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ARTICLES

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The Legal Lives of Mexican Americans: How the Law Communicates Otherness Through Landmark Legislation

Emily Maria Anaya

This study of five landmark court decisions seeks to increase awareness of the subtle and overt ways legal decisions impact the lives of Mexican Americans in the United States from the Mexican-American War of 1845 to the present. The American legal system has enshrined white supremacy into the codes we continue to follow today, and while most court cases addressing issues of the rights and protections of minorities in the U.S. may be decided fairly in accordance with American law, their foundation is rooted in oppression.

All Americans navigate their lives within the legal frameworks created for them, but the burden of awareness of its faults falls first on those the laws were written to subjugate rather than safeguard. The long-term effects of our laws, rather than simply their workings, must be studied closely by every variety of American persons in order to understand how our systems have crafted our realities and influenced our socioeconomic and political standings. The oppressive systems imposed against minorities in the United States did not emerge spontaneously nor do they occur in a vacuum—they lead to violence.

Introduction

The laws of our land were ideated, drafted, and written by a class of men who would decidedly benefit from their execution. Issues of land ownership, voting rights, and representation would never pose a systemic problem for rich white men in America.[1] This is not a contentious claim, and yet, the notion that our system of government and its laws could serve to uplift this class and put down the rest, in essence meaning that the United States of America was founded on inequality, ignites controversy. Among many other minority

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[1] Menand, L., *The Supreme Court case that enshrined white supremacy in law*. The New Yorker, (January 28, 2019), https://www.newyorker.com/magazine/2019/02/04/the-supreme-court-case-that-enshrined-white-supremacy-in-law

communities in the U.S., Mexican Americans have a unique history that has followed the population for centuries.

The "otherness" that sets Chicanos apart is rooted in racism; reinforced by xenophobia; and perpetuated by the social, political, and legal backdrop of the broader American landscape. The most visible consequences of this tradition of exclusion are reflected in the racist rhetoric Trump-era politicians use to identify themselves.[2] In this paper, I will explore the dark consequences of hate speech. As the most enduring and respected institutions in the land, American courts legitimize pre-existing notions of Mexican Americans as "other," especially as they set the precedent for subsequent arguments of legal issues pertaining to them.

In analyzing five landmark court cases involving Mexican Americans, I will present the argument that even legitimate rulings have had consequential and negative systemic influences on society's perception and treatment of Mexican Americans in the United States. Botiller v. Dominguez reveals the incipient historical decision that disenfranchised newly annexed Mexican Americans. Hernandez v. Texas illustrates a tradition of disparate treatment in court. San Antonio ISD v. Rodriguez reveals educational inequities as a result of property tax-based funding. Madrigal v. Quilligan shows the racial implications of reproductive rights violations. And Espinoza v. Farah Manufacturing Co. underscores the opportunistic nature of labor and employment systems. By analyzing each case in conversation with relevant historical issues and contemporary outcomes, a clearer image comes into view of how our legal system has constructed and marginalized Mexican American identity and sociopolitical standing.

I. Historical Beginnings and Land Ownership

Background

[2] Amber Phillips, *'Analysis | 'they're rapists.' president Trump's campaign launch speech two years later,* The Washington Post, (June 16, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/

Two rivers sparked the two-year war between the United States and Mexico, the Rio Grande and the Nueces.[3] Recently independent from Spain, the Mexican government argued that the Nueces River marked the frontier and was wary of America's offers to buy more Mexican land following the annexation of Texas in 1845. After the Mexican government refused his offer to buy New Mexico and California, U.S. President James K. Polk jumped at the first opportunity for invasion when Mexican troops crossed the Rio Grande and injured or killed 16 American soldiers, marking the beginning of the Mexican-American War. When the dust settled, the U.S. declared victory, delineating the Rio Grande River as the border between the United States and Mexico and annexing over 500,000 acres of Mexican land in the process. The stipulations of the annexation were outlined in the Treaty of Guadalupe Hidalgo, which officially ended the conflict and unofficially began another: determining what would become of the Mexicans ceded to the United States along with the land on which they lived and worked.

At the time of the treaty's signing in 1848, Mexican land ownership was informed by different cultural, historical, and political circumstances than American land ownership, so the translation was inherently inexact. The private property land grants issued to Mexicans by the Mexican government and Spain were "designed to reward military service," protect lands against invasions by indigenous tribes, and function as preservative efforts against foreign colonization while the nation sought to expand its territories following its independence from Spain.[4] American land grants and expansion were more prospective, individualistic, and economic in nature, driven by Manifest Destiny and the so-called "peculiar institution" of slavery.[5] Mexico, on the other hand, had already abolished slavery in 1829—

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[3] Encyclopædia Britannica, inc. (n.d.), *Mexican-American War*, Encyclopædia Britannica, (last updated March 23, 2023) https://www.britannica.com/event/Mexican-American-War

[4] Klein, C. A., *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, *26*(2), N.M. L. Rev., 201–255, (1996). (1996). https://doi.org/https://digitalrepository.unm.edu/nmlr/vol26/iss2/6/

[5] Encyclopædia Britannica, inc. (n.d.), *Mexican-American War*, Encyclopædia Britannica, (last updated March 23, 2023) https://www.britannica.com/event/Mexican-American-War

African slaves fled the United States via the Underground Railroad in both directions, seeking asylum in Mexico as well as Canada and the northern states.[6] Indeed, America was never a refuge for Brown and Black peoples, and the nation's economy was built upon subjugating them.

As a result of these differing implications of landownership between Mexico and the U.S., titles that were sufficient and valid under the Mexican government were not necessarily up to par with American standards, thus opening the door for rejection. Certainly, the two nations were in different places in their histories and had vastly different motivations for the acquisition and maintenance of their lands, so the transfer of land ownership had different implications for each of them.

With the transfer of jurisdiction over the annexed territory to the United States, Mexicans residing on the land with proper claims were immediately required to revalidate their land grants and no longer held legitimate ownership over the land they tilled and raised their families on. Table 1 describes one such instance of land grant revalidation being required of a Mexican titleholder through the California Land Claims Commission and the difficulties the requirement presented to defending Mexicans' rights to their lands. In setting the legal precedent that newly naturalized Mexican Americans needed to prove their entitlement to the land they already rightfully owned and occupied, the U.S. government commenced its subjugation of Chicanos. Their inherent deficit of privilege would be characteristic of the Mexican American existence in America for centuries to come.

Table 1
Botiller v. Dominguez | 130 U.S. 238 (1889)

Facts

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[6] Kohn, M., *South to freedom*, *HUMANITIES*, *34*(2), (2013) https://www.neh.gov/humanities/2013/marchapril/statement/south-freedom#:~:text=The%20Underground%20Railroad%20also%20led%20to%20Mexico.&text=The%20Underground%20Railroad%20also%20ran,before%20Abraham%20Lincoln's%20Emancipation%20Proclamation

Following the end of the Mexican-American War, Mexican citizens still lived on annexed lands. The California Land Claims Commission was established with the Act of Congress on March 3, 1851 to account for titles to plots of this newly acquired land. The Commission was tasked with validating private land claims in the state of California, which was part of the Mexican Cession, owned by Mexican citizens before the war. Some private landowners took decades to confirm their ownership with the Commission, one such being the defendant of this case, Dominga Dominguez, the owner of a plot of land called Rancho Las Virgenes. Dominguez sought to eject the Plaintiff, Brigido Botiller, from the ranch, but since he had never confirmed his claim to ownership with the Commission, the issue raised questions. The California Supreme Court decided that the Act of Congress that established the California Land Claims Commission was invalid and that the Commission lacked the jurisdiction to validate private land titles granted by the Mexican government prior to the Mexican American War and Treaty of Guadalupe Hidalgo. The case was sent to the United States Supreme Court.

Issues

Will land titles within a state that were granted to private landowners by a foreign government prior to the treaty that annexed that territory to the United States be considered valid without the presentation of a claim to a state's land claims commission for confirmation of its ownership by the owner?

Holding

No.

Rationale

If previous owners of land titles do not submit for confirmation from their state's land claims commission, the issue arises of new claims to the land being granted upon purchase and then later met with a prior claim that was never validated. Dominguez argued that the act which created the California Land Claims Commission was in violation of the Treaty of Guadalupe Hidalgo, but the United States government and the courts are responsible for enforcing U.S. statutes,

not the legality of Mexican-granted land titles. It was decided that there was no lack of constitutional power, treaty violation, or injustice involved in requiring that all claimants to annexed lands present their titles for verification by the commission and that no land titles in California would be considered valid if their owners do not follow these requirements.

Analysis

In keeping with the requirements of American land ownership precedent, the U.S. government subjected Mexican Americans to strict preconditions for their assimilation and continued land entitlement. Botiller v. Dominguez demonstrated a foundational legal moment regarding Mexican American separation from broader American society.[7] While the stringent standards surrounding the land titles may have been necessary in ensuring proper distribution and record-keeping of annexed lands, Botiller v. Dominguez undermines the Treaty of Guadalupe Hidalgo's language indicating that land rights would be "inviolably respected" (Oliver, 2017).[89] In writing the treaty, the U.S. government put forth a guise of cooperation with the Mexican government only to return to its opportunistic self-interest come time to follow through.

The United States government and the Court's imposed requirement of land claim validation did not subvert American legal precedent, but it did effectively introduce one of the first systems of disenfranchisement of Mexicans living in the United States. Americans were granted the opportunity to acquire lands to which Mexicans could not supply acceptable claims. The prohibitive requirements of travel, burden of proof, and language barrier effectively guaranteed that Mexican landowners like Brigido Botiller would fall victim to the legal technicalities of the newly imposed requirement. In addition, due to the nature of Mexican land ownership

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[7] Botiller v. Dominguez, 130 U.S. 238 (1889)

[8] *Id.*

[9] Oliver, P, What the Treaty of Guadalupe Hidalgo actually says. Race, Politics, Justice (July 12, 2017), https://www.ssc.wisc.edu/soc/racepoliticsjustice/2017/07/12/what-the-treaty-of-guadalupe-actually-says/.

before the Mexican Cession, many Mexican Americans with land titles lacked exact measurements and documentation of the specific boundaries of their land, which the U.S. government exploited as an opportunity to reject valid land ownership claims.[10] Certainly, incomplete or indiscernible limits of a land grant posed a challenge for the organized documentation of land ownership within annexed territories. However, these legitimate concerns led to the suffering of Mexican Americans who lost their rights to their land.

As with the later court cases, Table 1 exhibits the devastating outcomes of legal decisions made on the basis of precedent that would become generational and characteristic of the Mexican American experience in the U.S. From this moment forward, white Americans were implicitly given priority over land ownership as the authorities communicated that Mexican-owned property was theirs for the taking if they played the game correctly. Mexicans, on the other hand, were not even given the rulebook.

II. A Unique Relationship with the Justice System

Background

Nearly seventy years after Botiller, American society had transformed, and a new age of civil rights and the Chicano Movement were blossoming, building intersectional approaches to common issues of inequality.[11] While this was just a moment in time, the monumental changes that had already taken place were consequential to the burgeoning era of social justice. Since Mexican American integration into the U.S., the community has long been subjected to over-policing, over-incarceration, and systemic oppression by the justice system.[12] Lynching, segregation, and deportations colored the Mexican

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[10] Gates, P. W., Adjudication of Spanish-Mexican land claims in California. Huntington Library Quarterly 21(3), 213–236 (1958).

[11] Muñoz, Jr, C., The Chicano Movement: Mexican American History and the Struggle for Equality. Perspectives on Global Development and Technology 17(1/2), 31–52 (2018).

[12] Blakemore, E., The brutal history of Anti-Latino Discrimination in America (September 27, 2017), https://www.history.com/news/the-brutal-history-of-anti-latino-discrimination-in-america.

American experience prior to the Chicano and Civil Rights Movements.

The foot of the carceral state has long stood on the necks of Mexican Americans, with the excessive brutality of the Texas Rangers serving as a violent example. Hailed for their characteristically Texan rough-edged severity, the Rangers were formed to "eliminate" the Karankawa tribe in Texas.[13] Once they fulfilled this initial purpose, the Rangers turned their barbarism against Mexicans in Texas, justifying their targeted violence by using them as a scapegoat for any misfortune the state encountered. Their slaughter of hundreds of innocent Mexicans in Texas earned them the title "Los Diablos Tejanos," meaning the Texan Devils.

Police brutality is a visible threat to Mexican Americans, but there are many more. For example, the deeply entrenched disenfranchisement taking place in courtrooms is violent in its own right and is, at its core, undeniably racist. The complicated issue of Mexican racial classification in the United States requires context, with the Treaty of Guadalupe Hidalgo serving as its preamble. With the introduction of Mexicans into American society, it was not lost on white Americans that their Brown counterparts were clearly unlike them racially but, at the same time, were not the same as the African people they had enslaved.

Mexican ethnicity as we know it is unique and historically recent, born out of the unions of Indigenous Mexicans—either Aztecs, Mayans, or another tribe of peoples—with white Spanish settlers and the African slaves they brought. Mexican, rather than purely Indigenous Mexican ancestry, is "una mezcla," a mixture. Therefore, the United States census classifies them as white racially, but not ethnically.[14] Mexican Americans were considered racially fit for the rights white Americans enjoyed, but reality rarely played out that way. As a result, the Chicano and Civil Rights Movements ushered in an

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[13] Davies, D, 'Cult of glory' reveals the dark history of the Texas Rangers (June 8, 2020), https://www.npr.org/2020/06/08/871929844/cult-of-glory-reveals-the-dark-history-of-the-texas-rangers.

[14] Parker, K., et al., Chapter 7: The many dimensions of Hispanic racial identity. Pew Research Center's Social & Demographic Trends Project (May 10, 2022), https://www.pewresearch.org/social-trends/2015/06/11/chapter-7-the-many-dimensions-of-hispanic-racial-identity/

age of war against inequality. Cases like Hernandez v. Texas in Table 2 illuminated the subtleties of Mexican American disenfranchisement.[15]

Table 2
Hernandez v. Texas | 347 U.S. 475 (1954)

Facts

Pete Hernandez, an agricultural worker, was indicted for the murder of Joe Espinoza by an all-white grand jury in Jackson County, Texas. The defense claimed that Mexican Americans were barred from the jury commission, and that Hernandez was therefore not granted the right to trial by a jury of his peers. It had been over 25 years since a Mexican-American had served on a jury in Jackson County, which Hernandez claimed was proof of their discrimination by the court. The trial court denied the motions and Hernandez was found guilty of murder and sentenced to life in prison by an all-white jury. The Texas Court of Criminal Appeals affirmed this on the basis of Mexicans as legally-classified members of the white race and not a special class according to the Fourteenth Amendment. The court also argued that no Mexican-American had challenged this racial classification.

Issues

Is it a denial of the Fourteenth Amendment equal protection clause to try a defendant of a particular racial or ethnic category before a jury that has excluded all persons of that classification because of their race or ethnicity?

Holding

Yes.

Rationale

The Supreme Court held that the Fourteenth Amendment protects those beyond the two racial classes of Black or white,

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[15] Hernandez v. Texas, 347 U.S. 475 (1954)

extending to other racial and ethnic groups with established communities. Mexican-Americans are thus protected by the Fourteenth Amendment equal protection clause, especially with consideration of the facts that Jackson County has segregated bathrooms for Mexicans and excludes them from service on a jury, making them a special class.

Analysis

Mexican Americans were established to be a "special class" of American citizens. While this distinction could help protect them from the misrepresentation Hernandez faced, the Court's rationale as described in Table 2 set the precedent that Mexican Americans are a separate group despite their racial classification as white. The difference in and of itself is not the threat, but the legal demarcation of Mexican Americans as "other" would influence their treatment by the rest of American society, which was once and for all officially granted permission to set them apart.

\While Mexican American inclusion into the protections of the Fourteenth Amendment would indeed serve them with greater legal protections as a special class, the disparity between racial classification and ethnic separation presents social implications that are more ambiguous than simply 'good' or 'bad.' Today, Mexican Americans and the broader Latino community face disproportionate incarceration rates to the size of their total population. However, the data is subject to misrepresentation depending on how carceral institutions choose to classify their records. Since Latinos and Mexican Americans are racially classified as white, and "only 15 states reported ethnicity" in arrest records surveyed by the Urban Institute, the available data on Latino and Mexican American criminal justice is believed to be more distorted than widely assumed ("Lack of Data on Latinos"). Without accurate records indicating Latino representation in prisons, arrests, and parole, the extent of the population's over-policing remains unknown.

Some relationships with the criminal justice system are known to be unique to Mexican Americans, or at least, characteristic of their experience in American society. Immigration and Customs Enforcement (ICE), known colloquially as "la migra", apprehended 851,508 migrants at the U.S.-Mexico border in 2019, most of whom

were traveling in family units.[16] The 287(g) program empowers local law enforcement agencies to "carry out certain duties normally reserved for federal ICE agents," thereby significantly increasing the amount of patrol taking place for undocumented immigrants and the opportunities for abuse, which the ACLU reports to be a noteworthy issue.[17] With predatory practices like 287(g) in place, Mexican Americans are much more likely to experience arrest and detention under the assumption of their unlawful residency in the U.S. The watchful eye of every law enforcement officer is a threat to Mexican Americans and indeed, their safety as they constantly face the possibility of incarceration or deportation.

III. Systemic Educational Inequities

Background

As a result of their continued disenfranchisement, Mexican Americans and Hispanics earn lower incomes on average and sit at the bottom of the socioeconomic totem pole according to reports by Pew Research Center (Patten, 2016). At the same time, public schools rely on a combination of state funds and local property taxes in order to serve their students ("Public School Funding"). As a result, public schools in majority-Mexican American communities receive fewer funds from the property taxes collected from surrounding inhabitants of the school district. Fewer funds lead to fewer resources and a less effective education. As a result, undereducated children end up with fewer job prospects when they are adults and the cycle of poverty continues if not interrupted by some extenuating circumstance.

Before Brown v. Board of Education, which ended segregation in public schools in the United States, Mexican American children faced the same "separate but equal" treatment in education as African

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[16] Gramlich, J, How border apprehensions, ice arrests and deportations have changed under trump (September 8, 2020), https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump/.

[17] Berlin, K., Ice program foments abuse, hatred, and fear - and makes us all less safe: News & commentary. American Civil Liberties Union (June 21, 2022), https://www.aclu.org/news/immigrants-rights/ice-program-foments-abuse-hatred-and-fear-and-makes-us-all-less-safe.

American children. Mexican-only schools, the prohibition of Spanish speaking in many establishments, and "no dogs or Mexicans" signposts were facts of life (Blakemore, 2018). The delineation of Mexican Americans as separate from broader society excused such treatment. If the community were to ever escape the clutches of cyclical poverty and poor living and working conditions, its undoing necessitated class-action lawsuits against systemic oppression as is explored in Table 3.

