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# THE GENERAL BOOK

## ARTICLES AND SURVEYS



## NOTES AND COMMENTS



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# NOVA LAW REVIEW

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## ARTICLES AND SURVEYS



## NOTES AND COMMENTS

# A CRITIQUE OF THE JUDICIAL APPOINTMENT PROCESS AND RULE OF LAW IN THE UNITED STATES: A COMPARATIVE PERSPECTIVE

JAMES WILETS*
TRACY GARCIA*
STEPHANIE RODRIGUEZ*



* James Wilets is a Professor of Law at Nova Southeastern University ("NSU"). He received his M.A. in International Relations from Yale University in 1994, his J.D. from Columbia Law School in 1987, and his B.A. from the University of Washington in 1982. He teaches International Law, Constitutional Law, Comparative Law, Human Rights Law, and European Union Law. While at Yale University, Professor Wilets prepared, at the request of the Secretary-General of the United Nations ("U.N."), the first two drafts of a proposal for reforming the human rights functions of the United Nations, which was subsequently incorporated into the U.N.'s Agenda for Peace. He worked as an attorney for the International Human Rights Law Group's Rule of Law Project in Romania where he worked on issues related to creating an independent judiciary after the end of President Ceausescu's brutal and arbitrary rule. His task, among others, was to help create an independent bar that could operate as a check on the arbitrary and still politicized manner of judicial appointment and retention in the Romanian legal system. He also led a joint mission to Liberia by the National Democratic Institute and the Carter Center during the Liberian Civil War. Professor Wilets worked in Paris on some of the first negotiations between Israelis and Palestinians for a two-state solution. He writes extensively on constitutional and international law issues. Professor Wilets would like to express gratitude to Eli Pollack, Sarah M. Anderson, Veronica Kropakova, Petr Koral and Gretel Echarte.

* Tracy Garcia received her J.D. from Nova Southeastern University, in May 2022, where she was the Editor-in-Chief of the Nova Law Review. Tracy expresses her sincerest gratitude to her friends, family, and boyfriend, Damian Barker, for always supporting her through law school and her role with the Nova Law Review. She would also like to thank Professor Wilets for his guidance throughout law school. Tracy also thanks all the Nova Law Review members of Volume 46 for their hard work and dedication for their editorial work on this Article.

* Stephanie Rodriguez is a Juris Doctor candidate from Nova Southeastern University. She is the Lead Technical Editor for Nova Law Review, Volume 46. Upon graduation, she will be working in insurance defense and civil litigation. She would like to extend her deepest gratitude to her study group from 305A, her boyfriend Jonathan Perez and her family for supporting her throughout law school. She would like to thank Professors Coleman and Wilets for the lessons and opportunities they have given to her throughout law school. She also extends her gratitude to the staff of the Nova Law Review for Volume 46.

## I. INTRODUCTION

The manner by which judges are appointed ("Judicial Appointment") has enormous implications for the Rule of Law.[1] Politicization of the judiciary and subordination of judges to interested constituencies can threaten the underpinnings of a strong democracy.[2]

The United States is a common law country that employs Judicial Appointment systems at the federal, state, and local levels that differ

1. *See* James D. Wilets & Camilo Espinosa, *Rule of Law in Haiti Before and After the 2010 Earthquake*, 6 INTERCULTURAL HUM. RTS. L. REV. 181, 183–84 (2011); F.C. DeCoste, *Political Corruption, Judicial Selection, and the Rule of Law*, 38 ALTA. L. REV. 654, 668 (2000). "Rule of [L]aw" has been defined as a system of law which contains the following elements: (1) the government is bound, and its citizens governed, by laws which are clear and prospective in nature; (2) supremacy of law over personal, pecuniary or political considerations; (3) efficient and predictable enforcement of law; (4) efficient and predictable interpretation of the law; (5) equality of persons before the law among all persons similarly situated; (6) implementation of, and respect for, human rights and other individual rights in a manner not inconsistent with international standards; (7) accountability of government officials for their failure to apply or conform to the law. Wilets & Espinosa, *supra* (footnotes omitted).

2. *See* Samuel L. Bufford, *Defining the Rule of Law*, 46 JUDGES' J., 2007, at 16, 20–21. This issue is all the more pertinent today as the Executive Branch has, in the recent past, explicitly articulated a goal of using the judiciary to advance the personal political goals of a particular president; undermining the separation of powers, which has been traditionally viewed as an important component of the Rule of Law, and placing the personal interests of the president over those of the country in a manner that supersedes even the concerns that prompted the development of the constitutional doctrine of separation of powers. *See id.*; Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES, http://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html (last updated Mar. 16, 2020).

significantly from those used in other common law and civil law systems.[3] Examining those differences provides an opportunity to assess deficiencies in the American Judicial Appointment system while simultaneously determining the aspects of those systems that could improve the American legal system and strengthen the Rule of Law.[4]

The systems discussed in this article seek to reconcile three goals in the Judicial Appointment process: (1) judicial independence, so that judges can adjudicate based on a *neutral* interpretation of the law and in a non-politicized manner, (2) judicial accountability to the body politic, and (3) appointment of qualified judges based on merit who are capable of following the Rule of Law regardless of the specific Judicial Appointment system adopted.[5]

This Article posits that the United States' systems of judicial review at the federal and state level, employing a mix of political and partisan appointment methods, do not satisfy the above-articulated goals.[6] For example, judicial election—which is primarily used at the state level—may satisfy political accountability, but severely limits judicial independence and the appointment of the most qualified judges.[7] Similarly, the appointment of judges in the United States based primarily on political considerations does not satisfy *any* of the above-articulated goals.[8]

The principal distinctions between the United States' systems of Judicial Appointment and most other legal systems are the manner in which

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3. *See* Mark C. Miller, *The Study of Judicial Politics*, *in* EXPLORING JUDICIAL POLITICS 1, 2–3 (Mark C. Miller ed., 2008).

4. *See id.*

5. *See* discussion *infra* Part IV; Mary L. Volcansek, *Appointing Judges the European Way*, 34 FORDHAM URB. L.J. 363, 364–66 (2007).

6. *See* discussion *infra* Part III; Sandra Day O'Connor, Opinion, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18; Volcansek, *supra* note 5, at 364–66.

7. Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553, 555–56, 561 (2014) ("[T]he accountability theory is about holding judges accountable for mistakes (intentional and unintentional), for ignoring the law, for imposing their own views of the law, and for ethical misconduct, but not for correct decisions that the public does not like, or that the public does not understand."); *see also* Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RSVR. L. REV. 911, 916, 924 (2006). The Judicial Independence Theory provides for a judiciary free of being bound to a state legislature, governor, or public will, and rather use the law solely to decide cases. *See* Geyh, *supra*, at 915–16.

8. *See* Miller, *supra* note 3, at 2–3; Volcansek, *supra* note 5, at 364; Adam Liptak, *Rendering Justice, With One Eye on Re-election*, N.Y. TIMES, May 25, 2008, at 1.

judges are trained, and the United States' relatively unusual use of elections for Judicial Appointment.[9]

With respect to the training of judges, many countries utilize the Civil Service Model, which trains potential judges directly out of law school in a non-partisan manner.[10] This contrasts sharply with the United States' system of judicial training, where judges are appointed later in their careers based chiefly on partisan considerations.[11] Thus, rather than utilizing elections or appointments based on political considerations, countries using this model draw upon a professionalized pool of judicial nominees in merit-based appointments.[12] Unlike the United States, the pool of judicial candidates from which merit-based appointments are made are less likely to be closely affiliated with a particular political party or ideology.[13]

## II. IDENTIFYING THE PROBLEM TO BE REMEDIED: RULE OF LAW AND JUDICIAL POLITICIZATION IN THE UNITED STATES

Article II of the United States Constitution states that the "[President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" United States Supreme Court members.[14] Supreme Court Justices are granted lifetime tenure and cannot be removed, except through impeachment.[15] Life tenure was meant to enhance judicial independence by separating the judiciary from political branches and insulate the justices from partisan passions.[16] The Founders' concerns of balancing judicial independence and accountability were central determinants in creating the

9. *See* Liptak, *supra* note 8, at 5; Rachel Paine Caufield, *The Curious Logic of Judicial Elections*, 64 ARK. L. REV. 249, 258–59 (2011); Volcansek, *supra* note 5, at 367.

10. Volcansek, *supra* note 5, at 371–72.

11. *See id.* at 367; BARRY J. MCMILLION, CONG. RSCH. SERV., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT'S SELECTION OF A NOMINEE 8–9 (2022), http://sgp.fas.org/crs/misc/R44235.pdf; *Merit Selection: The Best Way to Choose the Best Judges*, AM. JUDICATURE SOC'Y, http://5y1.org/download/45dc88d03617d31c40d2730fa731b429.pdf (last visited Apr. 28, 2022).

12. *Merit Selection: The Best Way to Choose the Best Judges*, *supra* note 11.

13. *See id.*

14. U.S. CONST. art. II, § 2.

15. *Id.* arts. II, § 4, III, § 1.

16. Stuart Taylor Jr., *Life Tenure Is Too Long for Supreme Court Justices*, 37 NAT'L J. 2033, 2033 (2005).

means of selecting the judiciary and maintaining those justices in office.[17] One commentator illustrated this tension, stating that:

> [P]roviding judges with life tenure usually leads to a more independent judiciary, one that places itself above the fray of ordinary politics. There is also agreement that subjecting judges to periodic checks conducted by the public or its elected officials, such as reelection or reappointment, may lead to more accountable courts. Where commentators diverge is over how the balance between independence and accountability should be struck. While some argue for lifetime appointments to induce independence, others hold that accountability requires a threat of enforcement, including the possibility of removal by the people or their representatives.[18]

However, the appointment of judges and how they maintain their position are *separate* issues, the core of this Article focuses on the initial phase of appointment.*

### A. *Bush v. Gore*

One of the most salient examples of the pernicious effects of the politicization of the judicial appointment process with a concurrent loss of independent, non-partisan judicial decision-making, is *Bush v. Gore*.[19] This case arose out of the vote count in Florida during the 2000 presidential election.[20] In this case, Vice President Al Gore contested the Florida election results, in which there was a voting margin difference of 537 votes in favor of Republican Texas Governor George W. Bush out of almost a total of 6 million

17. *See id.* Alexander Hamilton most famously expressed this view in Federalist No. 78, one of a series of essays designed to garner support for the ratification of the Constitution. Rachel Paine Caufield, *What Makes Merit Selection Different?*, 15 ROGER WILLIAMS U. L. REV. 765, 765 (2010). He envisioned a federal judiciary that would stand above the fray of ordinary politics, interpreting the Constitution and statutes free from overt partisan or ideological influence. Caufield, *supra* note 9, at 258. To realize this vision and to prevent judges from evolving into legislators, the framers agreed on the need for judicial independence. *See* Caufield, *supra* note 9, at 258; Taylor, *supra* note 16, at 2033.

18. LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 8 (2005).

19. 531 U.S. 98 (2000) (per curiam).

20. *See id.* at 100–01; Linda Greenhouse, *Bush Prevails: By Single Vote, Justices End Recount, Blocking Gore After 5-Week Struggle*, N.Y. TIMES, Dec. 13, 2000, at A1.

votes, resulting in making Governor Bush President-Elect.[21] States are generally empowered with governing their own elections.[22] With that power, the Supreme Court of Florida ordered a vote recount consistent with state law.[23] Governor Bush and Richard Cheney immediately appealed the Supreme Court of Florida's decision to the United States Supreme Court as well as an emergency petition for a stay.[24] Within days, a review was granted and oral arguments took place, ultimately leading to the reversal of the Supreme Court of Florida's decision.[25] As noted by Ron Elving of NPR News, "*Bush v. Gore* has been regarded as one of the most politically consequential decisions in the history of the court, and one that damaged the court's preferred image of itself as an institution far removed from everyday partisan politics."[26] *Bush v. Gore* exemplifies the importance of avoiding politicization of the judicial appointment system because it can produce inconsistent judicial decision-making.[27]

The Supreme Court of the United States' five most conservative justices, who were all appointed by Republican presidents—Anthony Kennedy, Sandra Day O'Connor, William H. Rehnquist, Antonin Scalia, and Clarence Thomas—blocked the Supreme Court of Florida's decision *to recount ballots in all counties where "undervotes" had not already been recounted by hand*.[28] The five to four majority Supreme Court decision held

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21. Kristine Phillips, *Why Donald Trump Isn't Al Gore: How 2020 Legal Challenges to the Election Differ from 2000*, USA TODAY, http://www.usatoday.com/story/news/politics/elections/2020/11/09/trump-isnt-gore-how-2020-s-legal-challenges-arent-same-2000/6220157002/ (last updated Nov. 10, 2020, 5:16 PM); *US Election 2020: Does This Compare to 2000 Florida Recount?*, BBC (Nov. 12, 2020), http://www.bbc.com/news/election-us-2020-54903188.

22. Phillips, *supra* note 21.

23. Bush v. Gore, 531 U.S. at 100; Michel Rosenfeld, Bush v. Gore: *Three Strikes for the Constitution, the Court, and Democracy, but There Is Always Next Season*, *in* THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000 111, 125 (Arthur J. Jacobson & Michel Rosenfeld eds., 2002).

24. Bush v. Gore, 531 U.S. at 100–01.

25. BUSH V. GORE: THE COURT CASES AND THE COMMENTARY 97 (E.J. Dionne Jr. & William Kristol eds., 2001); Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1410–12, 1430 (2001).

26. Ron Elving, *The Florida Recount of 2000: A Nightmare That Goes on Haunting*, NPR (Nov. 12, 2018, 5:00 AM), http://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting.

27. *See id.*; *Bush v. Gore*, 531 U.S. at 111.

28. *See* Greenhouse, *supra* note 20, at A1; Pam Bacon, *What are Undervotes and Overvotes?*, S. PLATTE SENTINEL, http://www.southplattesentinel.com/2019/03/19/what-are-undervotes-and-overvotes/ (last updated May 16, 2019, 5:33 AM).

that the Supreme Court of Florida's decision ran afoul the U.S. Constitution's Equal Protection Clause because it failed to provide the guidance necessary to conduct the recounts in the short time that remained.[29] By reversing the Supreme Court of Florida, the five justices handed the State's electoral votes and thus, a majority of the Electoral College to Governor George W. Bush.[30]

The Court refused to have its own majority opinion decision treated as binding precedent, strongly suggesting it had little faith that its reasoning was sufficient to constitute binding legal precedent for future cases.[31] The Court's internal inconsistency went beyond contradicting the traditional judicially conservative deference to states' rights and state courts—a judicial principle putatively embraced by the majority.[32] The conservative justices' contradiction of their own judicially conservative tenets of judicial restraint, deference to the states, and its refusal to treat its own decision as binding precedent, constitutes a highly unusual and explicitly result-oriented decision.[33] Indeed, the dissent noted the traditional (frequently conservative) view that the Court is supposed to "accord[] respectful consideration and great weight to the views of the State's highest court."[34]

*Bush* provides one of the best examples of the problems with partisan Judicial Appointment affecting judicial decision-making and thereby undermining Rule of Law.[35] The dissent in this case reflected this view of the case as unwarranted judicial review.[36]

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> [An undervote] occurs when the number of choices selected by a voter in an election contest is less than the maximum number allowed for that contest. An undervote also occurs when there are no votes for a single choice contest. For example, a voter that is permitted to cast one vote for a candidate and does not select a candidate has undervoted. Voters have a right to undervote if they choose to do so, a ballot will not be canceled or disqualified as the result of an undervote.

Bacon, *supra*.

29. *Bush v. Gore*, 531 U.S. at 110 (reasoning that the difficulties of adopting "adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise" would violate the requirements of equal protection and due process); *see also* Greenhouse, *supra* note 20, at A1.

30. EPSTEIN & SEGAL, *supra* note 18, at 16–17.

31. *Bush v. Gore*, 531 U.S. at 111; *but see id.* at 127–28 (Stevens, J., dissenting).

32. *Id.* at 123 (Stevens, J., dissenting).

33. Balkin, *supra* note 25, at 1409.

34. *Bush v. Gore*, 531 U.S. at 137 (citing Gen. Motors Corp. v. Romein, 503 U.S. 181, 186 (1992)).

35. *Id.* at 1408–09.

36. *Bush v. Gore*, 531 U.S. at 129. The dissenting Justices — Stephen Breyer, John P. Stevens, Ruth Bader Ginsburg, and David Souter — in *Bush v. Gore*, agreed that the

### B. *Politicization of the Appointment/Election of Judges at the State and Local Levels*

The question of how to best select state and federal judges began during the 1787 debates leading to the United States Constitution.[37] In most countries, the judicial appointment is made by various appointment methods, and it was initially the preferred method in America.[38]

In the colonial era, judges were selected by the king.[39] After the Revolution, the original thirteen states each had their own manner of appointing judges.[40] Some states vested the appointment power in one or both of their legislative houses or by the governor and his council, and others vested appointment power in their governor but required him to gain consent of the

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Supreme Court erred in even taking on the case and involved overreaching by the Court. *Id.* at 144 (Breyer, J., dissenting); *see id.* at 123 (Stevens, J., dissenting); *Id.* at 129 (Souter, J., dissenting); *Id.* at 135–36 (Ginsburg, J., dissenting). The dissenting Supreme Court Justices disagreed with the Court taking on the case and effectively overturning the Supreme Court of Florida's interpretation of its state law because there was nothing to indicate that the interpretation was flawed. Bush v. Gore, 531 U.S. at 123 (Stevens, J., dissenting); *Id.* at 129 (Souter, J., dissenting); *Id.* at 136 (Ginsburg, J., dissenting). Justice Breyer stated in his dissenting opinion: "[t]he political implications of this case for the country are momentous. [Nevertheless,] the federal legal questions presented, with one exception, are insubstantial." *Id.* at 144.

37. John L. Dodd et al., *Judicial Selection White Papers: The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 354 (2002). In the Federalist Papers, Alexander Hamilton advocated selecting federal judges through appointment rather than election in order to provide for judicial independence and protect against encroachment by the other branches of government. *See* THE FEDERALIST NO. 78, at 393, 396–97 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("[N]othing can contribute so much to its firmness and independence as permanency in office . . . ."). Anti-Federalists, however, advocated selecting federal judges through popular election. *See* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 120 (Ralph Ketcham ed., Signet Classics 1986). The Federalists, of course, won this debate in the federal system. *See* Katherine A. Moerke, *Must More Speech Be the Solution to Harmful Speech? Judicial Elections After Republican Party of* Minnesota v. White, 48 S.D. L. REV. 262, 265–66 (2003). *See Bush v. Gore*, 531 U.S. at 123 (Stevens, J., dissenting); *Id.* at 129 (Souter, J. dissenting); *Id.* at 136 (Ginsburg, J., dissenting); *Id.* at 144 (Breyer, J., dissenting).

38. Christine L. Nemacheck, Book Review, 16 L. & POL. BOOK REV. 664, 666 (2006) (reviewing APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (Kate Malleson & Peter H. Russell eds., 2006)) ("[T]he judicial appointment commission . . . is the most frequently used approach by countries revising their judicial appointment systems."); Dodd et al., *supra* note 38, at 355–56. Judicial appointments varied from state to state, but most states that have or had judicial appointments made were done by the Governor. *See* Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U. L. REV. 65, 70 (2001).

39. Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 176 (1980).

40. *Id.*

council.[41] The states' shift from judicial appointments to elections began during the presidency of Andrew Jackson amid a growing concern that "unelected judges, especially those who made unpopular decisions, were not answerable to the [public]."[42] Only the United States, Japan, and Switzerland select state and local judges by popular vote.[43] In contrast, the Judicial Appointment process as provided in Article III has remained as the federal judiciary selection method.[44]

## III. METHODS OF JUDICIAL APPOINTMENT IN THE UNITED STATES

The individual states in the United States have adopted several means of Judicial Appointment: direct appointment, merit-based appointment by a commission or bar committee, and contested elections either non-partisan or partisan.[45] In addition, there have been proposals for a hybrid of the processes above.[46] Although the basic processes seem clear cut, no two states have adopted identical selection processes.[47] In fact, many states have not conformed to one single selection process and have instead adopted more than one to select judges at different levels of the court system.[48]

### A. *Direct Appointment*

There are two types of direct appointment: (1) gubernatorial and (2) legislative.[49] The gubernatorial appointment system is one by which the Governor appoints a candidate without the recommendation of a nomination commission.[50] In some cases, the appointment may require confirmation by an executive council or legislature.[51] "There are variations within such

41. *Id.* at n.1.
42. Dodd et al., *supra* note 37, at 358.
43. Liptak, *supra* note 8, at 3 ("Nationwide, [eighty-seven] percent of all state court judges face elections, and [thirty-nine] states elect at least some of their judges, according to the National Center for State Courts.").
44. Dodd et al., *supra* note 37, at 357.
45. AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: HOW IT WORKS, WHY IT MATTERS 6–7, http://perma.cc/CN88-MJ9V (last visited Apr. 28, 2022).
46. *Id.*; *see* Maida R. Milone, *No System for Choosing Judges Is Perfect, but a Hybrid System Would Be Better*, LANCASTERONLINE (Sept. 15, 2019), http://lancasteronline.com/opinion/columnists/no-system-for-choosing-judges-is-perfect-but-a-hybrid-system-would-be-better/article_6d2530c4-d599-11e9-b8a3-abd9f28ec2c0.html.
47. AM. JUDICATURE SOC'Y, *supra* note 45, at 6–7.
48. *Id.*
49. *See id.* at 360.
50. AM. JUDICATURE SOC'Y, *supra* note 45, at 7.
51. *Id.*

systems, and even restrictions on the gubernatorial appointment power apart from the standard requirement that nominations come from a commission-supplied list."[52] One alleged advantage of the appointment model as opposed to electing judges is that judicial candidates are selected *based on the merits of their expertise* rather than participating in a partisan political campaign.[53] For example, in New Jersey, the Governor appoints judges with the State Senate's advice and consent.[54] This system provides New Jersey Senators with the power to veto appointments of federal judges from their home district.[55] Senators from other districts, as a courtesy, will not approve of such an appointment until the Senator from that home district approves.[56]

In California, the Governor has the sole discretion to appoint judges with the consent of the *judicial appointment* commission, which is comprised of the chief justice, attorney general, and a presiding justice of the court of appeals.[57] However, the Governor must first submit the list of candidates to a *judicial evaluation* commission appointed by the State Bar Association to conduct a thorough background investigation.[58] Thereafter, any recommendations from the judicial evaluation committee are not binding upon the Governor in his appointment decision.[59]

The legislative appointment system empowers legislatures to appoint judges, but is only adopted by four states: Rhode Island, South Carolina, Virginia, and Connecticut.[60] The states vary in whether the legislature appoints only the Supreme Court justices or also appoints judges at the trial and appellate levels.[61] Unlike gubernatorial systems, legislative appointments must secure the confidence of a majority of both houses for the selection and the retention of a candidate.[62] For example, in South Carolina, the State's Supreme Court justices are selected by the South Carolina legislature to serve

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52. Dodd et al., *supra* note 37, at 361.

53. *Id.* at 360–61.

54. *Id.* at 361; *Welcome to the New Jersey Court System*, N.J. CTS., http://www.njcourts.gov/public/process.html?lang=eng#one (last visited Apr. 28, 2022).

55. Martin Tolchin, *Three U.S. Judgeships Unfilled Here a Year*, N.Y. TIMES, July 29, 1973, at 40.

56. Colleen O'Dea, *Explainer: How Do Our Judges Make It to the Bench in New Jersey?*, NJ SPOTLIGHT NEWS (June 3, 2014), http://www.njspotlightnews.org/2014/06/14-06-02-explainer-how-judges-make-it-to-the-bench-in-new-jersey/.

57. *How Appellate and Supreme Court Justices are Selected*, CAL. CTS.: JUD. BRANCH CAL., http://www.courts.ca.gov/7434.htm (last visited Apr. 28, 2022).

58. *Id.*

59. *See id.*

60. *See* Dodd et al., *supra* note 37, at 360.

61. *Id.*

62. *See Virginia Courts in Brief*, VA. CTS., (Sept. 2021), http://www.vacourts.gov/courts/cib.pdf.

ten-year terms.[63] In Virginia, the legislature appoints judges at both trial and appellate levels.[64]

Many states utilize a combination of the gubernatorial and legislative systems, using distinct systems for different judicial system levels.[65] However, both systems may open the door to nepotism and favoritism—evidencing that political considerations play as important a role in these selection systems as in every judicial selection system—due to the fact that there have been accounts of legislative leaders using their influence to see that their close friends are appointed to the bench, relying on the influence of unelected party power brokers in the appointment process, and refusing to reappoint judges for ideological reasons.[66]

Thus, the appointment system's inherent nature creates exposure to political influences in gubernatorial and legislative systems.[67] The risks of such appointment systems include the apparent infiltration of partisan politics and the limited pool of known candidates to the legislature.[68]

### B. *Merit-Based Appointment*

Merit-based appointment is the most prevalent method of appointing state appellate judges in the United States.[69] No state that has adopted it has ever wholly abandoned it.[70] This type of selection method is based on professional merit and qualifications—impartiality, experiences, legal expertise, and temperament—rather than politics.[71] Most states have adopted a variation of the merit-based system, which avoids many of the problems with delegating the appointment power solely to the governor.[72]

Because of the pitfalls in giving governors sole discretion in Judicial Appointment, many states have adopted the assisted appointment system—in which nominating bodies are formed for the initial selection of potential

63. *Overview of SC Judicial System*, S.C. JUD. BRANCH, http://www.sccourts.org/OverviewofSCJudicialSystem.cfm (last visited Apr. 28, 2022).
64. *Virginia Courts in Brief*, *supra* note 62.
65. *See* Berkson, *supra* note 39, at 178; Dodd et al., *supra* note 37, at 361.
66. *See* Dodd et al., *supra* note 37, at 360, 363, 369; Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1609 (2009).
67. *See* Shepherd, *supra* note 66, at 1593.
68. *See id.*
69. Dodd et al., *supra* note 37, at 360.
70. *Id.*
71. Caufield, *supra* note 17, at 766.
72. Dodd et al., *supra* note 37, at 361.

candidates and interim candidates.[73] This commission recommends a pool of applicants to the governor from which they appoint the best-qualified candidates.[74]

Their recommendations rely on each candidates' qualifications.[75] The nominating body is not homogenous and may be comprised of judges, lawyers, and some members of the legislative body.[76] However, "nearly all merit-[appointment] states delegate to bar associations the authority to fill some or all of the lawyer seats on the commissions, either by directly selecting members for the commission or by controlling the list of names from which elected officials must select members."[77] Thus, the state's bar has considerable influence in the initial selection by choosing the formation and composition of the nominating committee.[78] This is significant because the nominating committee, through its recommendation of judicial candidates, essentially molds the composition of the state's judiciary.[79]

Proponents of merit appointments argue that commission-based appointments provide a better quality of judges, advance diversity on the bench, and help prevent judicial misconduct.[80] An empirical study using misconduct and diversity as its variables revealed that over a twenty-five year period, the New York City elected judiciary "far surpass[ed] the [merit-based] appointed judiciary, on the variable of judicial misconduct."[81] The study also revealed that the bench owed its diversity to the merit-based selection system

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73. *See id.* at 362; Aman L. McLeod, *Differences in State Judicial Selection*, *in* EXPLORING JUDICIAL POLITICS 10, 21 (Mark C. Miller ed., 2009); *see, e.g.*, Caufield, *supra* note 17, at 777.

74. McLeod, *supra* note 73, at 21; AM. JUDICATURE SOC'Y, *supra* note 45, at 6; Dodd et al., *supra* note 37, at 361. Thirty-three states and the District of Columbia use nominating commissions to help the governor select state judges. McLeod, *supra* note 73, at 21; DOUGLAS KEITH, BRENNAN CTR. FOR JUST., JUDICIAL NOMINATING COMMISSIONS 1 (2019), http://www.brennancenter.org/sites/default/files/2019-08/Report_Judicial_Nomination_Commissions.pdf. Thirty-three states and the District of Columbia use the commission plan to make initial appointments to most, or all, of their courts; nine others use panels only for interim appointments. *See* McLeod, *supra* note 73, at 21. Under the "Missouri Plan," after the initial appointment, a judge then has to stand for subsequent retention elections. Dodd et al., *supra* note 37, at 362. This plan was seen as a "practical compromise between the goals of judicial independence and public accountability." *Id.*

75. McLeod, *supra* note 73, at 21.

76. *Id.*; *see also* AM. JUDICATURE SOC'Y, *supra* note 44, at 6.

77. Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 679 (2009).

78. *Id.* at 681.

79. *See id.*; McLeod, *supra* note 73, at 21.

80. Steven Zeidman, *Judicial Politics: Making the Case for Merit Selection*, 68 ALB. L. REV. 713, 721 (2005).

81. *Id.*

because it allowed non-political individuals to participate.[82] Merit-based appointments, which focus on candidates qualifications rather than on political alliances or influences, allow such candidates to stand on their own achievements, thus resulting in the nomination of non-traditional candidates.[83] For instance, racial minority candidates—who have historically been underrepresented due to voter suppression and lack of ongoing voter participation—would have fewer hurdles to overcome because they could instead be directly nominated based on their qualifications.[84] Furthermore, proponents claim that this more *objective* selection process eliminates "party influence inherent in an election [and] frees judges from any corrupting influence of partisanship."[85]

However, critics argue that the advantages of the merit appointment process come with substantial costs.[86] First, it deprives the public of using their fundamental right to vote for a critical government body.[87] Second, it diminishes judicial accountability when the public does not participate in the selection process.[88] The latter can be problematic because judges are already given many "undemocratic" powers, such as the authority to declare laws unconstitutional.[89]

Merit-selection states have much in common but differ widely in their retention methods.[90] Typically, selected judges are subject to retention elections, "or some other means of confirmation by legislative or popular endorsement," typically referred to as a hybrid merit-selection based appointment system.[91] Although merit-appointment systems preserve what

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82. *Id.*

83. Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 856 (2002).

84. *See id.*

85. *Id.* at 855.

86. *Id.*; *but see* Diane M. Johnsen, *Building a Bench: A Close Look at State Appellate Courts Constructed by the Respective Methods of Judicial Selection*, 53 SAN DIEGO L. REV. 829, 840 (2016) (explaining the results of a 2011 survey showing that appointed judges were more qualified than judges chosen by popular election and that appointed judges typically wrote higher-quality opinions than those who were elected). Researchers concluded that "[a]ppointed judges 'care about their reputation among a national community of like-minded professionals,' but elected judges are more like politicians who 'care about their reputation in the local community of lay voters and politicians.'" Johnsen, *supra*.

87. Bierman, *supra* note 83, at 855.

88. *Id.*

89. *See id.*

90. *See id.* at 858–59.

91. *Id.* at 855; *see also Milone*, *supra* note 46. Regardless of the retention method used, the judge who is up for retention runs unopposed and is reselected. *Judicial*

purely contested election appointment systems lack, it also perpetuates its flaws.[92] Elected retention appointment provides an effective, yet not perfect, check on non-elected appointments, ensuring that the judicial accountability inherent in the process is maintained.[93]

Critics such as Maida Milone have suggested that the United States adopt a hybrid-merit based system for the selection of justices and appellate judges that includes greater formal participation of bar associations or other screening bodies, while also requiring that these bodies be balanced from a partisan perspective.[94] Additionally, such a system should limit the degree to which governors and legislatures hold sole discretion in determining who retains their position by requiring a limited role for retention elections—which in turn, provides voters the ability to decide what justices and appellate judges will maintain their position based on their performance in the appointed roles.[95] Diversity of members whose voices would be heard in the judicial appointment process is promoted while also ensuring bipartisanship and protecting the public's respect for the judicial branch.[96] This system does not entirely resolve the tension between judicial accountability and judicial independence but does constitute a kind of compromise.[97]

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*Selection: Significant Figures*, BRENNAN CTR. FOR JUST., http://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures (last updated Oct. 4, 2021); Bierman, *supra* note 83, at 855. Retention elections can occur before, or after, a judge serves a full term but usually occur after a full term. McLeod, *supra* note 73, at 21–22; Milone, *supra* note 46.

