theory was a foregone conclusion—one so readily accepted that the Court need not hear any debate.[15]

Almost a century later, the Court again expanded the rights of corporations. This time, in *First National Bank of Boston v Bellotti* (1978), the Court heard a dispute between a group of corporations looking to spend money to campaign against an upcoming ballot initiative.[16] In this case, the Court affirmed the corporations' right to spend money in direct association with an election as a form of speech protected under the First Amendment, effectively quashing a statute preventing corporations from taking such an action in the State of Massachusetts. In his reasoned dissent, Justice Rehnquist cautioned the trajectory of the Court, emphasizing that the weight of this case law rests on the legal precedent from a statement in *Santa Clara* made "with neither argument nor discussion." Furthermore, he argued that the same State concessions recognized as integral to the smooth functioning of corporations (immortality, for example) could indeed "pose special dangers in the political sphere."[17] His hesitancy towards the Court's full-throttle approach to corporate personification is resistant to natural entity theory and reminiscent of the foundations of grant theory. Rather than follow the majority's deference to the increasingly personified conception of a corporation, Justice Rehnquist posited that corporations still maintain a grant-based relationship with the state, and thus are subject to state-sponsored efforts to curtail any unbridled liberty. While he conceded that corporations need not receive specific permission from the State to incorporate, Justice Rehnquist maintained that the legal framework under which corporations exist rests entirely on the willingness of the State to allow a corporation to be "organized or admitted within its boundaries."[18]

The most recent, and perhaps most contentious, of this judicial discourse arrived in 2010 with *Citizens United v Federal Election Commission*.[19] Here, the Court ruled on a number of opinions regarding the enforcement of the Bipartisan Campaign Reform Act of 2002 against corporate political speech. The Act limited the influence of special interest groups in elections by barring certain forms of corporate political speech within 30 days of an election. In their ruling, the Court held that political speech is such an essential element of American democracy that to prevent corporations from engaging would cause a "prolonged, nationwide chilling effect" on the marketplace of ideas. The Court affirmed that allowing corporations to fund this speech from their "general treasury" would not threaten to seed corruption in government, and that "the appearance of influence or access will not cause the electorate to lose faith in this democracy."[20] This approach once again tracks a steady shift towards the natural entity theory, cementing another right belonging to human persons—that of political speech—as one equally shared by corporations.

Corporations as Bearers of Rights

Given the legal precedent and intersecting theories involved in the conversation of corporate personhood, it now becomes necessary to broadly examine the idea of corporations being rights-bearing persons under the law. Corporations' success has always been contingent on receiving a number of rights and privileges from the government, all of which are rooted in the Constitution and in some way integral to the basic functioning of corporate enterprise.[21] These rights have included protections for contracts, unreasonable search and seizure, double jeopardy, and more.[22] In reading these rights as belonging to corporations in addition to natural persons, the Court had to rely on the extension of "person" to include corporations.[23] Where, then, is the divide between a human person's rights and those of a corporation, a body of human persons but nonetheless distinct in its functioning, favors, and aims? American philosopher John Dewey writes in the Yale Law Journal that indeed a "'person' might be used simply as a synonym for a right-and-duty-bearing unit."[24] Dewey explains that a corporation—similar to a natural person—would maintain "those rights and duties which the courts find it to have."[25] In short: Dewey implies that not all types of persons (that is, legal and natural beings) should be viewed equally under the law. Therefore, the divide conceivably rests where *necessary* corporate rights expire and extraneous rights begin.

This right-and-duty-bearing framework is essential to understanding how grant, association, and natural entity theories can be measured against the Court's legal precedent. Under the modern conception of the grant theory as laid out in Chief Justice Rehnquist's *Bellotti* dissent, a state grants corporations the "constitutional protections [which] are incidental to its very existence" (Internal quotations omitted).[26] This articulation of corporate personhood is also necessary to rebut critics of grant theory who instead favor association or natural entity theory. One such scholar, Ilya Shapiro, rebuked a delineation between "natural" persons and "legal" persons under the guise of a "fundamental misunderstanding of both the nature of corporations and the freedoms protected by the Constitution."[27] In reality, what Shapiro criticized as a discriminatory extension of *some* rights to corporations and *others* to human persons is actually a logical and moral process under the right-and-duty-bearing unit approach. Some rights are essential to the function of corporations; others are not. Thus, different right-and-duty-bearing units—also known as legal and natural persons—are necessarily discriminated against in this legal allocation that rests on centuries of precedent and tradition.

Corporations Without the Right to Political Speech

The intersection of grant theory with the right-and-duty-bearing approach supports the extension of legal rights to corporations only when *necessary* to their function in society. Under this premise, this section will explore how the extension of political speech rights under the Court's ruling in *Citizens United* was wrongly decided for two reasons: the right to political speech is not a logical extension of rights *necessary* to the function of a corporation and corporate political speech is detrimental to the legitimate functioning of American democracy.

While exploring which rights are necessary to a corporation's function, Justice Rehnquist contemplated property rights. In *Bellotti*, Justice Rehnquist maintained that a corporation needing to "acquire and utilize property" must logically be granted the protection

from the State that "necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law."[28] As such, Due Process Clause protections are bestowed upon corporate persons as a straightforward guarantee of incorporation. After all, without the power to maintain property, corporations would be extraordinarily limited in their capacity. Some rights, though, are universally understood to be *unnecessary* to the function of corporate business. For instance, "it can neither marry nor be given in marriage."[29] Thus, there must be some point at which the rights of natural persons and those of corporate persons fail to run parallel.

Justice Kennedy would seek to have these rights run parallel to a much greater extent than Justice Rehnquist. While writing for the majority in *Citizens United*, Justice Kennedy argued that "[political] speech is an essential mechanism of democracy" that "must prevail against laws that would suppress it."[30] On its face, Justice Kennedy seems to imply that no amount of compelling state interest could overcome strict scrutiny of political speech protections.[31] While this laissez faire approach is perhaps more acceptable applied to natural persons, the same cannot be said about corporate persons. By resting too heavily on the "associations of citizens" which are tied to a corporation, Justice Kennedy dismissed the historical tradition of corporations being granted only the rights *necessary* to their functioning under the right-and-duty-bearing unit approach.[32] In *Dartmouth College*, Chief Justice Marshall was clear that corporations should not "share in the civil government of the country, unless that be the purpose for which it was created."[33] Similarly, Justice Rehnquist, dissenting in *Bellotti*,[34] underscored that corporations should be affirmatively restricted from "[engaging] in political activity with regard to matters having no material effect on its business." Rather than maintaining this judicial approach, Justice Kennedy conformed to the precedent of case law built from the offhand statement preceding Chief Justice Waite's majority opinion in *Santa Clara*.[35] In effect, the Court in *Citizens United* extended a right to corporations outside their natural, historical scope.

Moreover, Justice Kennedy argued specifically that the unequal application of the First Amendment to media corporations further damages the legitimacy of selectively restricting political speech rights. He claimed that "[d]ifferential treatment of media corporations and other corporations cannot be squared with the First Amendment."[36] In making this assertion, Justice Kennedy diverged from the right-and-duty-bearing units approach. Media companies are unique; they are incorporated with the specific intent of providing forms of media to consumers. Often, this requires political speech that is necessary to reporting on topics like elections and political candidates. Similar to the pre-*Citizens United* standard, under which media corporations were uniquely treated under the law, the media corporation as a right-and-duty-bearing unit would be afforded different legal rights than a corporation engaged in a different form of business. After all, political speech is *necessary* for the function of a media corporation, and thus, media corporations should be endowed with the protection of those rights when incorporated. This type of exception is narrowly tailored and within the compelling interest of the state to maintain a free and fair press.

With the understanding that the right to political speech is not necessary to the function of a corporation (save for media corporations), it now becomes imperative to interrogate the anti-democratic effects of a *Citizens United* framework on American politics. Justice Kennedy was especially unmoved by advocates worried that corporate wealth would incentivize corruption or the appearance of corruption in politics. He wrote: "That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy."[37] He went on to refute the idea that corporations with massive amounts of wealth would unduly influence elections, explaining that "[a]ll speakers…use money amassed from the economic marketplace to fund their speech."[38] By downplaying the implications of corporate political speech funded by corporate treasuries, Justice Kennedy failed to accurately assess the consequences of relative advantage. While it is true that individuals can independently be wealthy and use this wealth for political speech, corporations have the unique ability to "use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace."[39] (Internal quotations omitted). This relative influence inherently moves the scale of political influence in the direction of corporate interests over the interests of individuals. It is precisely for this reason that the right-and-duty approach discriminately designates some rights (e.g., "immortality," and "hold[ing] property without the perplexing intricacies") only to legal persons and others (e.g., marriage and to "be given in marriage") only to natural persons.[40]