Table 3
San Antonio ISD v. Rodriguez | 411 U.S. 1, 93 S.Ct. 1278, 35 L.Ed.2d 16 (1973)

Facts

On behalf of minority and lower socioeconomic students, Mexican American parents of students in Edgewood ISD brought a class action lawsuit against San Antonio ISD. In the late 1940s, the Texas legislature enacted the Texas Minimum Foundation School Program in an effort to mitigate the inequality of resources granted to school districts on the basis of local property taxes. Since the property taxes in Rodriguez's district were significantly lower than those in other districts, the pupils in the San Antonio ISD were given fewer learning resources. The plaintiff argued that the disparity in public education funding and, as a result, quality of education, violated their rights under the Fourteenth Amendment Equal Protection Clause. The district court held that the Texas funding plan was unconstitutional and San Antonio ISD appealed to the Supreme Court.

Issues

Does a system of financing public education based on property taxes that results in significant inequality of funding among school districts violate the Fourteenth Amendment right of low socioeconomic students?

Holding

No.

Rationale

The right to education is not explicitly mentioned within the text of the Constitution, so Rodriguez's claim that it is intrinsic to the First Amendment is rejected on that basis. The Texas funding system should not be subjected to strict scrutiny as it conforms to the Constitution, but rather evaluated by whether it bears a rational relationship to a legitimate state purpose- which it was found to effectively fulfill. The Court determined that no reasonable alternative to the tax-based system of funding would fulfill the responsibility to provide public education in Texas. The decision of the court is reversed.

Analysis

As Table 3 indicates, the rationale for the Court's decision upheld the property tax system of financing public education despite its long-term pitfalls for disenfranchised and low-income communities. Challenging longstanding systems such as funding for public education is certainly no small undertaking, but an examination of those systems and their effects is in high order. According to the U.S. Bureau of Labor Statistics, Americans identifying as Hispanic or Latino have the lowest rate of higher education attainment, with 21% earning a bachelor's degree or higher. Meanwhile, Latinos and Hispanics have the highest public school dropout rate, with 24% of their population leaving school before graduating (2019). These data indicate crippling barriers to higher-income jobs, and it all begins with access to, and continued, engagement with public education.

In the past year, affirmative action has been brought to the Supreme Court to challenge the program's lawfulness. While the specific complaints pertaining to the practice of affirmative action are indeed related to other minority experiences such as those of Asian students, it would be a mistake to conflate equitable support in the attainment of higher education for students facing barriers, such as those examined in Table 3, with unfair advantages (Qin, 2022). Students who grow up sabotaged by the systemic injustices explored in every section of this paper are not unfairly privileged by extra consideration of their circumstances. Yet, society seems prepared to

move forward and shed affirmative action, despite the data showing Latinos still not attaining higher education at the same rates as other races.

In the struggle to attain higher education and higher-paying jobs, the barriers to entry must be thought of as a byproduct of widespread disrespect for Mexican Americans' personhood rather than circumstantial or coincidental setbacks. Tables 4 and 5 introduce new facets of the Mexican American experience that reveal a more corporeal view of Mexicans in the United States, one that strips the preceding issues down to the fundamental problem that Mexican Americans are simply not seen as equal to Caucasians.

IV. Feminist Struggles Against the Dehumanization of a Population

Background

In the heat of the California summer in July 1976, ten Mexican American women convened to form an unprecedented class action lawsuit against the Los Angeles County-USC Medical Center. Each of the women had been coercively sterilized by their doctors. Veiled by cultural stigma and the limitations of a separate sphere, a uniquely feminine brand of bodily abuse was taking place- one that would scar women first, and the rest of their families and society later.

When the Madrigal Ten finally came together to litigate against forced sterilization, tens of thousands of women had already been operated on against their will in the United States as the eugenics movement gained popularity and rested on sterilization laws dating back to 1909 (Molina, 2019). Chicanos were considered genetically inferior, and doctors with power and access to their ability to reproduce routinely eliminated their choice in doing so. In the broader context of the Chicano Movement, Madrigal v. Quilligan bridged cross-sections of the fight for equal rights and addressed one symptom of Chicano dehumanization that was central to their civil rights struggle against the United States Government. Madrigal v. Quilligan represents the nexus of race-based violence and gender-based violence, exposing the most vulnerable members of the Mexican

American community and the manifestation of state-sanctioned violence against them.

Table 4
Madrigal v. Quilligan | No. CV 75-2057-JWC (1978)

Facts

Each of the ten plaintiffs was a resident of East Los Angeles and had received irreversible tubal ligation by the LA County-USC Medical Center. Lack of consent was constituted by pressure to authorize the operation during labor, failure to counsel the patients on the actual effects of the procedure, and/or manipulation of the present English-Spanish language barrier between doctors and patients. Dr. Bernard Rosenfield of the LA County-USC Medical Center acted as a whistleblower to the malpractice taking place at the hospital, documenting and revealing the eugenic practices by the obstetrics department of targeting minorities and lower socioeconomic women including the Madrigal Ten for sterilization on the same bases as the 1909 sterilization laws: they were considered hyper-fertile and genetically unfavorable. Rosenfield compiled evidence of the abuse and repeatedly contacted a number of civil rights organizations until finally reaching the Model Cities Center for Law and Justice and bringing attorneys Antonia Hernandez and Charles Navarrete onto the case.

Issues

May a physician performing a sterilization procedure face liability if they have a bona fide and reasonable belief that the patient gave free and knowing consent?

Holding

No.

Rationale

Even in the case of negligent interpretation of the patient's consent as in the case of the Madrigal Ten, a physician is not liable for

conducting a sterilization procedure as long as that physician has a bona fide and reasonable belief that the patient gave their free and knowing consent to having the procedure carried out. In this particular instance, language barriers causing miscommunications contributed to the misunderstandings, so the Court decided that no malicious intent or disregard for the patients' well-being are to blame for their situation.

Analysis

The Human Betterment Foundation, an organization committed to the practice of eugenics in the United States and the sterilization of citizens with "bad hereditary", lists 12 outcomes of sterilization, manipulated to sound positive. This harrowing document, recorded in the Library of Congress, concludes with the assertion that sterilization is a "practical, humane, and necessary step to prevent race deterioration" ("Effects"). For all intents and purposes, the doctors practicing sterilization of Mexican American women were performing a silent genocide.

Merely four years after Roe v. Wade, but following decades of Chicano activism, Madrigal v. Quilligan came at a time when Chicana feminism needed stalwart support from the Chicano Movement as a whole. Latina femininity, indeed, Latina identity, is deeply invested in the role of the mother. Family pride, love, and legacy in the Mexican American community revolve around its continuity and is central to the Chicano lifestyle. The value placed on Latina motherhood and fertility, however, resulted in deep shame and domestic danger for women who were sterilized, even those coerced or forced into the procedure (Valdes, 2016). While facing the painful reality that they would never again be able to bear children, sterilized Latinas lost control over their position within the family and their community. The Madrigal Ten fought an uphill battle against the expectations placed upon them by their husbands, the inner turmoil of what had been done to them, and the call of duty to ensure it never happened to another woman.

The violent interference of white doctors and politicians to relegate Mexican Americans to an undesirable caste of citizens is not and has never been conceptual- it is the physical snipping of fallopian tubes and forceful removal of children from their mothers. It is carnal.

Forced sterilization is necessarily related to eugenics, which informs the racialization of Mexican Americans in the United States and therefore their routine incarceration, lack of representation, and cultural erasure (Lira, 2018). It is inherently related to the reduction of women of color to breeders of Brown babies polluting the waters of white supremacy. It is a misappropriation of the law to construct a society wherein Mexican Americans are forced to fight for the rights which white Americans have the luxury of taking for granted.

V. Labor Rights and the Disposable Mexican

Background

The abuses discussed in the preceding sections corroborate that in the United States, Mexican Americans are not seen as equal to white Americans. If they are to exist and operate in this society, they are expected to fulfill certain roles that serve white America. They must make themselves useful. Mexican Americans and indeed, the broader Latino community, are concentrated in low-wage jobs requiring physical labor.[18] The Mexican janitors, cafeteria workers, and landscapers we see today do not take up those jobs by accident; rather, the American court system systemically narrowed their occupational options long ago.

Bracero programs, in which Mexican laborers traveled back and forth across the border working seasonal U.S. agricultural jobs, were implemented to maintain the U.S. economy during wartime, specifically World War I and II.[19] The braceros, or farmhands, toiled for hours in the sun while being paid paltry wages. The Bracero programs were undeniably exploitative of Mexicans in the U.S., and the nation depended upon them for key crops like cotton, tomatoes, and grapes. While the Mexican government surely benefitted from

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[18] Rose Khattar & Jessica Vela, *Latino workers continue to experience a shortage of good jobs*, Center for American Progress, July 18, 2022. https://www.americanprogress.org/article/latino-workers-continue-to-experience-a-shortage-of-good-jobs/

[19] Philip, Martin, *Mexican braceros and US Farm Workers*, Wilson Center, July 10, 2020. https://www.wilsoncenter.org/article/mexican-braceros-and-us-farm-workers

having this economic relationship with the United States and receiving remittances from the laborers, the braceros were not offered the same labor and wage protections as Americans and were thus subjected to abuses, discrimination and "[exposure] to deadly chemicals" . The uncovering of the Bracero program's abusive practices alone was not quite enough to end the program, which was ultimately retired at the end of 1964 as automation made certain agricultural jobs cheaper and faster.

As mentioned in the background section preceding Table 4, Hispanics and Mexican Americans earn significantly less than their white counterparts, with Latinas specifically earning "54% of what non-Hispanic white men were paid in 2021."[20] Data on the wage gap as it affects Hispanic women are relevant to the case studied in Table 5. These further suggest that intersections of Mexican American race and gender, as analyzed alongside Table 4, reveal a severe lack of regard by society for Mexican American women. Indeed, Chicanas are systemically reduced to their reproductive role and compensated unfairly for their work. Despite those glaringly obvious societal abuses, issues of employment such as the Bracero programs and the following in Table 5 are upheld by interpretations of the U.S. Constitution which maintain this status quo treatment of Mexican American workers.

Table 5
Espinoza v. Farah Manufacturing | 414 U.S. 86 (1973)

Facts

Farah Manufacturing Co. denied Cecilia Espinoza's application to work as a seamstress due to the company's policy against hiring non-United States citizens despite her lawful residency in San Antonio, Texas. Espinoza attempted to right the situation through the Equal Employment Opportunity Commission, then sued Farah in federal court, arguing that the company violated Title VII of the Civil

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[20] *Latinas and the pay gap*, AAUW, Nov. 30, 2022. https://www.aauw.org/resources/article/latinas-and-the-pay-gap/

Rights Act of 1964 by discriminating against Espinoza on the basis of her national origin. The district court held that refusal to hire based on nationality and lack of citizenship constitutes discrimination, but the appellate court reversed, holding that Title VII's prohibition of discrimination against national origin does not encompass citizenship. The United States Supreme Court granted certiorari.

Issues

Does citizenship discrimination constitute a form of national-origin discrimination as prohibited by Title VII?

Holding

No.

Rationale

Farah Manufacturing Company's overwhelmingly Mexican American employee population is proof that the company does not discriminate against Mexicans on the basis of their ancestry. Further, by interpreting Title VII as encompassing citizenship discrimination, the Court would find that Congress discriminates on this basis in federal employment practices since it bars non-United States citizens from federal employment. Congress had no intention for Title VII to prevent employers from requiring citizenship as an employment condition as evidenced by this fact. Cecilia Espinoza is not entitled to relief under Title VII, so the appellate court is affirmed.

Analysis

While Farah Manufacturing Co. was within its rights to discriminate in employment on the basis of citizenship, the United States' longstanding tradition of benefitting from Mexican labor communicates a clear message to the rest of American society. Mexicans in the U.S. are seen as existing in this nation for the purpose of supplying cheap labor while employers are under no obligation to guarantee their continued employment if it is unfavorable to them for any reason. Latinos and Mexican Americans are undereducated, as discussed in Table 4, underpaid, and overworked.

This perception of disposability affects the rhetoric used against the Mexican American community, inciting violence against them and contributing to continual dehumanization and oppression. Indeed, a new era of politics was thrust upon America with ex-President Donald Trump's campaign launch speech best known for his declaration that "When Mexico sends its people, they're not sending their best…They're bringing drugs. They're bringing crime. They're rapists."[21] Brazen racism by authority figures such as politicians has historically and continues to excuse racism by their constituents. In an age where this display of hatred is applauded as 'telling it like it is,' we can rest assured that anti-Mexican American sentiment did not end with the progress of the Civil Rights Movement, it was only hidden behind closed doors.

The effects of viewing Mexican American people as disposable, as a mere labor force of bodies to profit from, are written in blood. In 2019, the brutal shooting at a Walmart in El Paso took 23 lives, most of which were Latino as the gunman intended. His perception, like that of many others, was that the Mexican immigrant population in the United States constitutes an "invasion" (Gamboa, 2020). Ultimately, Mexican Americans born in the United States and those who move here have similar experiences due to these sweeping accusations of unrightful residency and purely racist sentiments. The gunman didn't stop to ask for papers after all, and a Brown body never ceases to look threatening to an eye that can only see them as such.

VI. Conclusion

Explorations of a community's experiences as they navigate everyday life in a country that rejects them are complex and nuanced. I believe that in breaking down the Mexican American experience into the five fundamental facets I have discussed here, connections between systemic injustices and their contemporary effects can help expose not simply the oppression they face, but the faults in our longstanding

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[21] Amber Phillips, *'Analysis | 'they're rapists.' president Trump's campaign launch speech two years later,* The Washington Post, June 16, 2017. https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/

system of governance. Each of the cases I have presented were ruled in accordance with American laws and in that sense was 'just.' If we choose to suspend our expectations of righteousness and justice in our legal system at that alone, we fail to account for the tumbling repercussions that are passed down by each successive generation.

Ultimately, reform of our government and justice system in the United States is difficult and slow-moving, but the progress of the Civil Rights Movement and the Chicano Movement cannot be overlooked, even with the recent rise in anti-Latino sentiment (Gamboa, 2020). Additionally, and despite the inclination in the age of social media to inundate audiences with images of brutality against minorities at the hands of the carceral state and justice system in the hopes of spurring action, cycles of trauma plague minority peoples forced into the roles of both victim and educator about their victimhood.[22] Certainly, there is no easy answer to the question of how to go about reforming a state built on the backs of minorities, though the first step is awareness.

Mexican Americans are severely underrepresented in lawmaking as a result of low rates of higher education and the many barriers to success I have explored in this paper.[23] Even so, it ultimately lands on those within it to represent a community and demand that needs be met in issues of access, representation, and justice. Without a thorough education on the particular needs and experiences of the community, it would be difficult for anyone on the outside to advocate for Mexican Americans as efficaciously as they could, if only they are empowered to do so. As the Mexican American community looks toward the future and continues to champion itself, one of the best things people outside of the community can do is learn

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[22] Onwuachi-Willig, The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?. *Houston Law Review*, *58*(4), 2021. file:///Users/emilyanaya/Downloads/22269-the-trauma-of-awakening-to-racism-did-the-tragic-killing-of-george-floyd-result-in-cultural-trauma-for-whites.pdf

[23] Reyes, Raul A. *'So few of us': Latino attorneys are scarce, and they want more Hispanics to join their ranks,* NBC News, Oct. 13, 2017. https://www.nbcnews.com/news/latino/where-are-all-latino-lawyers-hispanics-scarce-legal-profession-n809141

to look through the five lenses I have presented here to see a more holistic image of their struggles.

By closely examining Mexican Americans' history, unique navigation of the justice system, access to education, fight for reproductive rights, and identity as a labor force in the United States, we can critically evaluate our nation's systems of governance and work to dismantle its substructure of white supremacy. Without such close examination, and until centuries of legal precedent are dismantled through deliberate choices to consider the oppressive histories which have informed past legal decisions, violence and terrorism against Mexican Americans will not stop. The frameworks of American law were constructed to establish non-white people within these borders as subhuman for the benefit of the powerful and white. Our nation does not have to be this way, and the longer we wait to address these systemic problems, the more deaths will occur and unjust treatment will continue. It is time to redefine justice for minorities in America.

VII. Acknowledgements

I want to give special thanks to my advisor, Dr. Shiv Ganesh, who has always pushed me to create works we can both be proud of, and my parents for helping me to develop the sense of self and confidence required in the pursuit of truth and justice.

* * *

Analyzing How Government Funding on TANF and SNAP Programs Impacts Participants Likelihood to Vote

Julia Flack

Introduction

This paper examines the relationship between poverty and voting, with a focus on the intersection between poverty-stricken citizens who rely on government assistance and face difficulties when it comes to voting. The study seeks to answer the question of whether the level of state funding for SNAP food stamps and TANF welfare checks can improve voter turnout. It is hypothesized that poverty-stricken individuals are less politically active than those with a stable socioeconomic status due to a lack of privilege, time, or means to be politically active. Although voting is often discussed as a right, in reality, it is a privilege that requires time to register, update one's address, and actually vote. This process can be difficult for citizens struggling to make ends meet, making voting less accessible. Therefore, the study investigates whether welfare programs improve one's likelihood to vote. Despite voting being a fundamental right, lower-income Americans tend to have lower voting rates, which can be attributed to required work, unreliable transportation, or a lack of knowledge. Moreover, disillusionment among candidates and the electoral process can discourage people from voting, regardless of their income level. According to Rev. William J. Barber II, the co-chairman of the nonpartisan Poor People's Campaign, over 40 percent of Americans with lower incomes remain a largely untapped political force. Thus, this research focuses on two government welfare programs, SNAP and TANF, to determine if they can improve the likelihood of voting for recipients.

I. How Impoverished People Vote

The right to vote is a fundamental cornerstone of any democratic society, but not all citizens have equal access to exercise this right. Despite the historically high turnout in the 2020 elections, poverty-

stricken citizens were still underrepresented. For those struggling to make ends meet, the process of voting can be a daunting task. This section examines the intersection of poverty and voting and explores the barriers that prevent many American citizens from exercising their right to vote. Additionally, this delves into the impact of social welfare policy on the perceptions of poverty and the influence of class bias on voting patterns. In 2020, 154.6 million people, 67 percent of the voting-eligible population, voted. This turnout is a historically high rate; however, the poverty-stricken population was still underrepresented. People with family incomes under $20,000 made up 3.6 percent of the population that voted, an underrepresentation of 1.4. Underrepresentation is calculated as the difference between each demographic group's voter share and citizen voting-age population share. A demographic is overrepresented among voters if the difference is positive and underrepresented among voters if the difference is negative.[24] We seem to expect today that the poor participate far less in politics than their rich counterparts.[25] When analyzing survey data, it becomes clear many barriers are preventing American citizens from voting. These include felony disenfranchisement laws.[26] limited registration[27] and workday rather than civic-holiday voting arrangements.[28] Both registered and unregistered did not vote in 2008 because of disapproval of candidate choices, busyness, illness, transportation, and registration/administrative problems. When looking at the barriers citizens face, Black and Hispanic citizens, who have poverty rates almost three times that of whites, were three times as likely to not have correct forms of identification, have difficulty finding a polling place, and do not receive an absentee ballot when requested. These struggles

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[24] Fabina and Scherer 2022."Voting and Registration in the Election of November 2020." *Census.gov*. https://www.census.gov/library/publications/2022/demo/p20-585.html (November 8, 2022).