92. *See* Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 2 (1994). Substantial empirical evidence establishes that judges, to ensure their chances of being re-elected are not harmed, decide politically charged cases based on public opinion. Shepherd, *supra* note 66, at 1594. Thus, retention concerns are highly influential on the voting of judges who face re-election. *See id.* Moreover, judges selected through the merit-based plus election retention process require funding for their retention elections equally as much as the judges in partisan elections do. McLeod, *supra* note 73, at 23. This creates a danger as judges may develop a sense of owing a duty to their financial supporters during and after retention elections. *Id.*

93. Goldschmidt, *supra* note 92, at 2; Bierman, *supra* note 83, at 855. The Missouri Plan still perpetuates problems of a purely contested election process. Bierman, *supra* note 83, at 860.

94. Milone, *supra* note 46.

95. *Id.*

96. *Id.*; Melissa Miller-Byrnes, *Judicial Independence, Interdependence, and Judicial Accountability: Management of the Courts from the Judges' Perspective*, NAT'L CTR. STATE CTS. 1, 3 (May 2006), http://www.ncsc.org/_data/assets/pdf_file/0018/17622/millerbyrnesmelissacedpfinal0506.pdf.

97. Miller-Byrnes, *supra* note 96, at 3–4.

In *Federalist No.78*, Alexander Hamilton makes a valid argument in favor of judicial appointment for life without elections.[98] Specifically, he argued that subjecting the judiciary to periodic appointments or elections might lead judges to decide cases in a particular way to curry popular favor.[99] This would arguably jeopardize the objective application of the Rule of Law and diminish public confidence in the courts.[100]

### C. *Contested Elections*

By the early 1830s, the American judicial appointment system came under attack, and states began to adopt contested election systems to select judges, whereby judges run against each other in non-partisan or partisan elections.[101] In partisan election systems, a judicial candidate is selected to represent a party in the same way parties choose cabinet officers and are listed on a ballot with their political party.[102]

Non-partisan elections, on the other hand, do not permit party association or endorsement of any candidate.[103] Regardless of party association, "each decision [a judge] make[s] on the bench is potential fodder for an opponent or special interest group during the next election."[104] For example, judges in jurisdictions where the death penalty is popular may strictly impose the death penalty or be reluctant to overturn a death sentence to ensure

98. Dodd et al., *supra* note 37, at 355–56; THE FEDERALIST NO. 78, *supra* note 37, at 396–97.

99. Dodd et al., *supra* note 37, at 355–56; THE FEDERALIST NO. 78, *supra* note 37, at 396–97.

100. Dodd et al., *supra* note 37, at 355–56; THE FEDERALIST NO. 78, *supra* note 37, at 396–97.

101. Dodd et al., *supra* note 37, at 361; Berkson, *supra* note 39, at 176. Seven states elect *all* of their judges in partisan elections; seven states use partisan elections to elect *some* of their judges. Berkson, *supra* note 39, at 184. Thirteen states use nonpartisan elections to select all of their judges. *Id.* at 178. An additional eight states use nonpartisan elections to select some of their judges. *Id.* In total, thirty-five states choose some, most, or all of their judges using some form of contestable popular election. *See id.* at 178, 184.

102. Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary* 26 J.L. ECON & ORG. 290, 297 (2010). Some states allow parties to compete through primary elections and general elections, and others are determined through conventional nomination. *See id.*

103. *Id.* at 3; *see also* Dodd et al. *supra* note 37, at 355.

104. Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 197 (1996).

members of the community are content.[105] American history is riddled with examples of judicial decisions influencing the results of a judicial campaign.[106]

Increased competition and advertising costs have led partisan and non-partisan candidates to "become increasingly dependent on and influenced by campaign contributions."[107] Therefore, a decisive factor in a judge's decision may be the relative amount of campaign contributions from lawyers that are involved in a case a judge is deciding.[108]

Hans A. Linde, former Justice of the Oregon Supreme Court, condemned the United States' adherence to judicial elections at the state level as equally incomprehensible as the country's repudiation of the metric system.[109] Former Supreme Court Justice Sandra Day O'Connor has also denounced the practice of electing judges, claiming that other nations do not follow the process because it jeopardizes judges' fairness and impartiality.[110]

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105. *Id.* at 200.

106. *See, e.g., id.* at 197; Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J. L. & POL. 57, 80–81 (1985).

107. Wiener, *supra* note 104, at 193; Schotland, *supra* note 106, at 61–63.

108. Wiener, *supra* note 104, at 203; *see, e.g.*, Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 820–21 (1995) (discussing unethical campaign contributions in return for attorney appointments); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 331–38 (1988) (arguing against the litigant choice model); Schotland, *supra* note 106, at 61–63 (listing examples of unethical campaign contributions, such as those from political action committees and lawyers who represent insurance companies); Mark Andrew Grannis, Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 418 (1987) (arguing that there is a constitutional right to an impartial forum that should protect individuals from judicial bias that results from an attorney's campaign contributions). "Whenever such contributions are large enough that a decision in the contributor's favor would substantially advance a judge's chance of reelection, or whenever such contributions otherwise create a possible temptation to decide one way or the other, this important constitutional right is violated." Grannis, *supra* at 108; *but see* Kenyon N. Griffin & Michael J. Horan, *Patterns of Voting Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming*, 67 JUDICATURE 68, 70 (1983) (contrasting the lack of campaigns for or against justices in Wyoming); Liptak, *supra* note 8, at 5 (arguing that there is greater transparency when judges are elected).

109. Adam Liptak, *U.S. Voting for Judges Perplexes Other Nations*, N.Y. TIMES (May 25, 2008), http://www.nytimes.com/2008/05/25/world/americas/25iht-judge.4.13194819.html; Liptak, *supra* note 8, at 21.

110. Liptak, *supra* note 8, at 21. The education of judges in other parts of the world differs from that of American judges. *Id.* at 21. They spend years taking practical and theoretical courses to educate them on how to be judges, consequently, "[t]he rest of the

The critiques focus on a lack of judicial independence or lack of electoral accountability.[111] As discussed earlier, to some extent, this is a zero-sum game since these are, to a large extent, inconsistent goals.[112] As this Article will discuss below, an appointment process that draws upon a pool of professionally trained and non-partisan judges would presumably maintain the judiciary's independence while retaining its professional character and avoid the problems with electing judges discussed above.[113]

## IV. NON-POLITICAL CHECK ON JUDICIAL APPOINTMENTS

The American Bar Association ("ABA") was founded in 1878 to advance the rule of law across the United States to provide practical resources for legal professionals, model ethics codes, and more.[114] The ABA is the largest voluntary bar association of lawyers and law students in the United States and is responsible for law school accreditation and continuing legal education for legal professionals.[115] It has also served a role in recommending Judicial Appointment at various levels.[116] Unfortunately, this involvement by a non-partisan civic organization has recently been eroded.[117] For example, former President Trump curtailed the involvement of organizations such as the ABA, choosing to appoint judges based on their loyalty to a particular political agenda rather than their ability to uphold the professional standards and Rule of Law.[118]

The ABA first created the Model Rules of Professional Conduct in 1908 and the standards for law school accreditation in 1952.[119] Also, in 1952, the ABA Standing Committee reached an agreement with the U.S. Department

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world . . . is stunned and amazed at what [America does], and vaguely aghast . . . the idea that judges with absolutely no judge-specific educational training are running political campaigns is both insane and characteristically American." *Id.* at 21.

111. Dodd et al., *supra* note 37, at 368.

112. *See* Miller-Byrnes, *supra* note 96, at 6–7; *but see* Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 912, 913–14 (2007).

113. *See* discussion *infra* Part IV; Volcansek, *supra* note 5, at 375–76.

114. *About the American Bar Association*, A.B.A., http://www.americanbar.org/about_the_aba/ (last visited Apr. 28, 2022).

115. *See id.*

116. *See ABA Timeline*, A.B.A., http://www.americanbar.org/about_the_aba/timeline (last visited Apr. 28, 2022).

117. *See* Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES, http://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html (last updated Mar. 16, 2020).

118. *Id.*

119. *ABA Timeline*, *supra* note 116.

of Justice under which the ABA would no longer make recommendations for federal judicial vacancies and would limit its work to the evaluation of the professional qualification of the nominees.[120] The ABA went further in 1978 and established the Center for Professional Responsibility "to provide national leadership in developing and interpreting standards and producing scholarly resources in legal and judicial ethics, professional regulation, professionalism, and client protection."[121] With the fall of the Berlin Wall in 1990, the ABA launched its Rule of Law Initiative ("ROLI") to promote the rule of law in emerging democracies, and expanded this program in 2007 to other regions of the world.[122]

Similar to the role of the ABA in the United States, Canada employs Judicial Advisory Committees ("JAC") to evaluate judicial applications.[123] The JAC must assess applicants against published assessment criteria, such as: general proficiency in law, intellectual ability, capacity to exercise sound judgment, awareness of racial and gender issues, and more.[124] The recent changes made to the appointment process for federal judges in Canada are to promote transparency and accountability.[125] The trend towards self-regulation and transparency is to promote public confidence in the judicial institution and "reflects the evolution of the accepted judicial values of independence and impartiality towards the inclusion of values such as accountability and transparency."[126] The focuses on accountability and transparency are a reflection of the public's growing concern with the significant power wielded by the judiciary.[127]

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120. *Id.*

121. *Id.*

122. *Id.*

123. Dep't. Just. Can., *Minister of Justice and Attorney General of Canada Announces Judicial Appointments in the Province of Ontario*, GOV'T CAN. (Dec. 20. 2021), http://www.canada.ca/en/department-justice/news/2021/12/minister-of-justice-and-attorney-general-of-canada-announces-judicial-appointments-in-the-province-of-ontario.html.

124. *Guide for Candidates*, OFF. COMM'R FOR FED. JUD. AFF. CAN., http://www.fja-cmf.gc.ca/appointments-nominations/guideCandidates-eng.html (last updated Apr. 1, 2022); *Guidelines for Judicial Advisory Committee Members*, OFF. COMM'R FOR FED. JUD. AFF. CAN., http://www.fja-cmf.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html#AppendixA (last updated Dec. 16, 2016).

125. *Judicial Conduct: Reforming the Complaints Process*, GOV'T CAN., http://www.justice.gc.ca/eng/csj-sjc/pl/jc-cj/index.html (last updated Mar. 15, 2022).

126. Gabrielle Appleby & Alysia Blackham, *The Growing Imperative to Reform Ethical Regulation of Former Judges*, 67 INT'L & COMP. L.Q. 505, 506 (2018); *see also* Richard Devlin & Adam Dodek, *Regulating Judges: Challenges, Controversies and Choices*, *in* REGULATING JUDGES: BEYOND INDEPENDENCE AND ACCOUNTABILITY 1, 9 (Richard Devlin & Adam Dodek eds., 2016).

127. Appleby & Blackham, *supra* note 126, at 510.

Public confidence in the judicial system is essential to all modern democracies.[128] The rule of law is necessary because it requires governance "by rules fixed and announced beforehand."[129] An example of why the rule of law is essential can be observed in the European Court of Human Rights case of *Baka v. Hungary*.[130] Hungary adopted a new Constitution in 2011 which restructured its existing judiciary system.[131] Andras Baka was the president of the Hungarian Supreme Court, which before the restructure was the highest court in the country.[132] Baka was elected by the Parliament in 2009 to serve a six-year term set to expire in 2015.[133] As president of the Supreme Court, he had an explicit legal obligation to express his opinion on parliamentary bills affecting the judiciary.[134]

In 2011, as the government began to take steps towards a new Constitution, Baka publicly criticized several legislative reforms affecting the judiciary such as the lowering of the mandatory retirement age.[135] The new Constitution, called the Fundamental Law, was adopted in spring of 2011.[136] With its adoption, the highest court in the country was now named Kuria and the Supreme Court was terminated along with Baka's mandate.[137] The Constitution ended Baka's tenure three and a half years too early and left him unable to challenge the decision in a Hungarian court.[138] The Kuria kept the same powers and competencies as the former Supreme Court and retained all its judges, but left Baka as the odd man out when it terminated his position.[139] The new criteria in place for selecting a president of the Kuria also excluded Baka from applying to the new position because the criteria specifically excluded the time he served as a judge of an international court.[140] Baka had served sixteen years as a judge of the European Court of Human Rights but only served two and a half years as a national judge, where the new criteria for president of the Kuria required five years of experience.[141] This was simply

128. *See id.*
129. DeCoste, *supra* note 1, at 660.
130. App. No. 20261/12, ¶ 1 (June 23, 2016), http://hudoc.echr.coe.int/eng?i=001-163113.
131. Sandor Szemesi, *Introductory Note to* Baka v. Hungary, 56 INT'L LEGAL MATERIALS 273, 273 (2017).
132. *Id.*
133. *Id.*
134. *Id.*; *Baka*, App. No. 20261/12, at ¶ 13.
135. Szemesi, *supra* note 131, at 273; *Baka*, App. No. 20261/12, at ¶ 21.
136. Szemesi, *supra* note 131, at 273.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. Szmesi, *supra* note 131, at 273.

an early example of Prime Minister Victor Orban's systematic dismantling of rule of law in Hungary to the point it is presently facing European Union sanctions.[142]

The Trump Administration has, in its own way, curtailed the Rule of Law by appointing federal judges based on their political ideology instead of their qualifications.[143] Selected for their conservative ideals, at least seven of the Trump-appointed judges also served on his campaign or on his administration.[144] Trump appointed fifty-four federal appellate judges during his four-year term of Presidency.[145] His appointments fall one judge short of the fifty-five that President Obama appointed over two four-year terms.[146] The numerous ideological appointments "'flipped' the balance of several appeals courts from a majority of Democratic appointees to a majority of Republican appointees."[147]

His ideological influence and power did not end there; he also appointed three justices to the nation's highest court.[148] The appointment of Justice Brett Kavanaugh, Neil Gorsuch, and Amy Coney Barrett, makes President Trump the third President to appoint an unusual number of justices in a four-year period.[149] "[Three Supreme Court justice appointments] are the most by any president since Ronald Reagan (who appointed four) and the most by any one-term president since Herbert Hoover (though Richard Nixon appointed four in his first four years . . . .)."[150]

## V. JUDICIAL APPOINTMENTS IN NON-U.S. LEGAL SYSTEMS: OVERVIEW

As discussed in the introduction to this Article, most non-U.S. legal systems rely on a Civil Service Model, where judges are trained on a judicial track immediately upon completing law school,[151] emphasizing technical

142. Jessica Parker, *Hungary and Poland lose EU Funding Fight over Laws*, BBC (Feb. 16, 2022), http://www.bbc.com/news/world-europe-60400112.

143. Ruiz et al., *supra* note 2.

144. *Id.*

145. John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), http://pewrsr.ch/2Zx21cQ.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Gramlich, *supra* note 145.

151. Samuel Spáč, *Recruiting European Judges in the Age of Judicial Self-Government*, 19 GERMAN L.J. 2077, 2082 (2018); Liptak, *supra* note 8, at 21; Volcansek, *supra* note 5, at 371–72.

skills and insulating judges from politicization.[152] This model has been adopted by countries such as Austria, France, Finland, Greece, Germany, Italy, Portugal, the Netherlands, Sweden, and Spain, to cite a few examples.[153] It requires judicial education and preparation acquired in a non-partisan track, and it *avoids* some of the blatant politicization characterizing Judicial Appointment in the United States.[154]

Proponents of this professional judge career track argue that it protects judges "from fickle political winds, and promot[es] the meritorious from within the judiciary."[155] Thus, judges arguably maintain a professional and non-partisan identity throughout their professional careers.[156] This stands in contrast to the United States' varying systems of judicial training and appointment, where lawyers can experience role-confusion while transitioning to the role of a judge mid-career.[157] Advocating for clients and/or causes is markedly different from being an impartial arbiter of the court.[158] Moreover, lawyers transitioning to the judicial role are more likely to be involved in partisan activities than judges who have been trained their entire professional careers to be strictly neutral.[159]

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> [M]ost civil law countries have systems in which the largest number of magistrates (a term used to connote both judges and prosecutors) are recruited directly from among young university graduates who score well on competitive examinations. . . . [T]he civil service model for appointing judges can be found in Austria, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, and Sweden.

Volcansek, *supra* note 5, at 371–72.

152. Elliot Bulmer, *Judicial Appointments: International IDEA Constitution-Building Primer 4*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE 4, http://www.idea.int/sites/default/files/publications/judicial-appointments-primer.pdf (last visited Apr. 28, 2022); Volcansek, *supra* note 5, at 371–72; Mary L. Volcansek, *Judicial Selection: Looking at How Other Nations Name Their Judges*, 53 ADVOCATE 95, 95–96 (2010).

> The civil or career service model for judicial selection can now be found across continental Europe, including the newer democracies of Central and Eastern Europe, and in many parts of Latin America, Africa, the Middle East and Asia. . . . The second exam determines on which court they will commence their judicial careers. . . . [In Japan,] approximately 20,000 law graduates take the multiple choice entrance exam, but only 700 of them will be accepted into a two year training program. . . . Pakistan, Thailand, Nepal, Singapore, Indonesia and Bangladesh all employ some variation of the civil service model . . . .

Volcansek, *supra* at 95–96.

153. Volcansek, *supra* note 5, at 372.

154. *See id.* at 363.

155. *Id.* at 375.

156. *Id.* at 375–76; *see also* Spáč, *supra* note 157, at 2083.

157. Volcansek, *supra* note 5, at 375–76; *see also* Spáč, *supra* note 151, at 2083.

158. Volcansek, *supra* note 5, at 375–76; *see also* Spáč, *supra* note 151, at 2083.

159. Volcansek, *supra* note 5, at 371, 375.

> The judges of highest courts are usually appointed by political authorities: the executive, as it occurs in United Kingdom, Australia, Canada, Finland, Norway or Malta; the parliament, such as in Germany or Ukraine; or by both according to a mixed system, as, for instance, in [the] United States of America, Israel, Lithuania, France, Greece or the Netherlands.[160]

While rejecting judicial elections, many societies elsewhere have rejected the United States Constitution's approach of guaranteeing a lifetime appointment when it comes to constitutional judges.[161] Outside of the United States, there are *only* two nations which adopt Judicial Appointment through an election process and do so in a very limited fashion.[162] Smaller cantons of Switzerland elect judges, and Japanese Supreme Court justices are appointed but are sometimes subjected to retention elections; however, many scholars say those elections are simply a formality.[163]

Constitutional framers around the world have adopted different Judicial Appointment methods.[164] For example, in Germany two Reichstag houses are authorized to select the sixteen constitutional court justices with the limitation that six must be professional judges.[165] Another example exists in Bulgaria where the supreme courts, the president, and the parliament each appoint one-third of the twelve justices.[166]

Just as the debate has intensified in the United States regarding varying terms of Supreme Court justices, other countries presently differ from each other in the terms for which constitutional judges serve.[167] For instance, in South Africa constitutional court justices are limited to serve a twelve-year term and in Italy justices only serve a nine-year term.[168] In other countries,

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160. Ana Martins, *Size and Composition of Highest Courts Selection of Judges*, *in* THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 203, 205 (Ingolf Pernice et al. eds., 2006).

161. EPSTEIN & SEGAL, *supra* note 18, at 9 (citing GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY 85 (Randall Calvert & Thrainn Eggertsson eds., 2005).

162. *See id.*

163. Liptak, *supra* note 8, at 21.

164. *See* EPSTEIN & SEGAL, *supra* note 18, at 9 (citing VANBERG, *supra* note 167 at 85).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*; Andrew Harding, *The Fundamentals of Constitutional Courts*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE 1, 3–4 (2017), http://www.idea.int/sites/default/files/publications/the-fundamentals-of-constitutional-courts.pdf.

such as the Republic of Korea and the Czech Republic, justices serve a fixed renewable term.[169] A renewable term in the Czech Republic means that court presidents may only be removed by a disciplinary panel.[170]

Although particularities may differ, there is a pattern familiar to European countries regarding Judicial Appointment.[171] In most European countries, judges of the ordinary judiciary are appointed into free slots based on fulfilling the formal requirements for the office rather than being elected.[172] Further, to bolster the independence and impartiality of the judge, the judges are appointed for an unlimited term.[173] On the other hand, appointing judges to European constitutional review bodies is generally a political rather than administrative process.[174] For example, constitutional judges frequently serve a fixed term without a possibility of being re-appointed or re-elected.[175] If the United States adopted a judicial appointment system that required judicial training, it would ideally deal with: (1) rule of law, i.e., judicial impartiality; (2) judicial competence; and (3) to the extent, this training would be a prerequisite to be being appointed, or arguably elected, it could avoid the tough choice between expertise and accountability.[176]

## VI. JUDICIAL APPOINTMENTS IN SPECIFIC COUNTRIES

### A. *France*

The Civil Service Model originated in France in the nineteenth century and remains in place with only some minor modifications.[177] After

169. EPSTEIN & SEGAL, *supra* note 18, at 9 (citing VANBERG, *supra* note 167 at 85); Harding, *supra* note 168, at 4; *Judge Selection and Terms of Office: Counties Compared*, NATIONMASTER, http://www.nationmaster.com/country-info/stats/Government/Judicial-branch/Judge-selection-and-term-of-office (last visited Apr. 28, 2022).

170. David Kosai, *Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law Between Court Presidents and the Ministry of Justice*, 13 EUR. CONST. L. REV. 96, 108 (2017).

171. *See* Victor Ferreres Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization?*, 2 INT'L J. CONST. L. 461, 466 (2004); Volcansek, *supra* note 5, at 370, 372.

172. *See* Comella, *supra* note 171, at 468; Volcansek, *supra* note 5, at 372–73.

173. Comella, *supra* note 171, at 468.

174. Volcansek, *supra* note 5, at 367–68.

175. *Id.*

176. *See* Comella, *supra* note 171, at 468; Volcansek, *supra* note 5, at 367–68, 372–73.

177. Philippe Bezes & Gilles Jeannot, *The Development and Current Features of the French Civil Service System*, *in* CIVIL SERVICE SYSTEMS IN WESTERN

the French Revolution, the French courts were designed to be *passive bodies* simply applying the Rule of Law in a mechanical fashion, not creating law, as is the case with the Common Law.[178] The French revolutionary government deliberately did this to ensure that judges only interpreted the law as written, and thus preserve an important aspect of the Rule of Law.[179] This largely derived from the French distrust of the judiciary, as traditionally a product of the aristocracy.[180] The French Constitution of 1958 included a Superior Council of the Magistrate (*Conseil Superieur de la Magistrature*) that was charged with disciplining and promoting judges.[181] This effort to professionalize and de-politicize the judiciary can be seen in the training of judges as well.[182]

France provides an emblematic example of the Civil Service Model of judicial training and subsequent appointment.[183] To become a judge, the candidate must first pass a *concours*—a competitive entrance exam—to obtain admission into the *Centre National d'Etudes Judiciaries*—National Centre of Judicial Studies—which was established in 1959 and was later renamed to the *École Nationale de la Magistrature* ("ENM").[184] This institute was designed to train those who passed the competitive examination, such as legal

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EUROPE 4–5 (Van der Meer Frits ed., 2d ed. 2011), http://hal-enpc.archives-ouvertes.fr/hal-01257027/document.

178. *See* John Henry Merryman, *The French Deviation*, 44 AM. J. COMPAR. L. 109, 111–12 (1996); Nemacheck, *supra* note 38, at 665–66. In France, a long history of favoring the legislative body over the judiciary stems back to Jean-Jacques Rousseau, who believed that executive and judicial authority were subordinate to the legislature. *See* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 179–80 (Kate Malleson & Peter H. Russell eds., 2006) [hereinafter PERSPECTIVES FROM AROUND THE WORLD].

179. Merryman, *supra* note 178, at 111–12.

180. *See id.* at 110, 112–13.

181. Volcansek, *supra* note 5, at 372; 1958 CONST. art. 65 (Fr.).

182. *See* Volcansek, *supra* note 5, at 372–73.

183. *Id.* at 371–72; *see also* Bezes & Jeannot, *supra* note 177, at 14.

184. CONST. ART. 14 of Act No. 58-1270 of 22 December 1958; Volcansek, *supra* note 5, at 372; Luis Muñiz-Argüelles & Migdalia Fraticelli-Torres, *Selection and Training of Judges in Spain, France, West Germany, and England*, 8 B. C. INT'L & COMP. L. REV. 1, 3, 9, 13, 14 (1985); Kelly Buchanan, *The French National School for the Judiciary*, LIBR. OF CONG.: IN CUSTODIA LEGIS (Jan. 26, 2011), http://blogs.loc.gov/law/2011/01/the-french-national-school-for-the-judiciary/. The first *concours* is for graduates with legal education and who are at least twenty-seven years of age. Muñiz-Argüelles & Farticelli-Torres, *supra*. The second *concours* is dedicated to employees or agents of the state or local authority, public institutions, community service, or holders of a master's degree of law with at least four years of work experience. *Id.* at 15. Finally, the third *concours* is reserved for professionals with at least eight years of work experience in the private sector or as an elected member of an assembly, a territorial authority, or a non-professional member of the judiciary. *See id.* at 14–15; Buchanan, *supra*.

practitioners with five years of experience and individuals in the civil service, to be judges or magistrates.[185] Admitted candidates are required to participate in a thirty-one-month course, which covers both theoretical and practical elements of judicial practices and later ends with an exit examination.[186]

Based on the results and the grades received throughout the training, the candidates obtain their rank.[187] Based on their rank, the candidates then choose from a list of posts drawn up by the Ministry of Justice.[188] The judges are then appointed for an unlimited lifetime term.[189] As discussed by Mary Volcansek:

> "Initial appointments are made [based on] examination scores, those receiving the highest scores getting first pick of the positions. Most of the graduates are appointed to a judgeship in the provinces at the lowest level . . . ." Advancement within the judiciary is based on seniority and merit, with actual promotions decided by either the Superior Council of the Magistrature for the higher courts and on the advice of the Council for the lower levels; in either case, the formal appointment is made by the Minister of Justice.[190]

The French *Conseil Constitutionnel*—the Constitutional Council—provides a different system for Judicial Appointment than that for lower court judges.[191] This system was established by the Constitution of the Fifth Republic.[192] This is connected to the specialized role that constitutional courts play in most countries.[193] Unlike the United States, where the Supreme Court's jurisdiction is not substantively limited, the purpose of the Constitutional Council is limited to supervising elections and ruling on

185. Volcansek, *supra* note 5, at 372.

186. *Id.*; Buchanan, *supra* note 184.

187. Volcansek, *supra* note 5, at 372–73; Buchanan, *supra* note 184.

188. Volcansek, *supra* note 5, at 372; Buchanan, *supra* note 184.

189. Art. 4 Ordonnance n° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature [Art. 4, Ordinance No. 58-1270 of Dec. 22, 1958 on the Organic Law Relating to the Status of the Judiciary] JOURNAL OFFICIEL DE LAW RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 23, 1958, p. 11551; Buchanan, *supra* note 184; *Types of Legal Professions: France*, EUR. E-JUSTICE PORTAL, http://e-justice.europa.eu/29/EN/types_of_legal_professions?FRANCE&member=1 (last updated Jan. 10, 2022).

190. Volcansek, *supra* note 5, at 372–73 (quoting Doris Marie Provine & Antoine Garapon, *The Selection of Judges in France: Searching for a New Legitimacy*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 176, 183 (Kate Malleson & Peter H. Russell eds., 2006).

191. 1958 CONST. art. 56 (Fr.).

192. *Id.*; *see* Volcansek, *supra* note 5, at 379.

193. *See* Volcansek, *supra* note 5, at 376.

statutes' constitutionality.[194] The Constitutional Council comprises nine members.[195] The term for a member of the Council is nine years, and the term is non-renewable.[196] The Council may also include former Presidents of the Republic.[197]

Unlike in the United States or the Czech Republic, where an appointment of a judge to a Constitutional or Supreme Court requires a nomination by the President and approval by a legislative body, the French system does not have this type of inter-branch cooperation.[198] Instead, three political bodies—the President of the Republic, the President of the National Assembly, and the President of the Senate—each separately appoint three individuals of their choosing.[199] As a result, the French Constitutional Council is *one of the most politicized tribunals of constitutional judicial review*.[200] Perhaps this should not be surprising since the issues it deals with are mainly political.[201] However, one could argue that the political functions of the Constitutional Court militate in favor of a *non-political* check on the political system, which the French system does not look to provide, at least at the Constitutional Council level.[202] Thus, while the French judicial system generally promotes non-politicization, independence, and the rule of law at most levels of the judiciary, it could be argued that it fails to do so at the Constitutional Council level.[203]

## B. *Germany*

Germany, like the United States, and unlike France, has a federal system of government, requiring an analysis of the judicial appointment

194. 1958 CONST. art. 58–61, 61-1 (Fr.). Until March 1, 2010, the Council only engaged in a priori review, since then, a party to a suit may also bring up a question whether the statute to be used is in accordance with the Constitution. *Id.* art. 61, 61-1.

195. 1958 CONST. art. 56 (Fr.).

196. *Id.*

197. *Id.*

198. *Id.*; U.S. CONST. art. II, § 2; Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 84 § 2.

199. 1958 CONST. art. 56. (Fr.); Volcansek, *supra* note 5, at 380.

200. *See* F.L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 AM. J. COMP. L. 89, 89 (1988); Volcansek, *supra* note 5, at 380.

201. Morton, *supra* note 200, at 91.

202. Merryman, *supra* note 178, at 117–18.

203. *Id.*

process at the state and the federal level.[204] "[J]udicial authority is shared between the Federation (Bund) and the sixteen 'Länder' which are states and provinces."[205] Germany's career judiciary is similar to the French Civil Service model because judges enter the judicial hierarchy right after graduation and spend the rest of their professional careers in it.[206]

German judges train through a three and a half year, government-mandated law school curriculum, culminating with rigorous written and oral examinations.[207] After completion, students enter a state-funded mandatory preparatory training internship for two years.[208] The internship includes two assignments: the first being selected for the candidate and the second selected by the candidate herself.[209] The candidate is assigned to an ordinary court—which oversees both civil and criminal cases—an administrative authority, and an attorney.[210] Students are then eligible to take the *Second Stage* exam, however, only those achieving a high score are eligible to apply and be considered by the state's ministry for that judiciary.[211] This leaves the remaining passing students eligible to join a branch of the legal service.[212] Notably, only fifty percent of those entering legal studies pass this second exam and enter legal service in the judiciary.[213] This would seem to suggest a considerable degree of competence for those lawyers making it to this level.[214]

The general recruitment process begins with the judicial candidates' application to a Länder.[215] Applicants present their application to the Länder's

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204. *See* Morton, *supra* note 200, at 89; FIONA O'CONNELL & RAY MCCAFFREY, JUDICIAL APPOINTMENTS IN GERMANY AND THE UNITED STATES 3, 10 (Mar. 15, 2012), http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2012/justice/6012.pdf.

205. O'CONNELL & MCCAFFREY, *supra* note 204, at 10 (citing Johannes Riedel, *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany*, *in* RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN EUROPE: AUSTRIA, FRANCE, GERMANY, ITALY, THE NETHERLANDS AND SPAIN 69, 69 (Giuseppe Di Federico ed., 2005)).

206. *Id.* at 11 (citation omitted).

207. *Id.*; Volcansek, *supra* note 5, at 373.

208. O'CONNELL & MCCAFFREY, *supra* note 204, at 11; Volcansek, *supra* note 5, at 373.

209. O'CONNELL & MCCAFFREY, *supra* note 204, at 11; Volcansek, *supra* note 5, at 373.

210. *See* O'CONNELL & MCCAFFREY, *supra* note 204, at 10.

211. Volcansek, *supra* note 5, at 373; Donald P. Kommers, *Autonomy versus Accountability: The German Judiciary*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 131, 143 (Peter H. Russell & David M. O'Brien eds., 2001).

212. Volcansek, *supra* note 5, at 373.

213. *Id.*; Kommers, *supra* note 211, at 144.

214. *See* Volcansek, *supra* note 5, at 373–74.