Justice Kennedy further outlined the Court's motivation for allowing corporate political speech, arguing that an ex ante prohibition of corporate political speech would create a chilling effect in the marketplace of ideas. The Court's reasoning is left unsupported on two fronts. For one, the issue at hand is *not* a traditional prior restraint. Justice Kennedy admits to this difference, qualifying his argument with: "The regulatory scheme at issue may not be a prior restraint in the strict sense."[41] Rather, corporations had sought protection against "prior restraint" to avoid the regulatory intricacy of establishing a political action committee (PAC), which Citizens United already had.[42] Likewise, under the right-and-duty-bearing unit approach, the question of prior restraint is avoided under the premise that corporations have no right to political speech (thus, no ex ante restriction is applicable). If a corporation wanted to establish an arm for "advocacy or electioneering," the path is clear: establish a PAC "financed through voluntary individual contributions" that operates under the regulations expressly protecting against illegal election meddling.[43] Secondly, there is compelling state interest to regulate corporate political speech. While Justice Kennedy summarized how "[l]aws that burden political speech are subject to strict scrutiny," he failed to weigh the Court's precedent that recognizes an applicable "compelling government interest in preventing corruption."[44] (Internal quotation omitted). This exact issue—rampant political corruption—was widely considered to be a negative externality should the Court establish corporate political speech in *Citizens United*.[45]

The remedy for this compelling state interest to defend against corruption has already been established. As in line with the doctrine of strict scrutiny, a "narrowly tailored" and "least restrictive" solution exists in the form of a political action committee.[46] While Justice Kennedy

may posit that restricting corporate political speech would do irreparable harm by restricting corporate ideas from competing in the "open marketplace of ideas…without government interference," his conceptualization of this marketplace is markedly misguided.[47] To begin, his assumption is based on the much-debated concept of "rights of nonparty listeners."[48] From this uneven ground, he extrapolates that the marketplace of ideas is one *without* regulation—a remark flying blindly in the face of centuries of Court precedent.[49] In contrast, regulations in the market are specifically in place to protect consumers. PACs achieve this protection in two useful ways: they regulate the source and use of corporate money and more readily conform to the tenants of the Friedman Doctrine.

Ethical Theories of Corporate Political Speech

The restrictions on corporate political speech rights can be more broadly understood in the context of two ethical theories of business: Milton Friedman's shareholder theory and Aristotle's virtue ethics. Under Friedman's conception of business, executives of a corporation are the direct employees of the owners (*i.e.*, shareholders, etc.). As such, they have an explicit responsibility to act only as agents and in the best interest of their shareholders. This framework would categorize political discourse as an agent's "social responsibility" if this discourse is extraneous to the interests of the shareholders.[50] As such, only individuals should exercise their social responsibility when not acting as agents of a principal. As applied to corporate political speech, taking funds from a corporation's treasury to support a political cause is (1) spending "someone else's money for a general social interest" and (2) "reduc[ing] the corporation's profits."[51] Both of these actions would strictly violate the shareholder theory established by Friedman. Instead, under the structure of a PAC, "financed through voluntary individual contributions," each principal would be explicitly supporting a specific type of political speech, whereby each agent could still act in direct accordance with her principal's wishes.[52] Thus, the theory is upheld.

Aristotle constructed a theory of virtue ethics that centers the golden mean as the ultimate "eudaimonia" of humankind.[53] This teleological framework encourages an individual to find "the mean between two vices, one of excess and one of deficiency."[54] For example, as analogous to corporate political speech, excess would be unrestricted corporate political speech from the "general treasury" while deficiency would be entirely restricted corporate speech.[55] Under the golden mean doctrine, the balance would plausibly lie in a system where corporations were allowed some form of regulated political speech. As conceived by the Bipartisan Campaign Reform Act of 2002, the logical center under this framework rests with the use of political action committees. While the Court has famously kept a distance from directly addressing the ethical and moral standings of corporations, these two theories provide a useful lens through which to contemplate the increasingly anthropomorphized American corporation.[56]

Conclusion

The question of corporate political speech rights is one steeped in centuries of conflicting precedent and academic theorizing. Since the Founding, corporations have pushed for increasing independence from their state incorporators to stifle the threat of corruption in government.

Today, corporations are increasingly driving too far from their roots, demanding rights that should be only reserved for natural, human persons. The risk of political corruption, which once instigated corporate independence, has now emerged as increasingly real under a *Citizens United* framework. A synthesis of American corporate history, theories of incorporation, and Supreme Court precedent all converge in one commanding direction: corporations should not maintain the right to unbridled political speech. Under the grant theory and right-and-duty-bearing unit approach, the government bestows upon corporations certain rights and privileges necessary to their business conduct. Political speech is not a necessary element of corporations and can indeed be detrimental to the function of American democracy. Rather than adhering to these guiding principles and the foundation outlined in Justice Rehnquist's *Bellotti* dissent, the Court in *Citizens United* veered towards natural entity theory, consequently endangering the bedrock of American democracy.

[1] US Const Art. 1, § 3.
[2] Morton Horwitz, "Santa Clara Revisited: The Development of Corporate Theory," 88 *W. Va. L. Rev.* 81 (1986).
[3] Ibid*,* 181.
[4] John Wallis, "Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852." 65 *The Journal of Economic History*, (2005).
[5] Morton Horwitz, "Santa Clara Revisited: The Development of Corporate Theory," 88 *W. Va. L. Rev*. 182 (1986).
[6] Lewis Kornhauser, "The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel." 89 *Columbia Law Review*, 1451 (1989).
[7] US Const Art 1, § 10.
[8] Lewis Kornhauser, "The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel," 89 *Columbia Law Review*, 1451 (1989).
[9] Morton Horwitz, "Santa Clara Revisited: The Development of Corporate Theory," 88 *W. Va. L. Rev.* 179, (1986).
[10] *Trustees of Dartmouth College v Woodward*, 17 U.S. 518, 64 (1819).
[11] US Const Art 1, § 10.
[12] *Trustees of Dartmouth College v Woodward* 17 U.S. 518, 28 (1819).
[13] Ibid.
[14] *Santa Clara County v Southern Pacific Railroad Company*, 118 U.S. 394, 396 (1886).
[15] Morton Horwitz, "Santa Clara Revisited: The Development of Corporate Theory," 88 *W. Va. L. Rev.* 178 (1986).
[16] *First National Bank of Boston v Bellotti*, 435 U.S. 765, 56 (1978) (Rehnquist, J., dissenting).
[17] Ibid*,* 58.
[18] *First National Bank of Boston v Bellotti*, 435 U.S. 765, 58 (1978) (Rehnquist, J., dissenting).
[19] *Citizens United v Federal Election Commission*, 558 U.S. 310, 16 (2010).
[20] Ibid, 1, 6.
[21] Ciara Torres-Spelliscy, "Does 'We the People' Include Corporations?" 43 *Human Rights Magazine* (American Bar Association), online at https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/we-the-people/we-the-people-corporations/.
[22] U.S. Const Art I, § 10.; U.S. Const Amend IV.; U.S. Const Amend V.
[23] Ibid*.*
[24] John Dewey, "The Historic Background of Corporate Legal Personality," 35 *The Yale Law Journal* 655, 656 (1926).
[25] Ibid*.*
[26] *First National Bank of Boston v Bellotti,* 435 U.S. 765*,* 57 (1978) (Rehnquist, J., dissenting).
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Invest in Justice: Economic Considerations for Representative Juries

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Abstract

This paper examines systematic barriers that exclude low-income Americans from participating on juries. The paper opens with information demonstrating that American courts struggle to obtain representative jury pools, given that the majority of potential jurors (60–90 percent) either ignore their jury summons or obtain excusals from jury service. Sociologists have found that the most common reasons for avoiding jury service are economic reasons, rather than attitudes of indifference. The paper then quantifies the specific economic barriers that prevent low-income people from serving on juries, including low pay from courts—both federal and state courts compensate jurors far below minimum wage—and lack of support from employers (only 21 percent of the lowest-paid tenth of the workforce receives paid jury leave from their employers, as opposed to 83 percent of the highest-paid tenth). The essay then examines the effects of this exclusion of low-income jurors, in terms of biased trial outcomes, public trust in the courts, and unfairness to the jurors themselves (despite the stereotype that jury service is a burden, studies have shown that most jurors experience their service as a positive form of civic engagement). The paper concludes by examining and assessing the effectiveness of proposed legislative solutions, including some that have been enacted by a handful of states.

In the 1946 case *Thiel v Southern Pacific Co.,*[1] the Supreme Court affirmed that jurors "of low economic and social status" were "a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system." Although this decision rendered the automatic exclusion of low-income jurors illegal, today many economic barriers still prevent low-income people from serving on juries. This paper presents evidence of potential jurors' pervasive inability to serve due to economic constraints, explains the causes of these barriers, analyzes the impact this exclusion has on the justice system, and discusses solutions. I argue that aside from administrative costs, the exclusion of low-income jurors harms three groups: the parties in the trials, who may be losing a unique perspective; the public as a whole, who question the legitimacy of courts; and the potential jurors themselves, who are deprived of a beneficial opportunity to engage in their communities and to make their voices heard in democracy.

Lack of Low-Income Jurors

American courts have been struggling to find jurors: sometimes jury summonses cannot be delivered, jurors are often excused because jury service would pose an undue hardship, and a substantial portion of jurors illegally ignore the jury summons. A dramatic illustration of the difficulty of finding jurors occurred a few years ago in a capital murder trial in Mississippi. [2] 250 jurors were summoned, but only sixty of them (24 percent) appeared in court.[3] After many were struck for cause, only nine qualified jurors remained, forcing the court to declare a mistrial.[4] (The trial required twelve jurors and two alternates.) The county convened a task force and found that 29 percent of jurors had been excused in advance, 26 percent of the summonses were undeliverable, and 21 percent of jurors had ignored the summons.[5] Regrettably, such struggles with low juror yield are not an anomaly.