[25] Freedman et al., 2004."Campaign Advertising and Democratic Citizenship." *American Journal of Political Science* 48(4): 723.

[26] Uggen and Manza 2006. *Locked out : Felon Disenfranchisement and American Democracy*. New York ; Oxford: Oxford University Press.

[27] Piven and Cloward 1988."Why Americans Don't Vote." *Contemporary Sociology* 17(6): 784.

[28] Freeman et al., 2004

are put on top of transportation issues and needing to work.[29] Class bias also affects who votes and who has the resources necessary to do so. Welfare recipients are often labeled lazy, immoral, and trying to take advantage of the system on the backs of hard-working Americans.[30] This lens shapes public opinion about welfare policy, reinforcing elite interests over the interests of the majority.[31] Today you are either rich or poor, causing middle- and working-class citizens to view their interests as the same as that of wealthy and elite citizens.[32] Social welfare policy blames the victim and perpetuates the idea that people choose to be poor. Political narrative propagates the myth that poverty is easy to escape and only traps a few; the narrative supports the idea that welfare leads to dependency, laziness, and a culture of poverty.[33] Class bias and stigmatization of poverty can have significant impacts on voter turnout and political representation, as those in poverty are often the most disenfranchised and underrepresented. Economically advantaged populations have easier access to political participation by voting, and they can also seek influence by donating money to interest groups and political campaigns that represent their political wishes and values. Low-income Americans, however, do not have that ability. They must seek ways to be influential in politics through methods that do not require significant amounts of money, such as through voting and the activities of labor unions. These actions require time, which is also a limited commodity. Over the past several decades, a steep decline in labor union membership occurred.[34] A study American life that used

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[29] Weeks 2013."Why Are the Poor and Minorities Less Likely to Vote?" *The Atlantic*. https://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities less-likely-to-vote/282896 (November 8, 2022).

[30] Edlin & Shaefer, 2015."$2.00 a Day: Living on Almost Nothing in America." *Houghton Mifflin Harcourt: New York*.

[31] Clawson & Trice, 2000."Poverty as We Know It." *Public Opinion Quarterly* 64(1): 53–64.

[32] Lakeoff 2004. "Don't Think of an Elephant! Know Your Values and Frame the Debate." *White River Junction, VT: Chelsea Green Publishing Company*.

[33] Wise 2015. *Under the Affluence : Shaming the Poor, Praising the Rich and Sacrificing the Future of America*. San Francisco, Ca: City Lights Book

[34] Western and Rosenfeld, 2011."Unions, Norms, and the Rise in U.S. Wage Inequality." *American Sociological Review* 76(4): 513–37. http://scholar.harvard.edu/files/brucewestern/files/american_sociological_review-2011- western-513-37.pdf (June 7, 2019).

income and education levels to determine socioeconomic status divided the US population into five equal groups and found that only 2% of people in the bottom bracket for income and education attended campaign meetings, rallies, or conducted campaign work, while 14% of people in the top group completed one of these activities. This means that there is a sevenfold difference between the two groups in terms of political participation. This suggests that socioeconomic status has a significant impact on political participation, with those in higher income and education groups being more likely to engage in political activities. Out of the, at least, 12,000 interest groups actively lobbying in Washington, DC, less than one percent lobby on behalf of low-income people. The groups that do advocate for low-income people have significantly fewer financial resources compared to businesses, which outspend them by a factor of 3,000 to one.[35] The decline in easy political participatory actions further reduces the political capitol of low income individuals. The lack of resources and representation leaves voting in elections as the primary resource to gain political influence. However, as the text notes, the act of voting can be challenging, especially for those who face financial and logistical barriers. If impoverished Americans cannot, or do not vote, their voices do not have representation. While some research finds few differences in policy preferences across income levels and broad dissatisfaction with inequality, high-income Americans do not share the same concern about inequality.[36] They do not put pressure on the government to reduce economic inequality as low-income Americans do.[37] American politics has become polarized over the last several decades as higher-income citizens increasingly support the Republican Party, and low-income citizens have gravitated towards the Democratic Party.[38] The

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[35] Schlozman et al., 2010."Weapon of the Strong? Participatory Inequality and the Internet." *Perspectives on Politics* 8(2): 487–509.

[36] Page & Jacobs, 2009."Class War? What Americans Really Think about Economic Inequality." *Chicago: University of Chicago Press*.

[37] Gilens 2009."Preference Gaps and Inequality in Representation." *PS: Political Science & Politics* 42(02): 335–41.

[38] McCarty et al., 2006.*Polarized America : The Dance of Ideology and Unequal Riches*. Cambridge, Massachusetts: Mit Press.

issue of polarization becomes more complex when one side has increasingly more power.

II. TAFT Welfare Reform

The implementation of TANF has had a significant impact on welfare programs in the United States. Unlike its predecessor AFDC, TANF does not serve as a welfare program, but rather as a funding source that states can distribute with restrictions. States have the flexibility to design their programs with limited benefits and availability, which marks a departure from the past idea of entitlement. As a result, TANF has left many low-income citizens with limited political capital and even fewer resources to gain political influence. This further reinforces the importance of voting as a primary resource for low-income citizens to have a voice in shaping social welfare policies.[39] TANF provides funds to state programs through block grants; AFDC receives its funding through a matching grant system. The program receives partial funding from the federal government because when states increase funding, they revive more federal support money. The black grant format alters the grant design by providing a fixed level of federal funding regardless of state-level spending changes. A block grant is a type of funding given by the federal government to state or local governments or organizations for a specific purpose. The grant is provided as a lump sum of money with few or no restrictions on how it should be spent, giving the state more flexibility in deciding how to use the funds, whereas a matching grant requires a state to first allocate its own funds for the federal government to match.[40] The new design decreases the likelihood of expansion and counter-cyclical support. To receive the federal grant, the state's welfare-recipient population needed to be increasingly employed. By 2002, state TANF programs were required to support at least 50 percent of employed people; however, this dropped due to a decline in applications. In 2002 the average rate of

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[39] Blank 2005."The Five Reasons Why Voter Turnout in Minnesota Is so High | MinnPost." *MinnPost*. https://www.minnpost.com/politics-policy/2016/09/five-reasons why-voter-turnout-minnesota-so-high/ (November 21, 2022).

[40] Weaver 2000.Washington, D.C.: Brookings Institution *Ending Welfare as We Know It*.

employment among states was 38 percent. One person can receive TANF assistance for up to 60 months over a lifetime. These changes clarified that cash assistance was no longer easy to obtain or something to be seen as an entailment, and by limiting the availability and benefits of TANF, the program has made it harder for low-income individuals to access resources and support, thus reducing their political capital and ability to engage in political participation. This, in turn, can perpetuate the cycle of poverty and make it even harder for low-income individuals to improve their socioeconomic status. TANF aims to provide income support to families who are struggling to make ends meet. However, in the 1980s and 1990s, the program was criticized for being too lenient and providing handouts. In 1996, the program underwent significant changes, which included adding work requirements, implementing time limits, and adopting a more directive and supervisory approach towards clients. Today, TANF is characterized by a rigid structure and a highly paternalistic manner, where individuals rely on frontline caseworkers who hold substantial power in distributing benefits, services, and punishments. This shift in policy and approach has led to greater scrutiny and control over the program's recipients.[41] Since its creation in 1996, TANF benefits in most states have reached their lowest levels. The lack of an increase in federal funding, coupled with inflation, has limited the impact of the grants. States have complete autonomy to set benefit levels and have opted to keep them below the level required to meet families' basic needs and maintain financial stability. Benefits are at or below 60 percent of the poverty line in all 50 states and are below 20 percent in 16 states, most of which are southern states. In all but six states, benefit levels have declined, when adjusted for inflation, since 1996. TANF benefits in all states still leave families unable to afford appropriate housing. Due to TANF providing inadequate resources, families face tough choices when addressing finances, like whether to pay bills or buy necessities.[42]

III. Snap Welfare Reform

[41] Soss 2000; Schram et al., 2007."A Public Transformed? Welfare Reform as Policy Feedback." *American Political Science Review* 101(1): 111–27.
[42] Safawi & Reyes, 2021

Changes in The Supplemental Nutrition Assistance Program (SNAP), have moved in the opposite direction of TANF, expanding to include new populations. This program helps low-income individuals obtain food for a healthy diet. Since 2002 SNAP has increased outreach to low-income households, simplified the program, and streamlined the application processes to make it easier to apply for and receive SNAP benefits if eligible. Most states have also reduced the amount of information needed to maintain their eligibility and benefits, making it easier for low-income households to participate and stay in the program. Rates of participation saw insignificant increases from 2001 to 2008. The highest rates of participation remain in the populations of children, individuals in households with incomes below the poverty line, and recipients of Temporary Assistance for Needy Families (TANF).[43] SNAP is the primary source of nutrition assistance for low-income people. In a typical month, SNAP helped about 42 million low-income Americans afford a nutritious diet. It provides important nutritional support for low wage working families, low-income seniors, and people with disabilities living on fixed incomes. Almost 70 percent of SNAP participants are families with children, and more than one-quarter are in households with seniors or people with disabilities. SNAP provides a foundation of health and well-being for low-income Americans, providing on average $1.40 per person per meal in 2017. By designating funds for food only, millions of Americans are lifted out of poverty and food insecurity by allowing their income to go to bills. When people don't have to worry about basic needs like food and shelter, they may be more likely to engage in political activities. Accessing government assistance programs like SNAP and TANF requires a significant investment of time and effort on the part of individuals seeking help. This can mean filling out lengthy applications, providing extensive documentation, attending meetings and interviews, and complying with ongoing reporting requirements. While these programs can provide much-needed support for struggling families, they also demand a level of engagement with government officials that

[43] Eslami et al., 2010. "Supplemental Nutrition Assistance Program Participation Rates: Fiscal Year 2010." *USDA*.

can be challenging for many people.[44] Government support can help to level the playing field and ensure that all citizens have a meaningful voice in the democratic process. While there are certainly challenges involved in accessing and navigating these programs, they can play an important role in promoting civic engagement and democratic participation among low-income Americans.

IV. Welfare Reform Impacts on Political involvement

A consequence of welfare reform is that those in need of financial assistance can be humiliated and stigmatized from the punitive, time-consuming, and dehumanizing process to prove their eligibility and receive benefits. Since the reform, the paternalistic practices of the cash assistance program have become more convoluted, but the food stamp program has recently undergone substantial changes to broaden access. These changes have implications for political participation.[45] Both the 2004 and 2006 November Current Population Surveys, with the added Voting and Registration Supplement, show that those employed in the public sector vote in substantially higher numbers than those employed in the private sector or the non-employed, suggesting that both employment[46] and connections to the government may increase political participation. This can be explained by the increased resources that come with a public job. Employment increases an individual's likelihood of political activities through increased income, civic skills, political efficacy, and recruitment at work.[47] The negative stereotypes about women on welfare are not accurate. However, the time constraints associated with complying with TANF requirements can limit women's ability to participate in community-

[44] Shapiro 1999. Information Rules: A Strategic Guide to the Network Economy. Boston, Massachusetts: Harvard Business School Press, 1999. X + 352 Pp." 2022. *Taylor & Francis*.

[45] Moffit 2015. "The Deserving Poor, the Family, and the U.S. Welfare System." *Demography* 52(3): 729–49.

[46] Faber 2010. "Rational Choice and Voter Turnout: Evidence from Union Representation Elections." *SSRN Electronic Journal*

[47] Schur 2003. "Employment and the Creation of an Active Citizenry." *British Journal of Industrial Relations* 41(4): 751–71.

building activities, which in turn disincentivizes civic and political engagement. These findings challenge the assumptions from various political viewpoints that welfare reform should encourage behaviors that are exhibited by impoverished populations. There are also differences between the literature on socioeconomic status and voting behavior, which traditionally suggest that employment increases voting, but does not focus on the specific and important population of women on welfare.[48]

V. Means-tested Government Assistance Effects Recipients View of Government

TANF and SNAP are means-tested entitlement programs which make up the majority of government assistance. Recipients of means-tested assistance are significantly less likely to vote than non-means-tested recipients (beyond differences in socioeconomic status and educational level). This difference in voting patterns points to political inequality. Negative encounters with government employees while in welfare undermines recipient confidence that the government is working in their interest, reinforcing negative perceptions of government. This lack of trust further distances a welfare population from their elected leaders. As welfare recipients become more distrustful and cynical of government institutions, they retreat from political activities, further marginalizing themselves.[49] These factors reduce one's likelihood of voting over time, even after they have stopped receiving benefits. Situations, marginally increasing ability to participate in political engagement.[50] The benefits of cash assistance programs can improve clients' psychological and physical situations,

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[48] Jennings 2001. "SNAP Is Linked with Improved Nutritional Outcomes and Lower Health Care Costs | Center on Budget and Policy Priorities." *Center on Budget and Policy Priorities*.

[49] Bruch et al., 2010.Information Rules: A Strategic Guide to the Network Economy. Boston, Massachusetts: Harvard Business School Press, 1999. X + 352 Pp." 2022. *Taylor & Francis*.

[50] Lawless & Fox 2001. "Political Participation of the Urban Poor." *Social Problems* 48(3): 362–85.

enabling them to avoid homelessness and improve otherwise all-consuming circumstances.

VI. TANF and SNAP Implication on Voting Habits of Recipients

Contacts with welfare can push people in one of two directions, either their engagement with the government educates and inspires them to get involved, or it pushes them away, furthering the belief that the government does not support them. Recent research suggests that welfare reform in the 1990s had a positive impact on the political participation of women, increasing the likelihood of their voting in elections. Specifically, the study found that welfare reform led to a two percentage point increase in the likelihood of women voting in even-year elections, and a three to four percentage point increase in the likelihood of their voting in presidential elections. Participation is more present in states that have a majority Democratic representation. These findings suggest that welfare reform has prosocial effects on civic participation, specifically voting.[51] Representative and contemporary data from the National Longitudinal Survey of Youth 1997 (NLSY97) studies the associations between political participation and welfare receipts, food stamps, cash assistance, among a sample of young adults.[52] The NLSY97 effectively analyzes policy feedback in the context of welfare because it reflects post-reform changes in TANF and SNAP programs. Receiving SNAP is positively related to being registered to vote. The odds of being registered to vote are 1.59 times higher for food stamp recipients compared to nonrecipients. Receipts of cash assistance are modestly and negatively related to being registered, but the association is not significant. In a random-effects model, the relationship between cash assistance and having voted is positive. The primary finding is that the SNAP program has a countervailing association with being registered to vote and actually having voted (this depends on a person's level of attention to

[51] Corman et al., 2017. "EFFECTS of WELFARE REFORM on WOMEN'S VOTING PARTICIPATION." *Economic Inquiry* 55(3): 1430– 51.
[52] Sugie & Conner, 2020. "Marginalization or Incorporation? Welfare Receipt and Political Participation among Young Adults." *Social Problems* 69.

government and public affairs). For a population who pays less attention to government affairs, SNAP tends to increase the likelihood of being registered to vote and actually voting. However, for those who express high attentiveness, food stamps' receipt decreases the likelihood of political behavior. These results indicate that food stamps affect political participation differently based on prior lived experience. Different models can lead to different outcomes. Variation in results come from different samples and data collection techniques. Young people face greater barriers to voting, and, from a developmental standpoint, changes in voting behavior during young adulthood have greater significance in turning people into long-term habitual voters or nonvoters.[53]

VII. Literature Conclusion

The relationship between the government and its people is fundamental to American democracy. research shows the way the government treats impoverished populations affects their trust and willingness to vote. It explains how interacting with government welfare leads to a minor positive increase in voting practices. SNAP seems to be more impactful than TANF. These programs have different premises, but impoverished people often qualify for both. SNAP benefits fall under an entitlement program, meaning anyone who needs food assistance can receive it for as long as they qualify. TANF, on the other hand, is deliberately temporary. Recipients can receive benefits for up to 60 months total during their lifetimes. Once on TANF, recipients must find work immediately if they have no dependents, or within 24 months if they have dependents. Differing outcomes make sense because SNAP is an entitlement program; therefore, the resources are easier to obtain. Some states provide more funding for both programs, which creates easier access to more resources. Moving forward, I am interested in the relationships between the level of funding for SNAP and TANF and voting participation on a state level. This literature

[53] Plutzer 2002. "Becoming a Habitual Voter: Inertia, Resources, and Growth in Young Adulthood." *American Political Science Review* 96(01): 41–56.

analysis focused on nationwide literature, but individual states can enact regulations and provide their benefits. Expanded research needs to compare state voter turnout compared to welfare funding. Literature shows that interactions with government officials and the ease of receiving benefits impact political trust. Greater funding increases resources. This prompts the question of Greater funding, therefore, will allow TANF and SNAP to have a greater positive correlation to political participation.

VIII. Hypothesis

This research focuses on two government assistance programs, Temporary Assistance for Needy Families (TANF) and Supplemental Nutrition Assistance Program (SNAP). The two programs target low-income individuals and families in different ways. TANF is the primary cash assistance program for families with children when they find themselves in a state of crisis or have very low incomes. The other program being studied is SNAP, the nation's most expansive anti-hunger program. The program's mission improves health outcomes and lower healthcare costs along with decreasing food insecurity. SNAP can help families buy adequate food, reduce poverty, and help stabilize the economy during recessions. SNAP's design is less bureaucratic than TANF as anyone eligible can receive benefits. States have the autonomy to provide as much funding as they see fit to TANF and SNAP programs. I hypothesize that states with higher levels of funding for these programs and wider access see higher voter turnout among the population impacted by government assistance programs.

IX. Data Collection

In order to test my hypothesis that increased state funding for TANF and SNAP leads to higher voting turnout, I analyzed data from the two welfare programs. Using voter registration data found in the two tables of the consensus from the November 2020 election, I gathered age and family income information on the reported voting and registration of family members. For states, I gathered the reported

voting and registration by age. For data on the reach of SNAP and TANF, I used state factsheets published by the Center of Badger and Policy Priorities. The United States Census Bureau surveys the United States population as it collects and analyzes social, economic, and geographic data. It provides conditional information on the level of Nation, States, and Counties. This survey's population of interest contains 50 state governments and 89,846 local governments, including the District of Columbia. (In the years ending in '2' and '7', the entire world is canvassed and surveyed. In intervening years, a sample of the population of interest is surveyed). Survey coverage includes a comprehensive study of state and local governments within the United States. Data collection for the state and local surveys consists of three modes of obtaining data: mail canvas, internet collection, and central collection from state sources. (Collection methods vary by state). For every national election since 1964, the United States Census Bureau has collected data on the characteristics of American voters. This data reflects the number of citizens of voting age who registered and voted by characteristics of age, sex, race, and ethnicity. The Center on Budget and Policy Priorities conducts research and analysis, strategic communications, and effective advocacy which shape debates and national policy across states. The center works with national, state, and community organizations to design and advance policies that promote economic justice, broaden opportunities in areas like housing, health care, employment, and education, and lower structural barriers for people of color and other marginalized communities. The center also demonstrates the harmful impacts of policies and proposals that would worsen poverty and widen disparities. Policy implementation at the federal, state, and local levels is the priority, maximizing the positive impacts of lessons learned during the policymaking process in Washington and regionally. Research and original data analysis, informed by the extensive knowledge of policy and program operations, strengthen their collaboration with partners.