215. O'CONNELL & MCCAFFREY, *supra* note 204, at 12.

selection commission, which votes on the candidate.[216] That vote is then taken into consideration by the Minister of Justice or the President of the court who then appoints the judge.[217] However, only seven out of the sixteen regional Länder courts include a selection commission in their judicial appointment system.[218] In Länder without a selection committee, the Minister of Justice or the President of the court solely consider the application and the candidate's interview in his/her appointment decision.[219] "Depending on the Länder, the appointment may be subject to cabinet approval."[220] Some argue that "party-political loyalties are . . . openly introduced through the selection committees' parliamentary influence and the preselection and co-determination powers of the elected Minister of Justice."[221] When the appointment is at the complete discretion of the *States' Ministry of Justice*, the Länder political system and biases are *simply re-created* at the judicial level.[222]

Judges are initially appointed on a three-year probationary period, and according to the German Judiciary Act, may be easily dismissed by the internal administrative supervisors within the first two years.[223] Once surpassing the probationary period, judges are eligible for promotion to higher courts.[224] Promotion within the judiciary depends on the merits of the judge as determined by the State Ministry of Justice as well as senior judges.[225]

Usually, judges begin at the Länder and move up the *ladder*, however, some judges are immediately appointed to the higher courts.[226] The Federal Electoral Committee, in conjunction with the Federal Minister of Justice, are responsible for electing judges to federal courts.[227] The Committee comprises

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216. *Id.*

217. *Id.*

218. Volker G. Heinz, Speech at the Australian Bar Association Conference: The Appointment of Judges in Germany (July 7, 1998), http://www.heinzlegal.com/sites/default/files/AppointOfJudgesInGermany.pdf.; O'CONNELL & MCCAFFREY, *supra* note 204, at 12, 14; Volcansek, *supra* note 5, at 377.

219. O'CONNELL & MCCAFFREY, *supra* note 204, at 12.

220. Kommers, *supra* note 211, at 144.

221. Heinz, *supra* note 223.

222. *See id.*; Volcansek, *supra* note 5, at 373–74.

223. Volcansek, *supra* note 5, at 374; O'CONNELL & MCCAFFREY, *supra* note 204, at 11; JOHN BELL, JUDICIARIES WITHIN EUROPE 115 (2006) (e-book); Deutsches Richtergesetz [DRiG] [German Judiciary Act], Apr. 19, 1972, BUNDESGESETZBLATT [BGBL I] at 1755, § 22(1), last amended by Act of Nov. 22, 2019; *see also* Maximiliane Koschyk, *How Independent are German Judges?*, DW (Aug. 5, 2017), http://p.dw.com/p/2hkcz.

224. Volcansek, *supra* note 5, at 374.

225. *Id.*

226. O'CONNELL & MCCAFFREY, *supra* note 204, at 11; Volcansek, *supra* note 5, at 373–74.

227. O'CONNELL & MCCAFFREY, *supra* note 204, at 15–16.

sixteen Ministers of Justice from the Länder and sixteen other members who are usually, but not required to be, Federal Parliament members with legal expertise.[228] Historically, there was a controversial debate about agents of the Executive branch taking part in the promotional process because it was seen as a method of political interference.[229] However, this argument was rejected because requiring judges alone to promote their fellow judges could result in a self-perpetuating elite profession by insulating it from democracy.[230]

Appointment to the federal courts does not follow a formal recruitment or application process as required at the Länder.[231] Each member of the election committee may propose a candidate, and judicial participation may occur through advisory opinions on the personality and fitness of the candidate who is being considered for a promotion to a higher court.[232] Such opinions are issued through the Prasidialrat—a body representing the judiciary—which exists at each court level and is composed of a president and judges.[233] Promotion of federal judges is different from appointments at the Länder because the election committee does not advise on it.[234]

Each member casts one anonymous vote and the decision for appointment is made based upon a simple majority.[235] Once the Committee for the Election of Judges selects a judge, the Federal Minister of Justice proposes the selection to the Federal President who then makes the appointment.[236] Appointed judges are set for a minimum probation period of three years and no longer than five years.[237] Once the judge completes the probationary period, the judge is appointed for an unlimited term, or if given an unlimited civil service tenure, she will be appointed as a public prosecutor.[238] Judges appointed for life must retire at the end of the month in which they reach the standard retirement age based on a birth-year sliding

228. *Id.* at 15; Volker Wagener, *How Does Germany Choose its Judges? Always the Best Pick?*, DW (Sept. 27, 2018), http://p.dw.com/p/2hC14.

229. O'CONNELL & MCCAFFREY, *supra* note 204, at 9.

230. *Id.*

231. *Id.* at 15.

232. *Id.* at 15–16.

233. *Id.* at 16.

234. O'CONNELL & MCCAFFREY, *supra* note 204, at 17.

235 Wagener, *supra* note 228; *Judges and Senates*, FED. ADMIN. CT. SUP. CT., http://www.bverwg.de/en/das-gericht/organisation/richter-und-senate (last visited Apr. 28, 2022).

236. *Judges and Senates*, *supra* note 235.

237. *See id.*; O'CONNELL & MCCAFFREY, *supra* note 204, at 11; Deutsches Richtergesetz [DRiG] [German Judiciary Act], Apr. 19, 1972, BUNDESGESETZBLATT [BGBL I] at 2145, § 12, last amended by Act of June 25, 2021.

238. Deutsches Richtergesetz [DRiG] [German Judiciary Act] at § 124.

scale.[239] Judges must retire after turning sixty-two if the judge is severely disabled.[240]

The German Federal Constitutional Court—*Bundesverfassungsgericht*—comprises sixteen elected justices.[241] Ten judges are elected for a limited twelve-year term and the remaining six judges, chosen from the judges of higher federal courts, are elected for an unlimited term.[242] At this level, each legislative body—the *Bundestag* and the *Bundesrat*—elect eight members of the Court.[243] The *Bundestag* is the upper and main chamber of the legislature whereas the *Bundesrat* is the lower chamber through which the states participate in the legislative process.[244]

Candidates at this level must be "judges or professors qualified for judicial office."[245] Electing the Constitutional Court judges begins with the Federal Minister of Justice compiling two lists of potential candidates.[246] The first list is composed of judges from federal courts.[247] The second consists of individuals suggested by Parliament.[248] The *Bundesrat* formally elects candidates from these lists in plenary sessions, based upon the work done by a committee of the Ministers of Justice from different Länder.[249] The *Bundestag* relies on a Parliamentary committee of twelve members composed of individuals representing different chamber parties.[250] After private deliberation, a judge is selected by a two-thirds majority vote.[251]

Judges are required to retire from the federal judiciary at the standard retirement age, unless special circumstances arise, such as having no suitable

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239. *Id.* § 48. For example, a judge born in 1955 must retire at age sixty-five and nine months, whereas a judge born in 1963 must retire at age sixty-six and ten months. *Id.*

240. *Id.*

241. *The Federal Constitutional Court: Structure*, BUNDESVERFASSUNGSGERICHT, http://www.bundesverfassungsgericht.de/EN/Das-Gericht/Gericht-und-Verfassungsorgan/gericht-und-verfassungsorgan_node.html (last visited Apr. 28, 2022); O'CONNELL & MCCAFFREY, *supra* note 204, at 16.

242. O'CONNELL & MCCAFFREY, *supra* note 204, at 16; DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 21–23, (3d ed. rev. and expanded 2012).

243. *The Federal Constitutional Court: Structure*, *supra* note 241.

244. O'CONNELL & MCCAFFREY, *supra* note 204, at 16.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*; KOMMERS & MILLER, *supra* note 242, at 8, 23.

249. O'CONNELL & MCCAFFREY, *supra* note 204, at 16; *see also* KOMMERS & MILLER, *supra* note 242, at 23.

250. O'CONNELL & MCCAFFREY, *supra* note 204, at 16.

251. *Id.*; BELL, *supra* note 223, at 159.

successor.[252] Critics of the German system claim the judicial appointment process is highly politicized and opaque.[253] They argue the reality behind the Judicial Appointment process is shrouded in secrecy from the public.[254] The secrecy adds fuel to arguments that Judicial Appointment is more like political horse-trading by the committee, rather than the paragon of judicial independence it purports to be.[255]

### C. *Czech Republic*

The Czech Republic adopts a career judiciary where professional judicial candidates must undergo specialized training.[256] Jury trials are non-existent.[257] However, laypersons—"Judges from the People"—have a limited opportunity to participate in the judiciary as judges and community representatives at large.[258] Two lay judges may sit in on a non-specialized case such as a criminal proceeding *with* a professional judge within a district or regional court, but never on appellate or higher-level courts.[259]

The appointment of professional judges typically begins at a first instance court and is later reassigned to Appellate and Supreme Courts.[260] The

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252. Deutsches Richtergestz [DRiG] [German Judiciary Act], Apr. 19, 1972, BUNDESGESETZBLATT [BGBL I] at 2145, § 48(1)–(6), last amended by Act of June 25, 2021; *see, e.g.*, Jean-Michel Hauteville, *Why Even Germany's Federal Constitutional Court Has a Politics Problem*, HANDELSBLATT TODAY (Nov. 9, 2018, 2:51 PM), http://www.handelsblatt.com/english/politics/handelsblatt-explains-why-even-germanys-federal-constitutional-court-has-a-politics-problem/23580560.html?ticket=ST-5473698-o1yA5KFUam1b9LAFxJ7l-ap3. For example, politics played a factor in the delay of Justice Ferdinand Kirchhof's retirement when he remained in office despite having reached the mandatory retirement age during his term due to a lack of suitable replacement from the Christian Democratic Union—Chancellor Angela Merkel's party. Hauteville, *supra*.

253. Hauteville, *supra* note 252.

254. *Id.*

255. *Id.*

256. *Czechia: Judicial Academy*, EUR. JUD. TRAINING NETWORK, http://www.ejtn.eu/About-us/Members/Czech-Republic/ (last visited Apr. 28, 2022); Zákon o soudech a soudcích [Act on Courts and Judges], Zákon č. 6/2002 Sb. § 60(3) (Czech).

257. Michael Bobek & Olga Pouperova, *UPDATE: An Introduction to the Czech Legal System and Legal Resources Online*, GLOBALEX (July/Aug. 2018), http://www.nyulawglobal.org/globalex/Czech_Republic1.html#_2.4._The_Judiciary.

258. *Id.*

259. *Id.*

260. Michal Bobek, *Judicial Selection, Lay Participation, and Judicial Culture in the Czech Republic: A Study in a Central European (Non)Transformation*, *in* 7 FAIR REFLECTION OF SOCIETY IN JUDICIAL SYSTEMS — A COMPARATIVE STUDY 121, 130 (Sophie Turenne ed., 2015); Frans Viljoen, *The Constitutional Court of the Czech Republic: An Introduction for South African Lawyers*, 35 DE JURE 1, 7 (2002).

judges sitting in Appellate and Supreme Courts chambers are *only* professional judges.[261] The systems used to select lay judges and professional judges differ greatly from each other.[262] Lay judges are elected through municipal or regional assemblies.[263] Professional judges, on the other hand, are appointed by the President of the Republic.[264] The respective courts' corresponding assembly selects each lay judge.[265] After their election, the lay judges swear the same oath as professional judges.[266]

Municipal or regional councils elect lay judges to district and regional courts, respectively.[267] Typically, there is no competition for a position as a lay judge; the decision to participate as one is voluntary.[268] The judicial candidate voluntarily submits his name to the local assembly for election.[269]

Lay judges are elected for a renewable term of four years.[270] However, the number of lay judges elected to a respective district or regional court depends on the number the president of that court determines is needed for each term.[271] The formula used to make this determination is to ensure that each lay judge will not sit for more than twenty calendar days each year.[272] The requirements to be a lay judge also differ greatly.[273] Lay judges are not required to have a legal education but must be a permanent resident or work in the judicial district where he or she wishes to be elected.[274] These requirements are in addition to the other requirements for professional judges, which are mentioned below.[275] Lay judges who appear in a mixed panel with a professional judge each get one vote.[276] The professional judge serves as the presiding chairman of the panel.[277]

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261. Bobek & Pouperova, *supra* note 257.
262. *Id.*
263. *Id.*; Zákon o soudech a soudcích [Act on Courts and Judges], Zákon č. 6/2002 Sb. § 64(1) (Czech).
264. Bobek & Pouperova, *supra* note 257; Bobek, *supra* note 260, at 132.
265. Bobek & Pouperova, *supra* note 257; *see also* Bobek, *supra* note 260, at 141.
266. Bobek, *supra* note 260, at 141.
267. Zákon č. 6/2002 Sb. § 64(1) (Czech).
268. Bobek, *supra* note 260, at 141.
269. *Id.*
270. Zákon č. 6/2002 Sb. § 61(2) (Czech).
271. *See* Bobek, *supra* note 260, at 132.
272. *Id.* at 141.
273. *See id.* at 140–41; Bobek & Pouperova, *supra* note 257.
274. Bobek, *supra* note 265, at 140–41.
275. *See id.*; *see also* Zákon č. 6/2002 Sb. § 60(1) (Czech).
276. *See* Zákon č. 6/2002 Sb. §§ 30, 34 (Czech).
277. *See id.* §§ 31(3), 35(3).

> [H]ypothetically, [it could happen that] the two lay judges [] outvote the professional judge. However, this is a very unlikely scenario, [considering] the huge . . . knowledge and [standing asymmetry] between [the] professional, permanently sitting judge, and a lay person sitting in just a few cases [in] up to 20 days a year.[278]

In the Czech Republic, professional judicial candidates must be citizens of the country, at least thirty years of age at the date of appointment, enjoy full legal capacity, and have no criminal record.[279] Further, candidates must have a five-year master's degree in legal education from a Czech university, pass the judicial bar examination, and be an individual of good moral character to guarantee due performance of the judiciary.[280] In 2002, the Act. No. 6/2002 established the Czech Judicial Academy—the central institution of justice where all target groups in the judiciary, such as judges, lay judges, and state prosecutors, are trained.[281]

Twice a year, the Minister of Justice compiles a list of suitable candidates.[282] The President of a regional court with a vacancy in a district court appoints judicial candidates from that list by recommending them to the Ministry of Justice, which retains or rejects the proposed candidate.[283] However, that appointment is checked by the Czech Republic Government.[284] The Prime Minister, or a member of the Government selected by the Prime Minister, must countersign the appointment.[285] Appointed judges then take the oath of office in the president's hands.[286]

The Minister of Justice then assigns the judge to a district court.[287] Judges who move to a higher court or move to a court within the court level in which they sit are considered transferred or re-assigned, not appointed to that

278. Bobek, *supra* note 260, at 141.

279. *See id.*; Zákon č. 6/2002 Sb. § 60(1) (Czech); Ivo Šlosarčík, *Czech Republic 2006–2008: On President, Judges and the Lisbon Treaty*, 16 EUR. PUB. L. 1, 10 (2010).

280. *See* Zákon č. 6/2002 Sb. § 60(3), (5) (Czech); Šlosarčík, *supra* note 279, at 10.

281. *Czechia: Judicial Academy*, *supra* note 256.

282. Bobek, *supra* note 260 at 132.

283. Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 63 § 3; Bobek, *supra* note 260, at 132.

284. Bobek, *supra* note 260, at 132.

285. *Id.*; Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 63 § 3.

286. Zákon o soudech a soudcích [Act on Courts and Judges], Zákon č. 6/2002 Sb. § 62(3)(a) (Czech).

287. Bobek, *supra* note 260, at 132; Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 67 §1.

court.[288] The Minister of Justice's decision to permanently or temporarily reassign or transfer the judge must also be done with the dual consent of the judge appointed and the president of that particular court.[289]

All professional judges are appointed for an unlimited term and may *only* be removed for disciplinary offenses following a proceeding conducted by the special judicial disciplinary panel.[290] The purpose of an unlimited term is to support the judge's independence and impartiality.[291] Further, the judge's term expires if the judge reaches seventy years of age, commits an intentional crime, or cannot perform her duties due to her health.[292] After appointment, judges are required to complete three years of specialized training within the courts.[293] Judges appointed to the appellate court level must meet the criteria listed above and must also meet additional criteria.[294] First, the judges must have adequate experience in legal practice, which must be at least eight years as a judge.[295] Second, the judge must demonstrate high erudition and legal expertise.[296] The latter requirement is determined through a standardized psychological test.[297] Evidently, this test created problems because individuals who did not answer in a manner corresponding with the answers of the average normative group would be weeded out of the running.[298] Today, psychological testing of judicial candidates is still used to measure a judge's high level of erudition and legal expertise, but such candidates who answer questions with non-conformist responses may still be nominated.[299]

> The practice of bluntly equating the only evaluative criterion with psychometric testing and making it a compulsory condition for a judicial appointment [addresses] a two-fold problem. First, in career judiciaries, appointment of young candidates to the bench for life without them having any previous professional track

288. Bobek, *supra* note 260, at 132.

289. *Id.*; Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 67 § 1, 71.

290. Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 82 § 2; *European Rule of Law Mechanism: Input – Czech Republic*, at 2 (July 20, 2021), http://ec.europa.eu/info/sites/default/files/cz-input.pdf.

291. *See* Zákon č. 6/2002 Sb. §§ 61–62 (Czech).

292. *Id.* §§ 91(a), (c), 94(a).

293. *See European Rule of Law Mechanism: Input – Czech Republic, supra* note 290, at 2; Zákon č. 6/2002 Sb. § 71 (Czech).

294. Bobek, *supra* note 260, at 128; *see also* Zákon č. 6/2002 Sb. § 71 (Czech).

295. Zákon č. 6/2002 Sb. § 71(3) (Czech); Bobek, *supra* note 260, at 128.

296. Bobek, *supra* note 260, at 129; *see also* Zákon č. 6/2002 Sb. § 71 (Czech).

297. Bobek, *supra* note 260, at 129.

298. *Id.*

299. *Id.*

> record will always mean, in a way, placing a bet on the character of the candidate. Second, to this adds the uneasiness that transforming societ[ies] have with the notion of good character and, on the whole, with morality in the public space and office.[300]

To begin, people in power are not ready to discuss what "good character" truly means.[301] Conversely, when such criteria are established for what constitutes "character" or "morality" by a legislator, it essentially becomes a psychometric standard that is better "left to the experts."[302] For the most part, judges at the appellate level are promoted to their positions through re-assignment, as opposed to being newly appointed to that court.[303] Appellate court judges are rarely directly appointed.[304]

The Constitution established the Constitutional Court.[305] It is a part of the judiciary but is not a part of the courts of general jurisdiction.[306] The Constitutional Court consists of fifteen justices.[307] A candidate for a justice of the Constitutional Court must be a citizen of the Czech Republic, at least forty years old, have no criminal record, have a university degree in legal education, and be active in a legal profession for at least ten years.[308] The appointment to the Constitutional Court is more political than the judicial appointment methods used at lower courts.[309] The President selects a candidate he later appoints with the approval of the Senate.[310] A simple majority in the Senate—an elected political body—is required to approve a candidate.[311] Therefore, the composition and profiles of the Constitutional Court justices vary, and a candidate's political standpoints and beliefs may determine whether she will

300. *Id.*
301. *Id.* at 129–30.
302. Bobek, *supra* note 260, at 129–30.
303. *Id.* at 133.
304. *Id.*
305. Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], arts. 83–85.
306. Bobek, *supra* note 260, at 128; Viljoen, *supra* note 260, at 7.
307. Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 84, § 1.
308. *See id.* arts. 19, § 2, 84, § 3.
309. Bobek, *supra* note 260, at 133.
310. *Id.*; Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 84, § 2.
311. *See* Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], arts. 39, § 2, 84, § 2.

be approved.[312] Many of these justices have not previously been judges of ordinary courts.[313] Many are former politicians, civil servants, and academics.[314] After the Senate's approval, the candidate becomes a justice of the Constitutional Court.[315] Before the justice may start to perform her duties, she must take an oath to the hands of the President.[316] The justice is appointed for a limited term of ten years and can be re-appointed.[317]

The current standing of the judiciary selection process is "in a sort of limbo," with conflicts between the Ministry of Justices and the presidents of courts regarding the centralization of the judiciary selection process.[318] The broad discretion court presidents have in appointing judges, and the public perception that a "narrow clique of judicial officials" controls the selection process, contribute to public dissatisfaction with the judicial system.[319] This is consistent with the perception that appointed professionals are not on the bench for their merit but rather for their good luck in societal connections.[320] These factors result in a public both dissatisfied and distrustful of a judiciary that does not represent the diverse Czech Republic community.[321] The danger is that the Czech Republic could suffer the kind of erosion of Rule of Law evidenced in Poland and Hungary over the last decade.[322]

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312. *See* Bobek, *supra* note 260, at 133–34; *History: The Constitutional Court*, ÚSTAVNÍ SOUD, http://www.usoud.cz/en/history (last visited Apr. 28, 2022). Similar to the United States, the President may change the Court's political balance by selecting the candidates. Bobek, *supra* note 260, at 133–34; *History: The Constitutional Court, supra*. It is therefore worth mentioning that because the Court was built from scratch in 1993, the first Czech President, V. Havel, was in a unique situation to appoint all fifteen justices of the Court. *See* Bobek, *supra* note 260, at 133–34; *History: The Constitutional Court*, *supra*.

313. Bobek, *supra* note 260, at 134.

314. *Id.*

315. *Id.* at 133.

316. Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 85, § 1.

317. *Id.* at art. 84, § 1; WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 14–15 (2005).

318. Bobek, *supra* note 260, at 135.

319. *Id.*

320. *Id* at 136.

321. *Id.*

322. *See* Baka v. Hungary, App. No. 20261/12, ¶ 16–23 (June 23, 2016), http://hudoc.echr.coe.int/eng?i=001-163113; Szemesi, *supra* note 131, at 273.

D. *Netherlands*

The Dutch Judicial Appointment system adopts a judicial council that only plays a limited role in selecting judicial candidates.[323] The judicial council particularly contributes by participating in decisions regarding "recruitment, selection and training of judicial and court officials . . . [and] the appointment of the members of the court boards."[324] Unlike in other countries, such as France and Italy, the judicial council does not contribute to decisions regarding the promotion or discipline of judges.[325] This *Judicial Council* is selected by the Ministry of Justice, the judiciary, and the legislature.[326] The Council includes four members: two members from the judiciary, and two others who previously held senior governmental positions.[327] The Council serves as the spokesperson for the judiciary in political and public debates, and it seeks to protect the interests of the judicial bodies while also overseeing rules and regulations to be applied uniformly to all courts.[328]

The Netherlands judiciary system has also adopted a variation of the French-Italian-German Civil Service Model.[329] The system permits individuals with a law degree to enter the judiciary through two unique routes, creating two groups of judges—young recent university graduates and judges who are long experienced members of the Dutch legal profession.[330] The first route requires an individual to participate in a six-year specialized judicial studies program after completing a law degree.[331]

This program offers individuals an opportunity to gain practical experience through an internship that can be completed at various legal entities.[332] The other potential route is for an individual who has earned her

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323. Nuno Garoupa & Tom Ginsburg, *The Comparative Law and Economics of Judicial Councils*, 27 BERKELEY J. INT'L L. 53, 59 (2009); European Commission for Democracy Through Law (Venice Commission), Judicial Appointments, at 6–7, Opinion No. 403/2006, CDL-AD(2007)028 (June 22, 2007), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e.

324. *The Judiciary System in the Netherlands*, DE RECHTSPRAAK 14 (2010), http://www.rechtspraak.nl/SiteCollectionDocuments/The-Judiciary-System-in-the-Netherlands.pdf.

325. Garoupa & Ginsburg, *supra* note 323, at 77.

326. *Id.*; Cheryl Thomas, *Judicial Appointments in Continental Europe*, Lord Chancellor's Dept. Res. Series 6/97 (1997); *see also* Volcansek, *supra* note 5, at 374.

327. *The Judiciary System in the Netherlands*, *supra* note 324, at 14–15.

328. *Id.* at 14.

329. Volcansek, *supra* note 5, at 374; *see also* Spáč, *supra* note 151, at 2082.

330. Volcansek, *supra* note 5, at 374; Spáč, *supra* note 151, at 2082–83; Garoupa & Ginsburg, *supra* note 323, at 77.

331. Volcansek, *supra* note 5, at 374; Spáč, *supra* note 151, at 2092.

332. Volcansek, *supra* note 5, at 374; *see also* Spáč, *supra* note 151, at 2092.

law degree to apply for a judgeship after working at a law firm for a minimum of six years.[333] This system has raised no serious concerns regarding excessive politicization.[334]

Once the mandatory requirements are completed, applicants entering either path must complete an examination testing their legal knowledge and are also subjected to psychological testing and assessment to determine their competence.[335] Applicants are also required to submit letters of recommendation.[336] Once these requirements are met, applicants must be interviewed by delegates from the selection committee.[337] This committee is composed of seventy-one persons who are predominantly attorneys.[338] It also includes several high-ranking university and government officials and representatives from other professions to a lesser degree.[339] The selection committee is self-perpetuating, as new members are constantly being recommended to it by sitting members.[340]

The committee determines whether a candidate should be appointed and looks at several specific criteria.[341] However, only one of those criteria relates to the candidate's knowledge of the law.[342] The remainder refers explicitly to the candidate's character.[343] Finally, when the committee members agree on a candidate's competency, the committee enters its recommendation to the Minister of Justice, who makes the appointment.[344] By Royal Decree, the Minister of Justice is politically responsible for judicial appointments and countersigning the Council's recommendation before making the appointment.[345]

Dutch judges are prohibited from challenging and reviewing the validity of laws against the Constitution—changes are expected to be made by politicians.[346] Consequently, a Constitutional Court does not exist in the

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333. Volcansek, *supra* note 5, at 374.
334. Garoupa & Ginsburg, *supra* note 323, at 78.
335. Volcansek, *supra* note 5, at 374; Spáč, *supra* note 151, at 2092.
336. Volcansek, *supra* note 5, at 374.
337. *Id.*
338. *Id.*
339. *Id.*
340. *Id.*
341. Volcansek, *supra* note 5, at 374.
342. *Id.*
343. *Id.*
344. *Id.*
345. Elaine Mak, *Judicial Self Government in the Netherlands: Demarcating Autonomy*, 19 GERMAN L. J. 1801, 1806 (2018).
346. Gerhard van der Schyff, *The Prohibition on Constitutional Review by the Judiciary in the Netherlands in Critical Perspective: The Case and Roadmap for Reform*, 21 GERMAN L. J. 884, 884 (2020).

Netherlands.[347] "International treaties on the other hand may overrule Dutch law, even the constitution, and judges are allowed in most cases to test laws against them."[348]

Supreme Court justices are appointed for life or until they turn seventy years old.[349] They must also be graduates of a Dutch law school, and there is no required previous judicial experience or minimum age.[350] The first step is for the Supreme Court to notify Parliament's Second Chamber of a vacancy and provide a list of six candidates ranked from one to six.[351] Then, the Second Chamber votes on those six candidates to have a final list of three.[352] Typically, the Second Chamber votes on the six who are recommended by the Supreme Court, but it is not bound to that list.[353] The Crown draws an appointment of one new justice from this short list.[354]

Arguably, the appointment system at this level is facially susceptible to political influence from the Second Chamber because it may select individuals outside of the candidates recommended by the Supreme Court.[355]

### E. *Italy*

The ordinary judiciary of Italy presents another variation of the Civil Service Model.[356] After World War II, Italy's Constitution provided for a Superior Council of the Magistrature that would oversee various elements in the judiciary, such as discipline and promotions.[357] Although the Italian judiciary is a career system, it differs from the systems adopted in Germany, The Netherlands, and France because it does not implement the required

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347. *See id.* at 889.

348. *Dutch Supreme Court (Hoge Raad),* ACTION GUIDE, http://actionguide.info/m/orgs/206/ (last visited Apr. 28, 2022).

349. Mak, *supra* note 345, at 1815.

350. *See id.* at 1810; Grundgesetz [GG] [Basic Law], art. 95 (Ger.).

351. Philip M. Langbroek, *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in the Netherlands*, *in* RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN EUROPE: AUSTRIA, FRANCE, GERMANY, ITALY, THE NETHERLANDS, AND SPAIN 159, 174 (Giuseppe Di Federico ed., 2005).

352. *See id.*

353. *See id.*

354. *Id.*

355. *See id.*

356. Volcansek, *supra* note 5, at 375; *see also* Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 107 (2009).

357. Volcansek, *supra* note 5, at 375; Garoupa & Ginsburg, *supra* note 356, at 106.

extensive training that embodies the systems in these countries.[358] Instead, admission as a judge is solely based on a competitive standardized examination, with a written and oral component, which requires a law degree.[359]

Under the Constitution, judicial candidates are recruited through the standardized test designed by the Minister of Justice.[360] The Superior Council of the Judiciary appoints the examining committee that administers the entrance exam.[361] Those who start their judicial career through this process usually have not practiced as attorneys.[362]

However, there are some exceptions to the exam requirement.[363] For instance, honorary judges are not required to complete the exam and may be appointed in certain cases.[364] Honorary judges are people who *act* as a judge and have similar powers to official judges—they can issue sentences, order restitution, and much more.[365] "L.D. No. 116 sets forth the qualification requirements for a candidate for the office of honorary magistrate, which include[s] Italian citizenship and age, professional ethics, experience, and academic criteria."[366]

Law school professors and attorneys who have at least fifteen years of experience may also be appointed by the Superior Council of the Judiciary to the Supreme Court of Cassation—the highest court of appeal in Italy.[367] "The [Constitutional] Court [consists] of [fifteen] judges: one-third appointed by the President of the Republic, one-third by [P]arliament, and one-third elected by the ordinary and administrative supreme courts."[368]

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358. *See* Volcansek, *supra* note 5, at 375.

359. *Id.*

360. *See* Art. 106 COSTITUZIONE [COST.] (It.).

361. *See* Giuseppe Di Federico, *Recruitment, Professional Evaluation, Career, and Discipline of Judges and Prosecutors in Italy*, *in* RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN EUROPE: AUSTRIA, FRANCE, GERMANY, ITALY, THE NETHERLANDS, AND SPAIN 127, 132 (Giuseppe Di Federico ed., 2005).

362. *See id.*

363. *See Italy: New Legislation on Honorary Judges*, LIBR. CONG. (Sept. 28, 2017), http://www.loc.gov/item/global-legal-monitor/2017-09-28/italy-new-legislation-on-honorary-judges.

364. *See id.*

365. *See id.*

366. *Id.*

367. Di Federico, *supra* note 361 at 130.

368. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, BETTER REGULATION IN EUROPE: ITALY 2012 50 (Revised ed. 2013); Di Federico, *supra* note 361 at 130; Simone Benvenuti, *The Politics of Judicial Accountability in Italy: Shifting the Balance*, 14 EUR. CONST. L. REV. 369, 378 (2018).

Although the judges do not undergo specialized training, they are arguably independent at the ordinary court level because their selection is based only on merit—the public exam.[369] The executive branch takes no part in the selection process at this level.[370]

However, some criticize the magistrates and judges for being politically influenced.[371] This stems from the fact that they are represented by unions that have strong political and ideological tendencies.[372] These unions run the slates—a group of candidates that run in elections with common platforms—for members of the Superior Council of the Magistrature elected by judges.[373] Since the unions come from various political and ideological backgrounds, the political currents of the judges at least cross the ideological spectrum.[374]

The adoption of councils resulted from a need for judicial independence after being ruled as a kingdom under the House of Savoy until 1922 and then suffering through a fascist regime under Mussolini.[375] The Italian Republic exited the period of undemocratic rule with the creation of the Constitution in 1948.[376] The Constitution ensured that the Italian government remained

> [U]nited around the principle of "republican allegiance," which involved fidelity to the republic, observance of the constitution and of the laws, loyalty to an elected president and acceptance of the republican form as a permanent institutional feature of the country with no possibility of changing it since the republican order could not (and cannot) be submitted to any constitutional revision.[377]

Previously, the Superior Council of Magistrature was explicitly in charge of promoting judges, and because judges elected its members, there is a plausible argument that they influenced the Council's promotion

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369. Garoupa & Ginsburg, *supra* note 356, at 110.