Although a mistrial is not typical, similarly high numbers of nonresponsive jurors appear elsewhere. Richard Seltzer, a scholar working in Washington, DC, found a similar pattern: for trials in that city, the average yield of qualified jurors was a measly 18 percent, with 40 percent of summonses returned as undeliverable and 20 percent of jurors ignoring their summonses.[6] Indeed, a study by the American Judicature Society surveying court administrators from jurisdictions across America found the average summons non-response rate to be 20.1 percent for state courts (the same figure in the Washington, DC study and the Mississippi case) and 10.8 percent for federal courts.[7] In some jurisdictions the juror yield is even worse. *The Jury Under Fire,* published in 2017, reports that "in some large cities, including New York City and Los Angeles, only approximately 10 percent of summoned jurors report for jury selection."[8] Taken together, these numbers of undeliverable summonses, nonresponsive jurors, and excusals for hardship suggest that somewhere between 60 and 90 percent of Americans are unable or unwilling to serve as jurors. Calling this a juror crisis would not be hyperbole.

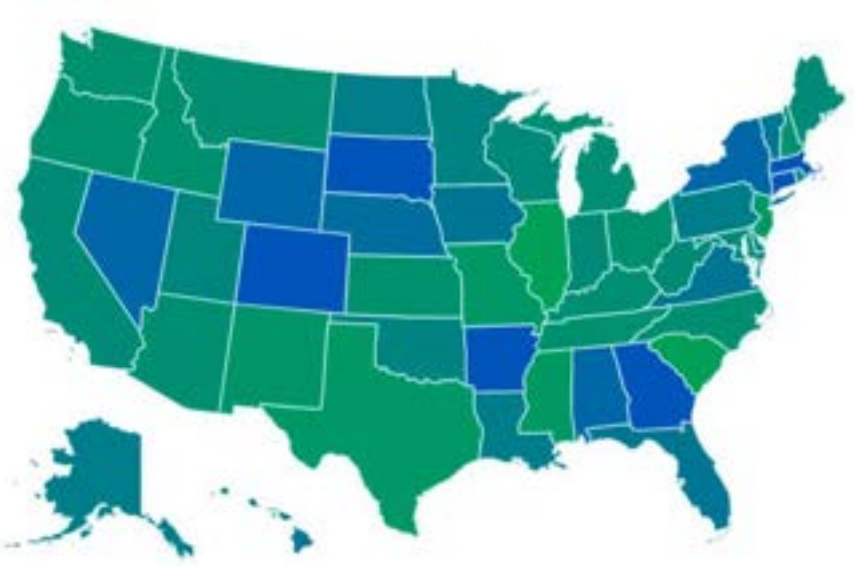
Even more disturbingly, this problem does not seem to be evenly distributed across all demographics; rather, Americans of lower socio-economic status are underrepresented on juries. Several studies suggest that practical pressures make it difficult for low-income people to serve on juries. In the Washington, DC study mentioned above, Seltzer and his colleagues from

Howard University reached out to 300 jurors who had ignored their summonses. In both phone interviews and face-to-face interviews, economic constraints—namely, not being able to afford taking days off from work to serve on a jury—topped the list of reasons respondents did not serve as jurors, followed by time constraints.[9] Other reasons included a perception that the justice system is biased, wasted time or other inconveniences in the courthouse, hesitation about judging others, and confidence in escaping penalties.[10] The predominance of economic pressure as the foremost factor in dissuading juror participation has been replicated in a number of other studies. For example, a 1998 study, which had the virtue of examining four different jurisdictions (in Pennsylvania, Washington State, Arizona, and Tennessee), found that summons non-respondents "exhibit both distinctive economic and attitudinal traits from summons respondents." Specifically, they are less wealthy, less likely to have employers who provide paid time for jury duty, less well-informed about how to request an excuse, and less confident in their ability to understand the trial and serve effectively.[11] (Notably, based on telephone interviews with potential jurors, this study did not find that people avoid jury service due to a missing sense of duty or dislike of courts; instead, the researchers explained, "The attitudinal reasons citizens have for nonresponse are more a reflection of their misgivings about themselves than they are about the court system.")[12] Moreover, although both of the previous two studies cited were conducted in the late 1990s, this problem does not seem to have improved; a 2012 study reaffirmed the connection between income and compliance with jury summons, finding that "Individuals with the highest income levels were the most likely to comply with the jury summons."[13] Furthermore, the problem is not restricted to jurors who ignore their summonses, as many jurors are also excused for economic hardship. In *Race and Jury*, Hiroshi Fukurai, et al. analyzed the prevalence of economic excuses, concluding, "the economic excuse thus becomes the most important determining influence on the ultimate jury composition."[14] Thus, the distribution of those who do not respond to their summons or are excused from service is not random: because of the potential economic burdens associated with jury duty, many low-income people do not serve on juries.

Economic Barriers to Jury Service

These studies affirm and quantify a problem that we should expect to exist given the current financial structures surrounding jury service. Jury service requires prospective jurors to take time off from work (if they are employed) to come to court. If selected, they must spend more time away from their jobs—at least several days and perhaps as much as two weeks or more. Jurors can be compensated for this time in two ways: being paid directly by the court or being paid their normal salary by their employer. Unfortunately, for many jurors, pay from the court is insufficient and pay from their employers is unavailable. Nowhere in the United States are jurors paid at minimum wage. Federal jurors are paid $50 per day, which is $6.25 per hour for an eight-hour day (the federal minimum wage is $7.25 per hour).[15] Jury pay in state courts is even stingier and wildly unpredictable. The map below captures the inconsistency of jury pay in state courts; light green represents the lowest-paying states and bright blue represents the

highest-paying states.[16]



No state pays more than $50 per day; in fact, only six states (Massachusetts, Connecticut, Arkansas, Georgia, South Dakota, and Colorado) pay this much.[17] Some states pay only a shocking $5 or $6 per day.[18] Robert Boatright argues that aside from the genuine financial hardships, such low jury pay is an insult. He points out that pay levels typically correspond with the perceived value of the work, so receiving a $5 check suggests that the juror performed a task that was not valuable to the justice system.[19] The average jury pay in state courts is $21.96 per day, which would be $2.75 per hour for an eight-hour day.[20] Clearly, current jury pay is insufficient to make jury service accessible to most citizens. The legality of paying jurors below the minimum wage was challenged in a 2020 Washington state case, *Rocha v King County*[21], but the Washington Supreme Court found that jurors do not have an employee relationship with the state and thus are not covered by Washington's minimum wage statute. (The court reached this decision despite acknowledging a Washington state precedent in which a juror who was injured in a car accident driving home from jury duty *was* found to be a state employee for the purposes of workers' compensation.)[22] Thus, the problem of low jury pay has not been solved through litigation.

The other avenue of pay—compensation from employers—is not always a possibility. In most states, while employers cannot fire employees for fulfilling their civic duty, they carry no obligation to make this duty economically feasible by providing paid time off for jury duty. Frequently, they do not. According to 2021 data on employee benefits from the U.S. Bureau of Labor Statistics, only 57 percent of American workers receive paid leave for jury duty,[23] down from 68 percent in 2010.[24] For almost half of American workers today, serving on a jury would mean going without meaningful pay for the length of the trial. The Bureau of Labor Statistics does not collect information on how many days of paid leave are provided, indicating that jury duty may still be financially inaccessible even for some of the 57 percent who have paid jury leave. Companies vary widely in how long they will pay an employee for jury service, thinning

the jury pool even further. In an article titled "Many Pay for Doing Civic Duty," the *Los Angeles Times* collected a series of distressing stories about jurors whose paid leave ended partway through a trial, leaving them dependent on $15 per day provided by California courts.[25] The article demonstrated a substantial gap between employers in Los Angeles who would provide at least some paid time off, 86.5 percent, and those who offered unlimited paid time for jury duty, a much smaller 22%.[26] Thus, the numbers of Americans who can afford to participate in a lengthy trial are distressingly low.

The disparity actually goes even deeper than just low-income jurors' reduced ability to go unpaid. Disturbingly (although perhaps not surprisingly), the Bureau's statistics reveal that access to paid jury duty leave directly corresponds with income. Only 21 percent of the lowest-paid tenth of the workforce receives paid jury leave, as opposed to 83 percent of the highest-paid tenth.[27] Precisely those workers who most need paid leave to serve are least likely to be able to access it. Thus, the lack of compensation from employers—and the even more pronounced rarity of such compensation for workers in low-paid jobs—is a systemic barrier preventing low-income people from serving on juries.

Implications of Unrepresentative Juries

Some might question whether this lack of accessibility is a problem, especially since the mechanisms through which low-income jurors are excluded appear voluntary. This perspective, however, ignores the fact that such self-exclusion is not a real choice when faced with economic pressures. Only if all jurors could afford to serve could this self-exclusion be considered voluntary. Moreover, the harms extend beyond the individual juror to the community. I will argue that unrepresentative juries thwart justice in four ways: the administrative costs are high, the parties in the trial lose a unique perspective, the public questions the legitimacy of verdicts delivered by unrepresentative juries, and the potential low-income jurors lose a beneficial opportunity to engage with their community and are excluded from a fundamental right of democratic participation.