X. Data Results and State Analysis

When comparing the states with the highest poverty rate against the states with the highest number of food stamp recipients, states'

position on one list lined up similarly to its position on the other list a study of the correlation between States with the highest poverty rates and States with the highest number of food stamp recipients suggest a direct correlation between one and the other. The ten states with the highest poverty rate, ranked highest to lowest, are Mississippi, Louisiana, New Mexico, West Virginia, Kentucky, Arkansas, Alabama, Oklahoma, South Carolina, and Tennessee (Figure 1). When ranking the number of SNAP recipients per 100 thousand people, the ten states with the highest number of recipients, from highest to lowest, are New Mexico, West Virginia, Louisiana, Mississippi, Oklahoma, Alabama, Illinois, Oregon, Pennsylvania, Rhode Island (Figure 2). Mississippi, Louisiana, New Mexico, and West Virginia are in the top five for both tables of data, and Alabama and Oklahoma are in the top ten for both poverty rate and the number of SNAP participants per 100 thousand residents. This association is important as a baseline to establish that states with high poverty rates have high rates of food stamp recipients. Not all food stamps are created equal though because states get to set levels of funding.

Figure 1

preliminary and can be subject to change.

State	Food Stamps Recipients (2019)	Recipients Per 100K (2019)
New Mexico	449,792	21,125
West Virginia	307,404	17,252
Louisiana	804,561	17,182
Mississippi	440,496	14,881
Oklahoma	579,618	14,487
Alabama	718,792	14,168
Illinois	1,778,953	13,888
Oregon	584,077	13,525
Pennsylvania	1,744,319	13,353
Rhode Island	147,597	13,341

Figure 1

State	Poverty Rate	Poverty
Mississippi	19.07%	564,439
Louisiana	18.05%	845,230
New Mexico	17.90%	381,026
West Virginia	16.84%	300,152
Kentucky	15.82%	717,895
Arkansas	15.51%	470,190
Alabama	15.03%	762,642
Oklahoma	14.63%	585,520
South Carolina	13.92%	726,470
Tennessee	13.74%	965,213

Figure 2

The same association between the percentage of poverty and SNAP recipients is seen in reverse. The ten states with the lowest poverty rate from lowest to highest are New Hampshire, Utah, Maryland, Hawaii, Minnesota, New Jersey, Massachusetts, Colorado, Connecticut, and Virginia (Figure 3). The ten states with the lowest number of SNAP recipients, from lowest to highest are Wyoming, Utah, New Hampshire, North Dakota, Kansas, Minnesota, New Jersey, Colorado, Idaho and Virginia (Figure 4). New Hampshire, Utah, Minnesota, and Colorado fall into the ten lowest for both categories. States with low levels of poverty have less food stamp recipients.

Virginia	9.44%	826,708
Connecticut	9.39%	339,156
Colorado	9.19%	544,232
Massachusetts	9.17%	653,454
New Jersey	8.98%	842,704
Minnesota	8.83%	511,185
Hawaii	8.68%	127,971
Maryland	8.49%	531,553
Utah	8.40%	283,360
New Hampshire	7.01%	97,418

Figure 3

Virginia	695,004	7,936
Idaho	142,199	7,510
Colorado	439,390	7,419
New Jersey	682,734	7,272
Minnesota	398,706	6,890
Kansas	198,426	6,715
North Dakota	48,243	6,027
New Hampshire	73,416	5,283
Utah	165,374	4,903
Wyoming	25,564	4,411

Figure 4

Voter turnout varies by state, and even though 2020 was a high-turnout election, not all states saw a large population of eligible citizens vote. The top ten states with the highest voter turnout in the 2020 presidential election, from highest to lowest, are Minnesota, Colorado, Maine, Wisconsin, Washington, New Hampshire, Oregon, New Jersey, Vermont and Michigan (Figure 5). The states with the lowest voter turnout from lowest to highest are Oklahoma, Arkansas, Hawaii, West Virginia, Tennessee, Mississippi, Texas, Indiana, New Mexico and New York (Figure 6).

New York	8,690,139	8,616,861
New Mexico	928,230	923,965
Indiana	3,068,542	3,033,121
Texas	11,350,000	11,315,056
Mississippi	1,325,000	1,313,894
Tennessee	3,065,000	3,053,851
West Virginia	802,726	794,652
Hawaii	579,784	574,469
Arkansas	1,223,675	1,219,069
Oklahoma	1,565,000	1,560,699

Figure 5

State	Total Ballots Counted	Total Pres. Ballots Counted
Minnesota	3,292,997	3,277,171
Colorado	3,295,666	3,256,980
Maine	828,305	819,461
Wisconsin	3,310,000	3,298,041
Washington	4,116,894	4,087,631
New Hampshire	814,499	804,991
Oregon	2,413,890	2,374,321
New Jersey	4,635,585	4,549,353
Vermont	370,968	367,428
Michigan	5,579,317	5,539,302

Figure 6

I chose four states to analyze which demonstrate the relationship between SNAP and TANF programs in relation to voter turnout. I selected Arkansas and Oklahoma because they consistently have the lowest voter turnout. Oregon was selected because of its high number of SNAP and TANF recipients and its high level of voter turnout. Minnesota was selected as it is consistently the state with the highest voter turnout.

In Arkansas, the SNAP program reached 11 percent of the population, and the poverty rate is the 6th highest, 15.51 percent. Arkansas does not provide as much financial assistance as other states with similar levels of poverty. 66 percent of eligible individuals participated in SNAP in Arkansas in 2018, and 61 percent of eligible workers participated. On average SNAP lifted 87,000 people above the poverty line in Arkansas on, including 43,000 children, per year between 2013 and 2017. SNAP recipients received $108 in 2019, $184 in 2020, and $151 in 2022 (The spike in funding was correlated to COVID-19). In 2020 (the most recent available date), Arkansas spent about $84 million in federal and state funds under the Temporary Assistance for Needy Families (TANF) program. It spent five percent of these funds on basic assistance, generally as cash assistance to TANF families. In 2020, Arkansas ranked 48th among States for percent of TANF funds spent on basic assistance. In 2020, Arkansas was awarded its TANF block grant of $57 million and an additional $7 million from the TANF Contingency Fund. (Unspent

block grant funds can be carried over to future years, so a state may spend more or less than its annual block grant allocation in any given year). As of 2020, Arkansas had amassed a substantial amount of unspent TANF block grant funds, totaling $99 million. This amount is equal to 175 percent of the state's total block grant allocation. This demonstrates that the State has not utilized a significant portion of the funds intended to assist low-income families. While Arkansas is not alone in accumulating unspent TANF funds, this trend highlights the potential for states to mismanage and underutilize federal funds intended to support low-income families. The accumulation of these funds is especially concerning given the current economic climate and ongoing pandemic, which has disproportionately impacted low-income individuals and families. The State's failure to allocate these funds to support those in need raises questions about their commitment to addressing poverty and providing essential support to vulnerable populations. Every year each state must also match at least 80 percent of its historical spending on poor families with children. However, this "MOE" requirement can be reduced to 75 percent if a state meets specific work participation rate requirements. In 2020, Arkansas met these requirements and was subject to the 75 percent MOE obligation. The 2020 MOE obligation for Arkansas was 21 million dollars. However, Arkansas continues to provide little support for its impoverished population. This can be seen in its lack of SNAP recipients and the limited funding for basic assistance through TANF. In the 2020 election, Arkansas had the second lowest voter turnout, 56 percent. Arkansas has little support for its citizens which can lead to a lack of trust and connection with the government which is supposed to be working for them. Arkansas is also very rural and lacks support for its citizens to access quality assistance for elections.

Oklahoma's SNAP program reaches 16 percent of the state population. SNAP reached 85 percent of eligible individuals in need in Oklahoma in 2018, and 78 percent of eligible workers participated. SNAP lifted 101,000 people above the poverty line in Oklahoma, including 47,000 children, per year between 2013 and 2017, on average. Per month, SNAP recipients received 128 dollars in 2019, 198 dollars in 2021, and 163 dollars in 2022. In 2020, Oklahoma spent about $145 million in federal and state funds under the

Temporary Assistance for Needy Families (TANF) program. Oklahoma spent 13 percent of these funds on basic assistance, generally as cash assistance to TANF families. In 2020, Oklahoma ranked 31st among the states and Washington, D.C. for percent of TANF funds spent on basic assistance. In 2020, Oklahoma was awarded its TANF block grant of $138 million. Unspent block grant funds can be carried over to future years, so a state may spend more or less than its annual block grant allocation in any given year. As of 2020, Oklahoma has accumulated $264 million in unspent TANF block grant funds, equal to 191 percent of its block grant. Every year each state must also spend, from its funds, at least 80 percent of its historical spending on poor families with children. This "MOE" requirement can be reduced to 75 percent if a state meets specific work participation rate requirements. In 2020, Oklahoma met these requirements and was subject to the 75 percent MOE obligation which was 60 million dollars in 2020. Basic assistance spending has decreased in Oklahoma leaving families with less support financially. In the 2020 election, only 55 percent of eligible voters voted. Since 1992 the percentage of eligible voters that are registered has decreased steadily as the state becomes more diverse (US Election Project). White citizens overrepresent themselves in Oklahoma elections. 42 percent of the population belongs to a minority group, but only 25 percent of voters identify as other than white.[54] The new generation has lower levels of financial assistance which can be tied to a passive negative view of their government.

Oregon has the 8th highest number of residents on SNAP food stamps per 100 thousand people, but unlike the states above, Oregon also has high voter turnout, ranking 7th nationally in 2020. 17 percent of Oregon's population receives SNAP programming. SNAP reaches Between 95 and 100 percent of eligible individuals. In 2018, 88 percent of eligible workers participated. SNAP lifted 117,000 people above the poverty line in Oregon, including 50,000 children, per year between 2013 and 2017, on average. For each household member per month, they received 133 dollars in 2019, 218 dollars in

[54] Hubbard 2016. "Rational Choice and Voter Turnout: Evidence from Union Representation Elections." *SSRN Electronic Journal*

2021, and 162 dollars in 2022. In 2020, Oregon spent about $246 million in federal and state funds under the Temporary Assistance for Needy Families (TANF) program. Oregon spent 34 percent of these funds on basic assistance, generally as cash assistance to TANF families, this is above the national average of 22 percent. In 2020, Oregon was awarded its TANF block grant for 166 million dollars. Unspent block grant funds can be carried over to future years, so a state may spend more or less than its annual block grant allocation in any given year. As of 2020, Oregon has accrued 45 million dollars in unspent TANF block grant funds, equal to 27 percent of its block grant. In 2020, Oregon met these requirements and was subject to the 75 percent MOE obligation which was 92 million dollars.

Oregon funding for SNAP allows the program to cover practically all citizens in need of assistance. Also, under TANF Oregon spends 12 percent more than the national average on basic assistance. As covered in the literature review section, a positive relationship with the state government can lead to an increased desire to participate politically.

Minnesota is a state with low levels of poverty; the rate being 8.83 percent, and a low amount of residents receiving financial assistance. It also had the highest voter turnout levels in the 2020 election. The state consistently has the highest voting turnout.[55] Both the median household income and educational attainment have ranked in the top five for the past decade. Minnesota has a high level of engagement in every way. They help their neighbor and volunteer at higher rates than most other states. Evidence of that is that Minnesota was one of the first states in the country for the Legislature to have an information service. The state takes participation and duty seriously.[56] We see across states that when citizens feel like their government works for them, they are much

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[55] Most 2022. "Why Does Minnesota Have the Best Voting Record in the U.S.?" *Sctimes.com*. https://www.sctimes.com/in-depth/news/2022/08/23/minnesota voting-access-number-1-in-voter-turnout-in-u-s-heres-why/65392204007/ (November 21, 2022).

[56] Bierschbach & Kaul, 2016. "The Five Reasons Why Voter Turnout in Minnesota Is so High | MinnPost." *MinnPost*. https://www.minnpost.com/politics-policy/2016/09/five-reasons why-voter-turnout-minnesota-so-high/ (November 21, 2022).

more likely to be politically involved.

XI. Limitations and Results

I wanted to compare voting turnout by income level to levels of funding state by state. Unfortunately, data regarding statewide voting turnout by income level remains unavailable. This is an error on my end as I assumed the data existed through the US Census. After multiple conversations with US Census employees I decided to further my research, I needed to go in a different direction. This limited my research as I couldn't see the full picture of data. I resorted to using the triangulation method. Using voter turnout data and SNAP and TANF funding data, both by state, I was able to conduct research in the same field. That method worked eventually after a lot of trial and error. I was not able to find the amount of data or support I was hoping for, but my research still supports my hypothesis that states with higher funding for SNAP and TANF programs see higher voter turnout. The top 10 states with the highest voter turnout in 2020 all had SNAP programs that reached over 90 percent of the eligible population. The majority of states in this group also provide more than the national average for basic needs under TANF. "Basic needs" include food, water, and housing. States that allocate less than the national average, of 22 percent, do not see the same increase in voter turnout. Moreover, when citizens receive government assistance that meets their basic needs, they are more likely to be engaged in their communities and more likely to participate in political activities. When individuals are struggling to make ends meet, they may not have the resources or energy to participate in civic activities. However, when their basic needs are met through government assistance programs like SNAP or TANF, they may have more time and resources to engage in civic activities, including voting. Therefore, it is clear that when state governments provide accessible and helpful support to their citizens, it can have a positive impact on civic engagement and participation in the democratic process. This underscores the importance of investing in social programs and policies that support the basic needs of all individuals, especially those who are struggling to make ends meet. The more robust a welfare program is, the easier it is to access and use. States need to invest in the resources

that their citizens need, and this research shows citizens need help with basic assistance. Through individual state analysis and cross analytics, my data concludes that there is a positive association between states providing greater access to basic needs through TANF and SNAP and voter turnout. States that invest more in TANF and SNAP have higher voting turnout. This research matters because as an individual's education, support, and income levels increase, they tend to vote more. A lack of voters from lower income brackets leads to underrepresentation. The new research shows that greater access to basic necessities through government assistance can increase citizens' ability and likelihood to vote.

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The Evolution of the Relationship Between the Free Exercise Clause and its Implications on Individual Freedom and Government Power.

Alysia Gray

The Free Exercise Clause is one of the foundational rights of American freedom. The First Amendment states, "Congress shall make no law… prohibiting the free exercise [of religion]." While theoretically simple, the ambiguous and deeply personal nature of religion culminated with the vague wording of the First Amendment text has resulted in numerous Supreme Court cases. With each case, the Court has wrestled with defining the line between individual religious freedom and government power. This article will examine the scope of protection allowed under the free exercise clause by exploring the historical pendulum and chronology of Supreme Court rulings, discussing the most recent rulings in *Tandon*[57], *Fulton*[58], and *Kennedy*[59], and inferring the future of the free exercise clause by analyzing unanswered questions.

I. Historical Free Exercise Clause Cases and Supreme Court Rulings

A. *Reynolds v United States (1879)*

Reynolds v. United States[60] is the first major Supreme Court case that defined the Free Exercise Clause. The facts of the case revolved around George Reynolds, a member of the Church of Jesus Christ of Latter-day Saints.[61] Reynolds was arrested and charged with bigamy,

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[57] Tandon v. Newsom 593 U. S. ____ (2021)

[58] Fulton v. City of Philadelphia 593 U.S. ____ (2021)

[59] Kennedy v. Bremerton School District, 597 U.S. ___ (2022)

[60] Reynolds v. United States, 98 U.S 145 (1879)

[61] Reynolds v. United States, Oyez, https://www.oyez.org/cases/1850-1900/98us145 (last visited Sep 21, 2022).

which was made illegal in the Morrill Anti-Bigamy Act of 1862.[62] Reynolds claimed that bigamy was a foundational element of his religion, and thus, his arrest violated his right to free exercise of religion.[63]

The Supreme Court ruled that the Morrill Anti-Bigamy Act of 1862 did not infringe on the Free Exercise Clause.[64] The Court held that it could not regulate beliefs but could regulate acts; therefore, it ruled that the Free Exercise Clause did not give individuals the right to violate a federal statute.[65]

The second reason behind the Supreme Court's decision was that allowing religious practices to override criminal statutes would create an unfair and dangerous loophole in the law.[66] In the majority opinion, Chief Justice Waite stated, "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. The government could exist only in name under such circumstances."[67]

While the correctness of the Supreme Court's decision is up to personal interpretation, this case established the first foundation for determining the scope of the Free Exercise Clause.[68] The ruling differentiated religious beliefs from acts and established congressional power to regulate religious acts under police powers.[69] However, the ruling was less decisive in defining the scope of congressional power in determining which religious actions to prohibit. This ambiguity opened the door for several future rulings that attempted to clarify the relationship between permissible religious acts and the Free Exercise Clause.

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[62] *Id.*

[63] *Id.*

[64] John R. Hermann, REYNOLDS V. UNITED STATES, https://mtsu.edu/firstamendment/article/493/reynoldsunited states

[65] *Id*

[66] *Id*

[67] *Id*

[68] Epstein, L., McGuire, K.T. & Walker, T.G., 2021. *Constitutional law for a Changing America a short course* 8th ed., Thousand Oaks, CA: CQ Press.

[69] John R. Hermann, REYNOLDS V. UNITED STATES, https://mtsu.edu/firstamendment/article/493/reynoldsunited states

B. *Minersville School District v. Gobitis (1940)*

Minersville School District v. Gobitis[70] was the next major case to define the limits of the Free Exercise Clause. This Supreme Court ruling followed *Reynolds'* footsteps by narrowing the scope of individual religious freedom. While this ruling was overturned three years later by *West Virginia State Board of Education v. Barnette*,[71] the verdict illustrated the Court's strong inclination to support the government's right to make neutral legislation even if it burdened individual religious rights.

Lillian and William Gobitis were expelled from their school in Pennsylvania for not participating in the Pledge of Allegiance and the mandatory flag salute.[72] They claimed that as Jehovah's Witnesses, they were not allowed to salute the flag; thus, their expulsion violated the Free Exercise Clause.[73] Subsequently, their father filed a suit against the school.[74]

The district court and the court of appeals ruled in favor of Gobitis, stating that the mandatory salute and pledge were unconstitutional. However, the Supreme Court later overruled the lower courts in an 8-1 decision.[75] The Court stated several reasons for its decision in the majority opinion written by Justice Felix Frankfurter, including the secular regulation test. The Court also established that there was a legitimate state interest and the method for promoting the state interest was for the legislatures and school boards to decide, not the Court.[76] The majority opinion stated that the Supreme Court did not

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[70] Minersville School District v. Gobitis, 310 U.S. 586 (1940) .

[71] West Virginia State Board of Education v. Barnette 319 U.S. 624 (1943)

[72] *Minersville School District v. Gobitis*, Oyez, https://www.oyez.org/cases/1940-1955/310us586 (last visited Sep 26, 2022).