370. *See id.*

371. Donatella Della Porta, *A Judges' Revolution? Political Corruption and the Judiciary in Italy*, 39 EUR. J. POL. RSCH., 1, 3–4 (2001).

372. *See* Garoupa & Ginsburg, *supra* note 323, at 58, 76; Della Porta, *supra* note 371, at 4.

373. *See* Della Porta, *supra* note 371, at 4.

374. *See id.* at 3–4.

375. *See* Garoupa & Ginsburg, *supra* note 356, at 110; SABINA DONATI, A POLITICAL HISTORY OF NATIONAL CITIZENSHIP AND IDENTITY IN ITALY, 1861–1950, 239, 256 (2013).

376. DONATI, *supra* note 375, at 240.

377. *Id.*; Art. 54 COSTITUZIONE [COST.] (It.).

decisions.[378] However, in April of 2005, new legislation was enacted to govern the magistrature, which allowed judges of higher competence to reach higher levels of seniority at a much faster pace based on educational qualifications as opposed to the Council's evaluation.[379]

Judicial appointment terms vary at all levels.[380] Honorary judges are appointed for four years and are eligible for an additional renewable term.[381] Ordinary court judges, with the exception of honorary judges and Supreme Court judges, are appointed for life.[382] Only the Superior Council of the Magistrature may remove, dismiss, or suspend for-life judges.[383] Thus, removing a judge without deliberate misconduct or egregious behavior is very difficult.[384] They are customarily appointed for nine years and may not be re-appointed.[385] Since Supreme Court justices are prohibited from quitting their positions on their own terms, scholars such as Giacomo Bertolissi argue that this is advantageous because it reduces the possibility of a party to control the Court.[386]

Italy adopts a fixed-term system rather than following lifetime appointments at the Constitutional Court level.[387] The Italian judiciary appointment structure for Constitutional Court justices preserves the Separation of Powers principle and deters politicization of the court because it diminishes the executive or legislative branches' influence on the judiciary.[388]

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378. *See* Volcansek, *supra* note 5, at 375.

379. *Id.*; Benvenuti, *supra* note 368, at 384.

380. *See* Volcansek, *supra* note 5, at 370.

381. Di Federico, *supra* note 361, at 130; D.Lgs. 13 luglio 2017, n. 116, G.U. July 31, 2017, n. 177 (It.).

382. *See Italy: New Legislation on Honorary Judges*, *supra* note 363; D.Lgs. n. 116/2017 (It.); *Judge Selection and Term of Office: Counties Compared*, NATIONMASTER, http://www.nationmaster.com/country-info/stats/Government/Judicial-branch/Judge-selection-and-term-of-office (last visited Apr. 28, 2022).

383. Art. 107 COSTITUZIONE [COST.] (It.); *see also* Di Federico, *supra* note 367, at 151.

384. *See* Di Federico, *supra* note 361, at 151.

385. Art. 135 COSTITUZIONE [COST.] (It.).

386. Giacomo Bertolissi, *Judicial Appointments in the Italian and U.S. Supreme Courts: A Brief Comparison*, COLUM. J. EUR. L.: PRELIMINARY REFERENCE (Mar. 2, 2016), http://blogs2.law.columbia.edu/cjel/preliminary-reference/2016/judicial-appointments-in-the-italian-and-u-s-supreme-courts-a-brief-comparison/.

387. Art. 135 COSTITUZIONE [COST.] (It.).

388. Bertolissi, *supra* note 386.

F. *Canada*

In Canada, all judges are appointed to the bench and have tenure until the age of seventy-five unless otherwise removed.[389] The Judges Act allows judges to retire early, at the age of seventy.[390] The Canadian judicial appointment process is said to be merit-based, ensuring that all judges have the experience and competence required for their positions.[391] When a position on a bench opens up, "the Attorney-General of the province, the Chief Justice of the court concerned, the Law Society, Members of Parliament, Senators, and [other] interest groups are always consulted."[392] Once a list of potential candidates is created, background checks are completed "and a final list of three or four [contenders] is submitted to the Canadian Bar Association for [additional] screening . . . ."[393] Most appointed judges are sought out and offered their position by the Minister's office because of their legal reputations in their respective provinces.[394] However, candidates interested in a judicial appointment can also contact the Chief Justice, Attorney-General, a local member of Parliament, the Minister of Justice, or the Judicial Affairs Advisor.[395] Most of the judges appointed in Canada are former practicing lawyers or legal academics.[396]

The provincial trial judges, the lowest tier in the Canadian court system, are appointed by the provincial cabinets on the recommendation of the province's attorney general.[397] All higher tiers, including the superior trial court level, the courts of appeal, federal courts, and the Supreme Court of Canada, are appointed by the Prime Minister of Canada or the Federal Minister of Justice.[398] According to Section 96 of the Constitution Act of 1867, the Governor General is responsible for appointing "the [j]udges of the Superior, District, and County Courts in each province," except the probate courts in two provinces.[399]

389. Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.).
390. Judges Act, R.S.C. 1985, c. J-1, s. ns8 (Can.).
391. L.A. Vandor, *The Appointment of Judges in Canada*, 7 ADVOCS.' Q. 129, 130–31 (1986).
392. *Id.* at 130.
393. *Id.*
394. *Id.* at 131.
395. *Id.*
396. Mark C. Miller, *Judicial Activism in Canada and the United States*, 81 JUDICATURE 262, 264 (1998).
397. *Id.*
398. *Id.*
399. Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.).

The text of the Constitution does not say anything with respect to the Governor General receiving a recommendation for appointment from the Prime Minister.[400] However, in practice, there is an informal and unwritten procedural understanding that the appointment comes from the Prime Minister. [401] Essentially, the Prime Minister recommends the justice, who is later appointed, to the Governor General.[402] There has never been a time that the Governor General has rejected the Prime Minister's recommendation.[403] Thus, in effect, the Prime Minister has the final say in deciding who is appointed to the Supreme Court of Canada.[404] There is no constitutional requirement that the appointment even needs to be discussed with parliament or the cabinet.[405]

The Supreme Court of Canada bench consists of nine judges, including the Chief Justice of Canada.[406] Due to the combined English-French population in Canada, at least three judges on the Supreme Court of Canada must be selected from judges or barristers of the Quebec Bar.[407] This ensures that the French population of Canada is represented in the Supreme Court.[408] In addition, generally three Supreme Court judges are from the Ontario Bar, one judge is from one of the Atlantic provinces, two judges come from the Western provinces, and one judge comes from one of the Prairie provinces.[409] Although this rule is not firmly established in an Act, it is often implemented when selecting judges for appointment to ensure that Canada's provinces and territories are well represented in the Supreme Court of Canada.[410]

The Supreme Court Act states that any person may be appointed as a judge in one of the following two ways: (1) by judicial appointment to a province's superior court or (2) by "a barrister or advocate of at least ten years standing at a province's bar."[411] The Supreme Court Act states that "the judges shall be appointed by the Governor in Council by letters patent under the Great

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400. *See id.*

401. *See id.*; Peter McCormick, *Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada*, 7 J. APP. PRAC. & PROCESS 1, 12–13 (2005).

402. *Id.*

403. *Id.*

404. *Id.* at 30.

405. *See id.* at 29.

406. Supreme Court Act, R.S.C. 1985, c S-26, s. 4(1) (Can.).

407. Supreme Court Act, R.S.C. 1985, c S-26, s. 6 (Can.); McCormick, *supra* note 401, at 13.

408. *See* McCormick, *supra* note 401, at 6, 13.

409. *Id.* at 13.

410. *See id.*

411. Supreme Court Act, R.S.C. 1985, c S-26, s. 5 (Can.); McCormick, *supra* note 401, at 13.

Seal."[412] However, the Governor General plays a more symbolic role in the appointment process, whereas the Supreme Court judges are actually selected for appointment by Canada's Prime Minister.[413] When appointing judges to the Supreme Court of Canada, the Minister of Justice first identifies potential candidates.[414] The potential candidate pool consists of provincial Court of Appeal judges, senior bar members, law professors, and any additional names put forward for consideration.[415] The Chief Justice sitting on the Supreme Court of Canada, the eight other judges, the Attorney General of the province or territory, and at least one senior member from both the Canadian Bar Association and the Law Society from the relevant region are consulted in compiling the candidate list.[416] The federal cabinet, run by the Prime Minister with the involvement of the Minister of Justice, ultimately tells the Governor General whom to appoint.[417]

Historically, the Canadian judiciary struggles to separate itself from politics.[418] However, Canada has put a system in place to de-politicize the judiciary.[419] There is a separation between Canadian judges and politics, which results from the merit-based appointment system it has adopted.[420] Because of this, Canadian judges boast about the country's judicial independence.[421] Canadian judges have even gone as far as saying the main difference between judges in the United States and the judges in Canada is "the political nature of judicial selection and judicial decision making in the United States. "[422]

## G. *India*

The judicial system in India, like the United States, is a three-tiered hierarchy—District Courts, High Courts, and the Supreme Court.[423] Judges

412. Supreme Court Act, R.S.C. 1985, c S-26, s. 4(2) (Can.).
413. McCormick, *supra* note 401, at 30.
414. *Id.* at 15.
415. *Id.*
416. *Id.*
417. *Id.* at 13.
418. Miller, *supra* note 396, at 262.
419. *Id.*; *see Guide for Candidates*, *supra* note 124; *The Judiciary*, GOV'T CAN., http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/05.html (last updated Sept. 1, 2021).
420. *See* Miller, *supra* note 396, at 264; *Guide for Candidates*, *supra* note 124; *The Judiciary*, *supra* note 419.
421. Miller, *supra* note 396, at 264.
422. *Id.*
423. Sande L. Buhai et al., *The Role of Law Schools in Educating Judges to Increase Access to Justice*, 24 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 161, 172 (2011). The District Courts are usually the court of first instance. *Id.*

appointed to District Courts are typically recent law school graduates who have enrolled as advocates, passed the judicial examination, and undergone the interview process.[424] Experience as an advocate is not necessary as long as the candidate is qualified to enroll as an advocate.[425] Depending on the state the age limit may be anywhere from twenty-one to thirty-five.[426]

However, judicial candidates with seven or more years of experience as advocates are eligible for appointment to a higher judiciary in the District Courts.[427] Moreover, civil judges and magistrates recruited immediately after graduation must wait at least ten years from completing their law school degree to become eligible for promotion.[428] Although law students in India have the opportunity to enter a career judiciary immediately after graduation, the educational system does not focus on training them to be judges.[429] Rather, the law school curriculum focuses on training lawyers-to-be.[430] This is largely because the Bar Council of India is charged with developing the curriculum and maintaining the standards for law school.[431]

District Court judges may be directly appointed to the highest court in the subordinate judiciary by the High Courts or the state Public Service Commission.[432] The District Court judge's promotion to such courts is based on their performance in the lower or higher judicial services exam.[433] Judicial appointment to the superior judiciary differs from this system because it occurs by promotion or direct invitation, rather than judicial service exams.[434] At all higher court levels, High Court judges and Supreme Court judges are appointed directly or through promotion.[435] These judges are appointed through the "collegium" system, a system made up of the Chief Justice and four of the most senior judges of the Supreme Court.[436]

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424. *Id.* at 172.; Delhi Judicial Service Rules, 1970, Rule 9(a), (c), 14(b).

425. Delhi Judicial Service Rules, Rule 14(b).

426. Ashish Bhan & Mohit Rohatgi, *Legal Systems in India: Overview*, PRACTICAL LAW (Mar. 1, 2021), http://uk.practicallaw.thomsonreuters.com/w-017-5278.

427. Buhai et al., *supra* note 42, at 172, 174.

428. *Id.* at 172.

429. *Id.* at 173.

430. *Id.*

431. *Id.* For example, the Bar Council of India is responsible for deciding "the courses to be taught in law school." *Id.*

432. Buhai et al., *supra* note 423, at 172; *see* India Const. art. 233, cl.1, art. 320, cl. 1, 2.

433. *See* Buhai et al., *supra* note 423, at 172.

434. *Id.* at 172–73.

435. *Id.* at 173; Delhi Judicial Service Rules, 1970, Rule 8–9(b).

436. *See* Delhi Judicial Service Rules, Rule 7(1)–(4); Abhinav Chandrachud, *Does Life Tenure Make Judges More Independent? A Comparative Study of Judicial Appointments in India*, 28 CONN. J. INT'L L. 297, 307 (2013).

The Supreme Court of India is considered one of the largest and most powerful in the world.[437] This is mainly because India's practice of judicial appointments insulates the judicial branch from other branches of government.[438] Currently, the Supreme Court is made up of about thirty judges, including the Chief Justice.[439] India's judicial appointment essentially has two steps.[440] First, the Chief Justice consults the four most senior justices sitting on the Supreme Court.[441] The collegium determines who is worthy of the appointment through consultation.[442] Second, after coming to a consensus, the Chief Justice makes a recommendation to the President, who then makes the appointment.[443] Although the collegium's unanimous recommendation is not binding and the President may return the advice of the cabinet for reconsideration, the President's role is, in effect, merely ceremonial and formal to ensure judicial independence.[444]

To be considered for appointment as a Supreme Court Justice, the candidate must be "a citizen of India," under sixty-five years old, "a Judge of a High Court (or of two or more such Courts in succession) for [at least] five years," an Advocate of the equivalent "for at least ten years, or, in the opinion of the President, a 'distinguished' jurist."[445] Essentially, Judges of the Supreme Court can be appointed through "promotion from the High Court or . . . direct appointment by advocates or renowned jurists."[446]

Once appointed, a justice's term is limited by the mandatory retirement age of sixty-five.[447] Although the justices are not explicitly given a fixed term, the mandatory retirement age, and the common practice of appointing justices, is between the ages of fifty-eight to sixty, which results in

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437. Chandrachud, *supra* note 436, at 309.

438. *Id.* at 299, 316.

439. *Id.* at 308–09; *Chief Justice & Judges*, SUP. CT. INDIA, http://main.sci.gov.in/chief-justice-judges (last visited Apr. 28, 2022); *Judges of the Supreme Court of India: A Ready Reckoner*, BAR & BENCH (May 3, 2020, 2:47 AM), http://www.barandbench.com/columns/judges-of-the-supreme-court-of-india-a-ready-reckoner.

440. *See* Chandrachud, *supra* note 436, at 307.

441. *Id.*

442. *See id.*

443. *Id.*; Utkarsh Anand, *In Posting of Judges, President's Role Only Ceremonial, Govt Tells SC*, INDIAN EXPRESS, http://indianexpress.com/article/india/india-others/in-posting-of-judges-presidents-role-only-ceremonial-govt-tells-sc/ (last updated June 9, 2015, 8:17 AM).

444. *See* Anand, *supra* note 443.

445. Chandrachud, *supra* note 436, at 307; *Constitution*, SUP. CT. INDIA, http://main.sci.gov.in/constitution (last visited Apr. 28, 2022); India Const. art. 124, cl. 2–3.

446. Buhai et al., *supra* note 423, at 173; India Const. art. 233, cl. 1.

447. India Const. art. 124, cl. 2.

an average tenure of three to seven years in office, although obviously younger judicial appointees will serve for a more extended period.[448]

In addition, an appointed justice may only be removed during their tenure for proven misbehavior or incapacity.[449] And, even then, removal is challenging because two-thirds of both houses of parliament must approve the motion.[450]

## V. CONCLUSION

The United States, along with other democracies have struggled with inherent tensions between judicial independence, maintaining a depoliticized judiciary, and holding the judiciary accountable to the body politic.[451] In many cases, this tension cannot be resolved.[452] For example, increasing judicial independence almost necessarily results in less public accountability.[453] However, certain aspects of non-U.S. legal systems would arguably improve judicial independence and Rule of Law without sacrificing accountability.[454]

First, the preparation of judges in a professional and non-partisan system of judicial track education, such as the Civil Service Model, would decrease the problem in the United States where judges are being appointed solely based on their previous political work.[455] Such a system of professional education is practiced in France, Germany, Italy, and the Netherlands.[456] The advantages of a system of non-partisan judicial education are that it increases judicial independence and promotes Rule of Law, while not affecting the actual appointment process.[457]

Second, electoral appointment of judges presents a serious problem in any legal system.[458] At the appointment stage, judges are required to run for office just like a politician, vastly reducing scrutiny of the judge's professional

448. Abhinav Chandrachud, *Speech, Structure, and Behavior on the Supreme Court of India*, 25 COLUM. J. ASIAN L. 222, 234 (2012).

449. *Appointment and Removal of Judges of the Supreme Court of India*, BYJU'S, http://byjus.com/free-ias-prep/appointment-and-removal-of-supreme-court-judges/ (last visited Apr. 28, 2022); India Const. art. 124, cl. 4.

450. *See Appointment and Removal of the Supreme Court of India*, *supra* note 449; *see, e.g.*, India Const. art. 124, cl. 4.

451. *See* Milone, *supra* note 46.

452. *See id*; Bierman, *supra* note 88, at 853.

453. Bierman, *supra* note 88, at 855.

454. *See id.* at 856; Liptak, *supra* note 8, at 4.

455. *See* Volcansek, *supra* note 5, at 371.

456. *Id.* at 368, 372.

457. *See id.* at 371, 373.

458. *See id.* at 366, 384–85; *but see* Shepherd, *supra* note 66, at 1607.

qualification or other suitability for judicial office.[459] Electoral retention of judges vastly decreases judicial independence and Rule of Law, as judges have to appease popular opinion just to retain their jobs.[460] This represents a serious problem with preserving judicial independence in the United States at both the state and local levels.[461]

Third, an unchecked appointment process presents similar problems as elections.[462] Instead of being beholden to the whims of popular opinion, judges, at least at the appointment stage, are beholden to those who appoint them.[463] Non-U.S. legal systems and states in the United States that employ an appointments process with checks on the appointment power would seem to best address this tension by simultaneously decreasing politicization of the judiciary, while still retaining a political element to the appointment and retention process.[464]

Fourth, the importance of non-governmental involvement in the judicial appointment process cannot be overstated.[465] Legal associations, such as the American Bar Association, have provided an important screening process that helps provide a more neutral screening of judges for professionalism, as opposed to only looking at political credentials.[466] Unfortunately, in the United States, the involvement of organizations, such as the American Bar Association, has been curtailed, particularly under the Trump Administration as judges are sought more for their fealty to a particular political agenda than their adherence to professional standards and the Rule of Law.[467]

459. *See, e.g.*, Schotland, *supra* note 106, at 63–64.
460. *See* Shepherd, *supra* note 66, at 1607–08.
461. *See id.* at 1604–05.
462. *See* Liptak, *supra* note 8, at 2, 5.
463. Shepherd, *supra* note 66, at 1607.
464. Volcansek, *supra* note 5, at 383–84.
465. *See* Liptak, *supra* note 8, at 1, 2.
466. *See* EPSTEIN & SEGAL, *supra* note 18, at 21–22, 71.
467. Ruiz et al., *supra* note 2.

# LYING BENEATH THE SURFACE: THE IMPACTS OF DEEPFAKE TECHNOLOGY ON THE PRIVACY AND SAFETY OF THE LGBTQ+ COMMUNITY

SERGIO E. MOLINA*



## I. INTRODUCTION

The year is 1938 and New Jersey residents have just turned on their radios to hear Herbert George ("H.G.") Wells broadcast fake news bulletins that warn of an alien invasion.[1] What the listeners do not seem to realize is that Wells is performing a radio adaptation of his science-fiction novel, *The War of the Worlds*.[2] What results is nationwide hysteria that causes a flurry of phone calls from anxious listeners to police stations, newspaper offices, and other radio stations with fears of an imminent Martian maraud—a predictable result of a population believing without seeing.[3] Fast forward to the 21st century, and now, even seeing is no longer believing; citizens can no longer

* Sergio E. Molina is a commercial litigator in Miami, Florida. Sergio obtained his Juris Doctor from Nova Southeastern University's Shepard Broad College of Law with the College's concentration in Intellectual Property, Technology, and Cybersecurity Law, and his bachelor's degree in finance with minors in economics and psychology from Florida International University.

1. A. Brad Schwartz, *The Infamous "War of the Worlds" Radio Broadcast Was a Magnificent Fluke*, SMITHSONIAN MAG. (May 6, 2015), http://www.smithsonianmag.com/history/infamous-war-worlds-radio-broadcast-was-magnificent-fluke-180955180/.

2. *Id.*

3. *Id.*

trust their own eyes or ears.[4] Claims such as these have moved out of the realm of fake radio bulletins, hyperboles, or even hypotheticals and into what is now our new, technologically-advanced reality.[5] To what do citizens of today's society owe this belief in absolute disbelief?[6] Enter "deepfakes," a term that combines the phrases "deep learning" and "fake," that refers to a wide variety of hyper-realistic images, videos, and audio recordings that are fabricated through the use of machine learning.[7]

Deepfakes are synthetic audiovisual ("AV") media with seemingly limitless applications—a type of media that can do everything from the recreation of voices to the swapping of faces from one person onto another.[8] Below is a compilation of images that depict the manner in which deepfake technology employs face-swapping methodology to create synthesized media of Donald Trump and Elizabeth Warren.[9]


*Deepfake Media of Donald Trump and Elizabeth Warren*[10]

4. *See* Holly Kathleen Hall, *Deepfake Videos: When Seeing Isn't Believing*, CATH. U. J.L. & TECH., Fall 2018, at 51, 51.

5. See Nicholas Diakopoulos & Deborah Johnson, Anticipating and Addressing the Ethical Implications of Deepfakes in the Context of Elections, 23 NEW MEDIA & SOC'Y 2072, 2073 (2021).

6. See id.

7. *Id.*; Elizabeth Caldera, Comment, *"Reject the Evidence of Your Eyes and Ears": Deepfakes and the Law of Virtual Replicants*, 50 SETON HALL L. REV. 177, 178 (2019); BRITT PARIS & JOAN DONOVAN, DATA & SOC'Y, DEEPFAKES AND CHEAP FAKES: THE MANIPULATION OF AUDIO AND VISUAL EVIDENCE 2 (2019), http://datasociety.net/library/deepfakes-and-cheap-fakes/.

8. PARIS & DONOVAN, *supra* note 7, at 2; Diakopoulos & Johnson, *supra* note 5, at 2073.

9. *See* Will Knight, *Facebook, Google, Twitter Aren't Prepared for Presidential Deepfakes*, MIT TECH. REV. (Aug 6, 2019), http://www.technologyreview.com/2019/08/06/639/facebook-google-twitter-arent-prepared-for-presidential-deepfakes/. Visual aids are used throughout this Article to assist the reader in seeing the effectiveness of some of the deepfake media currently available to the public. Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1709 (2014) ("On the rare occasions where journals did include images, they were startlingly effective.").

10. Knight, *supra* note 9.

With deepfakes already spreading throughout various facets of society, the strongest embrace is most notable from both the arts and entertainment fields.[11] Given deepfakes' ability to superimpose the faces of actors onto the bodies of stunt doubles or even to simulate actors' scenes altogether, it is no surprise that Hollywood has taken notice of the vast opportunities that the new technology presents.[12] But, it does not stop there.[13] The realms of art and entertainment have seen the uses of deepfakes taken as far as to bring long-deceased actors or public figures "back to life."[14]

Although deepfakes present numerous benefits to the creative arts, they also introduce a concerning reality.[15] As the number of online deepfakes grows by the day, many have questioned the harmful implications of the technology and the effects that it may have when compounded by current social and political climates.[16] However, the potential for harm is not exclusively reserved for public figures, nor is it reduced only to simplified forms of AV manipulation.[17] As society continues to see the democratization of more advanced technologies, deepfakes have begun to present individuals with novel methods of "exploitation, intimidation, and sabotage."[18] The most concerning example of this has perhaps been the widespread use of deepfake technology to fabricate pornography with the images of both public figures and private individuals without their consent.[19] This is just the tip of the iceberg.[20] Data suggests that minority communities, particularly women, are

11. Diakopoulos & Johnson, *supra* note 5, at 2073.

12. *See id.* at 2074; Hall, *supra* note 4, at 57.

13. *See* Diakopoulos & Johnson, *supra* note 5, at 2073.

14. *Id.*

15. *See* Marcus Baram, *How Deepfakes Evolved So Rapidly in Just a Few Years*, FAST CO. (Oct. 8, 2019), http://www.fastcompany.com/90414479/how-deepfakes-evolved-so-rapidly-in-just-a-few-years; Diakopoulos & Johnson, *supra* note 5, at 2072; Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1754 (2019).

16. Diakopoulos & Johnson, *supra* note 5, at 2072; PARIS & DONOVAN, *supra* note 7, at 3.

17. Diakopoulos & Johnson, *supra* note 5, at 2080; PARIS & DONOVAN, *supra* note 7, at 5–6.

18. Chesney & Citron, *supra* note 15, at 1754.

19. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-379SP, SCIENCE & TECH SPOTLIGHT: DEEPFAKES 1 (2020), http://www.gao.gov/assets/gao-20-379sp.pdf; Mika Westerlund, *The Emergence of Deepfake Technology: A Review*, 9 TECH. INNOVATION MGMT. REV., Nov. 2019, at 39, 43.

20. *See* Robert Size, *Publishing Fake News for Profit Should Be Prosecuted as Wire Fraud*, 60 SANTA CLARA L. REV. 29, 30–31 (2020).

more greatly affected by the harms that deepfake technologies present.[21] It is likely that minority communities with a greater stake in information and personal privacy, like the LGBTQ+ community, could stand to lose more in the wake of misused deepfake technology.[22]

While some believe that the discussions surrounding deepfakes' potential threats are overstated, it can hardly be denied that technology is better today than it was yesterday, and yet still not as good as it will be tomorrow.[23] This is a dynamic that necessitates a discussion on the law's evolution in order to effectively address technological advancements and the harms that they may impose.[24] In that regard, deepfakes do not provide an exception to this claim, but instead serve to reinforce its validity.[25]

This Article serves to address the current landscape of deepfake technology in modern culture and its impacts on marginalized communities, particularly the LGBTQ+ community, in four subsequent parts.[26] Part II offers a technical glimpse into the creation of deepfakes; how deepfakes came into being and why deepfakes circulate society with great frequency.[27] Part III looks at the threats that deepfake technology can pose when put in the hands of individuals seeking to harm or extort members of marginalized communities, such as the LGBTQ+ community, by providing a historical overview of similar forms of exploitation that the LGBTQ+ community has faced in the past.[28] Part IV explores the existing regulatory frameworks that serve to address the harms of deepfake technology along with the suggested evolutions and amendments of those frameworks.[29] This Article concludes by

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21. Robert Chesney & Danielle Keats Citron, *21st Century-Style Truth Decay: Deep Fakes and the Challenge for Privacy, Free Expression, and National Security*, 78 MD. L. REV. 882, 886 (2019); Baram, *supra* note 15; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 19, at 1.

22. *See* Chesney & Citron, *supra* note 21, at 886; Baram, *supra* note 15; Sergio E. Molina, *DL and Looking? So Are the Data Miners, and They Already Know What You're Into*, OUTSIDE INFLUENCE, Fall/Winter 2019, at 4–5.

23. Russell Brandom, *Deepfake Propaganda Is Not a Real Problem*, VERGE (Mar. 5, 2019, 12:25 PM), http://www.theverge.com/2019/3/5/18251736/deepfake-propaganda-misinformation-troll-video-hoax; Hayley Duquette, Note, *Digital Fame: Amending the Right of Publicity to Combat Advances in Face-Swapping Technology*, 20 J. HIGH TECH. L. 82, 103 (2020).

24. Duquette, *supra* note 24 at 103; *see also* David Dorfman, *Decoding Deepfakes: How Do Lawyers Adapt When Seeing Isn't Always Believing?*, OR. ST. B. BULL., Apr. 2020, at 18, 20.

25. Duquette, *supra* note 24, at 103; Dorfman, *supra* note 24, at 20.

26. *See* discussion *infra* Parts I–III.

27. *See* discussion *infra* Part II.

28. *See* discussion *infra* Part III.

29. *See* discussion *infra* Part IV.

advocating for the adoption of an amended regulatory scheme via Section 230 of the Communications Decency Act[30] and for the re-appropriation of deepfake technology until such time that federal legislation better promotes and protects the online privacy and personal safety of members of the LGBTQ+ community.[31]

## II. DEEP DIVING INTO DEEPFAKES

Audiovisual manipulation is by no means a novel concept; however, the newest stage in its evolutionary journey incorporates an added layer of technological advancements that makes its existence not only more widespread, but also more intricate.[32] In order to develop a better sense of the threats that deepfakes pose and the manners in which deepfakes may be mitigated, it is important to understand exactly where deepfakes came from, how they are made, and why their availability is growing.[33]

### A. *Remember to Rewind*

Society's understanding of deepfakes has become popularized at a time when "fake news"—or, as some define it, false, inaccurate, or misleading information designed, presented, and promoted to further interests—is front and center.[34] It is important to note that fake news serves as an umbrella term under which misinformation and disinformation exist[35]—misinformation being the unintentional furtherance of misleading or inaccurate information and disinformation being its intentional equivalent.[36] While the root of these concepts are ancient, social media structures and the rise of deepfakes have helped these concepts branch out into a post-truth society where "objective

30. Communications Decency Act of 1996, Pub. L. No. 104–104, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223 (Supp. II 1997)).

31. *See* discussion *infra* Part V.

32. *See* Chesney & Citron, *supra* note 21, at 884–85.

33. Russell Spivak, *"Deepfakes": The Newest Way to Commit One of the Oldest Crimes*, 3 GEO. L. TECH. REV. 339, 342 (2019); Westerlund, *supra* note 19, at 40; Diakopoulos & Johnson, *supra* note 5, at 2074.

34. *See* Cristian Vaccari & Andrew Chadwick, *Deepfakes and Disinformation: Exploring the Impact of Synthetic Political Video on Deception, Uncertainty, and Trust in News*, SOC. MEDIA & SOC'Y, Jan.–Mar. 2020, at 1, 2.

35. Fernando Nuñez, Note, *Disinformation Legislation and Freedom of Expression*, 10 U.C. IRVINE L. REV. 783, 785–86 (2020).

36. Kyle Anderson, Note, *Truth, Lies, and Likes: Why Human Nature Makes Online Misinformation a Serious Threat (and What We Can Do About It)*, 44 LAW & PSYCH. REV. 209, 211 (2019–2020).

facts are less influential in shaping public opinion than appeals to emotion and personal belief."[37]

Recent events have highlighted the manners in which all of these concepts intersect.[38] However, these concepts are the latest iteration of a longstanding practice.[39] For example, the earliest known surviving photograph was taken in the mid-to-late 1820s.[40] Since then, the practice of photo editing has been almost as long-standing as the history of the photograph itself.[41] Although photo editing became a developed practice long before the creation of the first computer, the emergence of photoshop in the 1980s allowed for the practice to popularize among both professionals and amateurs alike.[42] The twentieth century saw a similar pattern occur in film—like the development of the world's first editing machine in the 1920s—the development of the videotape recorder in the 1950s, and the introduction of non-linear editing with the help of modern computers.[43]

Advancements in the ability to manipulate all of these forms of media, in one way or another, could produce hundreds of takes and seamlessly string them together into one desired output that, as far as the consumer of the media knows, occurred in one attempt.[44] These edits of audiovisual footage without the use of machine learning are known as "cheapfakes," or "shallowfakes," the most common of which include photoshopped images, recontextualized media, and sped up or slowed down video.[45] As technology advanced and computers began running more intricate programs, the practice of physically splicing reels of film fell out of practice, and the adoption of more cutting-edge techniques like computer-generated imagery ("CGI") became the norm.[46]

Today, deepfake technology has brought society face-to-face with the latest version of the tried-and-true practices of its predecessors.[47] One of the

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37. Hall, *supra* note 4, at 54.

38. *See* Diakopoulos & Johnson, *supra* note 5, at 2073.

39. Chesney & Citron, *supra* note 21, at 884–85.

40. Spivak, *supra* note 33, at 341.

41. *See* Michael Scott Henderson, Note, *Applying Tort Law to Fabricated Digital Content*, 2018 UTAH L. REV. 1145, 1147 (2018).