Administrative Costs

The high numbers of potential jurors who ignore their summonses or are excused from serving impose severe administrative costs, both on the court and the wider community. Because many citizens will not be able to serve, courts must summon many more jurors than needed, which is an expense for the court and a frustration for those summoned. Occasionally these extra efforts to obtain a jury still fail, resulting in a mistrial and even more expense. One of the most pervasive examples of administrative strain comes from Washington, DC, where the lack of available jurors (predominantly due to economic barriers) meant that jury lists that were designed to last for two years were being exhausted after nine months. [28] Although being summoned every two years seems reasonable, sending a summons every nine months to the subset of citizens who can serve is a striking illustration of the strain caused by unavailable jurors. However, there are more fundamental grievances than administrative costs; excluding low-income jurors obstructs justice and democracy.

Harm to the Parties in the Trial

To begin with the most tangible harm: an unrepresentative jury is detrimental to the parties in the trial, who are losing a unique perspective and thus may receive a biased verdict. The idea that people of different socio-economic statuses have different outlooks on life is inherently plausible; income affects almost every aspect of a person's formative environment, from how they were educated and where they live to how they work and play. More relevantly, different experiences with privilege could engender different political views. For instance, in civil trials, low-income jurors may have different attitudes towards big business, and in criminal trials they may have greater understanding of mitigating factors, including the pressures that a low-income defendant might have experienced. In "Benevolent Exclusion," law professor Anna Offit argues that the legal system incorrectly sees the exclusion of low-income jurors as a form of "benevolence." Offit suggests that the juries composed of more affluent citizens are unfair to defendants, writing,

> The routine dismissal of citizens who face economic hardship excludes not only people but also the diversity of ideas, experiences, and frames of interpretation that characterize the American population…. The American jury system is plagued by a cruel irony: While poor people appear disproportionately as defendants in jury trials, they are also disproportionately excluded from jury service.[29]

These systemic disparities mean that low-income defendants do not truly have a "jury of their peers."

Sociological research supports the intuition that low-income people bring a different perspective to the jury box, at least for civil trials. A 2009 study of mock juries in several civil trial situations—an individual plaintiff suing a car manufacturer for defects that caused a car accident, an individual plaintiff suing a prescription drug company for serious side effects, and a corporate plaintiff suing an accounting firm for accounting malpractice—found that lower income was a significant predictor of a verdict in favor of the individual plaintiff in the car accident and prescription drug cases, although there was no noticeable effect in the corporate plaintiff cases.[30] African-Americans were also more likely than any other racial group to favor the plaintiff in car accident and prescription drug cases, and the researchers noted that although there was substantial overlap between the variables of race and income, both variables were independently relevant, as was gender.[31] Since jurors of different income levels bring different attitudes to the courtroom, juries which overrepresent the higher-income portion of the community could be biased in favor of one party in a trial, leading to unjust results.

The perspectives which low-income people bring to the jury box are broader than a mistrust of corporations, however. In fact, having low-income jurors does not always favor the plaintiff in civil cases. Another study suggests that low-income jurors tend to give smaller awards.[32] Putting a concrete monetary figure on a damage award is highly subjective, and different standards of comfort may change people's perception of how valuable any given sum is. Given that juries are often criticized for giving excessive and unpredictable awards, the inclusion of low-income people might be especially important for assigning damages fairly. (Bornstein and Greene, in their book *The Jury Under Fire*, devote two chapters to the perception

of juries awarding excessive and unpredictable damages, citing examples of cases that generated substantial media attention, including multi-million dollar damages for protests from the Westboro Baptist Church and multi-billion dollar damages for insufficient warnings on pharmaceutical drugs. Bornstein and Greene also note that juries receive relatively little guidance on how to award damages, except that they should reach their decision through "reasoned deliberation" rather than averaging their individual figures.)[33] Finally, although Offit's analysis is persuasive, the issue of income in criminal trials seems to be under-studied through a quantitative lens; scholars have bemoaned the "lack of literature concerning low-education, low-income, and religious views as is related to jurors and the [criminal verdict] decision making process."[34] Nevertheless, it seems unlikely that low-income jurors, who have a demonstrably unique perspective in civil cases, would set their experiences aside when entering a criminal court. The Supreme Court recognized this principle in the 1946 case of *Thiel v Southern Pacific Co.*, where a court clerk struck the names of low-income citizens from juror rolls, arguing that this made the juror selection process more efficient because such potential jurors were always excused for economic reasons. Justice Murphy, writing for the court, declared, "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."[35] For the sake of justice for parties at trial, low-income perspectives should not be excluded from the jury box.

Harm to the Public

Biased trial outcomes are linked to the next problem of unrepresentative juries—the erosion of public trust in the courts. American society has a long tradition of seeing a decision-making body as legitimate only if it includes representatives from their sector of the community, including the civil rights struggle to end racial exclusion from juries. The Supreme Court emphasized the importance of representative juries for over a century, from the 1880 case of *Strauder v West Virginia,* which struck down a statute prohibiting Black citizens from jury service, to the 1986 case of *Batson v Kentucky*, which prohibits the racially discriminatory use of peremptory strikes. American history is full of flash points in which homogenous juries reached verdicts which the public found unacceptable—most famously in the riots sparked by an all-white jury's acquittal of police officers who beat Rodney King. Racially unrepresentative juries are not only relevant as a parallel to economically unrepresentative juries, but there is also a direct relationship between the two, given the intersection of race and income in America. Today, public trust in the courts is still sometimes lacking, particularly based on concerns about bias against the poor and racial minorities—a sentiment which was unearthed in interviews and surveys from Richard Seltzer's study "The Vanishing Juror."[36] According to Seltzer's research, belief in racial or class bias was the third-most common reason for people to avoid jury service, which suggests that lack of public trust in courts can be a vicious cycle. Mistrust of courts leads some people to avoid jury service, which then leads to unrepresentative juries, which could

further exacerbate mistrust of courts. Although bias can exist in every part of the justice system from arrest to sentence, unrepresentative juries may be a substantial contributor to mistrust.

A fundamental democratic intuition is that people are more likely to accept decisions from a body that they view as representing their community. In the 1991 case of *Powers v Ohio,* the Supreme Court explicitly framed the necessity for representative juries in terms of the community's acceptance of the verdict:

> The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if . . . the prosecutor excludes jurors . . . on account of race.[37]

Moreover, the importance of demographic representation in terms of identities like class, race, and gender is higher for juries because it is one of the only visible guarantees of fairness. At least in theory, various gauges of legitimacy exist for other actors in the justice system. Prosecutors and judges typically stand for election, justices publish opinions justifying their decisions, but juries are unelected and deliberate in private. Jury scholars Brian Bornstein and Edie Green argue that,

> To outside observers, the composition of a jury . . . is typically all they can see because the public is not privy to most trial evidence and is forbidden from watching a jury deliberate. Thus, prospective jurors' beliefs about the fairness of courts . . . are informed by whether they think juries are representative of the breadth and depth of their communities.[38]

Thus, the harm of unrepresentative juries can extend beyond the courtroom, affecting the entire community.

Harm to Prospective Jurors

The unfairness to parties in a trial and the consequent loss of public legitimacy are the clearest harms; however, there is also a less obvious injustice to the prospective jurors themselves who are prevented from serving. Although complaints about jury duty are prevalent in popular culture, jury service can be a highly beneficial form of community engagement for those who can afford to serve. Sociological research has uncovered tangible benefits from jury service, including widespread perception among actual jurors that the experience was positive, that there are educational benefits, and that jury service amplifies civic engagement.

In a literature review, scholars Bornstein and Green cited eleven different studies conducted from the late 1990s to the early 2010s that demonstrated people's opinions of the jury improve markedly after serving on one, the vast majority of jurors viewed their courtroom experience positively, and most jurors would welcome the opportunity to serve again.[39] Improved opinions of the jury are even seen in potential jurors who come to the courthouse but do not serve.[40] One potential explanation for these positive valuations is the experience's educational benefits. A 1992 study found that an "overwhelming majority of respondents to the postservice survey, 88.9 percent, said that they learned something."[41] Moreover, when researchers coded responses to an open-ended survey question ("What, if anything, have you

learned?") as positive, negative, or factual/neutral, they found that very few jurors had gained cynicism from the experience. Rather, over two-thirds of jurors reported learning something factual or positive about the legal system from their experience.[42] Thus, since research shows that the majority of jurors find the experience enjoyable and educational, it is wrong to restrict this valuable opportunity to only those who can afford to overcome the financial burdens of service.

Moreover, some of the most interesting benefits of jury service are the broader impacts it can have on civic engagement, which simultaneously empowers the individual and benefits the community as a whole. In an exhaustive study, Gastil et al. used the voting and jury service records of more than 10,000 impaneled jurors across America to survey thousands of prospective jurors and to interview a portion of them in depth. They found that engaging in jury service, especially engaging in jury deliberation, led jurors to become more engaged with other aspects of community life. The researchers pointed to an increase in voting after jury service as their "most simple and compelling finding." Examining voting records showed that "deliberating on a jury causes previously infrequent voters to become more likely to vote in future elections . . . The effect is amplified in those cases with multiple charges, where jurors have a more complex deliberative task."[43] This change in voting behavior persists for years after the trial, leading Gastil, et al. to suggest that jury service "transforms" those who participate.[44] The civic engagement benefits extended beyond voting. The longitudinal survey of Gastil, et al. "reveal[ed further] general patterns, such as increased attention to news media and more frequent participation in conversations with neighbors about community issues."[45] Again, it is unjust that jury service, which has been shown to transform one's civic engagement, is often inaccessible to the most marginalized citizens. Underlying these tangible benefits is the fundamental democratic right to make one's voice heard in community decisions. The ability to rule on another person's freedom, sometimes even their life, is one of the most directly impactful decisions a citizen will ever make. Jury service is a duty, but it is also a democratic right: suffragists and civil rights activists fought tirelessly to participate in juries because they knew citizenship would be incomplete without it. Today, the de facto barriers to jury service reduce low-income citizens to less than full participants in American democracy.