[73] Id

[74] Aichinger, A., 2009. *Minersville School District v. Gobitis*. Available at: https://www.mtsu.edu/first amendment/article/308/minersville-school-district-v-gobitis [Accessed September 26, 2022].

[75] *Minersville School District v. Gobitis*, Oyez, https://www.oyez.org/cases/1940-1955/310us586 (last visited Sep 26, 2022).

[76] Id.

want to be the "school board for the country."[77]

The Court used the secular regulation test to determine whether the mandatory pledge and salute rule was enforced for a secular purpose and if the importance of the secular purpose outweighed the burden placed on the individual's free exercise of religion.[78] It found that the "state's interest in "national cohesion" was "inferior to none in the hierarchy of legal values" and that national unity was the "basis for national security."[79]

The *Gobitis* decision further cemented the standard set by *Reynolds* as it established that if the state had a legitimate secular purpose that did not intentionally discriminate against any religion, it had the right to choose the method in which it achieved that purpose.[80] While this ruling was later overturned, the "secular purpose" test persisted.[81]

C. Prince v. Massachusetts (1944)

In the two previous cases, the Supreme Court established the difference between religious acts vs. beliefs and the secular purpose standard. In *Prince v. Massachusetts,*[82] the court sided with the state again; however, it made a clear distinction between the religious rights of children and adults.[83]

Sarah Prince was arrested in Massachusetts for allowing her nine-year-old niece to accompany her and sell religious literature made by Jehovah's Witnesses.[84] She was convicted under the Massachusetts statute that prohibited minors from selling newspapers and other

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[77] Id.

[78] Id.

[79] Id.

[80] Id.

[81] Id.

[82] Prince v. Massachusetts, 321 U.S. 158 (1944)

[83] Prince v. Massachusetts. *Berkley Center fo Religion, Peace and World Affairs*. Available at: https://berkleycenter.georgetown.edu/cases/prince-v-massachusetts [Accessed September 27, 2022].

[84] Vile, J.R., 2009. Prince v. Massachusetts. *THE FIRST AMENDMENT ENCYCLOPEDIA*. Available at: https://www.mtsu.edu/first-amendment/article/280/prince-v-massachusetts [Accessed September 27, 2022].

merchandise in the streets or public places.[85] Prince filed a suit claiming that she and her niece's rights to equal protection and religious freedom were violated.[86]

The Supreme Court reviewed the case and ruled that the Massachusetts law on child labor was constitutional for several reasons.[87] to the acts vs. beliefs standard in *Reynolds*, when they that religious beliefs were not an excuse to disobey the law, and that the state had the right to enforce a law protecting children.[88] In the majority opinion, the justices compared the Massachusetts law to other laws created to promote child welfare, like mandatory school attendance and vaccinations.[89] They also noted that while the prohibition of an adult selling religious material would be unconstitutional, there are different standards for children when their welfare outweighs the potential burden placed on their free exercise rights.[90]

Overall, the Court further established that acts were separate from beliefs, that laws with a secular purpose did not violate the Free Exercise Clause, and that different protections apply to children. With each case, the Court continues to define the scope of the Free Exercise Clause by deciphering the vague lines between state interest, personal freedom, and protection.

D. Braunfield v. Brown (1961)

Braunfield v. Brown[91] was a watershed moment in determining the scope of protection for the Free Exercise Clause. While the Court ruled in favor of the state again, the plurality decision and individual justice opinions paved the way for the landmark decision *Sherbert v.*

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[85] Id.

[86] Id.

[87] Prince v. Massachusetts - 321 U.S. 158, 64 S. Ct. 438 (1944). *Community*. Available at:https://www.lexisnexis.com/community/casebrief/p/casebrief-prince-v-massachusett

[88] Id.

[89] Id.

[90] Prince v. Massachusetts. *Berkley Center of Religion, Peace and World Affairs*. Available at: https://berkleycenter.georgetown.edu/cases/prince-v-massachusetts [Accessed September 27, 2022].

[91] Braunfield v. Brown 366 U.S. 599 (1961)

Verner[92], which significantly broadened the Free Exercise Clause.[93]

This case centered on Pennsylvania's Blue Law which only allowed specific stores to operate on Sundays.[94] Abraham Baldwin was the owner of a clothing store that was not allowed to open on Sundays.[95] Baldwin filed a suit claiming that the Blue Law violated his religious rights because he could not keep his Saturday Sabbath and obey the law without significant economic hardship.[96] The Supreme Court wrestled with this case, and while they ultimately ruled in favor of the state, they had a plurality decision. Chief Justice Earl Warren explained in a plurality opinion that the decision was based on the precedented secular purpose and acts vs. beliefs standards.[97] However, the opinion also contained key inferences to the desire for change.[98] Chief Justice Warren stated, "it is constitutional for the government to pursue a valid secular policy even if it incidentally restricts religious exercise but only if there are no alternative means available that is less burdensome to religious liberty."[99] While he did not elaborate on how to determine a less burdensome alternative, his opinion served as the framework for the broader *Sherbert* test established in *Sherbert v Verner*.[100]

A. *Sherbert v. Verner (1963)*

The facts of the case revolve around Adell Sherbert, who was a devout member of the Seventh-day Adventist Church.[101] Adell Sherbert worked for a textile mill in South Carolina for 35 years; she worked five days a week, and she chose to avoid working on Saturdays to observe

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[92] Sherbert v. Verner 374 U.S. 398 (1963)

[93] Epstein, L., McGuire, K.T. & Walker, T.G., 2021. *Constitutional law for a Changing America a short course* 8th ed., Thousand Oaks, CA: CQ Press.

[94] Id.

[95] Id.

[96] Id.

[97] Id.

[98] Id.

[99] Id.

[100] Id.

[101] Id.

her Sabbath.[102] In 1959, her employer changed policies and mandated that she work Saturdays; she refused and was let go from her job.[103]After her release, she attempted to find employment at three different mills, but none of them would allow her to avoid working on Saturdays.[104] As a result of her lack of employment, she filed for unemployment benefits in South Carolina.[105] Sherbert was denied unemployment benefits because the state claimed she was willing and able to work, and she had refused three other employment positions.[106] Sherbert filed a suit and claimed that South Carolina violated the Free Exercise Clause.[107]

The Supreme Court heard Sherbert's case, and in a surprising turn from precedent, it distinguished the facts of this case from those in *Braunfield v. Brown*[108] and ruled in favor of Sherbert.[109] The 7-2 decision from the Court confirmed its desire for change foreshadowed in *Braunfield*. In the majority opinion written by Justice William J. Brennan, he explained the reasoning behind the Court's decision.[110] The opinion explained that the ban on Sherbet's unemployment benefits put a significant burden on her rights, and the state failed to show a substantial state interest that merited the burden.[111] Most importantly, the majority opinion established the Sherbert test where the "state had to demonstrate that it was pursuing a compelling state interest and that its method was the least restrictive alternative."[112]

Two Justices dissented from the ruling because they felt that the Court was making an unfair exception to those who didn't work on

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[102] Id.

[103] Id.

[104] Id.

[105] Id.

[106] Id.

[107] Id.

[108] Braunfield v. Brown 366 U.S. 599 (1961)

[109] Epstein, L., McGuire, K.T. & Walker, T.G., 2021. *Constitutional law for a Changing America a short course* 8th ed., Thousand Oaks, CA: CQ Press.

[110] Id.

[111] *Sherbert v. Verner*, Oyez, https://www.oyez.org/cases/1962/526 (last visited Sep 28, 2022).

[112] Id.

Saturdays for religious reasons instead of those who didn't work on Saturdays for personal reasons.[113] Despite their dissents, the *Sherbert* standard was established.

B. *Wisconsin v Yoder (1972)*

Wisconsin v Yoder[114] was an important case that clarified and solidified the *Sherbert* test, which became known as the *Sherbert-Yoder* test.[115] After the Court implemented the *Sherbert* test, there were questions on how to interpret the "least restrictive alternative" requirement and what constituted a compelling governmental interest. *Yoder* helped answer many questions by clearly showing that the Court was serious about requiring the government to provide substantial evidence of a least restrictive alternative even when dealing with legitimate state interests like education.

The facts of the *Yoder* case centered on three Amish fathers who refused to obey a Wisconsin law that required accredited school attendance until children were 16.[116] The state fined them for their noncompliance, causing them to file a suit alleging their religious rights were violated.[117] They claimed that an important principle of their religious beliefs involved restricting their children from attending public/private school after the eighth grade to preserve their religious belief system.[118]

The Supreme Court heard the case and applied the *Sherbert* rule.[119] As a result, the Court ruled in favor of Yoder by determining that the state did not have a compelling reason to justify the burden on

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[113] *Sherbert v. Verner*, Oyez, https://www.oyez.org/cases/1962/526 (last visited Sep 28, 2022).

[114] Id.

[115] Epstein, L., McGuire, K.T. & Walker, T.G., 2021. *Constitutional law for a Changing America a short course* 8th ed., Thousand Oaks, CA: CQ Press.

[116] Wisconsin v. Yoder (1972). *Khan Academy* . Available at: https://www.khanacademy.org/humanities/ap-us government-and-politics/civil-liberties-and-civil-rights/first-amendment-religion/v/the-first-amendment [Accessed September 29, 2022].

[117] Id.

[118] Id.

[119] Epstein, L., McGuire, K.T. & Walker, T.G., 2021. *Constitutional law for a Changing America a short course* 8th ed., Thousand Oaks, CA: CQ Press.

free exercise.[120] The lawyers representing the Amish fathers cleverly disputed the opposing counsel's claim that the state was protecting children's welfare by arguing that the Amish children were still receiving an excellent education at home. Their argument persuaded the Court not to evaluate the case by the *Prince* ruling, but to use the *Sherbert* test.[121]

C. *United States v. Lee (1982)*

United States v. Lee[122] was another major turning point in determining the scope of protection for the Free Exercise Clause. The case occurred because Edwin Lee would not pay social security taxes because a tenet of his Amish beliefs involved taking care of the elderly.[123] He was opposed to contributing to a program where the government supported the elderly and claimed that it violated his right to free exercise of religion.[124]

The Supreme Court faced a significant challenge in *Lee* because it had to decide between appearing to contradict the *Sherbert-Yoder* test or allowing someone out of compulsory tax laws.[125] The Court chose the former and determined that while mandating social security taxes did burden Mr. Lee's religious rights, the government had a significant interest in taxation.[126] Chief Justice Burger wrote in the majority opinion that "to maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."[127]

However, many were confused by the ruling as the *Yoder* case

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[120] Id.

[121] Epstein, L., McGuire, K.T. & Walker, T.G., 2021. *Constitutional law for a Changing America a short course* 8th ed., Thousand Oaks, CA: CQ Press

[122] United States v. Lee, 455 U.S. 252 (1982)

[123] Epstein, L., McGuire, K.T. & Walker, T.G., 2021. *Constitutional law for a Changing America a short course* 8th ed., Thousand Oaks, CA: CQ Press

[124] Id.

[125] Id.

[126] Id.

[127] Id.

also dealt with the Amish faith and compulsory legislation.[128] The Court was facing a conundrum because it was struggling to find a standard that would fit a broader array of cases than the *Sherbert-Yoder* test.[129] Many justices thought the *Sherbert-Yoder* test was too broad, and their ruling in *Lee* foreshadowed the shift away from that test.[130]

D. *Goldman v. Weinberger (1986)*

Goldman v. Weinberger[131] further revealed the Court's shift away from the *Sherbert Yoder* test.[132] S. Simcha Goldman was a captain and clinical psychologist in the United States Air Force.[133] Goldman was a devout Orthodox Jew, and because of that, he wore a yarmulke.[134] [135] In response, Goldman filed a case claiming that the Air Force regulation was unconstitutional because he had the right to wear his yarmulke under the Free Exercise Clause.[136]

In a 5-4 decision, the Court ruled against Goldman.[137] The Court explained that when the military is involved, "great deference" needs to be given to their leaders in determining whether burdening individual rights is necessary for a compelling military interest.[138] Similarly, the Court determined that uniform requirements were necessary for military discipline, unity, and duty.[139] While The Court attempted to differentiate the ruling from previous cases because of military involvement, many viewed the decision as more evidence that the Court was moving away

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[128] Id.

[129] Id.

[130] Id.

[131] Goldman v. Weinberger, 475 U.S. 503 (1986)

[132] Id.

[133] Curry, B., 2009. Goldman v. Weinberger. *THE FIRST AMENDMENT ENCYCLOPEDIA*. Available at: https://www.mtsu.edu/first-amendment/article/285/goldman-v-weinberger [Accessed September 29, 2022].

[134] Id.

[135] Id.

[136] Id

[137] Id.

[138] Id.

[139] Id.

from the *Sherbert-Yoder* test.[140] That thinking would prove correct as the Court made a radical change in the *Smith* decision.

E. *Employment Division, Department of Human Resources of Oregon v. Smith (1990)*

Employment Division, Department of Human Resources of Oregon v. Smith[141] was a significant decision that narrowed the scope of protections guaranteed under the Free Exercise Clause. In theory, the Court distinguished this case from *Sherbert* and *Yoder, but* this case essentially voided *the Sherbert-Yoder* test by eliminating the compelling interest test.[142] The Court's decision in *Smith* can be compared to the decision in *Reynolds v. United States*[143], where the Court established a distinction between acts and beliefs. The Court ruled in the *Smith* case that religious beliefs are not an excuse for disobeying a valid state law.[144]

Alfred Smith and Galen Black were members of the Native American Church and were employed as private drug rehabilitation counselors.[145] Both were fired and denied unemployment benefits because they failed drug tests.[146] Smith filed a suit claiming that his religious rights were violated because he was consuming peyote, an illegal drug, as part of a religious ceremony; thus, it was unconstitutional

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[140] Id.

[141] Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)

[142] Hermann, J.R. (2009) *Employment Division, Department of Human Resources of Oregon v. Smith*, *THE FIRST AMENDMENT ENCYCLOPEDIA*. Available at: https://www.mtsu.edu/first-amendment/article/364/employment division-department-of-human-resources-of-oregon-v-smith (Accessed: October 3, 2022).

[143] Reynolds v. United States, 98 U.S 145 (1879)

[144] *Employment Division, Department of Human Resources of Oregon v. Smith*, Oyez, https://www.oyez.org/cases/1989/88-1213 (last visited Oct 3, 2022).

[145] Hermann, J.R. (2009) *Employment Division, Department of Human Resources of Oregon v. Smith*, *THE FIRST AMENDMENT ENCYCLOPEDIA*. Available at: https://www.mtsu.edu/first-amendment/article/364/employment division-department-of-human-resources-of-oregon-v-smith (Accessed: October 3, 2022). Reynolds v. United States, 98 U.S 145 (1879)

[146] Id.

to deny him unemployment benefits.[147]

The lower court ruled in favor of Smith; however, the Supreme Court overturned its decision and ruled in favor of the state.[148] While the facts of this case are similar to *Sherbert,* the Court determined that the *Sherbert-Yoder* rule didn't apply because *Smith* was a pure free exercise case as opposed to a hybrid free exercise case.[149] The Court defined a hybrid free exercise case as a case that "couples a constitutional right with another fundamental right."[150] In the hybrid case, the *Sherbert-Yoder* rule applied, but the secular policy test was used in pure religious cases.[151] Under this logic, the Court determined that the state had a legitimate secular interest in enforcing criminal statutes.[152] In the majority opinion, Justice Scalia stated that allowing exceptions to every state law or regulation affecting religion would "open the prospect of constitutionality required exemptions from civic obligations of almost every conceivable kind."[153]

The *Smith* standard required a law to be neutral and generally applicable, and it essentially eradicated the *Sherbert-Yoder* test.[154] The Court's decision radically swung the pendulum of power in the state's direction and narrowed the scope of Free Exercise Clause protection.

F. *Babalu Aye, Inc. v. City of Hialeah (1993)*

In *Babalu Aye, Inc. v. City of Hialeah*[155], the Supreme Court ruled against the state. However, protests erupted after the ruling because the

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147 Id.

148 Hermann, J.R. (2009) *Employment Division, Department of Human Resources of Oregon v. Smith*, *THE FIRST AMENDMENT ENCYCLOPEDIA*. Available at: https://www.mtsu.edu/first-amendment/article/364/employment division-department-of-human-resources-of-oregon-v-smith (Accessed: October 3, 2022). Reynolds v. United States, 98 U.S 145 (1879)

149 Id.

150 Id.

151 Id.

152 Id.

153 *Employment Division, Department of Human Resources of Oregon v. Smith*, Oyez, https://www.oyez.org/cases/1989/88-1213 (last visited Oct 3, 2022).

154 Id.

155 Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)

Court used and confirmed the *Smith* test, which many viewed as a test that unfairly favored the government.[156]

This case revolved around a small religion known as Santeria.[157] A hub for the religion exists in Miami, and one of the tenets of faith is animal sacrifice.[158] A group of Santerians planned to build a church in Miami.[159] These plans resulted in a city council meeting that led to new laws prohibiting animal slaughter for purposes other than consumption.[160] The law explicitly prohibited ritual animal slaughter of any kind.[161] Under these new laws, Santerians could not practice many of their religious rituals. The Santerians filed a case claiming that the new laws violated the Free Exercise Clause because they explicitly targeted their faith by making two rules that differed when applied to religious purposes as opposed to secular purposes.[162]

The Court unanimously ruled that the city had violated the Free Exercise Clause; however, it differed in its reasoning.[163] The Court used the *Smith* test to determine that the city's laws were not neutral nor generally applicable.[164] The Supreme Court also decided that if a law does not pass the *Smith* test, it must pass the strict scrutiny test, meaning it "must have a compelling interest and be narrowly tailored to achieve that interest."[165] The city did not have a compelling interest because they intentionally targeted a religious group under the guise of preventing animal cruelty. It was not narrowly tailored because there were two

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[156] Epstein, L., McGuire, K.T. & Walker, T.G., 2021. *Constitutional law for a Changing America a short course* 8th ed., Thousand Oaks, CA: CQ Press

[157] Id

[158] Id

[159] Id

[160] Id

[161] Id

[162] Id.

[163] Green, W.C. (2009) *Church of the Lukumi Babalu Aye v. City of Hialeah*, *THE FIRST AMENDMENT ENCYCLOPEDIA*. Available at: https://www.mtsu.edu/first-amendment/article/29/church-of-the-lukumi-babalu aye-v-city-of-hialeah (Accessed: October 5, 2022).