42. Spivak, *supra* note 33, at 341.

43. Henderson, *supra* note 41, at 1149.

44. *See* PARIS & DONOVAN, *supra* note 7, at 14–15 (explaining that consumer software and free mobile apps allow for this manipulation).

45. *Id.* at 5–6.

46. *See* Diakopoulos & Johnson, *supra* note 5, at 2074; Marie-Helen Maras & Alex Alexandrou, *Determining Authenticity of Video Evidence in the Age of Artificial Intelligence and in the Wake of Deepfake Videos*, 23 INT'L J. EVIDENCE & PROOF 255, 256 (2019); David Song, *A Short History of Deepfakes*, MEDIUM (Sept. 23, 2019), http://www.medium.com/@songda/a-short-history-of-deepfakes-604ac7be6016.

47. *See* Diakopoulos & Johnson, *supra* note 5, at 2074.

more notable uses of deepfake technology and synthetic media is its use by the Dalí Museum to "resurrect," or rather, "reincarnate" Salvador Dalí for a more immersive, interactive guest experience that the museum's website describes as allowing "visitors an opportunity to learn more about Salvador Dalí's life from the person who knew him best: the artist himself."[48] But the technology is not limited only to living things.[49] For example, whereas the Dalí Museum in St. Petersburg, Florida, uses deepfakes to reproduce Salvador Dalí himself, Russian researchers have used similar software to animate intimate subjects that include the works of other great artists, such as Johannes Vermeer's *Girl with a Pearl Earring*, and Leonardo DaVinci's *Mona Lisa*, as depicted below.[50]

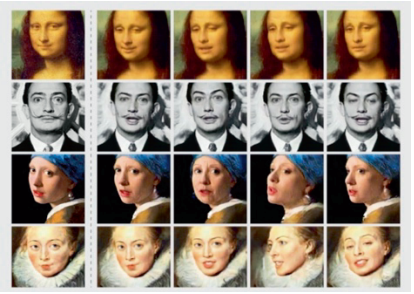

*Image of Works of Art Animated with Deepfake Technology*[51]

Much like copies of the works produced by some of art's great masters, deepfakes have been described as forgeries of photos, videos, and audios made with the assistance of artificial intelligence.[52] In many ways, referring to deepfakes as forgeries is a misnomer of sorts in that, at least in the colloquial sense, forgeries are almost exact copies of works already in existence.[53] Deepfakes, on the other hand, operate more as a hyper-realistic collage in that they synthesize a wide number of already existing works to

48. *Dalí Lives (Via Artificial Intelligence*), SALVADOR DALÍ MUSEUM, http://www.thedali.org/exhibit/dali-lives/ (last visited Apr. 12, 2022).

49. *See* Herbert B. Dixon Jr., *Deepfakes: More Frightening Than Photoshop on Steroids*, JUDGES' J., Summer 2019, at 35, 36.

50. *Id.*

51. Gregory Barber, *Deepfakes Are Getting Better, but They're Still Easy to Spot*, WIRED (May 26, 2019, 7:00 AM), http://www.wired.com/story/deepfakes-getting-better-theyre-easy-spot/.

52. U.S. Gov't Accountability Off., *supra* note 19, at 1.

53. *Forgery*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/forgery (last visited Apr. 12, 2022).

create an entirely new product that looks seamless and real.[54] Deepfakes fall under the larger umbrella of audiovisual manipulation, which is generally identified as the means for influencing the interpretation of media.[55] Audiovisual manipulation splits into two branches: either deepfakes, which incorporate artificial intelligence, or *cheapfakes*, which, as mentioned before, employ less technologically-advanced techniques.[56] Cheapfakes require that individuals upload media onto a computer and manually make adjustments—a process that, although still yielding a realistic product, can be incredibly labor-intensive and time-consuming, given its less technical nature.[57] However, the introduction of artificial intelligence, described in more detail below, provides a solution that cuts down on the time, as well as the amount of manual work needed to create a convincing product.[58]

It is important to note that "artificial intelligence" is often synonymized with "machine learning," however, the two terms are distinct.[59] Artificial intelligence is modeled after the human brain and reacts to incoming data, rather than relying on programmed rules, in order to operate rationally and intelligently.[60] To do this, artificial intelligence incorporates both algorithms—instructions or sets of instructions—and machine learning.[61] Machine learning is a branch of artificial intelligence that resembles the human trial and error process by allowing computer systems to learn directly from observing examples, data, and experiences.[62]

Deepfakes are created with a similar process that incorporates "deep learning," a deep neural network that takes in a multitude of data from an input layer and autonomously runs it through various nodes until it produces an output layer.[63] Oftentimes, this is done either with an autoencoder, which is an artificial neural network trained to reconstruct inputs from a simpler representation, or with a Generative Adversarial Network ("GAN").[64] GANs

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54. KELLEY M. SAYLER & LAURIE A. HARRIS, CONG. RSCH. SERV., IF11333, DEEP FAKES AND NATIONAL SECURITY (2021), http://crsreports.congress.gov/product/pdf/IF/IF11333.

55. PARIS & DONOVAN, *supra* note 7, at 5–6.

56. *Id.*

57. Jessica Ice, Note, *Defamatory Political Deepfakes and the First Amendment*, 70 CASE W. RSRV. L. REV. 417, 420 (2019).

58. *Id.* at 421.

59. Herbert B. Dixon Jr., What Judges and Lawyers Should Understand About Artificial Intelligence Technology, JUDGES J., Winter 2020, at 36, 36 (2020).

60. Maras & Alexandrou, *supra* note 46, at 256.

61. Dixon, *supra* note 59, at 36.

62. Maras & Alexandrou, *supra* note 46, at 256.

63. Ice, *supra* note 57, at 421.

64. *Id.* at 421–22.

use two programs: on one end, there is a generator, and on the other end, a discriminator.[65] The creator first obtains a wide variety of images or sounds of a single individual, the "data set," and inputs the data set into the generator.[66] The generator then processes the data and uses it to synthesize a new image that is the conglomeration of all distinguishable features of the subject.[67] After creating a new image or sound, the generator passes the media along to the discriminator, which assesses the image for realism and determines whether it is sufficiently convincing to pass off as real.[68] If the discriminator believes that the discriminator's synthesized media is sufficiently convincing, it produces the deepfake; however, if the discriminator believes that the synthesized footage is not sufficiently convincing, it sends it back to the generator to try again.[69] The two programs go back and forth, competing with each other until the two successfully chisel out a realistic product.[70]

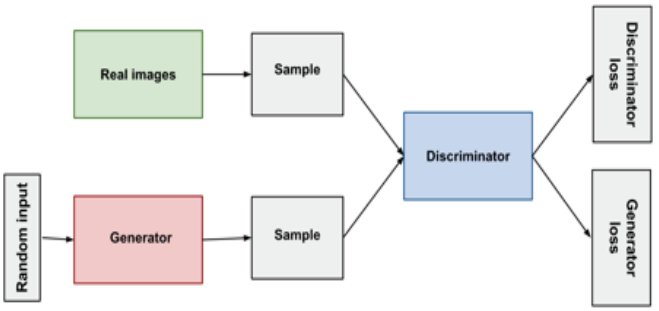


*Image of GAN Process*[71]

This process can be utilized to create either a visually-synthesized product or a vocally-synthesized product.[72] Video synthesis techniques are split into two forms: face-swapping or facial re-enactment.[73] The former places one person's face onto the face of another; the latter leaves the face of

65. Chesney & Citron, *supra* note 15, at 1760.
66. SAYLER & HARRIS, *supra* note 54.
67. *Id.*
68. Spivak, *supra* note 33, at 343–45.
69. Ice, *supra* note 57, at 422.
70. Lauren Renaud, Comment, Will You Believe It When You See It? How and Why the Press Should Prepare for Deepfakes, 4 GEO. L. TECH. REV. 241, 244 (2019).
71. *Overview of GAN Structure*, GOOGLE DEVELOPERS, http://developers.google.com/machine-learning/gan/gan_structure (last updated May 24, 2019).
72. *See* Diakopoulos & Johnson, *supra* note 5, at 2073.
73. *Id.* at 2074.

the subject as it, but moves it in accordance with the movements of another individual.[74] Voice synthesis techniques follow a similar pattern where the product will either mimic an audio recording and use it to create a video that matches up perfectly to the sound, or use a small clip of audio to then dictate any form of speech that is read in the voice of the subject.[75]

## B. *Spreading like Wildfire*

In today's techno-feudalistic society—the technology creators are the sovereign, its regulators are the nobility, its owners are the vassals, and its users are the peasants.[76] While the internet has provided history with a new dimension, it has also amplified previously restrictive notions of accessibility.[77] This has not only led to the democratization of technology, but also to the potential for harm that it brings.[78] In this techno-feudalistic world, although the simplicity with which technology has allowed deepfakes to be made is a concerning thought, one of the more troubling traits of deepfake technology is its recent and continued attainability.[79] After all,

> Modern technology has not only provided new, convincing, false content, it has also facilitated its dissemination. Social media platforms have made sharing content faster than ever by the retweeting, sharing, or reposting mechanisms they have implemented. This may not be a problem on its own, but recent research suggests that not all content spreads at the same rate. Research from Massachusetts Institute of Technology (MIT) suggests that false content spreads up to six times faster than factual content on social media sites and false news stories are seventy percent more likely to be shared.[80]

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74. *Id.*; *see* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 19.

75. Spivak, *supra* note 33, at 352.

76. Alex Hagan, Comment to *Future of Work: What Is "Techno-Feudalism"?*, QUORA (July 6, 2015, 1:37 AM), http://www.quora.com/Future-of-Work-What-is-techno-feudalism.

77. Erwin Chemerinsky, Dean of L., Univ. Cal. Berkley Sch. L., Fake News, Weaponized Defamation and the First Amendment, Keynote Address at Southwestern Law School (Jan. 26, 2012), *in* 47 SW. L. REV. 291, 291.

78. *Id.*; Nuñez, *supra* note 35, at 786, 788.

79. Katarina Kertysova, Artificial Intelligence and Disinformation: How AI Changes the Way Disinformation is Produced, Disseminated, and Can Be Countered, 29 SEC. & HUM. RTS. 55, 63–64, 67 (2018).

80. Nuñez, *supra* note 35, at 786.

Importantly, the hurdles on the path to mastering the creation and dissemination of deepfake media are not the technical skills required to create deepfakes, per se, but rather the attainability of processors with sufficient capacity to run large programs.[81] Because GANs make outputs a product of inputs, the greater its data training set, the easier it is for the program to develop a credible piece of deepfake media.[82] This requires that a creator obtain a graphic processing unit ("GPU") sizeable enough, and with a vast amount of memory, to work through the large quantities of photos, videos, or audios of the target.[83] More specifically, to perform deep learning, train a neural network to reconstruct patterns effectively, and ultimately create deepfake media, one would need a GPU greater than those found in commercially available laptops (at least as of 2019), and would require an understanding of "torrenting, path configuration, file structures, and application versioning."[84]

In reality, to create an effective deepfake, a user need only a computer comparable to a high-quality gaming laptop that retails for well under $3,000—a far smaller technological obstacle for gamers and avid computer hobbyists.[85] In fact, even that may not be entirely necessary, as anyone with basic computer skills has the means by which to create deepfakes.[86] What makes this heightened accessibility of creative processes possible is the rise of more readily available software in the open market and internet tutorials on the deepfake-media-making process that, together, work to lift technological constraints.[87] For example, FakeApp is a relatively accessible program that does not require complex equipment and creates deepfake media in as little as eight to twelve hours.[88]

Today, more programs are being cheaply sold, with some of the GPUs needed to make deepfake media selling for as low as $160 USD.[89] For those that do not have the financial means or interests to purchase, these types of

81. *See* Dorfman, *supra* note 24, at 20; SAYLER & HARRIS, *supra* note 54.

82. *See* J.M. Porup, *How and Why Deepfake Videos Work — and What Is at Risk*, CSO (Mar. 18, 2021, 2:00 AM), http://www.csoonline.com/article/3293002/deepfake-videos-how-and-why-they-work.html.

83. *Rise of the Deepfakes*, WEEK (June 9, 2018), http://www.theweek.com/articles/777592/rise-deepfakes.

84. Ice, *supra* note 57, at 425–26.

85. *See id.* at 426; Maras & Alexandrou, *supra* note 46, at 256.

86. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 19.

87. Kertysova, *supra* note 79, at 63–64; *Science & Tech Spotlight: Deepfakes*, *supra* note 19.

88. Hall, *supra* note 4, at 57.

89. SAYLER & HARRIS, *supra* note 54; Ice, *supra* note 57, at 426.

GPUs are also available to rent.[90] But even absent the necessary GPUs altogether, most people already have access to programs that can develop deepfake media.[91] Mobile applications like Snapchat, Doublicat, and Reface are allowing users to make deepfakes right from the palms of their hands.[92] This may help explain the growing interest that social media users have in the use of deepfake technology.[93] TikTok—one of the newer social media platforms circulating in popular culture—has seen its own buzz around deepfake media with the videos posted by a user very credibly impersonating actor Tom Cruise with deepfake technology.[94] As of the writing of this Article, that TikTok account, @deeptomcruise, now has over 943,600 followers and an approximated forty million views across only six videos.[95]

TikTok does not stand alone, as there are other social media sites with deepfake capabilities.[96] There is a wide field of social media platforms, all of which have seen a fair share of deepfake media uploads, along with, a vast body of literature addressing the issue and the factors that aggravate it.[97] Deep Trace, self-described as the world's first visual threat intelligence company, identified the existence of at least 14,678 deepfakes circulating online at the time of its report—a statistic that shows not only the ease with which deepfakes can be created, but also the simplicity with which social media platforms disseminate them, or at least play a substantive role in doing so.[98]

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90. SAYLER & HARRIS, *supra* note 54.

91. *See* Rick Andreoli, *Face Swapping App Doublicat/Reface is Hot! — But Is It Safe?*, PARENTOLOGY (July 30, 2020), http://www.parentology.com/the-hottest-new-app-is-doublicat-reface-but-is-it-safe/.

92. *Id.*

93. *See id.*

94. Mitchell Clark, *This TikTok Tom Cruise Impersonator is Using Deepfake Tech to Impressive Ends*, VERGE (Feb. 26, 2021, 5:54 PM), http://www.theverge.com/22303756/tiktok-tom-cruise-impersonator-deepfake.

95. *See* Tom (@deeptomcruise), TIKTOK, http://vm.tiktok.com/ZMeCkpGpt/ (last visited Apr. 15, 2022).

96. Danielle Keats Citron, *Cyber Mobs, Disinformation, and Death Videos: The Internet as It Is (and as It Should Be)*, 118 MICH. L. REV. 1073, 1081 (2020); *see* Nina I. Brown, *Deepfakes and the Weaponization of Disinformation*, VA. J.L. & TECH., Spring 2020, at 1, 22.

97. *See* Citron, *supra* note 96, at 1081; Diakopoulos & Johnson, *supra* note 5, at 2073; Duquette, *supra* note 24, at 85; Brown, *supra* note 96, at 7; Chesney & Citron, *supra* note 21, at 883–84; Mbilike M. Mwafulirwa, *Smoke and Mirrors: Constitutional Ideals When Fact and Fiction Can't Be Separated*, OKLA. BAR J., Mar. 2020, at 12, 13; Bruce Bimber & Homero Gil de Zúñiga, *The Unedited Public Sphere*, 22 NEW MEDIA & SOC'Y 700, 703 (2020); Cathay Y. N. Smith, *Truth, Lies, and Copyright*, 20 NEV. L.J. 201, 203 (2019); Nuñez, *supra* note 35, at 784; Caldera, *supra* note 7, at 178; Anderson, *supra* note 36, at 212.

98. Baram, *supra* note 15.

## III. THE FOE WITH A THOUSAND FACES

There are two sides to every coin, and with the good, there comes bad.[99] Deepfakes first hit the scene on Reddit for a troubling purpose: Creating synthetic pornography that featured the faces of well-known celebrities superimposed on existing pornography videos, all without their knowledge or consent.[100] As time went on, this function of deepfake technology became more and more prevalent, and targeted even those not operating as public figures in society.[101] In fact, research suggests that deepfake technology seems to be disproportionately impacting women, whether public figures or private individuals.[102] As one Article author put it, "[t]he harm wrought by [deepfakes] is not simply that a viewer might be deceived into believing that they are watching a video that actually portrays the subject (although, that harm may also exist). Rather, it is the dignitary harm inflicted on the subject herself."[103] Greater still is the disproportionate impact that deepfakes can have when used to blackmail people within vulnerable populations, like the LGBTQ+ community, that oftentimes find themselves hiding in the shadows.[104] The concept of data exploitation for the purposes of blackmailing or harming the LGBTQ+ community is not a new one, and historical data, in addition to modern concerns over dating apps, seems to suggest that the threat is magnified for such communities.[105]

This kind of data exploitation is very much in line with the more archaic forms of data exploitation that have threatened the LGBTQ+ community throughout various points in history.[106] During the height of the Nazi regime, the Gestapo raided sex research institutions and confiscated extensive lists containing the names and addresses of local homosexuals.[107] Those listed became the targets of the Reich Central Office for the Combatting of Homosexuality and Abortion.[108] The Nazis arrested over 100,000 men as homosexuals and took some of these men to concentration camps where they

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99. *See* Hall, *supra* note 4, at 57–58, 61.
100. *Id.* at 57.
101. PARIS & DONOVAN, *supra* note 7, at 40.
102. Chesney & Citron, *supra* note 21, at 886; Baram, *supra* note 15.
103. Thomas E. Kadri, *Drawing Trump Naked: Curbing the Right of Publicity to Protect Public Discourse*, 78 MD. L. REV. 899, 953 (2019).
104. *See* Kertysova, *supra* note 79, at 67.
105. *See* Molina, *supra* note 22, at 4–5.
106. *See id.*
107. FRANK RECTOR, THE NAZI EXTERMINATION OF HOMOSEXUALS (Stein & Day, Inc., 1981).
108. *Id.*

were denied support groups, experimented on, and murdered.[109] Similarly, in the United States, during the McCarthyist anti-communist campaign of the mid-1900s, the federal government gathered data on homosexuals through community member interrogations and raided community safe spaces to investigate "the alleged employment of homosexuals in the government service" through a congressional subcommittee created for that particular purpose.[110] Any federal employee suspected of being homosexual was terminated and outed publicly—exposing hundreds to lost livelihoods, financial instability, and reduced esteem among their fellow peers and community members, among many other concerns.[111]

As technology advanced, more and more LGBTQ+ individuals have been antagonized by breaches of online privacy and information exploitation.[112] Tragedies like those of Tyler Clementi,[113] Channing Smith,[114] and many others share that common factor.[115] In 2017, LGBTQ+ Chechens saw the latest iteration of this problem.[116] During the last week of February 2017, Chechen officials detained a young man who was suspected of being under the influence of a controlled substance.[117] At the time, Chechen officials searched the man's phone without permission and discovered intimate photographs and messages exchanged with other men which led to the investigation of his social media platforms.[118] The Chechen Officials raided the man's private electronic communications and tortured him to compile a list of other suspected Chechen homosexuals who were then tortured for the same purpose.[119] This sparked the Chechen anti-gay purges, which included the unofficial detention, humiliation, starvation, and torture of Chechen men

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109. *Id.*

110. Molina, *supra* note 22, at 4, 5.

111. *See id.*

112. *See* AJ Abell, *Coffee Co. Family Says Cyber Bullying Caused High School Student to Take his Own Life*, FOX 17 (Sept. 25, 2019), http://fox17.com/news/local/coffee-co-family-says-cyber-bullying-caused-high-school-student-to-take-his-own-life.

113. Kelly Ebbels, *Tragic end for a true talent*, NORTHJERSEY.COM (Oct. 1, 2010), http://web.archive.org/web/20121017154404/http://www.northjersey.com/news/104132029_Tragic_end_for_a_true_talent.html?page=all.

114. Abell, *supra* note 112.

115. *See id.*; Ebbels, *supra* note 113.

116. TANYA LOKSHINA, "THEY HAVE LONG ARMS AND THEY CAN FIND ME" 1 (Rachel Denber ed., 2017), http://www.hrw.org/sites/default/files/report_pdf/chechnya0517_web.pdf.

117. *Id.* at 16.

118. *Id.* at 16–17.

119. *Id.* at 17.

suspected of being gay.[120] While many of these men were returned to their families, release was often coupled with suggestions that forced disappearances and *honor killings* be carried out.[121]

Although technology has provided, for many in the LGBTQ+ community, access to resources and communities that they once worked secretly to identify, it has also been shown to serve as the target that many in society place on the backs of LGBTQ+ members, as well as the key with which others gain access to them.[122] The abuse of the LGBTQ+ community that we have seen throughout history makes this clear and offers a warning as deepfake technology begins to circulate more prevalently.[123] However, recent events indicate that we need not engage in extensive thought experiments to identify the harms that deepfakes can pose to the LGBTQ+ community.[124]

In 2019, a sex tape was made public of Azmin Ali, the Malaysian Minister of Economic Affairs, engaging in an intimate relationship with the male aid of a rival minister.[125] Aware that homosexuality is illegal in Malaysia, Ali and his allies downplayed the tape and its insinuation by claiming that it was fabricated with deepfake technology and not real.[126] Some digital forensic professionals have yet to find any evidence to suggest that the footage is a deepfake.[127] This circumstance exposes what experts call the "liar's dividend," or when a skeptical public aware of deepfake technology becomes primed to doubt the authenticity of real audio and video evidence.[128] Putting aside questions as to the veracity of the footage, the Ali controversy serves as a reminder that many members of the LGBTQ+ community still live in locations where the exposure of their sexual and gender identity can deny

120. *See id.*

121. LOKSHINA, *supra* note 116, at 1.

122. *See* Molina, *supra* note 22, at 4.

123. *See id.*

124. *See* Veronica Cordoba, *Malaysians Gets First Hand Experience of Deepfake Tech in Scandal Rich Country*, INDEP. NEWS & MEDIA (June 16, 2019), http://theindependent.sg/malaysians-gets-first-hand-experience-of-deepfake-tech-in-scandal-rich-country/.

125. *Id.*; Jarni Blakkarly, *A Gay Sex Tape is Threatening to End the Political Careers of Two Men in Malaysia*, SBS NEWS (June 17, 2019, 3:50 PM), http://www.sbs.com.au/news/a-gay-sex-tape-is-threatening-to-end-the-political-careers-of-two-men-in-malaysia.

126. Cordoba, *supra* note 124; Blakkarly, *supra* note 124.

127. *Digital Forensics Experts Not Convinced that Gay Sex Videos are Fake*, FREE MALAY. TODAY (June 17, 2019, 4:10 PM), http://www.freemalaysiatoday.com/category/nation/2019/06/17/digital-forensics-experts-not-convinced-that-gay-sex-videos-are-fake.

128. SAYLER & HARRIS, *supra* note 54.

them opportunities, employment, liberty, and even life.[129] However, whether the Ali video is ultimately identified as real or a deepfake is irrelevant in this discussion as the possibility alone highlights the reality that many in the LGBTQ+ community might soon face.[130] Even if no scandalous footage exists, any maliciously-intentioned individual could create a deepfake of a target that depicts them engaging in homosexual acts, and use it either to have them denied opportunities altogether or have them extorted for their own purposes.[131]

## IV. STOP, DROP, OR ROLL WITH IT

While numerous scholars, technologists, and government representatives have advocated for the development of new policy initiatives to specifically address the growing concern surrounding deepfake media and its implications, this Article focuses more squarely on the adaptation of current laws in order to provide recourse to those harmed by deepfake media, and on the legislative efforts that can be taken to secure the privacy and safety of members of the LGBTQ+ community in light of the potential for that content's misuse.[132]

### A. *The Regulation Race*

With the public's understanding of deepfake technology continuing to grow, and its concerns for its misuse growing with it, one question has become more prevalent among many others—if technology created the problem, shouldn't technology be the thing to offer the solution?[133] In 2020, Congress passed the first deepfake-specific statute—not one addressing any regulatory structure, but rather one incentivizing research into the development of deepfake detection software similar to the one depicted below that uses a blue box to track head rotation, red dots to map facial expressions, and green beams to detect the direction of eye movement.[134]

129. *See* Blakkarly, *supra* note 125; LOKSHINA, *supra* note 116, at 1.
130. *See* Blakkarly, *supra* note 125.
131. *See id.*; SAYLER & HARRIS, *supra* note 54.
132. *See* discussion *infra* Part III.
133. *See* Dorfman, *supra* note 24, at 21, 23–24.
134. *Id.* at 21.

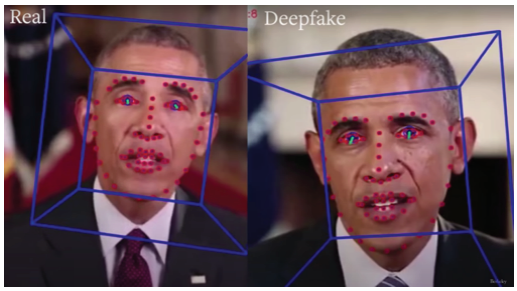


*Image Demonstrating Deepfake Detection Program* [135]

Although the development and implementation of deepfake detection software presents a compelling solution to the potential misuse of deepfake media, if detection technology lacks the capacity to keep pace with the continued advancement of development technology, it would fail to provide an effective solution.[136] After all, the very nature of the GANs used to create deepfake media is to identify the manners in which credibility is detected, and to work over and over to create an output that can successfully deceive its observer.[137] If programmed to understand the methods employed by detection technology, the GANs themselves could probably be trained to create outputs that overcome the detectors from the onset.[138] The most effective way to exercise a useful degree of control over deepfake technology is to take a multifaceted approach.[139]

Although some states have passed legislation regulating the use of deepfakes in particular circumstances, deepfakes still remain unregulated by federal law and not one area of jurisprudence fully governs their use and misuse.[140] Even regulatory agencies like the Federal Trade Commission ("FTC") do not have on-point policies to address this concern.[141] Although the FTC does note that, "[i]f a company's use of . . . deepfakes . . . misleads consumers, that company *could* face an FTC enforcement action."[142] Undoubtedly, crafting an effective legal framework to ensure judicial

135. UC Berkeley, *New Technique for Detecting Deepfake Videos*, YOUTUBE (June 18, 2019), http://www.youtube.com/watch?v=51uHNgmnLWI.

136. Chesney & Citron, *supra* note 15, at 1787.

137. Ice, *supra* note 57, at 422.

138. *See* Chesney & Citron, *supra* note 15, at 1787.

139. Sharon D. Nelson et al., *Detecting Deepfakes*, LAW PRAC. MAG., Jan/Feb. 2020, at 42, 45.

140. Caldera, *supra* note 7, at 178.

141. *See* Chesney & Citron, *supra* note 15, at 1807

142. Andrew Smith, *Using Artificial Intelligence and Algorithms*, FED. TRADE COMM'N: BUSINESS BLOG (Apr. 8, 2020), http://www.ftc.gov/news-events/blogs/business-blog/2020/04/using-artificial-intelligence-algorithms (emphasis added).

accountability is not without its difficulties.[143] For example, it is likely that an outright ban of deepfake media would survive constitutional muster under the First Amendment.[144]

Additionally, one of the more challenging obstacles that deepfakes present to those that wish to challenge them in the civil arena is the fact that finding their creators is very difficult given that the metadata needed to determine a deepfake's provenance may be inadequate for proper identification of its creator.[145] Moreover, although deepfake media necessitates the exploitation of copyrighted material for its development, a would-be challenger would still have to take on the herculean task of locating the large quantities of input media, sifting through all of the inputs to determine if they have rights in any one, or a few, of the materials used and, if so, still overcome arguments of fair use and transformative use.[146] By that same token, even if the creator of a deepfake is identified, given the geographically diverse nature of the internet, it may be likely that a deepfake creator is domiciled outside of the United States making the exercise of jurisdiction over the creator yet another difficult hurdle to overcome.[147] And of course, civil suits often come at a high cost to both the plaintiff's financial interests as well as to their regard in the public eye, ultimately introducing the possibility of exacerbating their harms.[148] While overcoming these initial road bumps is not impossible, the current legal landscape seems to be a difficult one under which a would-be plaintiff could find the solution they seek.[149] However, that is not to say that there may not be an effective path forward.[150]

### B. *Hope on the Horizon: Amending and Modifying Section 230*

Much of what makes deepfakes so harmful is not just the content itself, but also its ability to spread so rapidly on social media platforms.[151] However, what makes the latter of those two issues possible is not so much the product of the deepfakes themselves as it is the platforms that house them and the laws used to regulate them.[152] The most relevant among them is the

143. *See* Chesney & Citron, *supra* note 15, at 1789.
144. *See id.* at 1790–1791.
145. *See* Chesney & Citron, *supra* note 21, at 889.
146. *See* Chesney & Citron, *supra* note 15, at 1793.
147. *Id.* at 1792.
148. *Id.*
149. *See* Diakopoulos & Johnson, *supra* note 5, at 2086.
150. *See id.*
151. *See* Chesney & Citron, *supra* note 15, at 1768.
152. *Id.* at 1795.

Communications Decency Act,[153] a federal law passed by Congress in 1996—particularly, Section 230 of the Act.[154] Section 230 of the Communications Decency Act states in pertinent part:

> (c) Protection for "Good Samaritan" blocking and screening of offensive material
>
> (1) Treatment of publisher or speaker
>
> *No provider or user of an interactive computer service shall be treated as the publisher or speaker* of any information provided by another information content provider.
>
> (2) Civil liability
>
> No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) *any action voluntarily taken in good faith* to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) *any action taken to enable or make available to information content providers or others* the technical means to restrict access to material described in paragraph (1).[155]

Prior to the enactment of Section 230, websites that sought to moderate harmful or offensive material posted by third parties were treated as publishers and would be held liable if they were unsuccessful in removing the harmful material.[156] However, this presented an interesting loophole as it allowed for websites to stick their heads in the sand, so to speak, and evade the imposition of liability by ignoring any harmful content that they knew

153. Communications Decency Act of 1996, Pub. L. No. 104–104, § 110 Stat. 133 (codified as amended at 47 U.S.C. § 223 (Supp. II 1997)).

154. Citron, *supra* note 96, at 1088.

155. 47 U.S.C. § 230(c)(1) (emphasis added).