Solutions

Thus, if the exclusion of low-income people from juries causes biased trial outcomes, exacerbates public mistrust in courts, and denies low-income people their right to a democratic voice, what can be done to solve this problem? Some courts have tried to curb summons non-response by fining or even jailing those who ignore their summonses. However, this punitive approach may have limited success: in Dallas, a 2011 pilot program fining recalcitrant jurors increased participation rates by no more than 2.[46] In other jurisdictions, punitive enforcement may be effective in getting jurors to court, but with a backlash. Montgomery County in Pennsylvania has a harsh summons enforcement policy of jailing nonresponsive jurors for up to three days or fining them up to $500, and most residents do appear in court when summoned. On the other hand, Robert Boatright found that the Montgomery residents were "the most hostile

towards jury service of the citizens of any of the jurisdictions" that his study examined. (The other jurisdictions were in Maricopa County, Arizona; King County, Washington; and the Western District of Tennessee.)[47] Richard Seltzer also cautioned against punishing unresponsive jurors, predicting that a heavy-handed approach "might create unacceptable resentment in the district."[48] One seeming exception to this negative trend would be El Paso county, which had success with implementing consequences for juror non-response; however, El Paso judges also attribute their high juror yield to high pay, given that they saw juror yield double after raising direct pay for jurors from $6 to $40 per day.[49] More pertinent, if Fukurai, Seltzer, Boatright, and others implicated in the first section of this paper are correct that many people are financially *unable* to serve, as opposed to being simply *unwilling*, dragging nonresponsive jurors to court might decrease the nonresponse rate, but this would only result in increasing the excuse rate. This consequence seems especially plausible since Boatright found that most nonresponsive jurors could not afford to serve and were simply unaware of how to request an excuse or deferral.[50] In fact, financially punishing people who are financially unable to serve on juries would have the cruel irony of exacerbating the economic struggles faced by low-income jurors while furthering their lack of participation on juries. Thus, any truly effective reform package must address the underlying barriers to juror participation.

The most effective and readiest solution would be universal paid jury duty leave. The financial burden on employers, especially large employers, should be minimal: unlike other benefits such as sick leave and vacation days, which most employees would use every year, jury service is a comparative rarity. Paid jury duty leave might be an occasional expense for a company as a whole, but it would make a crucial difference in any individual employee's ability to serve. Probably due to low government pay, the importance of employer compensation in determining the composition of a jury is critical. Fukurai, et al., who found that economic hardship excuses were pivotal in shaping a jury, surveyed over a thousand jurors and potential jurors to gain a better picture of what factors influenced requests for this type of excuse. They concluded, "We have clear and consistent evidence that the company policy on jury compensation is the single most important determinant of requesting an economic excuse."[51] Fukurai, et al. examined a number of factors related to requesting an economic excuse, including age, gender, race, English proficiency, education, employment status, income, firm size, marital status, and employer compensation, to see which factors best predicted an individual's probability of requesting an economic excuse. Ultimately, they found that "compensation had the greatest effect on the economic excuse…."[52] Thus, reformers should prioritize making paid jury leave universally accessible.

Such legislative mandates are possible. In fact, legislatures from seven states and the District of Columbia require employers to provide fully paid leave for jury duty: Alabama, Colorado, Connecticut, Georgia, Massachusetts, Nebraska, and Tennessee.[53] Additionally, although New York does not require employers to continue paying a juror's full salary, employers must provide $40 per day for the first three days of jury service.[54] These statutes vary in how many days of paid leave they require the employer to provide: Connecticut, for example,

requires employers to provide the regular salary only for the first five days of the trial,[55] while Alabama and Nebraska require employers to provide unlimited paid time off.[56] Employers in Massachusetts who neglect to compensate for jury duty can be liable for triple the withheld wages.[57] This variation shows that mandatory jury leave policies need not be an all-or-nothing issue; legislatures that worry about causing an excessive burden to employers can adopt a softer version of jury leave laws, like those in New York or Connecticut. On the other hand, even in some states that do require a version of jury leave, there can still be room for further reform toward the most robust versions of these policies. Enacting such policies nationwide would help level the current disparity around who can afford to take time off for jury duty.

Although a substantial step forward, such statutes do not capture all potential jurors who might face economic burdens, including students, unemployed people, retired people, part-time workers (who are often ineligible for benefits), self-employed people, and employees of small businesses (which are typically exempted from paid jury leave statutes). In order to truly make jury service accessible to all citizens, direct pay from courts should be raised to a living wage. Moreover, a national survey by the Center for Jury Studies at the National Center for State Courts (NCSC) found a modest but visible effect by comparing current levels of pay from states: states which paid jurors above the national average had a lower rate of economic excuses compared to states which paid jurors below the national average.[58] However, such reforms need to be widely publicized to have an impact. A 2008 experiment authorized by the Washington State Legislature which temporarily increased pay from $10 per day to $60 per day in a handful of counties found no increase in juror yield; a follow-up study revealed that "only 1 out of every 12 persons receiving summonses but not meeting their obligations was aware that juror pay had been raised to $60 per day."[59] If prospective jurors are aware that they will be fairly compensated, a more representative jury can be created.

The path forward to increase jury pay would require both state and federal action. Congress controls juror pay for jurors in the federal court system, while juror pay for state courts is determined by each individual state.[60] Of course, all citizens are liable to be summoned for both federal and state jury duty, so reform is needed on both levels, although more urgently on the state level where, as discussed earlier, pay tends to be much lower. Although passing new jury compensation laws in all fifty states would be challenging, reformers can be encouraged by the non-partisan nature of this issue: the states which require employer compensation and which pay jurors more highly do not align with just one political party, but rather represent a relatively even split of Democratic and Republican dominance.

In addition to paying jurors a living wage, courts can also help alleviate other financial burdens associated with jury pay by offering reimbursement for other out-of-pocket expenses such as childcare or travel costs. According to the NCSC survey, over half of courts compensate, at least in some form, for travel expenses.[61] Moreover, a handful of jurisdictions provide some assistance with paying for childcare, including Minnesota (up to $50 per day),[62] Idaho ($3.15 per hour, per child),[63] and Massachusetts (up to $50 per day for retired or unemployed jurors).[64] Some jurisdictions are getting creative with funding to make jury reform a reality; last summer,

legislators from San Francisco championed a project called "Be the Jury" to establish a private philanthropic fund that would raise pay, for low-income jurors specifically, $100 per day.[65] Ideally, a combination of compensation from employers and direct support from the state should make jury service accessible for everyone.

Thus, the problem of juries which exclude low-income people is solvable; what is lacking is the political will to do so. Some areas may be motivated to make jury service more accessible because of unsustainably high administrative costs. Boatright noted that most jury reforms were undertaken in jurisdictions where jury yield had been especially low, concluding that "courts with the most difficulty attracting jurors have been the courts most willing to experiment with various changes aimed at attracting more citizens to jury service."[66] However, courts and legislators should also consider the implications for justice and democracy: a jury that excludes the unique perspectives of low-income people may produce biased results, unrepresentative juries may undermine public trust in courts, and the potential jurors themselves are deprived of a priceless opportunity to engage in democratic decision-making. Today, the economic barriers to jury service have realized the Supreme Court's fear, in *Thiel v South Pacific Co.*, that excluding low-income jurors "would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged."[67] America's continued tolerance of unrepresentative juries undermines democratic rhetoric that all voices matter. Thus, perhaps it should not be surprising that Boatright found that summons nonrespondents were also more hesitant about whether they knew enough to serve effectively and whether they would be treated respectfully by the judge and lawyers.[68] After all, the design of the current system implies that low-income voices are not needed or perhaps even wanted in the jury box. Until America is prepared to invest in representative juries, justice will not be achieved.

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In a Time of Crisis: Massachusetts Eviction Courts During COVID-19

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Abstract

During the COVID-19 pandemic, federal and state governments in the United States implemented temporary eviction moratoriums and emergency rental relief programs to offer assistance to tenants. However, these policies were inadequate to solve the problem of housing instability that had been exacerbated by the pandemic. This article draws on public eviction records by using the method of quantitative content analysis to examine the legal impact of eviction moratoriums and the distribution of emergency rental aid under the COVID-19 policies on eviction court outcomes. Given that the process of eviction happens at a local trial court level, the article focuses on the legal eviction procedure in Massachusetts. Building on the Marxist theory of law, this study examines potential struggles tenants may face as a result of eviction cases despite the merits of pro-tenant housing policies.