[164] Id

[165] Id

different standards related to religious and secular interests.[166]

All the justices agreed that under the *Smith* test, the Hialeah ordinances violated the Free Exercise Clause; however, many of the justices expressed disdain for the *Smith* test and disagreed with the ruling in *Smith*.[167] The public also protested the *Smith* test because they feared that the "neutral and generally applicable" standard was far too easy for the government to manipulate. The public felt that a case would rarely be as explicitly discriminatory as *Babalu Aye, Inc.*[168] Despite several legislative attempts by Congress to overrule the Court's decision, the current standard is that "the free exercise clause only requires neutral laws that apply broadly (*Smith*), while laws that single out religion for disfavored treatment must meet the demands of strict scrutiny (*Lukumi*)."[169]

II. Recent Free Exercise Supreme Court Decisions

A. *Ritesh Tandon, et al. v. Gavin Newsom, Governor Of California, et al. (2021)*

In *Tandon v. Newsom*[170], the Supreme Court clarified the *Smith* standard.[171] The Court issued a per curiam decision on an application for injunctive relief against a California COVID-19 restriction law that restricted the number of people allowed at private home gatherings.[172] The law caused Bible studies, prayer meetings, and other church gatherings held at homes to be restricted.[173] The applicants filed a petition for a writ of injunction against the California law. They claimed that since other businesses were allowed looser restrictions, the law

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166 Id

167 Epstein, L., McGuire, K.T. & Walker, T.G., 2021. *Constitutional law for a Changing America a short course* 8th ed., Thousand Oaks, CA: CQ Press

168 Id.

169 Id.

170 Tandon v. Newsom 593 U. S. ____ (2021)

171 Vile, J.R. (2021) *Tandon v. Newsom*. Available at: https://www.mtsu.edu/first-amendment/article/1901/tandon-v newsom (Accessed: October 31, 2022).

172 Id.

173 Id.

violated the Free Exercise Clause.[174] Similar cases had been filed in *South Bay United Pentecostal Church v. Newsom*[175] and *Roman Catholic Diocese of Brooklyn v. Cuomo*[176], and the Court used them to issue a strong statement to the 9th U.S. Circuit Court of Appeals by clarifying *Smith*[177].

The Court made a significant clarification to *Smith* by determining that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the free exercise clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[178] *Tandon* was an important ruling because it further explained the *Smith* test and made it clear that strict scrutiny would apply when the *Smith* test failed.[179]

B. *Fulton v. City of Philadelphia (2020)*

Fulton v. City of Philadelphia[180] was a landmark case because it expanded religious liberty, while also failing to evaluate or overturn *Smith*.[181] The *Fulton* case showed that even under the *Smith* test, laws could and will be struck down when it violates the free exercise clause. Catholic Social Services (CSS) was a service in Philadelphia that helped foster children find placements. Because of their religious beliefs, they had a policy that prevented same-sex couples from fostering children.[182] As a result, the city refused to renew its contract with CSS. In response, CSS filed a suit claiming that the city had violated their right to free exercise and free speech.[183]

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[174] Id.

[175] *South Bay United Pentecostal Church v. Newsom* 590 U. S. ____ (2020)

[176] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ____ (2020)

[177] Vile, J.R. (2021) *Tandon v. Newsom*. Available at: https://www.mtsu.edu/first-amendment/article/1901/tandon-v newsom (Accessed: October 31, 2022).

[178] Id.

[179] Id.

[180] Fulton v. City of Philadelphia 593 U.S. (2021)

[181] *Fulton v. City of Philadelphia*, Oyez, https://www.oyez.org/cases/2020/19-123 (last visited Oct 16, 2022).

[182] Id.

[183] Id.

The Supreme Court reviewed the case and ruled unanimously in favor of CSS.[184] The Court determined that because Philadelphia's law included exceptions that the Commissioner determined, it was neither neutral nor generally applicable.[185] Because the case failed the *Smith* test, it was evaluated by the strict scrutiny standard. The Court determined that the city had no compelling interest that would warrant the religious burden.[186]

Under this decision, the *Smith* and strict scrutiny tests remained the standard for evaluating free exercise cases. While the decision was unanimous, many Justices expressed disdain for the *Smith* test and wanted to eradicate it.[187] However, the Justices ultimately decided that this case did fall under the grounds of *Smith,* so the standards stayed the same.[188]

C. *Kennedy v. Bremerton School District (2022)*

This year, a landmark Supreme Court decision was decided in *Kennedy v. Bremerton School District*.[189] While the elements of this case involved the Establishment Clause and freedom of speech, the focus will be on the Free Exercise Clause.[190] Joseph Kennedy was a high school football coach fired for refusing to give up his post-game ritual of praying at the fifty-yard line.[191]

Mr. Kennedy filed a suit claiming the school district violated his First Amendment rights.[192] The school responded to the suit by claiming they were attempting to prevent itself from a lawsuit under the establishment clause. They also contended that Mr. Kennedy's First Amendment rights were interrelated with the Establishment Clause, and

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[184] Id.

[185] Id.

[186] Id.

[187] Id.

[188] Id.

[189] Kennedy v. Bremerton School District, 597 U.S. (2022)

[190] *Kennedy v. Bremerton School District*, Oyez, https://www.oyez.org/cases/2021/21-418 (last visited Oct 12, 2022).

[191] Id.

[192] Id.

therefore, they had the right to fire him.[193]

The Court ruled in favor of Mr. Kennedy and found that his termination violated his First Amendment rights.[194] The Court used the *Smith* and strict scrutiny rule to decide this case.[195]In this case, the Court determined that the school district's rule against Mr. Kennedy's post-game prayer was not general or neutral because other coaches were allowed to perform secular post game duties and they were no longer conducting their official coaching duties.[196]

Because the case failed the *Smith* test, the Supreme Court used the strict scrutiny test.[197] The Court explained that the school did not have a compelling interest and refuted the district's claim that it was protecting itself from violating the establishment clause.[198] The Court also determined that there was no evidence of Mr. Kennedy coercing others, and he performed his post game ritual alone.[199] *Kennedy* further cemented that the Smith test and, if necessary, the strict scrutiny test will evaluate free exercise clause cases.

III. Examining the Future of Free Exercise Cases and Analyzing Unanswered Questions

As described in previous sections, the Court has been narrowing and expanding the scope of free exercise protection for centuries. The current standard for evaluating Free Exercise Clause cases is the *Smith* test and, if necessary, the strict scrutiny test. While the current standard has been used for several years and was reaffirmed in *Tandon*, *Fulton,* and *Kennedy*, many questions still linger regarding the efficacy of the current standard and whether it will continue to stand in future cases.

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[193] *Kennedy v. Bremerton School Dist.* (no date) *Legal Information Institute*. Legal Information Institute. Available at: https://www.law.cornell.edu/supremecourt/text/21-418 (Accessed: October 12, 2022).

[194] Id.

[195] Id.

[196] Id.

[197] Id.

[198] Id.

[199] Id.

A. Future Supreme Court Cases

Since the overturning of the *Sherbert-Yoder* test and the ruling in *Babalu Aye*, public protest has claimed that the *Smith* test is too lenient and favorable towards the government.[200] For example, in the words of Senator Edward M. Kennedy, under the current standard, "dry communities could ban the use of wine in communion services, government meat inspectors could require changes in the preparation of kosher food, and school boards could force children to attend sex education classes."[201] More recently, the *Fulton* case revealed several justices' disdain for the *Smith* test and desire to change it. While there is much animosity towards Smith, the justices have avoided overturning it in *Tandon*, *Fulton,* and *Kennedy.*

The Court's failure to overturn *Smith* does not equate to their satisfaction or commitment to the standard. In *Tandon*, the Court made an important clarification to *Smith,* and in *Kennedy,* the Supreme Court determined that the *Smith* test didn't apply, nor did it comment on the legitimacy of *Smith*. However, in *Fulton*, several members of the Court explained their issues with *Smith* and recommended that *Smith* be overturned.

The *Fulton* case failed the *Smith* test and was decided by strict scrutiny. Thus, the Court determined that it was inappropriate to overturn a standard not used in the case. In the majority opinion in the *Fulton* case, Chief Justice Roberts stated, "But we need not revisit that decision here. This case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable."[157]

However, the majority opinion is not the sole method of determining the Justice's thoughts. As was evident in *Braunfield v. Brown*, concurring and dissenting opinions can serve as writing on the wall for the Court's future decisions. While no one can fully predict the Court's future rulings, several clues can be compiled to give insight into their future cases. In *Fulton*, the two concurring statements were

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[200] Epstein, L., McGuire, K.T. & Walker, T.G., 2021. *Constitutional law for a Changing America a short course* 8th ed., Thousand Oaks, CA: CQ Press

[201] Epstein, L., McGuire, K.T. & Walker, T.G., 2021. *Constitutional law for a Changing America a short course* 8th ed., Thousand Oaks, CA: CQ Press

extremely rich and provided valuable insight into the Justice's thinking on the *Smith* test.

In *Fulton*, one of the concurring opinions was written by Justice Barrett, joined by Justice Kavanaugh and Justice Breyer (everything but the first paragraph). Their concurring opinion agreed that this was not the case to overrule *Smith,* but they also expressed grave concern with the standard. In the first paragraph, the Justices favored textual and structural arguments. They noted

that the Free Exercise Clause is the sole component of the First Amendment that only protects against the bare minimum of discrimination. The Justices further explained that under the *Smith* standard, the individual is vulnerable to egregious violations of religious burden so long as the law is neutral and generally applicable. Despite the many issues the Justices described, they ultimately determined that this case was not the right case to overrule *Smith* and that many issues would have to be overcome to overrule *Smith.*

In *Fulton*, Justice Alito , joined by Justice Thomas and Justice Gorsuch, wrote an additional concurring opinion. Their opinion was much more elaborate than Justice Barrett's, but they took a different approach by claiming that the *Smith* test results in severe consequences. They explained that had Philadelphia not allowed for exemptions, their law would have passed *Smith*. This caveat was volatile and unacceptable to the Justices, and they claimed that it left gaps for crafty legislatures to discriminate against individuals. Most notably, all three justices are adamant that the *Smith* test needs to be reevaluated immediately. They provided several examples of public, judicial, and political disdain for *Smith*. They also provided four major case types that are vulnerable to *Smith*. Those include "hybrid-rights cases, rules that "target" religion, the nature and scope of exemptions, and identifying appropriate comparators." The justice's solution was to bring back the *Sherbert-Yoder* test.

The last concurring opinion in *Fulton* was written by Justice Gorsuch and joined by Justice Thomas and Justice Alito. This opinion starts boldly by explaining that the Court took this case to evaluate *Smith*, yet his colleagues were content to side-swipe it under the guise of incapability. The Justices also stated that while the Court may have avoided overruling Smith, they opened the door for future cases to

clarify their inaction. Justice Gorsuch said, "had we followed the path Justice Alito outlines— holding that the City's rules cannot avoid strict scrutiny even if they qualify as neutral and generally applicable— this case would end today." The opinion ends with a clear call to overrule Smith and urges the Court to stop waiting for the perfect solution.

B. Challenges to Overturning and Replacing the *Smith* standard

Tandon, *Fulton,* and *Kennedy* reveal many of the justice's desires to overturn *Smith*. While no ruling has overturned *Smith,* it is apparent that some of the justices are eager to replace it. However, they have also acknowledged the great difficulty of doing so. Replacing 32 years of precedent and creating a more effective standard than *Smith* is not simple. There are many hurdles to overturning and replacing *Smith.*

The most pressing question regarding the prospect of overturning *Smith* is determining what standard will replace it. *Smith* was created because the Court felt that the *Sherbert-Yoder* test was insufficient and, if applied, it would cause severe consequences and create legal loopholes to important statutes like prohibiting illegal drugs. Thus, the Court felt it had to create a new rule to address the issue. As stated earlier in the article, Justice Scalia wrote in the majority opinion that allowing exceptions to every law or regulation affecting religion would "open the prospect of constitutionality required exemptions from civic obligations of almost every conceivable kind."

Previous Courts felt unsatisfied with the highly ambiguous and easily achieved *Sherbert Yoder* test, while current Courts feel unsatisfied with the seemingly too restrictive *Smith* test. Thus, to overturn and replace *Smtih,* the Court must balance the need for government regulation with individual protections. The new standard must also be able to answer the difficult questions that spurred the *Smith* test's creation. Justice Barret explained some of the questions that would need to be answered if *Smith* was overturned in her concurring opinion in the *Fulton* case. She stated, "there would be a number of issues to work through if Smith were overruled. To name a few: should [religious] entities be treated differently than individuals? Should there be a distinction between indirect and direct burdens on religious exercise?" Additionally, the new standard must address some of the

cases that Justice Alito said were vulnerable to *Smith*. In his concurring opinion in *Fulton,* he described those vulnerable cases as being "hybrid-rights cases, rules that "target" religion, the nature and scope of exemptions, and identifying appropriate comparators."

Some of the justices have proposed through their concurring opinions in the *Fulton* case that the strict scrutiny test should replace *Smith*. While this proposition has clear benefits, like a less restrictive standard, more individual religious freedom, and a more satisfied public, the Court would still have to address the issues they faced more than thirty years ago with the *Sherbert*

Yoder test. Justice Barret clearly stated this when she wrote in her concurring opinion in the *Fulton* case that "if the answer is strict scrutiny, would pre-Smith cases rejecting free exercise challenges to garden-variety laws come out the same way?"

On the other hand, Justice Gorsuch was very clear in his concurring opinion in the *Fulton* case when he stated that difficult questions are "no excuse … rather than adhere to Smith until we settle on some "grand unified theory" of the Free Exercise Clause for all future cases until the end of time … the Court should overrule it now, set us back on the correct course, and address each case as it comes."

C. Predictions

While the Court must decide on the future of the *Smith* test eventually, I predict that they will continue to adjust the standard as necessary and wait at least a decade before overturning the decision. Historically, once the Supreme Court creates a new standard or overturns precedent, it waits a while to watch how the lower Courts and legislature implement the decision. Usually, they will take cases periodically to make minor clarifications,`but the Court often waits decades before making another landmark decision. For example, the Court waited 84 years before establishing the *Sherbert* test and another 27 years before the *Smith* ruling. While it has been more than 30 years since *Smith,* the Court has had ample opportunity to overturn it, but they have skirted the issue or made minor changes. Even when they took on the *Fulton* case to determine the *Smith* test's future, they remained indecisive and used strict scrutiny. Additionally, the Supreme Court has taken several Free Exercise cases in the last five years, and they have a

limited number of cases they hear yearly. Barring a major case they see fit to get involved with, I think they will focus on other pertinent issues and see how cases evaluated by the *Smith* test unfold.

While I predict the Court will overturn *Smith* eventually, I don't think they should. If necessary, the Smith test should continue to be adjusted, but the Court has already seen what the alternative does. The *Sherbert-Yoder* test was much more conducive to individual religious freedom but opened up dangerous legal loopholes. The *Sherbert-Yoder* test is too lenient and not the answer, but on the opposite end, the *Smith* test before *Lukumi* was too restrictive and not the answer. *Lukumi* helped balance the *Smith* test by adding the element of strict scrutiny, as did the adjustments made in *Tandon*. Thus, by continually changing or clarifying aspects of Smith as necessary, the Court is advancing Free Exercise jurisprudence as close to the middle ground as I believe possible.

Currently, the consequences of overturning *Smith* are greater than adjusting it as needed. For example, should the Court overturn *Smith* without implementing a clear new standard, it will threaten the rule of law and overwhelm the judicial system with a request for exemptions. Thus, unless the current Court suddenly discovers a more effective standard than *Smith*, something legislators, justices, and the public have been attempting to do for decades to no avail, they need to stick with what is working. While the *Smith* test isn't perfect, it balances individual religious rights with governmental power like no other standard or ruling ever has.

IV. Conclusion

Free exercise jurisprudence is a rich, controversial, and evolving area of constitutional law. From the first major decision in *Reynolds* to the most recent cases in *Tandon*, *Fulton,* and *Kennedy,* the Court is still wrestling with defining the line between individual religious freedom and government power. This article examined the scope of protection allowed under the Free Exercise Clause by exploring the historical pendulum of Supreme Court rulings, discussing the most recent rulings, and inferring the future of the Free Exercise Clause by analyzing unanswered questions.

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Art, Obscenity, and the Patriarchy

Lindsay Khalluf

Introduction

Perhaps one of the greatest examples of hypocrisy lies in the "culture wars" of the 1990s, when traditional American values and freedom of speech were no longer synonyms, but rather direct contradictions.[202] Conservative senators assessed influxes of controversial artwork as "sickening, blasphemous, and obscene *so-called art,*"[203] as they called for withdrawals of federal funding from said art. The controversy over "obscene art," however, was not specific to the culture wars: it was only one example of a larger, ongoing conflict between the Post Modern art movement and the standard for obscenity established in *Miller v. California (1973).*[204] *Miller* set a standard for obscenity that did not protect Post Modern and Contemporary art by promoting a culture that views only *some* sexually explicit art as having "serious artistic value" and thus worthwhile of first amendment protection. As seen through the funding cuts for the National Endowment for the Arts, *Miller*'s precedent has allowed for the censorship of progressive art. Sexually explicit art plays a powerful role in dismantling the patriarchy because it effectively communicates messages about sexuality, normalizes the nude body, and catalyzes progress. Thus, it deserves greater federal protection from censorship.

Section I will provide an overview of the *Miller*

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[202] "The 90s: Culture Wars," Opera America (Opera America, April 1, 2020), https://www.operaamerica.org/magazine/spring-2020/the-90s-culture-wars/.

[203] Maureen Dowd, "Unruffled Helms Basks in Eye of Arts Storm," The New York Times (The New York Times, July 28, 1989), https://www.nytimes.com/1989/07/28/arts/unruffled-helms-basks-in-eye-of-arts-storm.html.

[204] David L. Hudson Jr., "Miller v. California," The First Amendment Encyclopedia . Accessed December 16, 2022. https://www.mtsu.edu/first-amendment/article/401/miller-v-california.

test and other case law that established "obscene material" as a matter for judicial review. Section II will provide a brief overview of art history and, in particular, the Modern, Late-Modern, and Post-Modern art movements. Section III will explore the effects of *Miller* by investigating censorship through the restrictions imposed on funding for the National Endowment for the Arts. Section IV will evaluate the effects explored in Section III in relation to the patriarchy. It will investigate the importance of sexually explicit or "obscene" art in progressivism and dismantling the patriarchy. Section V will then provide a concluding opinion on the matter.

I. The Miller Test

Roth v. United States (1957) set the precedent for *Miller v. California (1973),*[205] by providing a basis for a constitutional definition of obscene material.[206] In *Roth*, the Supreme Court ruled that "obscene material" was not protected by the freedom of speech clause of the first amendment.[207] Under the *Roth* test*,* material was considered obscene if the court deemed it as "utterly without redeeming social value."[208]

This remained the standard for obscenity until 1973, when publisher Marvin Miller was arrested in the state of California for violating *Roth* by mailing advertisements for pornographic books and films.[209] When Miller appealed his case to the Supreme Court, the Court overturned the "utterly without redeeming social value" standard created by *Roth.* The Court instead created the *Miller* test[210] and broadened the definition of priority material considered unlawfully obscene. The *Miller* test was a three part obscenity test created by

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[205] Hudson Jr., "Miller v. California."

[206] Richard L. Pacelle Jr., "Roth v. United States," Roth v. United States (The First Amendment Encyclopedia), accessed December 16, 2022, https://www.mtsu.edu/first-amendment/article/414/roth-v-united-states.

[207] Pacelle Jr., "Roth v. United States."

[208] Pacelle Jr., "Roth v. United States."

[209] Hudson Jr., "Miller v. California."