156. Brown, *supra* note 96, at 43.

existed on their platform.[157] This was seen in action in 1994 when an individual accused Stratton Oakmont of fraudulent and illegal securities trading practices on Money Talk, a message board run by Prodigy Communication Corporation—a leading Internet Service Provider at the time.[158] Stratton responded by suing both Prodigy and Money Talk's administrator for libel.[159] The court concluded that Prodigy was a publisher because it held itself out to the public as controlling the content of its computer bulletin boards and practiced such control through its use of an automatic software screening program.[160] Following the ruling in the *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[161] Congress members grew concerned that the court's ruling would disincentivize the moderation of offensive content posted to internet service providers by third parties.[162] As a result, Congress passed the Communications Decency Act and included in it, Section 230, which offers internet service providers a broad shield of immunity from liability for moderating too much or too little of their third party users' speech.[163]

However, the absence of narrow language in Section 230's immunity clauses has come to be interpreted in a manner that is so broad that it has created yet another problem—immunity remains available even if an internet service provider intentionally encourages the posting of harmful content.[164] In fact, when it has been applied, this expansive immunity has allowed internet service providers to republish content with the knowledge that it violates the law, alter their platform to prevent the capture of criminals, and allow the sale of illegal or dangerous products.[165] For example, Grindr, a dating app marketed primarily to the gay community, often sees fake profiles on its platform wherein a user appropriates the images, whether more commonplace or intimate, of another ("catfishing").[166] Recently, one of Grindr's users, Matthew Herrick, sued the company for the negligent design of its application after Herrick's ex-boyfriend began impersonating him on the app by creating a fake profile in his name, spreading his nude photographs, and sharing rape

157. *See id.*
158. Spivak, *supra* note 33, at 387.
159. *Id.*; Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995).
160. Spivak, *supra* note 33, at 387–88; *Stratton Oakmont, Inc.*, 1995 WL 323710, at *4.
161. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
162. Citron, *supra* note 96, at 1088–89.
163. *Id.* at 1089.
164. *See* Chesney & Citron, *supra* note 15, at 1797.
165. *Id.* at 1798; *see also* Citron, *supra* note 96, at 1089.
166. *See* Chris Fox, *Why Do Gay Apps Struggle to Stop Catfish?*, BBC (Oct. 28, 2019), http://www.bbc.com/news/technology-50138390; Citron, *supra* note 96, at 1089.

fantasies with other users, among many other things.[167] Herrick notified Grindr of his ex-boyfriend's behaviors over one hundred times to no avail.[168] At one point, Herrick's ex-boyfriend shared Herrick's address publicly on the app, which led to over twenty strangers coming to his apartment on any given day, totaling more than a thousand trespassers.[169] The court dismissed Herrick's suit against Grindr on the grounds of Section 230 immunity, noting that his claims were all based on content provided by another Grindr user, not by Grindr itself, and that to the extent that Grindr had contributed to the profiles impersonating Herrick, it was only through "neutral assistance," for which Section 230 has been interpreted to provide immunity.[170] The ruling was later affirmed on appeal.[171]

Looking more directly at the role of Section 230 in the perpetuation of the threats that deepfake technologies present particularly to the LGBTQ+ community, the facts of *Herrick v. Grindr, LLC*[172] can be adapted to illustrate the point in action.[173] User A of a social media platform either creates or obtains a deepfake that impersonates User B, and depicts B in some intimate act without their knowledge or consent.[174] User A uploads the harmful or offensive deepfake to a social media platform, where the content spreads and gets shared.[175] Upon discovery of the deepfake content, B requests that the platform remove it on account of the professional, reputational and psychological harm that the synthetic media creates.[176] The platform never removes the content, it continues to spread and harm B, and B sues the platform.[177] Under the current framework of Section 230, it would be unreasonable to expect that the adapted facts would yield a conclusion different than the one in *Herrick*, despite the platform's actual knowledge of the harmful or offensive nature of the content in question and of the damage that it causes.[178] Herein lies the heart of the problem, worse even, when the

167. Citron, *supra* note 96, at 1089.
168. *Id.*
169. *Id.* at 1089–90.
170. Herrick v. Grindr, LLC, 306 F. Supp. 3d 579, 584, 589 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 586 (2d Cir. 2019).
171. Herrick v. Grindr, LLC, 765 F. App'x 586, 593 (2d Cir. 2019).
172. 306 F. Supp. 3d 579 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 586 (2d Cir. 2019).
173. *See id.* at 585; Citron, *supra* note 96, at 1089, 1091; Chesney & Citron, *supra* note 21, at 884–85.
174. *See Herrick*, 306 F. Supp. 3d at 584–85.
175. *See id.* at 585.
176. See id.
177. See id.
178. *See id.* at 589.

facts are adapted once more so that B is a closeted LGBTQ+ community member whom A exploits and extorts financially or professionally on social media platforms through the use of the deepfake media.[179] The risks seem endless and could even magnify to implicate national security.[180]

As it stands now, Section 230 provides nearly no incentive for social media platforms to monitor and moderate the content on their interfaces, even in the face of actual knowledge of their harmful and offensive nature.[181] However, growing calls to amend Section 230 could provide a solution that not only opens the door to the imposition of liability on account of deepfake media perpetuation, but also more broadly offers recourse for those harmed by it.[182] After all, amendments to Section 230's immunity clauses are not a foreign or far away idea.[183] Only three years prior to the time of this writing, Section 230's text was amended by the passage of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 ("FOSTA").[184] More recently, legislators on both sides of the aisle—like current Speaker of the House Nancy Pelosi, Senators Ted Cruz and Josh Hawley, and even a former White House technology advisor—have all suggested repealing or amending Section 230.[185] There is merit in Section 230's interest in fostering free speech, and making a blanket repeal could be costly with regard to social discourse; however, modification presents an appealing solution that allows for the maintenance of both the free speech and privacy protection interests.[186]

As Jon M. Garon, Professor and former Dean at Nova Southeastern University's Shepard Broad College of Law, has noted, there are two ways in which Section 230 can be modified to strike a more equitable balance between the two interests.[187]

> First, once content has been determined by a court to be libelous or harassing, the [Internet Service Provider] should have an obligation to remove that content immediately upon notification. Second, if an [Internet Service Provider] refuses to remove content someone

179. *See Herrick*, 306 F. Supp. 3d at 585, 589; Molina, *supra* note 22, at 4.

180. *See Herrick*, 306 F. Supp. 3d at 584; Chesney & Citron, *supra* note 15, at 1783; Molina, *supra* note 22, at 4.

181. *See* Citron, *supra* note 96, at 1088–89.

182. Chesney & Citron, *supra* note 15, at 1799.

183. *See id.* at 1798–99.

184. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115–164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. § 2421A); Brown, *supra* note 96, at 45.

185. Brown, *supra* note 96, at 44–45.

186. *See* Jon M. Garon, *How to Fix the Internet*, LAW360 (Feb. 17, 2017, 4:41 PM), http://www.law360.com/articles/889115/how-to-fix-the-internet.

187. *Id.*

> believes to be defamatory or an invasion of privacy, that person should be permitted to go to court to have the content removed. If a court determines the speech is harmful, then the [Internet Service Provider] should be obligated to take down or block the speech. That order would then apply to other [Internet Service Providers] as well.[188]

A similar proposed modification has been offered by Danielle Citron and Benjamin Wittes—both leading voices in the area of deepfake technology and its proposed regulation—that conditions immunity on reasonable content moderation practices [189] As suggested by Citron and Wittes, the proposed amendment to Section 230(c)(1) would read:

> No provider or user of an interactive computer service that *takes reasonable steps to prevent or address unlawful uses of its services* shall be treated as the publisher or speaker of any information provided by another information content provider *in any action arising out of the publication of content provided by that information content provider*.[190]

Although there is no simple legislative solution to specifically address the complications that deepfakes present, there is no shortage of reasonable amendments to Section 230's existing language that could remedy the present situation.[191] Amending Section 230 to at least allow individuals threatened by the posting of deepfake media to more fairly challenge its presence, not only establishes recourse where there currently seems to be none, but also shelters individuals, like those in the LGBTQ+ community, whose privacy and safety are at a heightened risk of exploitation and extortion.[192]

### C. *Embracing our New Reality: The LGBTQ+ Community's Information Anonymization Efforts with Deepfake Technology*

The LGBTQ+ community has long been a champion of reappropriating the tools of its oppressors for purposes of finding

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188. *Id.*

189. *See* Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Sec. 230 Immunity*, 86 FORDHAM L. REV. 401, 419 (2017).

190. *Id.*

191. *See* Garon, *supra* note 186; Citron & Wittes, *supra* note 189, at 419.

192. *See* Spivak, *supra* note 33, at 399; Garon, *supra* note 186; Citron & Wittes, *supra* note 189, at 419.

empowerment and freedom.[193] For a community in which the pendulum between its two driving values—visibility and privacy—swings quickly from one side to the other, it comes as no surprise that some of its members have now embraced deepfake technology.[194] Despite deepfakes posing potential privacy and safety threats, members of the LGBTQ+ community have been quick to get in front of deepfake technology and adopt it for anonymization and privacy protection purposes.[195] As of the time of this writing, the most notable use of such a tactic was by the creators of *Welcome to Chechnya*, a documentary exposing the realities of the victims of the Chechen anti-gay purges that uses deepfake technology to mask and protect the identities of the victims and informants featured in the film.[196]

Visual effects expert Ryan Laney described *Welcome to Chechnya*'s technological endeavor as "a digital prosthetic where 100[%] of the motion, the emotion, and the essence of what the subject is doing is there."[197] In order for the documentary's visual effects team to develop this advanced form of anonymization, individuals volunteered a personal image and consented to its application on the content of the film's subjects, ultimately resulting in a sort of digital marionette puppet.[198] Two things make this process different than the ones in which other deepfakes are usually seen.[199] First, the deepfakes were created with the consent of both the subject—the person on which the altered image is placed, or, in other words, the person anonymized—and the target—the person whose image is being transposed on the subject, or, in other words, the anonymizer.[200] Second, the purpose of such a deepfake is to safeguard the interest of the subject rather than to exploit it.[201]

193. *See* Juliette Rocheleau, *A Former Slur is Reclaimed, and Listeners Have Mixed Feelings*, NPR (Aug. 21, 2019, 10:33 AM), http://www.npr.org/sections/publiceditor/2019/08/21/752330316/a-former-slur-is-reclaimed-and-listeners-have-mixed-feelings.

194. Rebecca Heilweil, *How Deepfakes Could Actually do Some Good*, VOX (June 29, 2020, 11:10 AM), http://www.vox.com/platform/amp/recode/2020/6/29/21303588/deepfakes-anonymous-artificial-intelligence-welcome-to-chechnya.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *See* Heilweil, *supra* note 194.

200. *See id.*

201. See *id.*

*Image of Deepfake Technology used to Disguise Source Featured in Welcome to Chechnya*[202]

*Welcome to Chechnya* has reappropriated technology that is potentially dangerous to members of the LGBTQ+ community around the world and turned that sword, and its threat, into the shield behind which they can find privacy and protection.[203] In fact, this may already be a growing trend that members of the LGBTQ+ community can jump on board with.[204] Laney and other startups such as D-ID and Alethea AI have begun to take an interest in developing entities that facilitate and democratize the creation of "digital veils" to cloak individuals in danger.[205] Until legislation is created or amended to better protect against the threats that deepfake technology could pose to individuals like those in the LGBTQ+ community, the adoption of these "digital veil" programs could not only help to bring about peace of mind, security of liberty, and protection of life to members of the LGBTQ+ community.[206] It could also introduce them to the next evolutionary chapter in its long history of adaptation and self-preservation.[207]

## V. CONCLUSION

As society ventures into a new world where technology develops at an evolutionary rate faster than usual, society must remain mindful, in addition to being cautious, not only of the many implications that advancements have on the technical aspect of our society but also on the social implications that may arise as the natural byproduct.[208] While deepfakes present the newest, in

202. *Id.*; Joshua Rothkopf, *Deepfake Technology Enters the Documentary World*, NY TIMES, http://www.nytimes.com/2020/07/01/movies/deepfakes-documentary-welcome-to-chechnya.html (July 29, 2020).
203. *See* Heilweil, *supra* note 194.
204. See id.
205. *Id.*
206. See id.
207. See id.
208. Chesney & Citron, *supra* note 21, at 889–90.

a long history, of audiovisual manipulations, a closer look at society's response to deepfake technology through an equally evolutionary perspective is necessary.[209] The most effective manner of doing this is in the same way that we have for all other challenges that we face in our day-to-day lives: with the guidance of the law, whose essential function is to provide recourse where individuals are harmed, to carve out a path to such an outcome where there does not exist such a form of redress, and to disincentivize malicious wrongdoers from their misdeeds.[210]

Society must remain hopeful that experts, scholars, technologists, and legislators will move to introduce specific policies that help society counteract the potentially negative implications that deepfake technology may present.[211] However, until a one-size-fits-all policy is adopted, it is necessary to adapt existing regulatory frameworks like Section 230 so as to effectively face deepfakes' problems as they come and protect the interests of those communities like the LGBTQ+ community that remain vulnerable to them.[212]

209. *Id.* at 889.
210. Citron, *supra* note 96, at 1074.
211. *See id.* at 1087.
212. *See id.* at 1090.

# THE INCONSISTENT APPLICATION OF INTERNET REGULATIONS AND SUGGESTIONS FOR THE FUTURE

LOGAN BECKMAN*



## I. INTRODUCTION

Countless novels, movies, and television shows depict a dystopian image of a bleak, dusty, technologically advanced, submissive society ruled by an authoritative and oppressive government who punishes its citizens for speaking contrary to the government's narrative.[1] The Orwellian Big Brother keeps control of his citizens through the use of in-home surveillance, doctoring history, and records to fit his current narrative and remove dissidents from society.[2] He does this in order to portray an image of an absolute, all-knowing,

* Logan Beckman earned his bachelor's degree in International Affairs and Spanish with Business at Florida State University in 2017. He is currently a 3L Juris Doctorate Candidate at Nova Southeastern University, Shepard Broad College of Law. Logan would like to thank his friends, family, and professors for their encouragement and support. Specifically, Logan would like to thank his wife, Jaimie, his parents, Thomas and Linda, his brothers, Dan and Jordan, and his father-in-law Wyn, for their patience, sacrifice, and love. Logan would also like to thank his colleagues on *Nova Law Review*, Volume 46, for working to help refine and perfect this Comment.

1. *See, e.g.,* RAY BRADBURY, FAHRENHEIT 451, at 11 (Simone & Schuster 2012) (1951); GEORGE ORWELL, 1984, at 3–5 (Signet Classics 1977) (1949).

2. ORWELL, *supra* note 1, at 259–60.

and infallible figurehead to lead the country into prosperity and happiness.[3] Big Brother is able to control the societal narrative by constantly making revisions and corrections to textbooks and news articles to ensure that, at any given time, the information being disseminated is in accordance with the narrative that Big Brother seeks to push.[4] He effectively employs this through constant changes that only provide one version of events throughout history.[5]

Another familiar image is the pile of books engulfed in flames, the constant smell of kerosene, and the fear of constant government monitoring, as seen in Ray Bradbury's *Fahrenheit 451*.[6] These types of images, often associated with limited communication and information access, seem so far-fetched in today's world because of the use of the internet and the ease in which information can be instantly transmitted.[7] However, monopolization and inconsistent application of regulations can affect how society receives and perceives the world around them.[8] Giving companies unfettered power to monitor and restrict content can potentially create echo-chambers where the voice of corporations, not the citizens, control what is *important* to society.[9]

Countries like Cuba and China are arguably in the early stage of controlled dissemination of information through censorship perpetrated by the government.[10] The governments of these countries, among others, are able to influence the societal narrative by restricting access to speech that opposes the

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3. *See id.* at 262.

4. *See id.* at 54–55.

5. *See id.*

6. BRADBURY, *supra* note 1, at 52; *see also* ORWELL, *supra* note 1, at 36–37.

7. *See* Simon Kemp, *Digital 2020: The United States of America*, DATAREPORTAL (Feb. 11, 2020), http://datareportal.com/reports/digital-2020-united-states-of-america ("There were 288.1 million internet users in the United States of America in January 2020").

8. John Samples, *Why the Government Should Not Regulate Content Moderation of Social Media*, CATO INST. (Apr. 9, 2019), http://www.cato.org/policy-analysis/why-government-should-not-regulate-content-moderation-social-media.

9. Lee Rainie et al., *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, PEW RSCH. CTR. (Mar. 29, 2017), http://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/.

10. *See Cuba: Freedom in the World 2021 Country Report*, FREEDOM HOUSE, http://freedomhouse.org/country/cuba/freedom-world/2021 (last visited Apr. 1, 2022). Cuba is listed as 13/100 on their internet freedom score. *Id.* China is listed as a 9/100. *China: Freedom in the World 2021 Country Report*, FREEDOM HOUSE, http://freedomhouse.org/country/china/freedom-world/2021 (last visited Apr. 1, 2022). In contrast, the United States scored an 83/100. *United States: Freedom in the World 2021 Country Report*, FREEDOM HOUSE, http://freedomhouse.org/country/united-states/freedom-world/2021 (last visited Apr. 1, 2022).

will of the government.[11] For instance, the Chinese government can block individuals from accessing certain websites.[12] The government can affect an individual's ability to buy a plane ticket.[13] The government can even jail people for anti-government rhetoric.[14] Engaging in anti-government rhetoric can result in citizens being tortured in a concentration camp simply for worshipping a certain deity.[15] Or worse, the government can just make you disappear without a trace.[16] This is the grim reality for people in a country just across the Pacific.[17] A country that is becoming increasingly powerful and is slowly scooting their way forward to take place as the new hegemon, as they lead in technological adoption.[18]

To ensure the highest degree of a free and functioning democracy, the United States needs a consistent application of internet regulations, rather than simply updating legislation every time it suits an incumbents' need.[19] In essence, this means that Internet Service Providers ("ISPs") should provide equal, uninhibited access to their customers with few exceptions.[20] The recent trend of repealing executive orders is inefficient and ultimately results in inconsistent applications of the standards in which ISPs are held to and how

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11. *See* Katie Canales, *China's 'Social Credit' System Ranks Citizens and Punishes Them with Throttled Internet Speeds and Flight Bans if the Communist Party Deems Them Untrustworthy*, BUS. INSIDER, http://www.businessinsider.com/china-social-credit-system-punishments-and-rewards-explained-2018-4 (last updated Dec. 24, 2021, 11:00 AM); *Cuba: Freedom in the World 2021 Country Report*, *supra* note 10.

12. *China: Freedom in the World 2021 Country Report*, *supra* note 10.

13. Canales, *supra* note 11.

14. Chun Han Wong, *World News: China Jails Twitter Users to Stifle Critics*, WALL ST. J., Jan. 30, 2021, at A8.

15. *See* Darren Byler, *For China's Muslim Minority, the Internet Was a Safe Haven — Until It Wasn't*, FAST CO. (Sept. 23, 2019), http://www.fastcompany.com/90405715/for-chinas-muslim-minority-the-internet-was-a-safe-haven-until-it-wasnt; Tracey Shelton & Bang Xiao, *China 'Disappeared' Several High-Profile People in 2018 and Some of Them are Still Missing*, AUSTL. BROAD. CORP., http://www.abc.net.au/news/2019-01-06/the-people-who-china-disappeared-in-2018-and-where-they-are-now/10676016 (last updated June 5, 2019, 5:41 PM).

16. *See* Shelton & Xiao, *supra* note 15.

17. *See* Byler, *supra* note 15.

18. *See* Joseph S. Nye, Jr., *The Changing Nature of World Power*, 105 POL. SCI. Q. 177, 185 (1990).

19. *See* discussion *infra* Part VI.

20. *See* discussion *infra* Sections IV.A, V.A. These exceptions—which will not be detailed in this article—include internet service to first responders, hospitals, law enforcement, military, and other public functions which public interest would best be served by prioritizing their internet access. *See* discussion *infra* Sections IV.A, V.A.

the laws are applied.[21] Part VI of this Comment will discuss an alternative to the current internet regulations, as well as the implications involved in changing the current laws and executive orders.[22]

Part VI of this Comment will also explain that the current legislation for internet regulations should require ISPs to provide equal internet access to everyone, while at the same time working toward shedding the cloak of protection that ISPs, social media companies, tech companies, and media companies are afforded, when it comes to censorship on their platforms.[23] The purpose of Section VI.B of this Comment is to highlight the potential for abuse and erosion of the First Amendment by analyzing current trends and their long-standing implications.[24] Additionally, Section VI.B of this Comment proposes alternatives to the current and recent trends in internet regulation.[25] In so doing, I will discuss the advantages and disadvantages of government regulation of private tech businesses, specifically ISPs, social media companies, and other current tech giants.[26] Section VI.A of this Comment will compare similar situations of censorship going on internationally and domestically, demonstrating how removing liability has caused damage, and connecting the dots between what is going on now with social media liability and the network neutrality debate which has been inconsistently applied over the years.[27] Ultimately, this Comment will suggest that the problem boils down to providing a necessary utility to citizens and ensuring that universal internet access is not prioritized or restricted on any basis.[28]

## II. EVOLUTION OF COMMUNICATIONS REGULATIONS

The internet, like the radio and television, is a form of communication.[29] Accordingly, the function of the Federal Communications Commission ("FCC") is to act as a regulator for all recognized forms of

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21. *See* Lauren Feiner, *Net Neutrality Foe and Trump's Former FCC Chairman Ajit Pai Stands by Repeal as Democrats Take Over*, CNBC (Jan. 26, 2021, 2:21 PM), http://www.cnbc.com/2021/01/26/net-neutrality-foe-and-departed-fcc-chairman-ajit-pai-stands-by-repeal.html.

22. *See* discussion *infra* Part VI.

23. *See* discussion *infra* Part VI.

24. *See* discussion *infra* Section VI.B.2

25. *See* discussion *infra* Section VI.B.

26. *See* discussion *infra* Section VI.B.

27. *See* discussion *infra* Section VI.A; H.R. REP. NO. 104–458, at 194 (1996) (Conf. Rep.).

28. *See* discussion *infra* Part VI.

29. *See What We Do*, FED. COMMC'NS COMM'N, http://www.fcc.gov/about-fcc/what-we-do (last visited Apr. 1, 2022); NAT'L RSCH. COUNCIL, REALIZING THE INFORMATION FUTURE: THE INTERNET AND BEYOND 21 (1994) (ebook).

communication.[30] As the mediums of communication became more widespread, the necessity for regulations became increasingly apparent.[31] Various legislation regulating communications has evolved throughout the history of the United States and the next Section of this Comment provides a brief insight into each.[32]

### A. *The Early Days of Radio Regulations*

The year was 1912 and the world was starting to get a larger glimpse into the utilization of radio communication.[33] At the time, radio signals were not well established and radios were not widely used by United States citizens.[34] Many frequencies were used for United States military personnel, but the United States government did not have exclusive control over radio waves.[35] In fact, the majority of radio frequencies led to overlapping, and consequently ineffective, signals.[36] A lack of formal regulation meant interfering frequencies and many inconsistencies.[37]

The watershed moment for realizing the need for radio communication regulation was arguably the sinking of the Titanic in the Northern Atlantic Ocean.[38] The Royal Mail Ship ("RMS") Titanic sent out a distress call that was heard in the northern regions of Canada, specifically in Newfoundland.[39] However, the distress call was masked by interference from amateur, unregulated radio stations throughout the east coast of the United States.[40] These interfering frequencies caused a delayed emergency response

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30. *What We Do*, *supra* note 29; *see also* 47 U.S.C. § 151.

31. *See* 47 U.S.C. § 609; *What We Do*, *supra* note 29.

32. *See* discussion *infra* Sections II.A–B.

33. *See* Sharon Morrison, *Radio Act of 1912*, FREE SPEECH CTR.: FIRST AMEND. ENCYC. (2009), http://www.mtsu.edu/first-amendment/article/1090/radio-act-of-1912 [hereinafter *Radio Act of 1912*].

34. *See id.*; Carole E. Scott, *The History of the Radio Industry in the United States to 1940*, ECON. HIST. ASS'N, http://eh.net/encyclopedia/the-history-of-the-radio-industry-in-the-united-states-to-1940/ (last visited Apr. 1, 2022).

35. *See* Thomas H. White, *Pioneering Amateurs: (1900–1917)*, U.S. EARLY RADIO HIST., http://earlyradiohistory.us/sec012.htm (last visited Apr. 1, 2022).

36. *See* Sean Coughlan, *Titanic: The Final Messages from a Stricken Ship*, BBC (Apr. 10, 2012), http://www.bbc.com/news/magazine-17631595; Morrison, *supra* note 33.

37. *Radio Act of 1912*, *supra* note 33.

38. *See id.*; Coughlan, *supra* note 36.

39. Marc Montgomery, *Canada History: April 15, 1912, Titanic Disappears off Newfoundland*, RADIO CAN. INT'L (Apr. 15, 2021, 2:13 PM), http://www.rcinet.ca/en/2019/04/15/canada-history-april-15-1912-titanic-disappears-off-newfoundland/.

40. *See* Coughlan, *supra* note 36; *Radio Act of 1912*, *supra* note 33.

because of the lack of communication.[41] This tragic incident represented the reality that certain radio frequencies *must* be accessible in case of emergency.[42]

The Radio Act of 1912 was passed a few months later and vested the United States Government with the power to require radio stations to obtain licenses that would allow the government to broadcast a signal to the general public.[43] The United States Government effectively took complete control over broadcasting, requiring licensing and restricting frequencies.[44] Following the end of the First World War, radios became a household staple for American citizens.[45] For the first time ever, people could use radios to do things like listen to music without needing a record player, hear news stories without needing to read the paper, and listen to sports without having to watch it live.[46] However, the United States Government did not anticipate how widespread radio would become in the 1920s; thus, new legislation was required to keep up with the times.[47]

In order to handle the unforeseen widespread usage of radio communication, the Radio Act of 1927 was passed, creating a governmental body to manage the service.[48] This act created a new body called the Federal Radio Commission ("FRC"), which was vested with the power to regulate radio communication.[49] The FRC, initially created as a temporary agency, quickly realized that its duties could not be performed in the preliminary time frame that was suggested.[50] Radio soon competed with the newspaper industry, not only as a means of entertainment, but also as a news source and

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41. *See* Coughlan, *supra* note 36; *Radio Act of 1912*, *supra* note 33.

42. *See* Coughlan, *supra* note 36.

43. An Act to Regulate Radio Communication, Pub. L. No. 62-264, § 6412, 37 Stat. 302, 302 (1912); *Radio Act of 1912*, *supra* note 33.

44. *See Radio Act of 1912, supra* note 33.

45. Joe Wood, *History of the Radio: From Inception to Modern Day*, TECH. WHOLESALE, http://www.techwholesale.com/history-of-the-radio.html (last visited Apr. 1, 2022).

46. *Id.*; *First Radio Broadcast of the Olympics*, GUINNESS WORLD RECS., http://www.guinnessworldrecords.com/world-records/first-radio-broadcast-of-the-olympics (last visited Apr. 1, 2022).

47. *See* Wood, *supra* note 45.

48. Radio Act of 1927, Pub. L. No. 69-632, § 4, 44 Stat. 1162, 1163–64; Keith Masters, *Construction of the Equality Clause in the Davis Amendment*, 1 J. RADIO L. 1, 1–2 (1931); Sharon L. Morrison, *Radio Act of 1927 (1927)*, FIRST AMEND. ENCYCLOPEDIA, http://www.mtsu.edu/first-amendment/article/1091/radio-act-of-1927 (last visited Apr. 1, 2022) [hereinafter *Radio Act of 1927*].

49. *Radio Act of 1927*, *supra* note 48.

50. *See* FED. RADIO COMM'N, ANNUAL REPORT OF THE FEDERAL RADIO COMMISSION TO THE CONGRESS OF THE UNITED STATES FOR THE FISCAL YEAR ENDED JUNE 30, 1927, at 8 (1927).

a more efficient form of communication.[51] The number of radio stations had risen exponentially and long-distance signals were becoming more widely adopted.[52] The ability to reach a larger audience presented valuable potential for many forms of entertainment.[53] Additionally, spending on radio advertisements had risen and new forms of entertainment programs were making their way onto the radio.[54]

Other than granting the power to require and delegate radio licenses to broadcast, the Acts[55] also denoted radio waves as public property and therefore became subject to the United States Constitution.[56] This classification would be described in greater detail seven years later, when new legislation was passed.[57]

### B. *The Communications Act of 1934*

By 1934, sixty percent of the households in the United States had radios.[58] However, Congress realized that a more constitutionally-favorable method of radio communication regulation could be established by utilizing its Commerce Clause powers vested by the United States Constitution.[59] Consequently, President Roosevelt signed the Communications Act of 1934,[60] which created the FCC to replace the FRC.[61] The newly created FCC was granted the power to oversee radio, telephone, and television communications.[62] The Communications Act incorporated several titles for services, but most notably Title I and Title II.[63] The titles represent different

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51. *See* Rhonda Jolly, *Media Ownership and Regulation: A Chronology*, PARLIAMENT AUSTL., http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/Media_ownership/19938 (last visited Apr. 1, 2022).

52. Scott, *supra* note 34.

53. *Id.*

54. *Id.*

55. *See Radio Act of 1912*, *supra* note 33; *Radio Act of 1927*, *supra* note 48.

56. *See Radio Act of 1927*, *supra* note 48.

57. *See id.*; Brian Caterina, *Communications Act of 1934 (1934)*, FIRST AMEND. ENCYCLOPEDIA (2009), http://www.mtsu.edu/first-amendment/article/1044/communications-act-of-1934.

58. Scott, *supra* note 34.

59. *See* Caterina, *supra* note 57; Communications Act of 1934, Pub. L. No. 73-4165, § 1, 48 Stat. 1064, 1064.

60. § 1, 48 Stat. at 1064.

61. *See id.*

62. *See id.;* Caterina, *supra* note 57.

63. *See id.*; Kia Kokalitcheva, *The Most Important Internet Law Was Written in 1934*, VENTUREBEAT (Nov. 13, 2014, 3:00 PM), http://venturebeat.com/2014/11/13/the-most-important-internet-law-was-written-in-1934/.

standards subject to different standards of regulation.[64] For example, Title II services are subject to "common carrier" rules, whereas Title I services are subject to fewer restrictions.[65]

Pursuant to the Communications Act of 1934, a single corporation was limited in the amount of radio station ownership in a given market.[66] Additionally, a single corporation was not allowed to own and operate more than a designated amount of television stations in a given market.[67] These numbers were adjusted as more stations began to emerge.[68] However, the purpose behind the ownership restrictions was to encourage competition and ensure that media sources had the opportunity to spread their forms of communication equally among United States citizens.[69] Additional regulations from the Communications Act that were present created limits on the amount of audience-reach to households a given media company could have.[70] Consistent with First Amendment, the public policy reasoning behind that limitation was to ensure diversity in information dissemination as well as to ensure the information being broadcasted was relevant and equally accessible.[71] These restrictions, although seemingly arbitrary, were created in accordance with constitutional interests in mind.[72] Ultimately, it would be six decades before new laws were created that would regulate communications.[73]

## III. THE RISE IN INTERNET USAGE

The internet began to see commercial use in the late 1980s and early 1990s.[74] "In 1989, [The World became] the first commercial [ISP] on the

64. *See* § 1, 48 Stat. at 1064.

65. *See id.*

66. § 301, 48 Stat. at 1081; *see also* Jonathan A. Obar, *Beyond Cynicism: A Review of the FCC's Reasoning for Modifying the Newspaper/Broadcast Cross-Ownership Rule*, 14 COMM. L. & POL'Y 479, 484–85 (2009).

67. Obar, *supra* note 66, at 485.

68. *Id.* at 487.

69. *See id.* at 487 n.42.

70. *See* § 303(h), 48 Stat. at 1082; Rev. of the Comm'n's Reguls. Governing Television Broad., 10 F.C.C. Rcd. 3524, 3560 (1995).

71. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 624, 662 (1994); *id.* at 686 (Ginsburg, J., concurring in part and dissenting in part).

72. *Id.* at 663 (majority opinion); *id.* at 686 (Ginsburg, J., concurring in part and dissenting in part).

73. *See* H.R. REP. NO. 104-458, *supra* note 27.

74. *Who Invented the Internet — A Full Story*, BROADBAND SEARCH, http://www.broadbandsearch.net/blog/who-invented-the-internet-full-history (last visited Apr. 1, 2022).

planet for the general public."[75] As the use of the internet became more widespread, it became clear that there was a need to appropriately regulate the internet, without giving the government too much power over what information was available and without leading to monopolies who controlled the information that was accessible to citizens.[76] At that time, it was clear that researchers were aware of the concern that government could control the information it generates, which could result in a monopoly over information made available to the public.[77] Although the National Research Council was giving their preliminary findings regarding the regulation of the internet, it was clear that the regulations would have to evolve and adapt as the usage of the internet did as well.[78] Ultimately, the National Research Council's preliminary findings along with several cases helped form the legislation which led to a momentous change in the realm of communications regulation.[79]

### A. *The Rise of the Internet*

In the 1990s, while the internet was still in its infancy, a connection was established using a dial-up connection.[80] A dial-up connection was created by using a telephone line to change how communication was transmitted.[81] Because dial-up was the only mode of internet accessibility for most people, the FCC impliedly received the power to regulate the internet.[82] As the internet gained more users, people began to access it through other methods, like cable modems.[83] Ultimately, the FCC would maintain the power

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75. *History of the World — Our Version*, WORLD, http://theworld.com/world/about/history/our_version (last updated July 31, 2010); *Who Invented the Internet – A Full Story*, *supra* note 74.