I. Introduction

Housing precarity has been a longstanding issue in the United States. Between 2000 and 2018, 69.7 million eviction cases were filed nationally with around 2.7 million households threatened with eviction each year.[1] In relation to the poverty debate, eviction has deeply affected low-income families and communities of color. Members of these families and communities are forced to the bottom of the rental market, not only due to unaffordable rent and utility costs, but also because once they are evicted, these records negatively affect their subsequent housing applications as many landlords reject tenants with an eviction history.[2] Moreover, even after the enactment of the Fair Housing Amendments Act in 1988, housing discrimination has remained an issue because of weak enforcement mechanisms.[3] Studies show that statistically, poor Black and Hispanic renters, particularly women, are more likely to be evicted compared to white renters.[4] Ultimately, as Matthew Desmond's *Evicted* concludes, eviction triggers and institutionalizes urban poverty by restraining economic mobility. Additionally, apart from housing limitations, the experience of eviction contributes to a higher risk of mental and physical health, especially among young adults and urban mothers.[5]

With the outbreak of COVID-19 and its accompanying economic recession, the problem of homelessness was aggravated, evoking severe health concerns. As a remedy, both federal and state governments implemented legislation halting evictions to decrease the rate of coronavirus transmissions.[6] To further help with affordable housing during the economic recovery, emergency rental relief programs were funded. But when the eviction moratorium ended and an unprecedented number of people began seeking rental assistance, these programs were revealed to be immaturely constructed and unable to solve the housing crisis.

My research focuses on whether COVID-19 has impacted the overall court judgments of nonpayment of rent eviction cases. (Other causes of eviction, such as violation of lease, were not analyzed in this study). As housing law and local practices are different across the United States, this paper only deals with data from Massachusetts. There is currently a low volume of conclusive quantitative data for eviction court outcomes across the nation due to the locality and complexity of the eviction process.[7] This study adds to the existing literature by bringing the influence of coronavirus into the conversation.

In the literature review section, I establish a conflict theoretical framework to understand the relationship between class structure and the dysfunction of the housing court with a discussion of how poor tenants are subordinated and exploited throughout their eviction trial in practice. Then, I summarize both federal and Massachusetts housing policies in response to COVID-19. Based on previous studies and the conflict paradigm, my hypothesis is that COVID-19 housing policies do not have a significant impact on eviction case outcomes; in other words, judgment is uniformly ruled for the landlords. I collected data by employing content analysis of public court records over the course of November 2019, March 2020, and December 2020. The research findings focus on the characteristics of the court cases each month under the influence of eviction moratoriums and rental assistance. In my analysis, I further discuss how conflict theory supports the results and the limitations of the conflict framework. Overall, this study

suggests that, although results contradict my initial hypothesis regarding an increase in dismissed cases and a decrease in cases that were ruled in favor of the landlords, stronger nationwide housing policies and funding programs are necessary to support both the tenants and the landlords.

II. Eviction: A Conflict Perspective

As formalized institutions governed by fixed rules, courts are often believed to settle legal disputes like eviction with legal professionals representing the interests of both parties.[8] However, in many housing courts, almost all landlords have lawyers while tenants do not.[9] Marxist conflict theory offers a theoretical framework for understanding the disparity in eviction cases and the dysfunction of housing courts by analyzing the relationship between law, state, and class. From the traditional Marxist base-superstructure metaphor, a cultural superstructure arises out of the economic relations taking place in the base. Both state and law are parts of the superstructure. Although law has never been the center of inquiry in the original writings of Marx or Engels, it is described as an ideology reflecting the interests of the bourgeoisie in the broader superstructure.[10] There has been debate over whether law is autonomous from the base.[11] But as Isaac Balbus contended, a certain level of autonomy reinforces law's ideological role of masking real systems of domination and exploitation in capitalist social relations.[12] Unlike law, the state is explicitly defined by Marx and Engels as "[nothing] but a committee for managing the common affairs of the whole bourgeoisie."[13] By legitimizing the class structure, the superstructure emphasizes property value and private ownership. In the context of eviction court, this suggests that as opposed to ensuring equal access to justice, its main operation premise is built upon the entitlement of landlords, the property owners.[14]

Later theories connected to Marx further stress the commodity character of housing displayed in social and legal settings. According to critical urban theory, it is impossible for cities to be constructed to serve people's basic needs under the capitalist mode of production in which cities are driven by profits, and as such fall into the endless cycle of commodification and recommodification.[15] In this circumstance, housing is not acknowledged as a right. Instead, it has emerged as a commodity, or consumer good, that is free for exchange at the social and political creation of markets. Inspired by the first volume of Marx's *Capital*, Evgeny Pashukanis indicated an essential homology between commodity form and legal form in his commodity-exchange theory.[16] The logic of commodity form is the same as that of the legal form, where individuals essentially become commodities that appear to be equal though they are inherently different. Specifically speaking, a house has an initial use-value in its construction phase that incorporates an unequal amount of labor. Then, in the rental market, its use-value changes to an exchange-value in the form of a commodity, which can be translated quantitatively into the universal equivalent of money—in this case, rent—despite the qualitative difference in each house's use-value. Similarly, in the transaction process, the landlords and tenants are transformed into equal juridical persons under abstract law, with the presupposition that both are free and capable of exchanging commodities for their own benefit.[17] However, like the commodity form, the legal form eliminates distinct social backgrounds of persons under the

guise of formal equality. With the obscurity of the parties' inherent class differences, social needs are not a topic of discussion in housing courts.

The core of Marxism is its condemnation of capitalism due to its embedded inequality and poverty. The very nature of capitalism yields an unequal income distribution because of the difference in private ownership of capital.[18] For example, in tribal societies with simple economies and no distinct class structure, courts are organized institutions for resolving conflicts; judges act as mediators and restore social harmony by bringing litigants back together through a lawsuit. However, in complex Western societies, the role of the courts seems to be adjudicating private property ownership, not mediating the relationship between landlords and tenants.[19] As a result, the wealthier group of people has a higher vertical status and thus more advantages in court than the poor.[20] As Barbara Bezdek proposed, eviction court "is a theater of class conflict in which businesses and their hirelings constitute a class of professional claimants exercising significant advantages over the individual defendants whom they bring before the court, who are poor and poorly situated."[21] Thus, in the context of conflict theory, the housing court can be seen as an instrument for landlords to justify their eviction of tenants.

III. Eviction in Practice

Inferred from the Marxist theory, political actors in the legal superstructure sustain the class structure by disciplining the poor according to market expectations through the restriction of available aid, including legal services.[22] Judicial actors reinforce this structure by controlling civil legal counsel. In the ruling of *Lassiter v Department of Social Services*,[23] the Supreme Court interpreted the due process clause in civil cases as holding that the appointment of counsel is required only if there proves to be a potential deprivation of physical liberty from an indigent litigant. The Court also cited three factors from *Mathews v Eldridge*[24] which trial courts must evaluate when making that determination: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." By applying this standard in a restrictive fashion, courts, including lower housing courts, rarely appoint counsel for litigants, even though the presence of an attorney can have a considerable impact on the outcome of eviction cases, making it less likely for tenants to be evicted.[25] Similar to the design of welfare programs that cater to a limited number of recipients, although poor tenants can seek help from legal services, they may not satisfy the eligibility criteria posed by state or federal funding sources. Even if they are eligible, they often receive a disparate level of services from those who can afford a full-representation lawyer because of the scarcity of resources.[26] In the face of the problem of inadequate access, it is thus unsurprising to see unrepresented, poor litigants flooding courts without adequate legal aid.[27]

During court proceedings, because both litigants are deemed to be equally reasonable actors in the context of commodity-exchange theory, tenants who have 'willingly chosen' to appear without an attorney are treated as outsiders. Permeated by class bias, courtroom personnel exhibit hostility towards unrepresented poor tenants.[28] In a study observing Baltimore's rent court, Bezdek found that judges often interrupt or even silence them during their hearings.[29] Even when judges listen to tenants' explanations, they frequently view these stories as irrelevant

and order judgments for the landlords. As social relations between persons are distorted and replaced by material relations, courtroom personnel are solely concerned with payment or nonpayment of the rent.[30] Qualitative data reflects that judges, clerks, and landlords—the power-holding group in the room—describe the eviction verdict as a simplistic judgment that decides who gets possession.[31] Ultimately, housing courts perform as assembly lines, or eviction machines, occupied with evicting tenants without considering their stance.[32] Driven by docket control, "the court is not in the social work business."[33] In summary, based on the literature review and conflict theory, grounded in capitalist ideals, housing courts are hostile to disadvantaged tenants.

IV. Housing Policies During COVID-19 Pandemic

The COVID-19 pandemic in the United States caused an economic crisis which exacerbated financial hardships and housing instability, predominantly affecting low-income populations. According to survey data released by the U.S. Bureau of Labor Statistics, from March to April 2020, the unemployment rate rose from 4.4 to 14.7 percent. While both earnings and employment were gradually recovering by mid-2020, they were, nonetheless, much lower compared to the beginning of the year.[34] Data collected by the U.S. Census Bureau between late April and early May of 2020 revealed that excluding those whose rent was deferred or who did not report, approximately one in seven renters, or 10.8 million adults, living in a renter-occupied housing unit were behind in paying their rent, of which 42 percent had a household income less than $25 thousand.[35] In another survey, nearly half of the respondents indicated no confidence in making the next month's payment. As depicted in research by Benfer et al., due to a lack of legal and financial support, one-fourth of the households in poverty nationally were already spending over 70 percent of their income on rent before the pandemic.[36] The sudden economic recession, along with the pre-existing issue of unaffordable housing prices, led to an increase in eviction and housing displacement. The resulting homelessness and overcrowding impeded people's ability to comply with the Centers for Disease Control and Prevention's (CDC) pandemic protocols (i.e., social distancing, self-quarantine, etc.), and eventually exacerbated coronavirus transmission and mortality.