[210] David L. Hudson Jr., "Miller Test," Miller Test (The First Amendment Encynclopedia), accessed December 16, 2022, https://www.mtsu.edu/first-amendment/article/1585/miller-test.

Justice Burger[211], stating that material is obscene on this basis:

1. "Whether the average person, applying community standards, would find that work taken as a whole, appeals to the prurient interest"

2. "Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"

3. "Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value"[212]

The *Miller* test differed from the ruling in *Roth* in two major ways. First, under *Roth,* material had to meet a national standard of obscenity. The ruling in *Miller,* however, changed the "community standards" used to deem obscenity and made them applicable to the local level. Meeting a local community's standard for obscenity was now enough of a reason to lose constitutional protection. Second, the *Miller* test indicates that any "redeeming social value" is not enough for material to earn first amendment protection. Instead, material must have "serious literary, artistic, political, or scientific value." "Any redeeming social value" demands the artwork to simply have any effect on society, which nearly all art can be defended to have. "Serious artistic value," on the other hand, is a more restricting demand: what determines if an artwork's value is "serious" enough? This is the biggest change between the two rulings, as it opens a much larger scope of material to be considered obscene.[213]

The ruling in *Miller* was upheld in *Pope v. Illinois (1987),*[214] when the court reaffirmed that obscenity depends on whether a reasonable person would find "serious value" in the material. *Pope* provided higher protection for artists by establishing an objective standard for the third prong of the *Miller* Test that differed from the other two. The first two prongs follow a community standard, but in *Pope,* the court ruled that the third prong follows a "reasonable person

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211 Amy M. Adler, "Post-Modern Art and the Death of Obscenity Law," *The Yale Law Journal* 99, no. 6 (1990): p. 1359, https://doi.org/10.2307/796739, 1362.

212 Hudson Jr., "Miller Test."

213 Adler, 1362

214 "Pope v. Illinois," Oyez (Oyez), accessed December 16, 2022, https://www.oyez.org/cases/1986/85-1973

standard."[215] This allows for art experts and art curators to attest for "artistic value" in the court, as the "ideas represented in a work do not have to win approval from a majority of the community to be protected."[216] However, Justice Stevens' dissenting opinion explains why this does not provide necessary protection for artists: "There are many cases in which some reasonable people would find that specific sexually oriented materials have serious artistic, political, literary, or scientific value, while other reasonable people would conclude that they have no such value…"[217]

Despite valid criticisms such as Stevens', the standard for obscenity created in *Miller* and upheld in *Pope* remains the standard today. Ultimately, our government wrongfully operates on a system that believes "serious artistic value" can separate obscenity from sexual art.[218]

II. Post-Modern Art

To understand why the *Miller Test* provides insufficient protection of art, one must first understand the characteristics of Post-Modern and Contemporary Art, *an understanding must first be achieved of the basic* characteristics of Post-Modern and Contemporary Art. The Post-Modern Art Movement was a response to Late-Modernism, which began in the 1950s as a continuation of 19th and early 20th century Modernism.[219] Late-Modernism "distinguished between good art and bad art by demanding that good art be pure, self critical, original, sincere, and serious."[220] It resided on the definition of "high art" as art

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[215] "Pope v. Illinois."

[216] "Pope v. Illinois."

[217] Rick Marshall, "Obscenity Case Files: Pope v. Illinois," Comic Book Legal Defense Fund, March 27, 2013, https://cbldf.org/2013/03/obscenity-case-files-pope-v-illinois/.

[218] Adler, 1362

[219] Adler, 1363

[220] Adler, 1363

which "elevates and inspires the cultivated spectator,[221]" first cultivated by Modernism, in comparison to "low art" which "merely amuses or entertains the masses." "High art" also *refers* to traditional mediums, while "low art" referred to mass-made commodities and pop culture mediums.[222] Modernist "high" art was primarily drawings, paintings, and sculptures created by cisgender, heterosexual white men.[223] Though it rejected realism and encouraged more creative art styles, it still relied on the belief that art must embody a deeper, serious meaning to have value. However, this "serious meaning" did not refer to the controversial social commentary we see in art today— such art was rejected by the Modernist and Late-Modernist movements.

Late-Modernism was heavily influenced and defined by the beliefs of Clement Greenberg, perhaps the most prominent voice of the 20th century abstract art movement.[224] Greenberg expanded on traditional Modernist ideas to advocate for avant garde, or abstract art, the "only living culture still in existence,"[225] during the emergence of 1950s American consumer culture. He referred to the increase in commercial and technological goods, or "kitsch," as a "by-product of tacky, cheap industrialized society."[226] He advocated for abstract art created through traditional art mediums, where the "serious meaning" resided in the purposeful choices of line and color. Though the abstract art era paved the way for more creative expression in art, it emphasized the belief that art should be separate from the problematic society around it.[227]

The Post-Modern Art movement*, though it* technically refers to the art of the 1970s to the 1990s, remain*s in principle* constant throughout the current Contemporary Art movement. Post-Modern Art

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[221] "Postmodernist Art Definition, Characteristics, History." Postmodernist Art: Definition, Characteristics, History. Accessed December 16, 2022. http://www.visual-arts-cork.com/postmodernism.htm.

[222] "Postmodernist Art Definition, Characteristics, History."

[223] "Postmodernist Art Definition, Characteristics, History."

[224] Julie Lesso, "How Clement Greenberg Shaped Modernist Art," TheCollector, July 3, 2020, https://www.thecollector.com/clement-greenberg/

[225] Lesso, "How Clement Greenberg Shaped Modernist Art."

[226] Lesso, "How Clement Greenberg Shaped Modernist Art."

[227] Lesso, "How Clement Greenberg Shaped Modernist Art."

rejects Late-Modernist principles, often characterized as "unserious, impure, irreverent, and derivative."[228] At its core, it challenges Modernism and Late-Modernism with the idea that all art is equally valuable and valid. The Post-Modern Art movement also included an increase in female, non-white, and homosexual artists who explored new mediums, such as performance and digital art.[229]It set the precedent for the contemporary art we know today, where there are nearly no restrictions on who can be an artist and what can be used to create art.

Post-Modernism birthed many artists who rejected the definition of "serious artistic value" proposed in Modernism and Late-Modernism. Artists such as Julie Watchel traced cheap greeting cards onto canvas, rejecting the idea that mass-produced items lack artistic value.[230] Roy Lihtenstein and Andy Warhol led the pop-art movement, [231] which relied on the digital art medium and commercial culture that Modernist artists, such as Greenberg, condemned.[232] Most importantly, however, it birthed artists such as Robert Mappelthorpe and Karen Finley, who used non-traditional mediums, such as pornographic photography and "shock performance art,"[233] to do exactly what Modernist art did not: highlight and respond to widespread societal issues in a controversial and uncomfortable fashion.[234]

Referring to Post-Modern Art as comprising "serious artistic value" implies that there is also art with unserious artistic value. The inclusion of this criterion in the *Miller* test insinuates not only that this distinction is possible, but also that this distinction is one that increases or decreases the art's value. This is inherently incompatible with the Post-Modernist principle that all art is equal in value. Thus, The *Miller*

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[228] Newman, Cara L. *Eyes Wide Open, Minds Wide Shut: Art, Obscenity, and the First Amendment in Contemporary America*, 2003: p. 125, https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1434&context=law-review.

[229] "Postmodernist Art Definition, Characteristics, History."

[230] Adler, 1367

[231] "Lichtenstein and Warhol - Pop Art from the Collection ," Zillman Art Museum, accessed December 17, 2022, https://zam.umaine.edu/lichtenstein-and-warhol-pop-art-from-the-collection/.

[232] Lesso, "How Clement Greenberg Shaped Modernist Art."

[233] Adler

[234] Newman, 126-128

Test reflects the Late-Modernist period of which it was created.[235]It assumes that only *some* art deserves constitutional protection, the same way Late-Modernist artists believe that only *some* art is "good" art. The test suggests that art only deserves constitutional protection if it is "serious" enough, and that there can even be a distinction between good and bad art in the first place.[236] For Post-Modern artists, such a distinction is impossible.

Furthermore, allowing the courts to form this distinction requires them to decide what intent and value constitutes as "serious" enough for the protected use of sexual imagery— it enables the government to instill their own views into the art, censoring progressivism under the notion that the meaning of the art was simply not serious enough.

III. Art Censorship Through Funding

As of the late 20th Century, most dispute over sexually explicit art does not extend beyond widespread criticism or social media discourse. It is generally accepted that in a free society, artists have the right to create and privately distribute what they please. Is this freedom, however, still applicable once that art is federally funded or publicly displayed? A plethora of instances reveal that once this question is raised to the courts, the standard imposed by *Miller* is insufficient protection for artists, oftentimes providing a socially accepted tool of government censorship.

Perhaps the most blatant example of government censorship lies in the 1990s "Culture Wars", where restrictions were placed on the National Endowment for the Arts' funding.[237] The National Endowment for the Arts (NEA) was created by President Lyndon B. Johnson in 1964, to "foster the excellence, diversity, and vitality of the arts in the United States."[238] "The Culture Wars" began once NEA funding of

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[235] Adler, 1364

[236] Adler, 1364

[237] "The 90s: Culture Wars."

[238] "The Battle over the National Endowment for the Arts," Constitutional Rights Foundation, accessed December 17, 2022, https://www.crf-usa.org/bill-of-rights-in-action/bria-13-2-a-the-battle-over-the-national-endowment-for-the-arts.

"controversial" Post-Modernist artists, such as Robert Mapplethorpe, Bella Lewitzky, and Karen Finley was met with public outrage.[239]

A. Robert Mapplethorpe

The Culture Wars began in 1989, when Republican Senator Jesse Helms expressed outrage over the federal funding of Robert Mapplethorpe's artwork.[240]In particular, he strongly condemned the NEA's decision to fund Mapplethorpe's exhibit, *The Perfect Moment*—a collection of sexually explicit, homoerotic photographs.[241]It included strategically placed flowers, nudes, and "brutal, intimate images that, truth be told, do bear a striking resemblance to pornography."[242]Helms, particularly infuriated over the sadomasochism and homoeroticisim present in the photographs, proposed an amendment allowing government regulation over NEA funding. In 1990, Section 304 (a) was added to the Interior and Related Agencies Appropriation Act, its most significant proposition being:[243]

(A) None of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene…

The definition of "obscene" provided in the Section follows that of *Miller,* stating that it is "including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do

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[239] "Public Funding of Controversial Art," Freedom Forum Institute, accessed December 17, 2022, https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/arts-first-amendment-ov erview/public-funding-of-controversial-art/.

[240] Paul N. Rechenberg, Losing the Battle on Obscenity, But Can We Win the War: The National Endowment for the Arts' Fight against Funding Obscene Artistic Works, 57 MO. L. REV. (1992) https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3083&context=mlr

[241] Newman, 131

[242] Alexandra Peers, "Robert Mapplethorpe's 'Perfect Moment,'" Architectural Digest (Architectural Digest, January 24, 2019), https://www.architecturaldigest.com/story/robert-mapplethorpe-guggenheim-exhibition

[243] Rechenberg, 302

not have serious literary, artistic, political, or scientific value."

In addition, the NEA added a certification step to the grant receival process, which required pre-approved artists to agree in writing that "none of the funds would be used 'to promote, disseminate, or produce materials which... may be considered obscene."[244]

The passing of Section 304 (a) was met with newfound concern over obscene art and the withdrawal of federal funding: shortly after its passing, the director of the Corcoran Gallery canceled the exhibit of Mapplethorpe's *The Perfect Moment*.[245] An end to the museum's funding from the NEA "threatened the museum's campaign to increase their endowment by damaging ability to apply for private matching grants."[246] Later in the year, the Contemporary Arts Center in Cincinnati was sued for displaying Mapplethorpe's work, marking "the first time in the history of the country that a museum and director were charged criminally for obscenity because of a public exhibit."[247] Though SCOTUS dropped all obscenity charges in *Contemporary Arts Center v. Ney (1990),* it was due to the testimonies of several art experts,[248] and Section 304 (A) remained in effect.

B. Bella Lewitzky

Bella Lewitzky, a modern dance choreographer and teacher, applied for a grant before Section 304 (a) was put into effect.[249] However, due to the recent certification step added in the amendment, Lewitzky was required to agree to not make any obscene material with the funds. Lewitzky refused to agree and the NEA canceled all future funding to her.[250] She sued, claiming that the obscenity claim in the

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[244] Rechenberg, 303

[245] Newman, 131

[246] Newman, 62

[247] John Faherty and Carol Motsinger, "Pornography or Art? Cincinnati Decided," The Enquirer (Cincinnati, March 29, 2015), https://www.cincinnati.com/story/news/2015/03/28/pornography-art-cincinnati-decided-robert-mapplethorpe-trial-25 -year/70591342/.

[248] "City of Cincinnati V. Contemporary Arts Center," Artist Rights, accessed December 17, 2022, http://www.artistrights.info/city-of-cincinnati-v-contemporary-arts-center.

[249] Newman, 302

[250] Newman, 303

Section was unconstitutionally vague: obscenity cannot be determined by the NEA because it cannot adhere to a national, objective standard, as all prongs in the *Miller* test follow either a community or reasonable person standard.[251] Since artists cannot possibly know what the NEA will consider obscene, Lewitzky argued that they will overly censor their work, creating a chilling-effect on free speech and the production of art.[252] Lewitzky won the case and the Court agreed that the NEA cannot determine obscenity. The court specifically acknowledged that although the government is not required to provide funding towards art, Section 304 (a) violates free speech because of the "extensive role the NEA plays in funding arts… a NEA grant marks a project as worthy of support, [and] an NEA grant is often necessary to obtain private funding."[253]In consequence, Section 304 (a) was overturned.[254] This decision, however, did not mark the end of the war on sexually explicit art.

C. Karen Finley

Section 304 (a) may have been overturned, but government efforts to censor the federal funding of "obscene" art persisted. Section 304 (a) was replaced by 20 USCS 954(d)(1); an amendment added to the National Foundation on the Arts and Humanities Act. The amendment issued a new requirement for obtaining NEA funding:

"...for any artistic endeavor funded by the NEA, 'artistic excellence and artistic merit' must include consideration of 'general standards of decency and respect for the diverse beliefs and values of the American public.'"[255]

The amendment seemingly changed the power of the NEA from regulating obscenity to regulating decency, despite the fact that another proposition of the amendment specifically requires for projects that are

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[251] Newman, 305-308

[252] Newman, 305

[253] "Bella Lewitzky Dance Foundation v. Frohnmayer," Artist Rights, accessed December 17, 2022, http://www.artistrights.info/bella-lewitzky-dance-foundation-v-frohnmayer.

[254] Rechenberg, 318

[255] "20 U.S. Code § 954 - National Endowment for the Arts," accessed December 17, 2022, https://www.law.cornell.edu/uscode/text/20/954.

deemed obscene to be "prohibited from receiving financial assistance."[256] Nonetheless, the court began referring to a standard of decency rather than obscenity. However, as evident through *National Endowment for the Arts v. Finley (1998),*[257] there is little difference between indecency and obscenity, and these standards are applied in the same way.

Karen Finley was a Post-Modern performance artist who specialized in using sexually explicit imagery for shock-performance art. In 1990, Finley performed *"We Keep Our Victims Ready,"* in response to sexual violence against women.[258] The performance included Finley stripping naked and covering herself with chocolate, to illustrate how "men treat women like shit."[259]In doing so, the performance asserts a powerful statement on female objectification and degradation. The NEA, however, deemed the performance as violating "general standards of decency and respect," and withdrew Finley's proposed grant.[260]In *NEA v. Finley (1998),* Finley challenged the amendment on the basis of view-point discrimination and vagueness.[261] Differing from the ruling in *Lewitzky,* the Court ruled in *Finley* that the NEA had the right to withdraw the grant *without* violating the first amendment, because 20 USCS 954(d)(1) was constitutional.[262]

There were three major components of the court's ruling:

1. The "general standards of decency and respect" provision is not viewpoint discrimination, because it does not suppress a specific class of speech the way an obscenity provision does. "General standard

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[256] "20 U.S. Code § 954 - National Endowment for the Arts."

[257] Tom McInnis, "National Endowment for the Arts V. Finley," National Endowment for the Arts v. Finley (The First Amendment Encyclopedia), accessed December 17, 2022

[258] Aylin Usta, "Attacking Patriarchal Norms with Art: We Keep Our Victims Ready, Karen Finley," Arcadia (Arcadia, January 15, 2022), https://www.byarcadia.org/post/attacking-patriarchal-norms-with-art-we-keep-our-victims-ready-karen-finley.

[259] Paper Magazine, "Karen Finley's New Book Is Grabbing Our Attention," PAPER (PAPER, January 22, 2021), https://www.papermag.com/karen-finley-grabbing-pussy-2616328592.html?rebelltitem=18#rebelltitem18.

[260] McInnis, "National Endowment for the Arts V. Finley."

[261] "National Endowment for the Arts v. Finley." Oyez (Oyez), accessed December 17, 2022, https://www.oyez.org/cases/1997/97-371

[262] "National Endowment for the Arts v. Finley."

of decency and respect" is highly subjective, meaning it provides the freedom for the NEA to allocate their funding on their own terms.

2. The provision does not create any more view-point discrimination than what would naturally occur without the provision. The process of choosing how to allocate limited funding is inevitably and inherently content-based discrimination.

3. The decision to fund one activity instead of another is not a process of view-point discrimination.[263]

Through the ruling of *Finley,* all progress made in *Lewitzky* for the protection of sexually explicit art was reversed. Though the Court previously acknowledged the chilling-effect on free speech in *Lewitzky,* it now seems to believe that although artists cannot realistically assume what the NEA will find obscene, they can somehow assume what the NEA will find indecent. The Court acknowledged in *Lewitzky* that the obscenity standard in Section 304 (a) caused view-point discrimination given the massive role of the NEA in art funding. The Court has generally ruled under the idea that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others,"[264] with public funding and government subsidies included in the definition of speech regulation. Yet somehow, the Court now believes that withdrawing government funding under the basis of indecency for the American public is not view-point discrimination. The general consensus in the Court's ruling is that obscenity refers to a specific class of speech, while decency does not. Decency, however, in consideration of the values of the American public, "requires discrimination on the basis of conformity with mainstream norms."[265]It is comical to believe that the decency clause was not created in reference to a specific class of speech, considering the amendment was created by Republican senators in response to Robert Mapplethorpe's work. The cosponsor of the bill confirms its purpose by stating that "...[w]orks which deeply offend the sensibilities of significant portions of the public ought not to be supported with

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263 "National Endowment for the Arts v. Finley."

264 "National Endowment for the Arts v. Finley."

265 "National Endowment for the Arts v. Finley."

public funds."[266] Even if one is naive enough to believe that the bill was drafted with no view-point discrimination in mind, its use in *Finley* is enough to prove that indecency is essentially a synonym for obscenity—20 USCS 954(d)(1) is no different from Section 304 (a).