76. NAT'L RSCH. COUNCIL, *supra* note 29, at 158. The National Research Council, with regard to First Amendment challenges, stated: "the First Amendment suggests that government should permit no one to exercise monopoly control over the content carried over the network; content determination and editorial control issues should be the province of competing information providers." *Id.*

77. *Id.* at 154.

78. *Id.* at 84.

79. *See* H.R. REP. NO. 104-458, *supra* note 27.

80. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 967 (2005).

81. *Id.*

82. *See id.* at 967, 970.

83. John B. Horrigan, *Part 1. Broadband Adoption in the United States*, PEW RSCH. CTR. (May 28, 2006), http://www.pewresearch.org/internet/2006/05/28/part-1-broadband-adoption-in-the-united-states/.

to create and enforce internet regulations and went on to classify it as information service.[84]

This classification was different from radio, television, and telephone communications, and therefore was subject to different regulations.[85] However, the legislators and the FCC did not predict how important internet access would become and how foundational it would be in society today.[86] Several cases, however, led the charge when it came to how the internet, as an information service, would be regulated.[87] One of the first issues presented with internet regulation was whether websites or Internet Service Providers would be considered publishers or distributors of the information on their websites.[88] The reason this was so important was because it helped to determine how defamation law would be addressed in the new medium of communication.[89]

In *Cubby, Inc. v. CompuServe Inc.*,[90] the United States District Court for the Southern District of New York was tasked with determining whether a website is responsible for statements written in one of its forums.[91] The plaintiff sued the defendant after several defamatory comments were made about the plaintiff on a forum hosted on the defendant's website.[92] The court noted that the defendant-website did not have editorial control over the comments made on the message boards and thus could not be considered a publisher of the defamatory speech.[93] Rather, the defendant acted as a distributor of the speech.[94] In coming to their conclusion, the court drew an

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84. *See Nat'l Cable & Telecomm. Ass'n*, 545 U.S. at 968.

85. *See id.* at 967.

86. *See* Emily Stewart, *Give Everybody the Internet*, VOX (Sept. 10, 2020, 8:30 AM), http://www.vox.com/recode/2020/9/10/21426810/internet-access-covid-19-chattanooga-municipal-broadband-fcc.

87. *See, e.g.*, Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Act of 1934 tit. II (codified as 47 U.S.C. § 230).

88. *See Cubby, Inc.*, 776 F. Supp at 137, 139.

89. *Id.* at.135.

90. 776 F. Supp. 135 (S.D.N.Y. 1991).

91. *Id.* at 137–38.

92. *Id.* at 138.

93. *Id.* at 140.

94. *Id.* Interestingly, the *Cubby* court also referenced the famous First Amendment case, *Smith*, in which the Court struck down an ordinance which imposed liability on the owner of a bookstore for possessing a book with obscene content because it would be unreasonable to require a bookstore owner to know the intimate contents of each book on their bookshelves. *Cubby, Inc.*, 776 F. Supp. at 139–40; Smith v. California, 361 U.S. 147, 152–53 (1959).

interesting comparison between the website and traditional sources of information:

> A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information.[95]

Another significant ruling was made a few years later in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*,[96] where the New York Supreme Court was again tasked with determining whether a website should be held as a publisher of statements made by an anonymous user on an online forum.[97] The Plaintiff-brokerage firm—which ultimately dissolved because it defrauded shareholders resulting in many shareholders being arrested and incarcerated[98]—sued the defendant-website for defamatory comments that were made anonymously on a message board.[99] The plaintiff asserted that the defendant should be held responsible as a publisher because the defendant held itself out as a moderator of the content that was published on its message boards.[100] In fact, the defendant used a software screening program to automatically prescreen board postings for offensive language.[101] The New York court agreed with the plaintiff and granted summary judgment in its favor on the issue of whether the defendant acted as a publisher of speech.[102] In doing so, the court distinguished the facts from *Cubby* by noting that the defendant, in that case, had little to no editorial control over the content of those publications, whereas the defendant, in this case, made decisions as to the content, and such decisions constituted editorial control.[103] This ruling, along with *Cubby*, helped set the stage for the Communication Decency Act, which was incorporated under the Telecommunications Act of 1996.[104]

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95. *Cubby, Inc.*, 776 F. Supp. at 140.
96. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
97. *Id.* at *2.
98. *See* THE WOLF OF WALL STREET (Paramount Pictures 2013).
99. *See Stratton Oakmont, Inc.*, 1995 WL 323710, at *1.
100. *Id.* at *2.
101. *Id.*
102. *Id.* at *1.
103. *Id.* at *4; *see Cubby, Inc.*, 776 F. Supp. at 140.
104. H.R. REP. NO. 104-458, *supra* note 27 (indicating that one of its specific purposes was to overrule *Stratton Oakmont, Inc.,* and any other similar decisions, which have treated providers and users as publishers or speakers of content that is not their own because

## B. *The Telecommunications Act of 1996*

In February 1996, the Communications Act of 1934 was amended by the Telecommunications Act of 1996.[105] Once again, the United States was in the midst of a technological boom as mobile telephones and the internet became household staples.[106] The purpose of the Act was to help stimulate economic growth and technological innovation, increase diversity, and decrease costs.[107] This Act not only created new standards for internet regulations, ISPs, and websites, but it also affected previous regulations for other forms of communication.[108] Furthermore, the Telecommunications Act of 1996 loosened restrictions against media companies on the ability to purchase additional radio and television stations.[109] President Clinton, who signed the bill, stated that the bill "promotes competition as the key to opening new markets and new opportunities."[110] He further stated that the bill would "protect consumers by regulating the remaining monopolies for a time and by providing a roadmap for deregulation in the future."[111] Ultimately, the Act focused largely on updating and establishing classifications for radio, cable, and ISPs.[112]

With those restrictions being lifted, media corporations were able to fast-track the monopolization of radio, television, and telephone communications.[113] Twenty-five years after its passage, media giant iHeartRadio, f/k/a Clear Channel, owns more than 850 radio stations operating

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they have restricted access to objectionable material); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; *see Cubby, Inc.*, 776 F. Supp. at 140.

105. *Telecommunications Act of 1996*, FED. COMMC'N COMM'N, http://www.fcc.gov/general/telecommunications-act-1996 (last updated June 20, 2013); Communications Act of 1934, Pub. L. No. 73-4165, 48 Stat. 1064.

106. *A Brief History of the Telephone: 1990–2000*, PHONES - THEN AND NOW, http://phones-thenandnow.weebly.com/1990-2000.html (last visited Apr. 1, 2022).

107. *See Telecommunications Act of 1996*, *supra* note 105.

108. *See id.*; David McCabe, *Bill Clinton's Telecom Law: Twenty Years Later*, HILL (Feb. 7, 2016, 9:00 AM), http://thehill.com/policy/technology/268459-bill-clintons-telecom-law-twenty-years-later.

109. *See Telecommunications Act of 1996*, *supra* note 105.

110. McCabe, *supra* note 108; *see* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56

111. *Id.*

112. Christopher H. Sterling, *Transformation: The 1996 Act Reshapes Radio*, 58 FED. COMMC'N L.J. 593, 593 (2006); *Telecommunications Act of 1996*, *supra* note 105.

113. Sterling, *supra* note 112, at 593; *Telecommunications Act of 1996*, *supra* note 105; *see also* COMMON CAUSE EDUC. FUND, THE FALLOUT FROM THE TELECOMMUNICATIONS ACT OF 1996: UNINTENDED CONSEQUENCES AND LESSONS LEARNED 5 (Mary Boyle ed., 2005).

in the United States, and Sinclair owns over 190 television stations.[114] Accordingly, critics of the Telecommunications Act of 1996 have argued that the law was a complete failure because it endorsed censorship by creating powerful media companies which allowed for selective information dissemination.[115] Alternatively, proponents of the Telecommunications Act of 1996 argued that monopolization does not necessarily limit market reach because the monopoly owner seeks the widest possible audience reach.[116]

Another major effect of the Telecommunications Act of 1996 was the incorporation of section 230, the Communications Decency Act ("CDA").[117] As opposed to regulating access to the internet as a form of communication, this Act represented the first attempt at regulating access to information on the internet.[118] Additionally, the CDA had the effect of establishing operators of internet services as distributors, rather than publishers of information.[119] This further defined legal culpability, as it related to holding operators liable for speech by users of their services.[120]

Almost immediately after the CDA's enactment, federal courts had several challenges regarding the CDA.[121] In *Reno v. ACLU*,[122] the Supreme

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114. *See Who Owns What*, INSIDE RADIO, http://www.insideradio.com/resources/who_owns_what/ (last visited Apr. 1, 2022); *Number of Radio Stations Owned by iHeartMedia in the United States from 2014 to 2020*, STATISTA (June 4, 2021), http://www.statista.com/statistics/603256/iheartmedia-radio-stations/; Alvin Chang, *Sinclair's Takeover of Local News, in One Striking Map*, VOX (Apr. 6, 2018, 8:20 AM), http://www.vox.com/2018/4/6/17202824/sinclair-tribune-map.

115. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; *see* Ernie Smith, *Not-So-Clear Channel*, TEDIUM (Apr. 21, 2020), http://tedium.co/2020/04/21/clear-channel-911-memorandum-history/. While operating as Clear Channel and following the September 11, 2001 terrorist attacks, iHeartRadio created a blacklist of songs which they strongly discouraged their affiliate stations from playing on the air. *Id.* For instance, the group Rage Against the Machine had their entire catalog of music blacklisted from Clear Channel stations. *Id.* Additionally, several other artists were blacklisted, thought to be for political reasons. *Id.*

116. Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194, 207 (1952); *see also* Steven T. Berry & Joel Waldfogel, *Do Mergers Increase Program Variety? Evidence from Radio Broadcasting*, 116 Q.J. ECON. 1009, 1010 (2001) (concluding that consolidation reduces station entry but increases product variety); *Telecommunications Act of 1996*, *supra* note 105.

117. *See* 47 U.S.C. § 230; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

118. 47 U.S.C. § 230; *see also* Reno v. ACLU, 521 U.S. 844, 845 (1997).

119. *See* 47 U.S.C. § 230.

120. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995).

121. *See Reno*, 521 U.S. at 845; Zeran v. Am. Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997); 47 U.S.C. § 230.

122. 521 U.S. 844 (1997).

Court struck down several portions of the CDA, holding that they improperly infringed upon constitutional rights.[123] In *Zeran v. Am. Online, Inc.*,[124] the federal appellate court held that the CDA granted ISPs immunity from libel suits because they were acting as distributors, rather than publishers of the speech.[125] Therefore, ISPs were effectively granted immunity from such a suit pursuant to the broad power bestowed upon them pursuant to the CDA.[126] Thus, it was becoming increasingly clear that the original regulations set in place for the internet would need to be further defined and adjusted as they became more widely adopted.[127]

## IV. NETWORK NEUTRALITY

One of the first cases dealing with the concept of net neutrality created the ability for the FCC to classify and regulate the internet.[128] In *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*,[129] the Court held that ambiguity in the Communications Act of 1934, as amended by the Telecommunications Act of 1996, could be resolved by the appointed agency whose role was to carry that statute out.[130] This ruling allowed the FCC to fill in gaps and assume authority that was not explicitly vested in both the Communications Act of 1934 and the Telecommunications Act of 1996.[131] Therefore, because broadband internet access was not as accessible during either communications enactment, the FCC and President Obama began the process of reclassifying broadband access over a series of executive orders and various litigations.[132]

### A. *The Open Internet Order*

Prior to 2015, broadband internet was classified as a Title I service under the Communications Act, which treated the internet as an information

123. *Id.* at 844, 879, 882; 47 U.S.C. § 230.
124. 129 F.3d 327 (4th Cir. 1997).
125. *Id.* at 331–32; 47 U.S.C. § 230.
126. *Zeran*, 129 F.3d at 331; 47 U.S.C. § 230.
127. *See* Preserving the Open Internet, 25 F.C.C. Rcd. 17905, 17907 (2010).
128. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83, 1003 (2005).
129. 545 U.S. 967 (2005).
130. *Id.* at 1003; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.
131. *Id.* at 983–84; *Telecommunications Act of 1996*, *supra* note 105.
132. *See* discussion *infra* Section IV.A.

service.[133] Title I standards granted ISPs a greater amount of discretion in how they managed customers' data, the types of websites customers could access, and the bandwidth speeds they provided to their customers.[134] The initial classification was ultimately reevaluated by the FCC with the purpose of ensuring network neutrality by equally distributing data speeds and access to the internet.[135]

The Open Internet Order ("OIO") or "net neutrality" was an order passed by the FCC in 2010 that changed the standard of care that ISPs were held to maintain.[136] However, one of the unintended consequences of the order was that it allowed ISPs to charge more for high-speed access, which ultimately did not create a truly neutral network.[137] In fact, the OIO allowed ISPs to create internet fast lanes, in which data could be prioritized, thus giving unequal access speed to various persons and entities.[138]

In *Comcast Corp. v. FCC*,[139] the United States Court of Appeals was tasked with determining whether the FCC had authority to enforce the OIO and regulate ISPs that had interfered with customers' internet access.[140] The court held that the FCC did not have authority to regulate ISPs because the internet was classified under Title I of the Communications Act.[141] This ruling was quintessential in developing net neutrality principles because, in their explanation, the court laid the foundation for how the FCC could ultimately acquire authority over ISPs.[142] The court reasoned that the FCC could not enforce the net neutrality regulations while the internet was classified as an

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133. Communications Act of 1934, Pub. L. No. 73-4165, 48 Stat. 1064; *see* Rebecca R. Ruiz & Steve Lohr, *F.C.C. Votes to Regulate Internet as Utility*, N.Y. TIMES, Feb. 27, 2015, at B1.

134. Communications Act of 1934, Pub. L. No. 73-4165, 48 Stat. 1064; Ruiz & Lohr, *supra* note 133.

135. *See* Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601, 5603, 5607–08 (2015).

136. *See* Preserving the Open Internet, 25 F.C.C. Rcd. 17905, 17907 (2010). Because a common carrier is held to the highest standard of care, reclassifying the internet had the effect of changing the standard of care ISPs had to give their customers in handling their data and broadband access. *Id.* at 17981.

137. *See* 30 F.C.C. Rcd. at 5607–08. This order enabled ISPs to create internet highways in which they could charge higher prices for faster access—also referred to as an internet "fast lane"—it is comparable to a highway charging a premium for access by a motor vehicle. *Id.*

138. *See id.* at 5607.

139. 600 F.3d 642 (D.C. Cir. 2010).

140. *Id.* at 644.

141. *Id.* at 661; *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

142. *Comcast Corp.*, 600 F.3d at 648.

"information service," subject to Title I regulations.[143] It raised the question of whether the FCC actually has the legal authority to repeal title classifications and if it could be estopped from reclassification because of clear inconsistencies.[144]

In 2014, Verizon challenged the FCC again on the basis that it lacked authority to impose regulations.[145] In *Verizon v. FCC*,[146] the court held that the FCC did not have the authority to hold ISPs to nondiscriminatory policies and common carrier regulations because of the title classification of the internet.[147] This ruling was a landmark case for the FCC because it clearly demonstrated the means in which the FCC could implement net neutrality regulations.[148] *Verizon* ultimately led to the reclassification of the internet once more, since it showed the FCC a new avenue of achieving net neutrality.[149]

In 2015, the FCC released an updated Open Internet Order that would allow equal, uninhibited distribution of data to all internet users in the United States by reclassifying ISPs as a telecommunication service, recognizing the internet as a "common carrier" subject to Title II standards of the Communications Act.[150] True to its name, the Open Internet Order was intended to preserve internet openness.[151] Specifically, the Act stated the following:

> Given that broadband providers—both fixed and mobile—have both the incentives and ability to harm the open Internet, we again conclude that the relatively small incremental burdens imposed by our rules are outweighed by the benefits of preserving the open nature of the Internet, including the continued growth of the virtuous cycle of innovation, consumer demand, and investment. We note, for example, that the disclosure requirements adopted in this order are widely understood, have industry-based definitions, and are commonly used in commercial Service Level Agreements by many broadband providers. Open Internet rules benefit investors, innovators, and end users by providing more certainty to

143. *Id.* at 649.
144. *Id.* at 644, 647.
145. Verizon v. FCC, 740 F.3d 623, 634 (D.C. Cir. 2014).
146. 740 F.3d 623 (D.C. Cir. 2014).
147. *Id.* at 628, 650.
148. *See id.* at 667 (Silberman, J., concurring in part and dissenting in part).
149. *See id.* at 667–68 (Silberman, J., concurring in part and dissenting in part).
150. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601, 5870–71 (2015).
151. Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601, 5603 (2015).

> each regarding broadband providers' behavior and helping to ensure the market is conducive to optimal use of the Internet. Open Internet rules are also critical for ensuring that people living and working in rural areas can take advantage of the substantial benefits that the open Internet has to offer. In minority communities where many individuals' only Internet connection may be through a mobile device, robust open Internet rules help make sure these communities are not negatively impacted by harmful broadband provider conduct. Such rules additionally provide essential safeguards to ensure that the Internet flourishes as a platform for education and research.[152]

In essence, common carrier status means that a service cannot vary the type or quality of access it provides to users.[153] A common carrier is held to the highest legal standard of care in providing a service, maintaining the utmost level of liability for occurrences caused during the administration of their service.[154] For the internet, it basically meant that ISPs could no longer block access to websites and were required to maintain the speed and quality of their services.[155] As it relates to prioritizing certain information over others, the Order addressed this as follows:

> A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization. "Paid prioritization" refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.[156]

This classification had some major implications, especially for protecting consumers.[157] Consumers benefited from the classification because it ensured that their private data was handled with the utmost level of care.[158]

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152. *Id.* at 5643–44.
153. *See id.* at 5644.
154. *See Carrier*, BLACK'S LAW DICTIONARY (11th ed. 2019).
155. 30 F.C.C. Rcd. at 5646.
156. *Id.* at 5607–08.
157. *Id.* at 5605.
158. *Carrier*, *supra* note 154.

In theory, this meant that ISPs could be held responsible for preventable data breaches and censorship violations.[159]

## B. *Challenges to Net Neutrality*

A notable downside to the reclassification was the possibility of creating monopolies and reducing private spending on infrastructure.[160] This potential for monopolization was conceivable by understanding that increased regulations can result in higher barriers of entry to the ISP market, due to the expensive precautions that ISPs would need to take in delivering secure, uninhibited internet access.[161] The maintenance of regulations may also redirect private spending by ISPs away from innovative development of technology and infrastructure.[162] This could be problematic because the ability to maintain efficacy as more internet users come online can be hindered by the lack of innovation and infrastructure to support those users.[163]

In 2017, the Trump administration took control of the White House, which was accompanied by the newly appointed chairman of the FCC.[164] Ajit Pai, who had served on the FCC under the Obama administration, had previously served as general counsel for Verizon, one of the big three ISPs.[165] The FCC began to work on the repeal of net neutrality, asserting that the reclassification of ISPs would create an increase in economic stimulation in the private technology sector, and consequently lower the barriers for entry into the ISP marketplace.[166] In January 2018, the Open Internet Order was officially repealed and ISPs would soon be allowed to return to the way things were before.[167]

Unfortunately, not long after the repeal, the state of California was faced with its first major issue arising out of the newly reestablished Title I

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159. *See Net Neutrality: When Data is Used Against You*, BOOST LABS (Aug. 29, 2018), http://boostlabs.com/blog/net-neutrality-when-data-is-used-against-you/.

160. *See* Restoring Internet Freedom, 33 F.C.C. Rcd. 311, 364, 390–91 (2018).

161. *See id.* at 364.

162. *Id.* at 368–69, 370.

163. *See id.* at 369–70.

164. Christine Wang, *President Trump Designates Ajit Pai as Next FCC Chairman*, CNBC (Jan. 23, 2017, 6:34 PM), http://www.cnbc.com/2017/01/23/president-trump-designates-ajit-pai-as-next-fcc-chairman.html.

165. *See id.*; Jon Brodkin, *There Are Ajit Pai "Verizon Puppet" Jokes That the FCC Doesn't Want You to Read*, ARS TECHNICA (Feb. 7, 2018, 12:42 PM), http://arstechnica.com/tech-policy/2018/02/there-are-ajit-pai-verizon-puppet-jokes-that-the-fcc-doesnt-want-you-to-read/; *Mobile Broadband Internet Providers*, BROADBANDNOW, http://broadbandnow.com/Mobile-Broadband-Providers (last visited Apr. 1, 2022).

166. *See* 33 F.C.C. Rcd. at 450.

167. *Id.* at 491, 578.

classification.[168] On June 29, 2018, the Santa Clara Fire Department ("SCFD") responded to a rapidly spreading fire in Northern California.[169] Unbeknownst to the emergency responders, the repeal of network neutrality had gone into effect weeks prior, leaving them little to no notice regarding the opportunity of data throttling.[170] Data throttling "is a reactive measure employed in communication networks to regulate network traffic and minimize bandwidth congestion."[171]

Verizon was the ISP in charge of providing access to the SCFD at the time of the fires.[172] While coordinating its response, the SCFD noticed that its vehicles were experiencing significant connectivity issues.[173] Apparently, its internet speed had "slowed to a crawl."[174] Emails were quickly sent out to try and resolve this issue, with hours going by before receiving a response from Verizon.[175] The SCFD expressed its need for an internet plan without data caps or throttling and an account manager with Verizon suggested it simply needed to upgrade its subscription.[176] According to the declarations and emails submitted by the SCFD fire chief, "Santa Clara Fire paid Verizon for 'unlimited' data but suffered from heavy throttling until the department paid Verizon more."[177] Fire Chief Anthony Bowden presented his case as to why the lack of network neutrality protections presents challenges to safety.[178] "Bowden said Verizon reduced its data rates to just one two-hundredths of

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168. *See* Gigi Sohn, *Verizon Couldn't Have Restricted Santa Clara County's Internet Service During the Fires Under Net Neutrality*, NBC NEWS (Aug. 24, 2018, 10:35 AM), http://www.nbcnews.com/think/opinion/verizon-couldn-t-have-restricted-santa-clara-county-s-phone-ncna903531.

169. *See Tesla Fire*, CAL. DEPT. FORESTRY AND FIRE PROTECTION (CAL FIRE), http://www.fire.ca.gov/incidents/2018/6/29/tesla-fire/ (last updated Jan. 4, 2019, 9:57 AM).

170. *See* Sohn, *supra* note 168; Colin Dwyer, *Verizon Throttled Firefighters' Data as Mendocino Wildfire Raged, Fire Chief Says*, NPR (Aug. 22, 2018, 4:13 PM), http://www.npr.org/2018/08/22/640815074/verizon-throttled-firefighters-data-as-mendocino-wildfire-raged-fire-chief-says.

171. *About: Bandwidth Throttling*, DBPEDIA, http://dbpedia.org/page/Bandwidth_throttling (last visited Apr. 1, 2022) (recalling that the Open Internet Order in 2015 restricted the ability to throttle internet access).

172. Jon Brodkin, *Verizon Throttled Fire Department's "Unlimited" Data During Calif. Wildfire*, ARS TECHNICA (Aug. 21, 2018, 3:49 PM), http://arstechnica.com/tech-policy/2018/08/verizon-throttled-fire-departments-unlimited-data-during-calif-wildfire/ [hereinafter *Verizon Throttled Fire Department's "Unlimited" Data During Calif. Wildfire*].

173. Dwyer, *supra* note 170.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Verizon Throttled Fire Department's "Unlimited" Data During Calif. Wildfire*, *supra* note 172.

178. Dwyer, *supra* note 170.

what was usual—and did so at a critical time for the emergency response."[179] In its response, Verizon stated the following:

> Regardless of the plan emergency responders choose, we have a practice to remove data speed restrictions when contacted in emergency situations . . . . We have done that many times, including for emergency personnel responding to these tragic fires. In this situation, we should have lifted the speed restriction when our customer reached out to us. This was a customer support mistake. We are reviewing the situation and will fix any issues going forward.[180]

The newly repealed net neutrality protections allowed Verizon to throttle data because of the lack of government regulations.[181] This was one of the first instances in which unforeseen consequences of net neutrality reared its head.[182]

## V. ISSUES WITH CURRENT APPLICATION OF INTERNET REGULATIONS

Within the last three presidential administrations, the United States has seen the internet reclassified three different times.[183] The inconsistent application of regulations has allowed ISPs and media companies to alter how they provide services to their customers.[184]

### A. *Rinse, Repeal, Repeat*

When reclassifying the internet, and other services for that matter, the FCC makes decisions pursuant to an executive appointment.[185] Their decision-making affects all consumers of the internet, but these decisions may

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179. *Id.*

180. *Verizon Throttled Fire Department's "Unlimited" Data During Calif. Wildfire*, *supra* note 172.

181. *See id.* Recall that the emergency response to the sinking of the Titanic was also delayed because coordination was impossible due to the lack of governmental oversight on the medium of communication. Coughlan, *supra* note 36.

182. *See Verizon Throttled Fire Department's "Unlimited" Data During Calif. Wildfire*, *supra* note 172.

183. *See* Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601, 5603 (2015); 47 C.F.R. pts. 1, 8, 20 (2020).

184. *See* 30 F.C.C. Rcd. at 5603.

185. *See* Chris Mills, *Former FCC Chairman Destroys the Anti-Net-Neutrality Argument Point by Point*, BGR (Aug. 1, 2017, 6:06 PM), http://bgr.com/politics/fcc-ajit-pai-tom-wheeler-net-neutrality-arguments/; *Verizon Throttled Fire Department's "Unlimited" Data During Calif. Wildfire*, *supra* note 172; 47 U.S.C. § 151.

not be representative of the betterment of the internet; rather, they may be made pursuant to political party objectives.[186] Additionally, because the FCC is appointed by the executive branch, the possibility that lobbying or cronyism influences the manner in which citizens are granted access to a fundamental part of our functioning society, can create issues.[187] Because the FCC is making decisions that determine the way people get information, express their opinion, conduct their work, and help society function as a whole, some argue that they should be subject to constitutional restrictions and consequently should make ISPs subject to state action.[188]

Proponents of Title I classification may resort to comments on the FCC's website to support the idea that there is no clear majority opinion on the title classifications.[189] In the past decade, the internet has been reclassified by the FCC two times, under two different FCC Chairmen, serving politically distinct administrations.[190] In 2014 and 2017, the FCC digitally opened the floor for commentary regarding the decision to reclassify the internet by encouraging citizens to give feedback on their website.[191] Celebrities, talk show personalities, and other influencers made a push for citizens to get

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186. *See What We Do*, *supra* note 29; PAULA WILLIAMS, HOW THE INTERNET IS BEING USED BY POLITICAL ORGANIZATIONS: PROMISES, PROBLEMS AND POINTERS i (Dep't Parliamentary Libr. 2012), http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/DR005/upload_binary/DR005.pdf;fileType=application/pdf#search=%221990s%201998%22.

187. *See* Mills, *supra* note 185. Tom Wheeler was a president and CEO of two major ISP related organizations, in addition to serving as the FCC Chairmen during the Obama Administration. *Id.*; *Biography of Former FCC Chairman Tom Wheeler*, FED. COMMC'NS COMM'N, http://www.fcc.gov/biography-former-fcc-chairman-tom-wheeler (last updated Jan. 20, 2017); Common Cause, *New Report: How Lobbying and Political Influence by Broadband Gatekeepers Has Shaped the Digital Divide*, YUBANET (July 19, 2021), http://yubanet.com/usa/new-report-how-lobbying-and-political-influence-by-broadband-gatekeepers-has-shaped-the-digital-divide/.

188. *See* Eric Sirota, *Can the First Amendment Save Net Neutrality?*, 70 BAYLOR L. REV. 781, 784 (2017).

189. *See* Bridget C.E. Dooling & Michael Livermore, *Bot-Generated Comments on Government Proposals Could Be Useful Someday*, SLATE (June 21, 2021, 11:00 AM), http://slate.com/technology/2021/06/bot-generated-comments-on-regulatory-proposals-could-be-useful.html.

190. *See, e.g.*, Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601, 5614 (2015); 47 C.F.R. pts. 1, 8, 20.

191. *See* Jacob Kastrenakes, *FCC Received a Total of 3.7 Million Comments on Net Neutrality*, VERGE (Sept. 16, 2014, 6:06 PM), http://www.theverge.com/2014/9/16/6257887/fcc-net-neutrality-3-7-million-comments-made; Paul Hitlin et al., *Public Comments to the Federal Communications Commission About Net Neutrality Contain Many Inaccuracies and Duplicates*, PEW RSCH. CTR. 1, 2 (Nov. 29, 2017), http://www.pewresearch.org/internet/2017/11/29/public-comments-to-the-federal-communications-commission-about-net-neutrality-contain-many-inaccuracies-and-duplicates/.

involved and express their opinions on the matter.[192] However, the FCC was free to ignore the comments and had no obligation to take them into consideration.[193]

In 2014, the FCC's website crashed due to the unexpected traffic volume, with an overwhelming number of citizens advocating for stricter net neutrality regulations.[194] In 2017, the FCC sought to repeal the regulations that were established at the end of 2014.[195] Again, the FCC welcomed comments from citizens discussing their opinions surrounding the classification.[196] This time, there was a pretty comparable number of proponents and opponents of the choice to return to Title II regulations.[197] However, some internet users claimed that the FCC's comment page may have been the victim of some type of spambot attack.[198] One user detected abnormalities with language processing techniques that pointed to suspicious consistencies like duplicate comments and similarities in verbiage.[199] Users also asserted that spambot campaigns were used to generate millions of pro-Title II submissions in an attempt to create a false illusion of repeal support.[200]

Recently, the importance of having adequate, uninhibited access to the internet has become very apparent.[201] Throughout the coronavirus pandemic,

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192. *See* Soraya Nadia McDonald, *John Oliver's Net Neutrality Rant May Have Caused FCC Site Crash*, WASH. POST (June 4, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/06/04/john-olivers-net-neutrality-rant-may-have-caused-fcc-site-crash/.

193. *See* Jacob Kastrenakes, *FCC Ignored Your Net Neutrality Comment, Unless You Made a 'Serious' Legal Argument*, VERGE (Nov. 22, 2017, 10:58 AM), http://www.theverge.com/2017/11/22/16689838/fcc-net-neutrality-comments-were-largely-ignored [hereinafter *FCC Ignored Your Net Neutrality Comment*].

194. McDonald, *supra* note 192; Kastrenakes, *supra* note 191.

195. *See* DANA A. SCHERER, CONG. RSCH. SERV., R45338, FCC MEDIA OWNERSHIP RULES 2 (2021).

196. Hitlin et al., *supra* note 191, at 2.

197. *See id.* at 6.

198. *See* Dooling & Livermore, *supra* note 189; *What is a Spam Bot? How Spam Comments and Spam Messages Spread*, CLOUDFLARE, http://www.cloudflare.com/learning/bots/what-is-a-spambot/ (last visited Apr. 1, 2022). A spambot attack is essentially a campaign by one or more users to cause a mass influx of comments on an internet medium. *Id.*

199. Jeff Kao, *More Than a Million Pro-Repeal Net Neutrality Comments Were Likely Faked*, HACKER NOON, http://hackernoon.com/more-than-a-million-pro-repeal-net-neutrality-comments-were-likely-faked-e9f0e3ed36a6 (last updated Nov. 29, 2017).

200. *See id.*

201. *See* Emily A. Vogels et al., *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, PEW RSCH. CTR. 1, 2–3, 7 (Apr. 30, 2020), http://www.pewresearch.org/internet/wp-

our country has witnessed this first-hand.[202] Whether the internet was required to work or attend school, it has become absolutely essential in how our country functions.[203] Accordingly, the necessity of regulating the internet as a utility, rather than its current classification, should be one of the country's largest concerns.[204] The internet has become so ingrained in our daily lives that to function without it seems unfathomable.[205] In fact, school districts that had less access to the internet had to turn toward other entities in order to provide access to their students.[206] Specifically, some governments and organizations have worked together to provide students with tablets, computers, and internet access, so that these students could be accommodated in the age of online education.[207] If nothing else, this past year has shown the citizens of the world how essential the internet is to provide information, and accordingly, should be treated as a public utility.[208]

## VI. ALTERNATIVES TO CURRENT REGULATIONS

### A. *Comparisons to Other Countries*

If the United States wants to align consistently with the founding fathers, it is in society's best interest to ensure the highest level of freedom on the internet.[209] However, internet freedom does not simply mean that nothing

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content/uploads/sites/9/2020/04/PI_2020.04.30_COVID-internet_REPORT.pdf ("Americans were also asked how important the internet has been for them during the coronavirus pandemic. Fully 87% of adults say the internet has been at least important for them personally during the coronavirus outbreak, including 53% who describe it as essential.").