Recognizing this disruptive casual effect, Congress passed policies to prevent eviction. Section 4024 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act established a 120-day eviction moratorium from March 27 to July 24, 2020, prohibiting landlords from evicting tenants because of nonpayment of rent. Nevertheless, this moratorium only applied to approximately less than half of rental families, although with some variation among states.[37] Although on September 4, 2020 the CDC issued a new eviction moratorium, citing the need to control the spread of COVID-19, this moratorium contained similar limitations as the previous one. Additionally, in order to invoke the CDC's order, renters must have met the income requirement and have the knowledge to file a declaration to the property owners by themselves. After being extended four times, the CDC order was eventually nullified on August 26, 2021 after the Supreme Court's ruling in *Alabama Association of Realtors v United States Department of Health*,[38] stating that "CDC's moratorium exceeded its statutory authority." For all temporary

eviction moratoriums, the biggest challenge for low-income households was, presumably, that they did not stop the accumulation of housing-related debt. When the latest moratorium expired, tenants who previously owed rent were still at risk of eviction.[39]

V. Eviction in Massachusetts

Apart from eviction moratoriums, the U.S. Department of Treasury allocated funds for Emergency Rental Assistance (ERA) to help struggling households afford rent. The funds were issued directly to states, and the amount varied. Since the eviction process is also dependent on state law and local practices, this study will specifically examine the eviction situation in Massachusetts. As Massachusetts has comparatively more effective policies in terms of the total households served and funds distributed, the results of the study may reflect common issues faced by other states nationally.[40] The next paragraphs will provide contextual background on the legal eviction process in Massachusetts and the state's housing policies during COVID-19.

In Massachusetts, the eviction process is known as the "summary process." Notably, it is illegal for landlords to evict tenants without a court order, thus prohibiting informal forcible evictions. The proper steps of eviction due to nonpayment of rent involve first serving a "14-Day Notice to Quit" to tenants, which must state the reason for eviction and the tenants' right to stop the process by paying back full rent. Next, landlords must serve the summons and complaints against the tenant seven to thirty days before filing the summary process paperwork with the court by the sheriff. The hearing is held normally ten to sixteen days after the case is entered. If tenants want to file an answer to the complaint, they must do so with the clerk within a week of the entry date. The answer deadline is also the deadline for them to pay owed rent to avoid eviction. Attending a hearing is crucial for tenants; if they fail to appear, the judge will rule uniformly in favor of landlords, which means that the case defaults. When tenants lose at trial, the court will issue a writ of execution that becomes effective ten days after the judgment is entered, by which point the tenant has to have moved out. If tenants do not vacate the rental unit within that time frame, they will be forcibly removed by law enforcement. The process typically lasts one to three months.[41]

In response to the outbreak of COVID-19, on the one hand, Massachusetts held the strongest eviction ban nationwide.[42] Governor Charlie Baker invested $20 million in creating legislation known as the Eviction and Mortgage Foreclosure Moratorium (EMFM) Act, which effectively shut down most housing courts—except for emergency cases—when the Act was in effect.[43] The EMFM Act was passed on April 20 and was extended to October 17, 2020.[44] Its eviction ban component not only lasted longer than its federal counterpart, but also provided more protections compared to the CDC's ban. Even now that the ban has expired, nonpayment-of-rent eviction cases can be postponed if a tenant experiencing a pandemic-driven financial hardship proves a pending application for short-term emergency rental relief.[45] Once the application is approved or denied, the proceeding continues.[46]

However, these policies were still insufficient to support the large pool of tenants who applied for funds. Shortly after the EMFM Act eviction moratorium ended, the new case filings for nonpayment of rent reached 2,380 in November and 3,063 in December.[47] Within twelve

months, the number reached nearly fifteen thousand.[48] Rural counties like Bristol and Worcester piled up far more new cases than urban or suburban locales like Suffolk or Middlesex.[49] Massachusetts implemented roughly $843 million to its local ERA programs after receiving two waves of federal ERA funding, and had disbursed $650 million as of July 2022.[50] Nevertheless, only 48 percent of the ERA applications were approved, suggesting that most renters were at risk of losing their homes.[51] Despite the complexity of the application process, because state and local governments had never needed a program to handle this level of demand, waiting periods could be long and excruciating for the tenants, as well as unfair for the landlords.[52] Additionally, rent prices surged as they had been unprecedentedly low at the peak of COVID-19, which made it more difficult for people to keep up with their rent payments.[53]

Given the challenging circumstances faced by low-income tenants in Massachusetts and the limitations of federal and state COVID-19 eviction policies established by the CARES Act and EMFM Act, both policies align with the Marxist theory of law and the concept of disciplining the poor. While they provided some rental relief, they were unable to meet every need, and the low-income population continued to struggle with the affordable housing crisis. The problem of inadequate access to justice or legal counseling was also exacerbated as a result of the pandemic, with a rising number of people seeking out limited available legal resources.[54] Existing studies on eviction have yet to incorporate the topic of COVID-19, and public records only provide quantitative data on case filings.[55] Thus, the question of how COVID-19 policies impacted the outcome of eviction cases remains. Based on the conflict theoretical framework and previous court observations, I hypothesize that even during the COVID-19 pandemic, eviction cases are substantially ruled in favor of the landlords, though the duration of the summary process may last longer than pre-pandemic time.

VI. Methods

To answer my research question, I examined the impact of the independent variable of COVID-19 housing policies, like eviction moratoriums or rental aid, on the dependent variable of court judgments. I employed content analysis to review and code the outcomes of summary process filings from six different court divisions in Massachusetts within the selected three months. The information was collected directly from *Masscourts*, a system that offers e-access to all trial court cases. By using purposive sampling, I selected cases based on five general elements: (1) type of housing, (2) initiating action, (3) filing date, (4) judgment methods, and (5) entry location. First, I examined only private (rather than public or subsidized) housing rented out by individual landlords, as focusing on private housing isolates the impact of state interventions. Also, as demonstrated in financial ability and interest, private landlords (individuals) and corporations (property management firms) are intrinsically different. Second, I narrowed down the type of initiating action. Landlords (plaintiffs) can file an eviction case for nonpayment of rent, cause, no-fault, foreclosure, or other reasons; this study solely focused on the non-payment cause to capture the market dynamics of capitalism. Third, when determining the periods from which I drew the cases, I considered two factors: the timeframe of COVID-19, and the state's eviction moratorium established by the EMFM Act. The three months that I chose

are November 2019 (control group), the month before the identification of the first COVID-19 case; March 2020, the month before the enactment of the eviction moratorium; and December 2020, the second month after the eviction moratorium ended and when the number of case filings surged. In addition, the entry dates of the cases were spread throughout the month to avoid front-loading or back-loading. Fourth, cases settled in an agreement during housing specialist mediation, or Alternative Dispute Resolution, were filtered, since my focus is on the court's final judgment. Finally, for entry location, there are six court divisions in MA: Central, Eastern, Metro South, Northeast, Southeast, and Western. The Department of Research and Planning at Massachusetts Trial Court provides statistics on summary process case filings arranged by action type, county, and calendar year (CY). I tracked which housing court division each county belongs to and summed up the volume of cases each division received in the previously determined months. The number of cases chosen was proportional to the total number calculated. However, due to a lack of relevant cases, I had to reduce the cases drawn from Eastern (for all three months) and Metro South (for March 2020) Housing Courts. In summary, a total of 104 cases were sampled for November 2019, 64 for March 2020, and 133 for December 2020.

The cases were coded into three categories—"judgment for landlord," "judgment for tenant," or "dismissal"—and recorded in Excel. Methods for ruling in favor of the landlord included Agreement, Finding, and Default. It is important to note that Agreement for Judgment is different from Agreement reached during an Alternative Dispute Resolution. Although both indicate settlement through mediation or negotiation between the landlords and the tenants, the former is an official court judgment that can hurt the tenant's credit rating and future housing applications.[56] As my research project is interested in the outcome of case judgments, I only selected cases with a final judgment. Reasons for dismissal include the plaintiff's failure to appear consecutively, the plaintiff's submission of a notice of voluntary dismissal, and court action. Yet, if only the defendant failed to appear, the case defers to a default judgment. After collecting all the data, the percentages of each coding category were calculated for each of the three months. Additionally, I recorded whether a party had legal representation (including limited appearance/legal aid), and the average duration of the case.

VII. Findings

November 2019. Out of the 104 cases collected, ninety-two (88.46 percent) were ruled in favor of the plaintiff; one (0.96 percent) was ruled in favor of the defendant; and eleven (10.58 percent) were dismissed. Cases selected from Metro South and Eastern Housing Courts were all ruled uniformly for the landlords. Moreover, as many as 90 percent of cases from Southeast Housing Court were judged for the landlords as well. These three housing courts serve four of the most urban counties in Massachusetts as determined by land area: Suffolk, Norfolk, Middlesex, and Barnstable.[57] Urban tracts were observed to have higher eviction rates than their suburban counterparts because of their socio-demographic and rental market differences.[58] Among the judgments for landlords, forty-three (46.74 percent) defaulted, forty-three (46.74 percent) resolved in an agreement, and six (6.52 percent) were settled by court findings. The

majority (90.91 percent) of dismissals were initiated by the plaintiff. On average, it took 26.5 days for a case to be settled in a judgment.