The replacement of Section 304 (a) with an equivalent 20 USCS 954(d)(1) reveals the damage of *Miller* on society's view of art. Even when one successfully points out the artist censorship present in the *Miller* obscenity standard, we simply exchange one form of art censorship for another. Even when the word "obscenity" cannot be used, we find replacements to convey the same message. The government tries to find any legal way to suppress sexually explicit artists, such as through federal funding restrictions. The *Miller* test set the basis for a society that accepts government censorship. It cultivated a culture that believes *some* art is simply too sexual for value. Both 20 USCS 954(d)(1) and the *Miller* test remain today, and as long as this is true, efforts to repress sexually explicit art will persist, and the cycle of legal reprimands and artistic resistance will continue.

IV. Dismantling the Patriarchy

With the *Miller* test[267] as our current primary standard for obscene speech, and bills such as 20 USCS 954(d)(1) still in effect, sexually explicit artists who may be deemed "obscene" by today's standards do not have sufficient legal protection for their art. Through an examination of Karen Finley and Robert Mapplethorpe's artwork, it is clear that sexual imagery is often used to further causes necessary for dismantling the patriarchy, such as acknowledging sexual assault victims or accepting homosexuality. By using their work to inspire amendments such as Section 304 (a) or 20 USCS 954(d)(1), the law indicates that the government does not believe these causes are serious enough for first amendment protection or federal funding. Furthermore, what these amendments, as well as the *Miller* test, fail to consider is that sexual imagery in art inherently has "serious artistic value."[268] Nude art works towards dismantling the patriarchy by destigmatizing sex and the

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[266] "National Endowment for the Arts v. Finley."

[267] Hudson Jr., "Miller Test."

[268] Hudson Jr., "Miller Test."

female body. When something is destigmatized, it can no longer be weaponized.

A. Background

Throughout Section V, this paper refers to the term *patriarchy.* The use of the word patriarchy, rather than sexism or misogyny, is a very deliberate choice, as it is only the word patriarchy that refers to the widespread, institutionalized oppression of women. Only the word patriarchy can encapsulate the multilayered, seemingly invisible mechanism of gender inequality intertwined within public and private spaces like courtrooms, workplaces, and homes. The patriarchy is the driving force behind "seemingly isolated and disparate events," such as "the Weinstein affair, the election of Trump, the plight of women garment workers in Asia,...women farm workers in North America, and the Indian rape epidemic."[269]

It is a common misconception that the patriarchy is a thing of the past; something that was resolved by the suffrage movement and now only relevant in the Global South. Many believe that since women can go to school and get a job, there is no longer a power difference between women and men in the Global North. This reveals the most defining characteristic of the patriarchy: its ability to be invisible, as it "reproduces itself endlessly through norms and structures," and appears "seemingly natural and inevitable."[270] The patriarchy does not refer to specific sexist acts or policies, rather, the "structure of power relations" that serve as the root cause, uniting all oppression on women with a common denominator.[271]It is a byproduct of cultural beliefs and norms that equate masculinity with power, tracing back to the beginning of time. For this reason, the term patriarchy "accommodates the idea that not all men enthusiastically uphold it or benefit equally from it; and that

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[269] Charlotte Higgins, "The Age of Patriarchy: How an Unfashionable Idea Became a Rallying Cry for Feminism Today," The Guardian (Guardian News and Media, June 22, 2018), https://www.theguardian.com/news/2018/jun/22/the-age-of-patriarchy-how-an-unfashionable-idea-became-a-rallyin g-cry-for-feminism-today.

[270] Higgins, "The Age of Patriarchy: How an Unfashionable Idea Became a Rallying Cry for Feminism Today."

[271] Higgins, "The Age of Patriarchy: How an Unfashionable Idea Became a Rallying Cry for Feminism Today."

some women may, on the other hand, do a great deal towards supporting it."[272] Equating masculinity with power, the patriarchy pressures men and women to fulfill the trope of the heterosexual nuclear family: the man as the dominant, strong "leader of the house," and the woman as the submissive homemaker.

The patriarchy is upheld through tradition and societal norms. Thus, when Karen Finley and Robert Mapplethorpe's artwork is considered "obscene" or "indecent," it is simply another example of our patriarchal culture. Mapplethorpe's homoeroticism is condemned, as it suggests an alternative lifestyle for men that strays away from traditional masculinity and the nuclear family. Finley's sexually explicit art is considered obscene, because under the patriarchy, the woman's body is inherently sexual and "in prurient interest."[273] The woman must be submissive to the man, allowing him to control and take ownership over her nude body. Reclaiming their body as their own through public nudity or simply wearing "revealing" clothing ruins the power imbalance. Thus, the war on sexually explicit art is a war on women and homosexuality.

B. The Message

To correlate sexual imagery with obscenity due to the mere fact that they share the same images is reflective of traditionally Modernist ideals. Similar to Modernism, it prioritizes the visual aesthetics of art, and essentially ignores its conceptual value.[274] To draw such a conclusion ignores the role of most sexually explicit art in the Post-Modern and Contemporary art eras: to impart a message on sexuality and its respective issues in society. Sexually explicit art, such as that of Karen Finley and Robert Mapplethorpe, is often used to communicate ideas that address and attempt to dismantle the current patriarchal structure of our society.

Karen Finley often appears nude in her performance art. However, her subject "is not obscenity…[it] is pain, rage, love, lovelessness, need, fear, dehumanization, oppression, brutality and

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[272] Higgins, "The Age of Patriarchy: How an Unfashionable Idea Became a Rallying Cry for Feminism Today."

[273] Hudson Jr., "Miller Test."

[274] "Postmodernist Art Definition, Characteristics, History."

consolation."[275] Finley's work is often created with the intent of revealing and attacking the objectification of the female body in society. For example, her nude performances, such as *We Keep Our Victims Ready,* include her smearing food on her body as she cries out the stories of female sexual assault victims.[276]In doing so, Finley "disrupt[s] the voyeuristic pleasure the audience would ordinarily take from viewing her body…she challenges the role of women as rightful subjects of the controlling male gaze, obliged to submit to being viewed."[277]Thus, Finley's artwork both addresses and demolishes the most fundamental aspect of the patriarchy: the idea that a woman's body is a commodity that exists for pleasure. She loudly vocalizes stories of sexual assault, making the suffering of women salient in a society that otherwise turns a blind eye. By using the nude body and sexual performance to do so, she demands control over the audience's perception of her body. She demands that her body be seen as "real flesh and blood rather than merely objects of male desire,"[278]in a society that has deemed the display of her body indecent. Finley's work challenges the viewer to deconstruct patriarchal structures by demanding that the female body is displayed without correlation to pleasure, prurient interest, or lust— by censoring her work on the basis of obscenity or indecency, we uphold the patriarchy.

Robert Mapplethorpe similarly challenged the patriarchal objectification of sexuality, but through the use of homoerotic photography. Mapplethorpe, a gay artist himself, created homoerotic art in the 1990s: a time when the AIDS epidemic and resulting homophobia were at their peak.[279] His work in *The Perfect Moment* included a

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[275] Marcelle Clements, "Karen Finley's Rage, Pain, Hate and Hope," The New York Times (The New York Times, July 22, 1990), https://www.nytimes.com/1990/07/22/theater/theater-karen-finley-s-rage-pain-hate-and-hope.html.

[276] Newman, 143

[277] Newman, 143-144

[278] Artstor, "Karen Finley: 'Straight from the Gut,'" Artstor, July 7, 2021, https://www.artstor.org/2013/02/25/karen-finley-straight-from-the-gut/.

[279] Alexandra Peers, "Robert Mapplethorpe's 'Perfect Moment,'" Architectural Digest (Architectural Digest, January 24, 2019), https://www.architecturaldigest.com/story/robert-mapplethorpe-guggenheim-exhibition

mixture of sexually explicit and non-sexually explicit artwork, creating something "of a gateway drug to tolerance for several viewers, first desensitizing them to nudes, then to same-sex kissing, then the brutal, intimate images that, truth be told, do bear a striking resemblance to pornography."[280] Through his unique approach to sexual-art, Mapplethorpe advocates for the normalization and acceptance of homosexuality in society. To work towards dismantling homophobia is to work towards dismantling the patriarchy, as homophobia and misogyny "feed into each other…like a snake eating its own tail."[281] Homophobic ideology is largely rooted in heterosexual male norms, which perpetuate the idea that a "real man" behaves in traditionally masculine ways, and thus, pursues women.[282] Thus, once again, the use of sexually explicit imagery by previously censored artists is revealed to be valuable towards dismantling the patriarchy.

C. Inherent Value of Sexual Imagery

Karen Finley and Robert Mapplethorpe's artwork is thus proven valuable towards society through their message and intent. Their artwork, however, would still be beneficial towards dismantling the patriarchy even if they were not specifically used to impart a message about female objectification or homosexuality. Female objectification and sexism revolve around the core belief that sex has power, and that the female nude body is inherently sexual and shameful. The mere inclusion of nudity in artwork and public exhibitions decreases the stigmatization around the human body, thus normalizing the naked female body. The only way to dismantle the patriarchy is to attack the stigma of the very thing it weaponizes: sex and the female body. One cannot weaponize something that is normalized in society, something that cannot be held over women in the first place. Mapplethorpe's work, in particular, can serve as an example of this. Though his art contains

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[280] Peers, "Robert Mapplethorpe's 'Perfect Moment.'"

[281] Harriet Williamson, "Misogyny and Homophobia: Patriarchy, Gender Policing, and the Male Gaze," openDemocracy, July 29, 2015, https://www.opendemocracy.net/en/5050/misogyny-and-homophobia-patriarchy-gender-policing-and-male-gaze/.

[282] Williamson, "Misogyny and Homophobia: Patriarchy, Gender Policing, and the Male Gaze."

specific messages on sexuality, the display of imagery serves a purpose on its own. Mapplethorpe's exhibits contain sexual, "pornographic" photography dispersed amongst socially accepted, non-sexual photography.[283] By doing this, the strict boundaries that demarcate accepted works and explicit works are torn down, as the audience views "a sadistic tableau side by side with a celebrity portrait or a lyrical still life of baby's breath. The distinctions between corruption and innocence are blurred. [Mapplethorpe] insists it is all the same." [284]

The *Miller* test is predicated on the idea that only *some* sexually explicit art has "serious artistic value" that keeps it from being considered legally obscene, and thus, losing first amendment protection.[285] What the *Miller* test fails to consider is the inherent value in displaying sexual imagery in art and the public sphere: all sexual art is beneficial towards dismantling the patriarchy, by destigmatizing sex and the human body. All sexually explicit art thus has "serious artistic value."[286]

D. Subjectivity

The trials of "obscene" artists reveal the patriarchal roots of the US legal system. While each artist carries their own values and passion in each brushstroke, color choice, or photograph, it is displayed to the public to invoke a personal emotion. One may resonate with the brutality of a performance piece, another with the intricate details that tell a story of their own. The beauty of art is in its infinite scope of interpretation, meaning, and feeling. The U.S. government irresponsibly ignores this aspect of the craft, often misconstruing works to fit their agenda. This is especially true in sexually explicit works. The court uses vague terms such as "social value" and "artistic meaning" to judge a work, criteria that will be fundamentally different from person to person. But all it takes to strip an artist of their freedom of expression is a single interpretation, often from a white, heterosexual male, carrying with him the principles of the patriarchy.

Phrases such as "serious artistic value" and "general standards

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[283] Peers, "Robert Mapplethorpe's 'Perfect Moment.'"

[284] Newman, 130

[285] Hudson Jr., "Miller Test."

[286] Hudson Jr., "Miller Test."

of decency and respect…for the American public"[287]leave it to the government to define vague terms, such as "serious," "value," and "decency." As seen through the ruling of *NEA v. Finley (1998),*[288]the Court can shift the meaning of subjective terms to find one that fits with their agenda. They can censor work, such as Finley's, despite it containing what most would consider "serious artistic value:" clear contribution to feminism.

Pope v. Illinois (1987)[289] attempted to address the subjective nature of art in its inclusion of a reasonable person standard for the third prong of *Miller.*[290] The standard allowed for art experts to testify for a work's artistic value. The ruling in *Pope* allowed for successful protection for artists in some cases, such as Mapplethorpe in *Cincinnati v. Cincinnati Contemporary Arts Center (CAC)*.[291] CAC museum director Dennis Barrie faced an obscenity charge, and was successfully defended by art critics who testified for the value of Mapplethorpe's work. This, however, reveals a flawed system, where opinions are taken as fact, subjectivity used as law. The use of artist testimonies may have protected sexually explicit art in this instance, but this is not always the case.

In *Tipp-It Inc. v. Conboy,* a gay bar owner in Nebraska was prosecuted by the Supreme Court of Nebraska for displaying "obscene" art in the bar basement.[292] The art contained sexually explicit depictions of the male body, male genitilia, and homoerotic sexual relations.[293] The court assessed the case using the *Miller* test, and concluded that the artwork failed to show "serious artistic value" due to the opinion provided by an art curator.[294] Curator Dr. Akin used the "four-corners test" to support his point.[295] The use of a "four-corners test" reflected

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[287] "20 U.S. Code § 954 - National Endowment for the Arts."

[288] "National Endowment for the Arts v. Finley."

[289] "Pope v. Illinois."

[290] "The Miller Test."

[291] "Contemporary Arts Center v. Cincinnati."

[292] "Tipp-It, Inc. v. Conboy," Justia Law, accessed December 17, 2022, https://law.justia.com/cases/nebraska/supreme-court/1999/096-0.html.

[293] "Tipp-It, Inc. v. Conboy."

[294] "Tipp-It, Inc. v. Conboy."

[295] "Tipp-It, Inc. v. Conboy."

outdated Late-Modernist principles, through its belief that the value of a work of art is most evident through its physical properties, such as composition and form.[296] Dr. Akin, as well as the court, ignored the inherent value in the artwork for both the normalization of homosexuality and the dismantling of the patriarchy.

The difference between the outcomes of the two cases, with one art expert recognizing the value of homoerotic art and another not, reveals the insufficiency of using the testimony of art experts as outlined in *Pope*[297] to mitigate subjectivity. The opinions of art experts are subjective as well. When a subjective medium, such as art, is restricted by another subjective process through the use of vague wording, one is inevitably left with censorship influenced by individual views.

E. Progression

Since the "serious artistic value" prong of the *Miller* test is subjective, the use of the test furthers political agendas. The test is weaponized by individuals under the disguise of regulating obscenity, when, in fact, it is often used to regulate only *certain* sexual art, thus suppressing specific viewpoints. For instance, the creation of Section 304 (a) and 20 USCS 954(d)(1) seemed to be in favor of regulating obscenity or indecency. However, the amendments were introduced by Senator Jesse Helms in wake of Mapplethorpe's artwork.[298] Helms was not concerned with the mere inclusion of sexual-imagery in the artwork. He particularly expressed outrage over the inclusion of *homoerotic* sexual-imagery.[299] Helms often referred to Mapplethorpe's homosexuality, calling "artists like Mapplethorpe 'human cockroaches.'[300] Mapplethorpe created his work during the heights of the AIDS epidemic, while Helms "fought bitterly against federal financing for AIDS research and treatment, saying the disease resulted

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296 "Tipp-It, Inc. v. Conboy."

297 "Pope v. Illinois."

298 Rechenberg, 315-316

299 Rechenberg, 315-316

300 Phillip Kennicott, "Robert Mapplethorpe Was One of the Most Controversial Artists of the '80s.," Morán Morán (The Washington Post, January 24, 2019), https://moranmorangallery.com/robert-mapplethorpe-was-one-of-the-most-controversial-artists-of-the-80s/.

from 'unnatural' and 'disgusting' homosexual behavior."[301] Section 304 (a), sponsored by Helms,[302] specifically refers to "homoeroticism" in its definition of obscene material to not be funded by the NEA. Thus, the desire to regulate "obscenity" was really just the desire to suppress homosexuality.

It is important to note that legal action, such as Section 304 (a), gained widespread support because of the political climate at the time. In the late 20th century, homosexuality was a much more taboo topic than it is now. Despite the explosive reaction Mapplethorpe's work once evoked, his work is rarely considered obscene in the present day: "today, he is fondly remembered for his superb technique and remarkable 'aestheticization of [a] supposedly forbidden subject matter.'"[303] Even Karen Finley, whose work was once considered too indecent for funding, "continues to draw audiences eager to see her performance works."[304] What our society has generally considered promiscuous or obscene has drastically changed overtime, as we progress in the feminist and LGBTQ+ rights movements. It is with this realization that the true danger of the *Miller* test and the culture it has cultivated is revealed. Controversial art that challenges societal norms causes progression. It challenges the dominant beliefs and norms in our society, which often reflect the predominantly cisgender, white, heterosexual male society in which they were created. Art serves as a catalyst for a change, by fostering critical thinking and encouraging people to consider different perspectives. Any strides we have made for the rights of marginalized communities were once considered obscene and generally indecent to the American public. But how do we allow for progression if we simply suppress the views that make us uncomfortable?

V. Conclusion

The standard created in *Miller* set the precedent for a culture that

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[301] Steven A. Holmes, "Jesse Helms Dies at 86; Conservative Force in the Senate," The New York Times (The New York Times, July 5, 2008), https://www.nytimes.com/2008/07/05/us/politics/00helms.html?pagewanted=2&_r=1&hp.

[302] Newman, 131

[303] Newman, 122

[304] Newman, 122

celebrates and enforces a distinguishment between "valuable" and "unvaluable" sexually explicit art, reflecting the Modernist era from which it was created.[305] Such a distinction is proven impossible by the Post-Modern Art era, as the majority of sexually explicit art provides valuable social commentary on issues pertaining to objectification and sexuality. Even without a deliberate message, there is inherent value in sexually explicit art, as the inclusion of sexual imagery normalizes and destigmatizes sex and the nude body. Thus, all sexually explicit art has "serious artistic value." The subjective nature of art and the vague wording in *Miller,* however, allows for this to be ignored. As the *Miller* test remains the primary standard today, we are left with an inadequate definition of obscenity that does not provide sufficient protection for sexually explicit art. The effects of *Miller* can be seen through the constraints imposed on the NEA's funding, which also still remain in effect today.

The "serious artistic value" prong of the *Miller* test is subjective, vague, and ignorant to the importance of sexual art in the feminist and LGBTQ+ rights movements. Its principles have been used to censor artists such as Karen Finley[306] and Robbert Mapplethorpe,[307] two artists who greatly contributed to dismantling harmful systems such as the patriarchy. Finley and Mapplethorpe's artwork is no longer considered as drastically obscene by today's standards,[308] indicating that the *Miller* test hinders progressivism. As long as *Miller* remains our standard for obscenity, sexually explicit artists are constantly at risk for censorship, whether that be through a withdrawal of funding or other vehicles. We must return to the obscenity standard defined in *Roth,* where artwork received first amendment protection by possessing any "redeeming social value." All sexually explicit art contains social value, meaning under the correct interpretation of *Roth,* all sexually explicit art is protected. In a society where one must choose between regulating obscenity or protecting sexually explicit art, one must choose the latter, to reclaim the primary instrument utilized by our patriarchal society.

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[305] Adler, 1364

[306] "National Endowment for the Arts v. Finley."

[307] Newman, 131

[308] Newman, 122