March 2020. A total of sixty-four cases were examined, where twenty-seven (42.19 percent) were judged for plaintiff and thirty-seven (57.81 percent) ended in a dismissal. On one hand, the frequency of the methods used to reach judgment for landlords was not significantly altered compared to November 2019. Eleven cases (40.74 percent) defaulted, thirteen (48.15 percent) were mediated, and three (11.11 percent) were settled by findings. On the other hand, unlike the dismissed cases in November 2019, 90.91 percent of which were resolved by plaintiff's voluntary dismissal, 27.03 percent of cases in March 2020 were dismissed due to both parties' failure to appear. Because of the State of Emergency surrounding the COVID-19 virus, most of the court orders were suspended, and a final judgment decision took approximately 280.5 days. Thus, it is possible that either the sudden switch to a virtual court session made it difficult for both parties to attend, or the rent issue dissolved over a longer period of time.

Twenty-four cases contained at least one submission of Plaintiff's Affidavit Concerning CDC Order. This Affidavit certifies whether the plaintiff has received a statement from the defendant about the CDC Order, which temporarily stops the eviction process due to the pandemic. Cases that included an Affidavit lasted on average 307.1 days, 42.6 days longer than cases without a CDC order submission. Therefore, one possible motivation for the tenant to file a declaration would be to extend the summary process in order to look for other available housing or gather rent in that time. In terms of the judgment result, the CDC order variable did not make cases more likely to be dismissed. Instead, 91.67 percent of them were ruled in favor of the landlords, and only 8.33 percent were dismissed.

December 2020. Among the 133 sampled cases, seventy-eight (58.65 percent) were ruled for the plaintiff, zero were ruled for the defendant, and fifty-five (41.35 percent) were dismissed. In contrast to November 2019 and March 2020, the percentage of judgment by agreement dropped to 32.05 percent, while judgment by finding increased to 17.95 percent and judgment by default also rose to 50 percent. Similar to the pre-pandemic months, 87.5 percent of the selected cases from the Southeast Housing Court resulted in a ruling for the landlords, though that proportion fell to around 66.7 percent in March 2020. Meanwhile, that percentage was reduced substantially in the Eastern Housing Court to 45.5 percent. Dismissal due to neither party's appearance decreased, but was still 21.82 percent. The time taken to settle a case was longer than in November 2019, the control group, with an average of 151.8 days.

By December 2020, and although the Massachusetts Trial Court required every landlord in a nonpayment-of-rent eviction case to file an Affidavit with regard to the CDC eviction moratorium order, the tenant's filing of a rental assistance application emerged as an additional independent variable. While it was unknown whether their applications were successfully approved, nineteen out of the twenty-eight (67.86 percent) cases with a pending application were dismissed, and the other nine cases (32.14 percent) were judged for the landlords. Furthermore, with a pending application, cases took an average of 239.3 days to reach a judgment, which is 109.9 days longer than those without it.

Like prior research has found of judges at Georgia eviction courts, those in Massachusetts rarely rule a possession in favor of the tenants.[59] As a result, case dismissal is often the tenant's goal. Although a ruling in favor of landlords does not always result in execution,[60] the pure threat of eviction negatively affects mental (e.g., anxiety) and physical (e.g., high blood pressure) health, suggesting that eviction has far-reaching consequences beyond losing a place to live.[61] In each of the three months surveyed, around half of the cases with a judgment for the landlords found the defendant in default. Evidence from previous legal studies suggests that the likelihood of a default positively correlates to case difficulty, community-level concentration of poverty, and a lack of legal counsel.[62]

The data demonstrate a positive correlation between judgment duration and dismissal rate. Despite the pause in response to CDC orders and rental assistance applications, court services might have experienced further delays as they shifted to remote operations during the pandemic. On one hand, taking measures that can slow the summary process benefits the tenants by providing them opportunities to pay owed rent or seek alternative housing arrangements, allowing them to avoid potential homelessness and incentivizing landlords in the low-income rental market to mediate with tenants instead of relying on judicial means.[63] To address tenant concerns about landlords refusing to participate in rental assistance programs, discrimination lawsuits are possible if landlords deny rental aid or fail to complete their portion of the application.[64] However, filing relevant forms or applying for rental relief is a long and difficult process for tenants, especially in states that have stringent eligibility criteria. The slow disbursement process further reveals greater institutional deficiency on a macro level.[65]

Although no causal relationship can be drawn regarding the effects of legal representation on case outcome from this study, the percentage of legal representation for the defendant increased from November 2019 to March 2020 by 7.46 percent, and from November 2019 to December 2020 by 7.85 percent. By December 2020, defendants more frequently obtained legal assistance from organizations such as Greater Boston Legal Services and Community Legal Aid. However, there remained a substantial gap between plaintiff and defendant representation in all three months. This result corresponds to the patterns observed by previous studies on inadequate access to justice in the form of representation. For example, within the Housing Court in New York, only an estimated five to ten percent of the tenants are represented by counsel.[66]

In summary of the above quantitative data, the results contradict my hypothesis with a decrease in the percentage of cases judged for the landlords during the COVID-19 pandemic, accompanied by an increasing rate in legal counsel representation for the tenants. To protect tenants, eviction prevention in Massachusetts has burdened landlords to "give a tenant an eviction notice that includes information on available rental assistance, a copy of any emergency local, state, or federal protections for tenants, and notice that the tenant does not need to leave until a court orders."[67] The requirement for landlords to file a Plaintiff's Affidavit Concerning CDC Order in December 2020 may be a failsafe for the courts to ensure that they are complying with this policy. Apart from informing the tenants about their rights, statistics from the Department of Research and Planning at Massachusetts Trial Court revealed that as opposed to

the high volume of case filing, the rate of execution for nonpayment of rent eviction cases in housing courts dropped to 9.6 percent in December 2020, showing a decline from the forty percent in November 2019 and the 33.6 percent in March 2020.[68] These findings reflected an expanded availability of pro-tenant financial and legal aid during COVID-19.

However, the struggles that low-income renters continue to face must not be overlooked. First, notwithstanding the rise in tenants' legal counsel representation rate, attorney representation still fails to satisfy the vast needs. Second, although agreement was the most common method to reach a judgment for landlords over each of the three months, unless the defendant defaulted, suggesting the courts' preference for mediation, a formal court order could still damage a tenant's credit rating and constrain housing supply. Third, as soon as the housing courts reopened in October 2020, the rate of execution reached 200 percent, implying that previously piled-up cases were processed.,[69] Even regarding the discrepancy between the high eviction filing rate and low execution rate in December, Garboden and Rosen argued that landlords use serial filing as a means of threatening tenants with legal action in order to strategically maximize their revenue and avoid the costs of actual eviction.[70] As highlighted in Marxist theory, materiality distorts social relations in the market's logic.[71] Instead of a tenant-landlord relationship, it is more similar to a debtor-creditor relationship because of the power hierarchy between them.[72] Fourth, an overview of eviction moratoriums indicates that state governments did not have a uniform interpretation of the CARES Act or the CDC eviction bans, meaning that there was no standardized protection of tenants' rights on a national scale.[73] Pausing the summary process was also unhelpful in alleviating owed rent. Relating to the comment in Sudeall and Pasciuti's study, the decisive factor of nonpayment-of-rent eviction cases remains strictly payment or nonpayment, even when the courts disguise themselves as mediators.[74]

Finally, the review of the COVID-19 Rental Assistance Programs reveals the inefficiencies in distributing funds promptly. Even in states like Massachusetts, which had a relatively high number of served households, when encountering a large pool of applicants, it failed to meet around half of their needs. Challenges such as limited staff capacity and tracking down incomplete applications further prolonged candidates' waiting periods.[75] Frequent changes in eviction policies may also add confusion among the renters in terms of their rights and eligibility. Consequently, rental assistance is insufficient to address tenants' accumulated rental debts.[76] Following Marx's conclusion that the state ultimately serves the interest of the bourgeoisie, the essence of rental aid is to 'relieve' private property owners by ensuring they receive the financial compensation they deserve, rather than helping renters to secure a place to live. Overall, the power of the state in policymaking and fund distribution sustains a system of dominance, as discussed in the conflict theory.

VIII. Conclusion

This study contributes to existing literature on eviction and housing instability by investigating and analyzing the impact of COVID-19 housing policies on the outcomes of nonpayment of rent eviction cases in Massachusetts. The outbreak of the pandemic placed an

additional burden on low-income households; especially as such, my findings indicate that there must be more uniformity and clarity in federal and state housing policies and rental assistance programs. A permanent, efficient, and comprehensive fund distribution system that can handle a large pool of tenant applications is crucial to preventing homelessness and reducing rates of poverty, especially in times of crisis. In addition, these findings interrogate the role of the housing courts on a larger scale. Instead of functioning as eviction machines that punitively hurt tenants' credit ratings by imposing judgments, they could, and should, embrace a more restorative role aimed at resolving the conflicts in agreements, while mediating the broken relationship between landlords and tenants. Specifically, with the help of housing specialists, mediation should be a neutral process that empowers both parties without imposing institutional barriers to negotiation. Moreover, states should consider expanding the availability and promotion of pre-filing mediation consultations, which can save both parties time and reduce financial costs.[77] I conclude by noting that this study faces several constraints, the most prominent being that this study did not examine the degree to which COVID-19 influenced judges' opinions or led landlords to be more tolerant of unpaid rent. Future studies could focus on collecting qualitative data, such as interviewing judges from different housing court divisions to determine their rationale when making judgments.

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