202. *See id.* at 3–5.

203. *See id.*

204. *See* Jack J. Barry, *COVID-19 Exposes Why Access to the Internet Is a Human Right*, OPEN GLOB. RTS. (May 26, 2020), http://www.openglobalrights.org/covid-19-exposes-why-access-to-internet-is-human-right/.

205. *See* Vogels et al., *supra* note 201, at 2–3.

206. *See The Impact of COVID-19 on Student Equity and Inclusion: Supporting Vulnerable Students During School Closures and School Re-Openings*, OECD (Nov. 19, 2020), http://www.oecd.org/coronavirus/policy-responses/the-impact-of-covid-19-on-student-equity-and-inclusion-supporting-vulnerable-students-during-school-closures-and-school-re-openings-d593b5c8/ [hereinafter *COVID-19 and Student Equity*].

207. *Id.*; *see also* James K. Willcox, *COVID-19 Relief Package Will Help Families in Need of Internet Access*, CONSUMER REPS., http://www.consumerreports.org/broadband-access/covid-19-relief-package-will-help-families-in-need-of-internet-access/ (last updated Dec. 28, 2020).

208. *See* Barry, *supra* note 204.

209. *See The Founding Fathers*, NAT'L GEOGRAPHIC (Jan. 24, 2020), http://www.nationalgeographic.org/article/founding-fathers/.

is censored and anything goes.[210] Internet freedom stands for the idea that information should be easily accessible to all citizens without giving preference to information that may be slanted or biased one way or another.[211]

Iceland is an example of a country that has been recognized for having high levels of internet freedom.[212] Iceland is a country that explicitly values citizens' rights to their own personal data, which is recognized through legislation.[213] Consistent with the free flow of information are Iceland's whistleblower protection laws, which grant immunity to those who uncover wrongdoings conducted by government officials.[214] Furthermore, "[t]here are no government-imposed restrictions on connectivity in Iceland, and the government does not exercise technical or legal control over the . . . infrastructure."[215]

## B. *Ideas for the Future*

Ultimately, the manner in which the internet is regulated needs a complete overhaul.[216] For starters, the market share held by any single ISP should be limited.[217] In order to maintain the freest flow of information, our internet access should be available from several different entities.[218] As it stands, the current state of accessibility is generally limited to two or three different ISPs, with a few other subsidiaries of those ISPs posing as separate entities.[219] However, these subsidiaries function by using the same infrastructure as the main ISPs, and therefore are limited to providing services

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210. *See* Smith v. California, 361 U.S. 147, 152 (1959) (exemplifying obscene speech as one of the several categories of speech that is not protected by the constitutional guarantees of freedom of speech and of the press).

211. *See* Preserving the Open Internet, 25 F.C.C. Rcd. 17905,17941–42 (2015).

212. *Freedom on the Net 2020: Iceland*, FREEDOM HOUSE, http://freedomhouse.org/country/iceland/freedom-net/2020 (last visited Apr. 1, 2022).

213. *Id.*

214. *Id.*

215. *Id.*

216. *See* Peter Christiansen, *Why Can I Only Get a Few Internet Providers?*, HIGHSPEEDINTERNET.COM (Nov. 11, 2021), http://www.highspeedinternet.com/resources/why-can-i-only-get-a-few-internet-providers.

217. *See id.*; VALERIE C. BRANNON, CONG. RSCH. SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT 32–33 (2019).

218. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994); Christiansen, *supra* note 216.

219. *See* Christiansen, *supra* note 216; Ingrid Burrington & Commentary, *Tracing the Byzantine Maze of the Companies that Have Come to Control America's Internet*, QUARTZ (Oct. 5, 2016), http://qz.com/790210/tracing-the-byzantine-maze-of-the-companies-that-have-come-to-control-americas-internet/.

by the big three.[220] Further, our country should encourage competition by restricting the amount of market share, as was done with radio and television, prior to the adoption of the Telecommunications Act of 1996.[221]

There are important implications for changing the current state of internet regulation.[222] As it stands, social media companies, as well as many other internet websites, are given broad latitude in how they regulate speech on their platforms.[223] This is done pursuant to section 230, the Communications Decency Act of the Telecommunications Act of 1996.[224] Section 230 allows websites to regulate speech and posts on their websites with complete immunity.[225]

As discussed above, the websites that allow posts on their websites are not held to be publishers of that speech—rather, they are held to be distributors of the speech.[226] This is significant because it brings up the issue of allowing private entities to regulate speech and the dissemination of information reflecting conflicting viewpoints.[227] However, there is a lot of debate and differing viewpoints that suggest social media companies should be subject to constitutional restrictions for censoring speech on their platforms.[228] The arguments for section 230 state that a private company should have the ability to restrict users from its platform however it sees fit.[229] The problem with this thought process is that the restrictions may result in the controlled dissemination of speech, sometimes reflecting only one side of the story.[230] The arguments against section 230 protections largely cite to this problem.[231]

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220. *See* Christiansen, *supra* note 216.

221. *See* Rev. of the Comm'n's Reguls. Governing Television Broad., *supra* note 70; Telecommunications Act of 1996, Pub. L. No. 104-104, § 230, 110 Stat. 56, 137.

222. *See* Wesley D. Lewis, *Trends in ISP and Platform Liability: CDA Section 230 and DMCA Safe Harbors*, HAYNES BOONE 2, 4 (Aug. 18, 2020), http://www.haynesboone.com/-/media/project/haynesboone/haynesboone/pdfs/attorney-publications/2020/cda-section-230-and-dmca-safe-harbors.pdf.

223. Jessica Guynn, *Donald Trump and Joe Biden vs. Facebook and Twitter: Why Section 230 Could Get Repealed in 2021*, USA TODAY, http://www.usatoday.com/story/tech/2021/01/04/trump-biden-pelosi-section-230-repeal-facebook-twitter-google/4132529001/ (last updated Jan. 5, 2021, 11:10 PM).

224. *See* Lewis, *supra* note 222, at 1; § 230, 110 Stat. at 137.

225. *See* 47 U.S.C. § 230(c)(2).

226. *See* Lewis, *supra* note 222, at 1.

227. *Id.* at 2.

228. *Id.*

229. *See* discussion *supra* Section III.B; 47 U.S.C. § 230(c)(2).

230. *See* Lewis, *supra* note 222, at 2; Torsten Bell, *The Truth Is Out There, but It's Increasingly Hard to Distinguish from Lies*, GUARDIAN (July 4, 2021, 5:00 PM), http://www.theguardian.com/commentisfree/2021/jul/04/the-truth-is-out-there-but-it-is-increasingly-hard-to-distinguish-from-lies.

231. *See* Lewis, *supra* note 222, at 2.

Allowing large corporations with dominant market shares, and consequently large influence over society, to dictate the information being given to its users creates platforms where a single viewpoint or ideology is represented, and consequently creates echo chambers for persons who do not get to see alternative arguments.[232]

## VII. CONCLUSION

Recently, Justice Clarence Thomas filed a concurring opinion that discussed the legal difficulties in applying old doctrines to new technology and digital platforms.[233] In the lower court, the Second Circuit held that the comment threads on Twitter were a public forum in justifying its holding.[234] But many argued that if Twitter comment threads—which make up the majority of the platform—are held to be public forums, they should not be treated as such.[235] The Court has previously held, as a matter of law, that a public forum is subject to the highest judicial scrutiny under the First Amendment.[236] As such, the government may not regulate speech in a public forum, unless it meets judicial strict scrutiny.[237] However, social media platforms, like Twitter, are given immunity from civil lawsuits for regulating speech on their platform, yet they are held to be a public forum in the eyes of the Second Circuit.[238] In addressing this, Justice Thomas stated the following:

> Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.[239]

With that in mind, it is easy to see the inconsistency in allowing platforms, such as Twitter, to be free to regulate speech as they please without

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232. *See* Bell, *supra* note 230.
233. *See* Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1221 (2021).
234. *Id.* at 1221.
235. *Id.* at 1224.
236. *Id.*
237. *Id.*
238. *See* 47 U.S.C. § 230(c)(2)(A); *Knight First Amend. Inst.*, 141 S. Ct. at 1221, 1226.
239. *Knight First Amend. Inst.*, 141 S. Ct. at 1221.

facing liability, but at the same time treating the platform as a public forum that is traditionally subject to the strictest form of judicial scrutiny when regulating speech.[240] Many critics have argued that the enforcement of the Communications Decency Act was the product of legislative cronyismand allowing it to continue will undoubtedly lead to more interference with the First Amendment rights of individuals who should not be subject to this in the first place.[241]

Internet regulations, as well as communication regulations as a whole, need to be updated.[242] Failing to do so would delegitimize the legislature because the regulations would be easily alterable and constantly subject to suit the executive office's objectives.[243] In some cases, this can be a good thing, but it leaves it susceptible to cronyism as well.[244] We have seen the importance of the internet firsthand throughout the pandemic.[245] Accordingly, it should be regulated by an updated law that emphasizes the importance the internet has in our lives.[246] This could be done by repealing the Telecommunications Act of 1996 and amending the Communications Act of 1934 to reflect how we classify various mediums of communication and the protections we give media companies.[247] Specifically, the law should hold all forms of communication up to common carriage standards.[248] Additionally, new regulatory legislation should hold ISPs as having an agency relationship with the government so that they are held to upholding constitutional rights.[249] Further, it should reevaluate whether media companies should be given complete immunity in censoring their platforms because some of these websites have proven themselves to be integral in how citizens receive

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240. David McGee, *What Constitutes a Public Forum on Social Media?*, 43 HUM. RTS., no. 4, 2018, at 10.

241. 47 U.S.C. § 230; *see When Does Twitter Blocking Violate the First Amendment?*, NAT'L CONST. CTR. (Aug. 1, 2019), http://constitutioncenter.org/interactive-constitution/podcast/when-does-twitter-blocking-violate-the-first-amendment.

242. *See* Ben Sperry, *Conservatism and the Section 230 Debate: Applying First Principles*, TRUTH ON MKT. (Sept. 30, 2020), http://truthonthemarket.com/tag/communications-decency-act-section-230/; Christiansen, *supra* note 216.

243. *See* Sperry, *supra* note 242.

244. *See, e.g.*, NAT'L CONST. CTR., *supra* note 241.

245. *See* Vogels et al., *supra* note 201.

246. *See id.*; *United States: Freedom in the World 2021 Country Report*, *supra* note 10.

247. *See* Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601, 5723 (2015); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; Communications Act of 1934, Pub. L. No. 73-4165, 48 Stat. 1064.

248. *See* Preserving the Open Internet, 25 F.C.C. Rcd. 17905, 18067 (2010).

249. *See* BRANNON, *supra* note 217, at 25.

information, and thus creates echo chambers of information where people do not have an opportunity to receive diverse information.[250]

250. Bell, *supra* note 230; *see also supra* Section VI.B.

# SHOULD "MORPHED" CHILD PORNOGRAPHY FALL UNDER THE PROTECTION OF THE FIRST AMENDMENT'S FREE SPEECH CLAUSE?

CARLIETTE SIERRALTA*



* Carliette Sierralta earned her bachelor's degree in International Relations at the University of South Florida. She is currently a Juris Doctor Candidate for May 2022 at Nova Southeastern University, Shepard Broad College of Law. Carliette would first like to thank her fiancé, Kristian Hernandez, who has supported and encouraged her throughout law school. Additionally, Carliette would like to acknowledge her friends and mentors, Marissa Remedi and Tracy Garcia, for their continuing guidance and advice. Carliette is grateful for her mother, and father, Benigno W. Sierralta, who although no longer with us, inspired Carliette to follow in his footsteps and attend law school. Finally, Carliette would like to thank the Editorial Board and her fellow colleagues of *Nova Law Review*, Volume 46, for all their hard work and dedication to her article.

## I. INTRODUCTION

It is well established that the First Amendment's free speech clause does not protect the production or exchange of *real* child pornography—material that exhibits the *real* abuse or sexual conduct of children.[1] However, virtual child pornography, where no real children are required for its production, is still a widely contended topic among courts.[2] Although seemingly simple, this subject walks a fine line between the protection of free speech and the public interest in protecting children from abuse.[3] With the overwhelming advancements in editing and digital technology, there have undoubtedly been new obstacles for lawmakers and prosecutors in terms of creating laws to control this issue.[4] These advancements have made it difficult to distinguish between what images contain real children and what images contain, so called, *fake* children or some other hybrid form.[5]

There are three general categories of virtual child pornography.[6] The first is computer-generated child pornography, which is made without the use of real children or images of real children.[7] Therefore, the children depicted in these sorts of films are completely fictional and fabricated.[8] The second is child pornography that is created with the use of youthful-looking adults who role play as children.[9] Both are considered legal, as the first does not involve the harming or use of real children and the second involves films or images between consenting adults.[10] The focus of this Comment is on the third category—morphed child pornography—a subject that falls in the middle of what is considered real child pornography and completely computer-generated child pornography.[11] Morphing is developed by using actual photos or videos

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1. Shepard Liu, Ashcroft, *Virtual Child Pornography and First Amendment Jurisprudence*, 11 U.C. DAVIS J. JUV. L. & POL'Y 1, 2 (2007); U.S. CONST. amend. I.

2. Liu, *supra* note 1, at 3; United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).

3. Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002).

4. David L. Hudson Jr., *Virtual Child Pornography*, FREEDOM F. INST., http://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/internet-first-amendment/virtual-child-pornography/ (last updated Sept. 18, 2017).

5. *Id.*

6. Liu, *supra* note 1, at 2.

7. *Id.* at 3.

8. *See id.*

9. *Id.* at 2.

10. Virginia F. Milstead, Note, Ashcroft v. Free Speech Coalition: *How Can Virtual Child Pornography Be Banned Under the First Amendment?*, 31 PEPP. L. REV. 825, 834–35 (2004).

11. Liu, *supra* note 1, at 2; United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).

of children, which can then be digitally manipulated to create an entirely different sexualized image.[12] For example, this can be accomplished by superimposing the faces of children onto the bodies of adults engaging in sexual conduct.[13] With these methods, there are many ways that a child predator could use superimpositions to create child porn.[14]

Circuit courts have disagreed on whether morphed child pornography should be categorized as a protected speech, since it seems to be the middle ground between what has historically been unprotected and what is still considered protected under the First Amendment.[15] In February 2020, *United States v. Mecham*[16] brought the issue before the Fifth Circuit.[17] The Fifth Circuit acknowledged the arguments on both sides, but ultimately joined the Second and Sixth Circuits in its decision to exclude morphing from First Amendment protection.[18] More importantly, the court in *Mecham* dissected and rejected the main argument brought forth in the Eighth Circuit, which supports that morphing should be categorized as protected speech.[19] Further, the Supreme Court decided not to review the decision in *United States v. Mecham*.[20] Thus, the Supreme Court has failed to guide courts on how to address this issue uniformly.[21]

This Comment will discuss the legislative history of child pornography, the different cases and arguments surrounding the current circuit split, and the newest case to add an opinion on the issue of morphed child pornography.[22] Ultimately, this Comment will argue that morphed child pornography should not fall within the protections of the First Amendment and that the absence of clear precedent on this issue, along with conflicting arguments across circuits calls for judicial review at the Supreme Court level.[23]

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12. Liu, *supra* note 1, at 3.
13. *Mecham*, 950 F.3d at 260.
14. *See id.*
15. *See id.* at 265.
16. 950 F.3d 257 (5th Cir. 2020).
17. *Id.* at 257.
18. *Id.* at 265.
19. *See id.* at 266–67.
20. 141 S. Ct. 139 (2020) (*cert. denied)* (referring to United States v. Mecham, 950 F.3d 257 (5th Cir. 2020)).
21. *See id.*
22. *See infra* Parts III, IV, V.
23. *See infra* Part VI.

## II. THE SOCIETAL IMPACT OF VIRTUAL CHILD PORNOGRAPHY

The sexual abuse and exploitation of children through child pornography has always been a significant national concern.[24] Unfortunately, the internet has created new avenues for child abusers to commit crimes behind the comfort of their screens.[25] According to the United States Sentencing Commission, more than half of all internet child pornography content is of infants and toddlers.[26] Thus, not only does internet child pornography exploit the weakest members of our society, but it also creates a forum in which abuse is permanent and can be further circulated.[27] Children who fall victim to any form of child pornography on the internet experience extreme emotional and psychological harm.[28] Child pornography has shown to be a new form of abuse since child molesters no longer have to physically abuse their victims.[29] Instead, they can easily manipulate child victims into performing acts or posing for a camera, which can later be used for sexual purposes.[30] Victims of this abuse often suffer from anxiety, depression, isolation, and may even develop their own sexual behavioral issues.[31] For obvious reasons, the most negative outcomes appear in individuals who have experienced abuse from a father figure or have experienced abuse for a long duration of time.[32]

Similarly, victims whose images have circulated the web experience deep shame and embarrassment at the thought that someone will recognize them from images of their abuse.[33] As a result, victims of child pornography are forced to relive their abuse over and over again.[34] Clinical psychologists note that many victims struggle to identify a time when their abuse ended and cannot find closure, even as adults.[35]

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24. New York v. Ferber, 458 U.S. 747, 757 (1982).

25. RICHARD WORTLEY & STEPHEN SMALLBONE, INTERNET CHILD PORNOGRAPHY: CAUSES, INVESTIGATIONS, AND PREVENTION 2 (Graeme R. Newman ed., 2012).

26. U.S. SENTENCING COMM'N, FEDERAL SENTENCING OF CHILD PORNOGRAPHY NON-PRODUCTION SENTENCES 4 (2021), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210629_Non-Production-CP.pdf; Emily Riley, *Internet Blamed for Increase in Child Porn*, CRIME REP. (June 29, 2021), http://thecrimereport.org/2021/06/29/internet-blamed-for-increase-in-child-porn/.

27. Sarah Sternberg, Note, *The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antitheses*, 69 FORDHAM L. REV. 2783, 2785 (2001).

28. *Id.*

29. WORTLEY & SMALLBONE, *supra* note 25, at 75.

30. *Id.*

31. *Id.* at 72.

32. *Id.* at 73.

33. *Id.* at 77.

34. *See* WORTLEY & SMALLBONE, *supra* note 25, at 77.

35. *See id.* at 77.

Aside from the various harms imposed on victims, child pornography acts as a tool for child molesters to seduce children into normalizing sexual activity with adults.[36] Child molesters may use materials to persuade children into participating in creating sexual images which can be utilized to lure more child victims.[37] Child pornography viewers may also find support and encouragement in groups or forums that engage in the same content; forty-three percent of offenders have participated in some sort of an internet child pornography community.[38] The effects that child pornography has on its viewers are equally harmful.[39] When enacting child pornography legislation, Congress acknowledged that pedophiles use this content to self-gratify and stimulate their sexual appetites.[40]

Similarly, almost all pedophiles collect some sort of child pornography in an attempt to fulfill their fantasies or to collect ideas to perpetuate abuse.[41] In 2019, forty-eight percent of child pornography offenders, who were not charged with its production, committed some sort of "aggravating sexual conduct" before, or at the same time, as their offense.[42] These statistics comparatively increased from studies conducted in 2010, showing that there has been a steady incline in abrasive conduct by child pornographic viewers.[43] Experts have described child pornography as an addiction for pedophiles.[44] The addiction eventually intensifies and requires the individual to search for more graphic and explicit content to continue to achieve arousal.[45] Repeated exposure to the same stimuli will eventually require new content for the viewer's stimulation.[46] Thus, the user becomes desensitized to the content, no matter how extreme.[47] Additionally, child pornography viewers often experience a worsening of their personal relationships and problems.[48] One-third of people arrested for child pornography offenses between 2001 and 2006 were actively living with their significant other and experienced such issues.[49]

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36. Sternberg, *supra* note 27, at 2786.
37. *Id.*
38. Riley, *supra* note 26.
39. WORTLEY & SMALLBONE, *supra* note 25, at 82.
40. Sternberg, *supra* note 27, at 2786 (citing S REP. NO. 104-358, at 12 (1996)).
41. *Id.* (citing S REP. NO. 104-358, at 13).
42. U.S. SENTENCING COMM'N, *supra* note 26, at 6; Riley, *supra* note 26.
43. *See* U.S. SENTENCING COMM'N, *supra* note 26, at 6; Riley, *supra* note 26.
44. Sternberg, *supra* note 27, at 2786.
45. *Id.* at 2786–87.
46. WORTLEY & SMALLBONE, *supra* note 25, at 83.
47. Sternberg, *supra* note 27, at 2787.
48. WORTLEY & SMALLBONE, *supra* note 25, at 82.
49. *Id.*

The profitability and demand for different types of child pornography are what drive the market, a market that likely holds billions of dollars.[50] The fact that the distribution of this content is international poses an enormous challenge for its regulation and control.[51] For example, an image can be created in Asia, held in a server in Europe, and be accessed by an offender in North America.[52] Most of the time, child sexual abuse material is being investigated in the present jurisdiction where it is occurring.[53] However, when those materials cross jurisdictional boundaries, it becomes difficult for police departments and investigators to share that information.[54] Additionally, different countries have different laws pertaining to child pornography and its derivatives.[55] For example, Australia and the European Union have already gone as far as to outlaw all virtual child pornography, *even* fully computer-generated material.[56] On the other hand, in the United States, certain types of virtual child pornography are still constitutionally protected.[57] Prices for this content in the industry rarely decrease and because the chances of getting caught are less likely on the internet, child pornographic producers have no interest in stopping.[58]

Computers, cellphones, and other technological advancements have allowed for the expansion of child pornographic material.[59] Morphing software enables individuals to combine real images of children with pornographic images of adults.[60] Thus, the reality is that real children are no longer needed to produce child pornography.[61] In fact, because most child pornography is produced by family members or individuals who are close to the children, many victims would not even be aware that they are being used in pornographic contents.[62] Consequently, when the digital age changes the way child pornography is made, child pornography laws deserve a second look.[63]

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50. Sternberg, *supra* note 27, at 2787.
51. WORTLEY & SMALLBONE, *supra* note 25, at 2.
52. *See id.*
53. *See id.*
54. *See id.*
55. *Id.*
56. WORTLEY & SMALLBONE, *supra* note 25, at 5.
57. Milstead, *supra* note 10, at 834–35.
58. *See* Sternberg, *supra* note 27, at 2787.
59. Brian G. Slocum, *Virtual Child Pornography: Does It Mean the End of the Child Pornography Exception to the First Amendment?*, 14 ALB. L.J. SCI. & TECH. 637, 641 (2004).
60. Sternberg, *supra* note 27, at 2788.
61. *Id.* at 2788–89.
62. WORTLEY & SMALLBONE, *supra* note 25, at 72, 74.
63. Sternberg, *supra* note 27, at 2789.

## III. HISTORY OF REGULATIONS SURROUNDING REAL AND VIRTUAL CHILD PORNOGRAPHY IN THE UNITED STATES

Although the sexual abuse and exploitation of children are as old as humanity itself, internet child pornography is a relatively new phenomenon.[64] The miniature boom of child pornography occurred around the 1960s, as obscenity laws in other countries loosened.[65] For the first time, the United States set forth regulations to outlaw child pornography and to prohibit its importation.[66] By the 1980s, the internet had exponentially increased the amount of child pornography that was being produced and traded.[67] However, virtual child pornography, particularly morphed content, is what has become known as the legal gray area of this topic.[68] The only piece of legislation that sought to regulate virtual child pornography in the United States was introduced in 1996, as the Child Pornography Prevention Act ("CPPA"), which was later overturned in 2002.[69]

### A. *The Miller Standard and its Application to Child Pornography*

In 1973, *Miller v. California*[70] created the current standard of review for obscenity.[71] Although not directly relating to restricting child pornography, *Miller* made an important distinction on what type of pornography is considered obscene.[72] Under the *Miller* test, the guidelines to determine whether material is obscene must be:

> (a) [W]hether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken

64. WORTLEY & SMALLBONE, *supra* note 25, at 1.
65. *Id.*
66. *Id.*
67. *Id.* at 2.
68. United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).
69. Child Pornography Prevention Act (CPPA) of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009-26, *invalidated by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).
70. 413 U.S. 15 (1973).
71. *Id.* at 24.
72. *Id.* at 36–37.

> as a whole, lacks serious literary, artistic, political, or scientific value.[73]

Although this test would certainly include some sort of child pornography, by nature it would not include all of them.[74] It would be even less likely that it includes child pornography that falls in the gray area of what is considered real and fake.[75] Because the Court in *Miller* failed to categorize child pornography as inherently obscene, future decisions were bound to be made to specifically attack this issue.[76]

### B. New York v. Ferber: *Child Pornography as a Compelling State Interest*

In 1982, *New York v. Ferber*[77] established that child pornography is not protected by the First Amendment's guarantee of free expression.[78] In addition, the Supreme Court clarified that the government has a compelling interest in prosecuting individuals who partake in the creation of child pornography, as the sexual exploitation and abuse of children has always been a national concern.[79] Ultimately, the standards set forth in *Miller* were irrelevant to the issues of child pornography, as *Miller* only established that adult pornography was protected under the First Amendment, so long as the materials were not obscene.[80] Generally, *Miller* defined obscenity as images lacking "serious literary, artistic, political, or scientific value."[81] Ultimately, *Ferber* determined that the *Miller* case could not be used to examine the material of children engaging in sexual conduct and therefore, child pornography did not require proof of obscenity.[82]

In *Ferber*, the defendant sold two sexually explicit films to an undercover police officer.[83] The films depicted young boys engaging in sexual acts.[84] Under New York law, "[a] person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he

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73. *Id.* at 24.
74. *See id.* at 27.
75. *Miller*, 413 U.S. at 27.
76. United States v. Mecham, 950 F.3d 257, 261–62 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020); *see also Miller*, 413 U.S. at 16.
77. 458 U.S. 747 (1982).
78. *See id.* at 764.
79. *See id.* at 760–61.
80. *Id.* at 761; *see Miller*, 413 U.S. at 24.
81. *Miller*, 413 U.S. at 24.
82. *Ferber*, 458 U.S. at 761; *see Miller*, 413 U.S. at 24.
83. *Ferber*, 458 U.S. at 751–52.
84. *Id.* at 752.

produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age."[85] Therefore, the defendant was convicted at the trial level under the New York statute.[86] However, because the statute did not require the obscenity standard set forth by *Miller*, the defendant claimed the statute was overly broad and appealed his convictions.[87] The Appellate Division of the New York Supreme Court affirmed the trial court's convictions.[88] However, the New York Court of Appeals agreed with the defendant and reversed the convictions on the grounds that the statute violated the First Amendment.[89] The Supreme Court of the United States granted the state's petition for certiorari.[90]

The Supreme Court presented five compelling government interests that justified the ban of non-obscene child pornography.[91] First, the Court emphasized the importance of safeguarding the "physical and psychological well-being" of children.[92] Even when laws have shown the possibility of imposing on some area of constitutionally protected rights, the Court has sustained legislation that has protected youth.[93] Second, child pornographic films and photographs impose direct and continuous harm on the children involved.[94] Digital pornographic materials allow for a permanent record of a child's involvement that negatively impacts the child's life with every circulation.[95] Third, there is an economic motive and a continuous demand for the production of such films.[96] Thus, allowing any remnant of protections for child pornography would essentially be the Court's promotion of illegal activity.[97] In the same manner, the Court suggested that the constitutional freedom of speech and freedom of press does not excuse the use of speech and writing that directly contributes to crime and illegality.[98] Fourth, cases where depictions of children engaging in sexual conduct are used for scientific or educational work are unlikely.[99] Therefore, there is little value in protecting non-obscene child pornography for the purpose of protecting the few and rare

85. *Id.* at 751.
86. *Id.* at 752.
87. *Ferber*, 458 U.S. at 752–53; *see Miller*, 413 U.S. at 24.
88. *Ferber*, 458 U.S. at 752.
89. *See id.*
90. *Id.* at 753.
91. *Id.* at 756–57, 759, 761–63.
92. *Id.* at 756–57.
93. *Ferber*, 458 U.S. at 757.
94. *Id.* at 759.
95. *Id.*
96. *Id.* at 761.
97. *See id.* at 761–62.
98. *Ferber*, 458 U.S. at 761–62.
99. *Id.* at 762–63.

instances where it would be acceptable.[100] Fifth, the negative impact that child pornography has on children is substantial, and therefore outweighs the concerns for First Amendment protection.[101] For these reasons, the Court held that New York's statute was not overbroad.[102] Almost half of all states at the time of *Ferber* were enforcing legislation that directly targeted child pornography without the obscenity standards set forth by *Miller*.[103]

Ultimately, the case seemed to focus on the types of harms that child pornography causes.[104] The physical and psychological harms that are imposed on children who are the subjects of child pornography exemplify a direct injury.[105] This direct harm is also present when these pornographic materials are continuously distributed and that child's trauma is further exasperated.[106] The Court also considers the indirect harms of child pornography.[107] Child abuse is at the core of all child pornography.[108] For example, pedophiles often utilize child pornography to seduce their victims into engaging in sexual activity.[109] The Court in *Ferber* even proposes that the eradication of the child pornography market would likely prevent the infliction of harm on other children.[110] Thus, preventing the direct and indirect harm of children is in the interest of the state.[111]

The Court successfully recognized that child pornography, whether obscene or not, should be prohibited.[112] The consensus was that the First Amendment's protections became of smaller importance when held in comparison to the societal damage that child pornography produces for the Nation.[113] However, the focus of the case was dedicated to real child pornography, that is pornography that captures the actual abuse of a child, whereas the more elusive issue of virtual child pornography was not directly addressed.[114] Instead, the Court suggests that "other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First

100. *Id.* at 762.
101. *See id.* at 764.
102. *Id.* at 774.
103. *Ferber*, 458 U.S. at 749; *see Miller*, 413 U.S. at 24.
104. *See* Liu, *supra* note 1, at 8–9.
105. *Id.*
106. *Id.* at 8.
107. *See id.* at 9.
108. *Id.*
109. *See* Liu, *supra* note 1, at 9.
110. *See id.*
111. Liu, *supra* note 1, at 9.
112. *See* New York v. Ferber, 458 U.S. 747, 756 (1982).
113. *See id.* at 758.
114. *See* Liu, *supra* note 1, at 10.

Amendment protection."[115] This rhetoric creates a loophole in both the way that child pornography can avoid regulation and the way that child pornographic content creators can experiment with images and videos to give the illusion that children are engaging in sexual conduct, when, in fact, there is no live performance taking place.[116] The decision in *Ferber* was expanded in 1990 with *Osborne v. Ohio*,[117] which made it illegal to possess child pornography.[118] Furthermore, the Court in *Osborne* expressly listed the use of child pornography in the seduction process as a valid reason for the state to encourage the destruction of these materials as well as the criminalization of their possession.[119] However, over time, the absence of clear precedent on virtual child pornography brought about the introduction of the CPPA.[120]

## C. *Virtual Child Pornography*

### 1. The CPPA

In 1996, Congress sought to regulate virtual child pornography with the CPPA.[121] The CPPA defined child pornography as:

> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is [] [a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that] of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.[122]

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115. *Ferber*, 458 U.S. at 765.

116. *See* Liu, *supra* note 1, at 10.

117. 495 U.S. 103 (1990).

118. YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES 95 (2008); Osborne, 495 U.S. at 111; *see Ferber*, 458 U.S. at 748.

119. AKDENIZ, *supra* note 118, at 96; Osborne, 495 U.S. at 111.

120. Liu, *supra* note 1, at 10; *see* Child Pornography Prevention Act § 121, 110 Stat. at 3009–27.

121. Liu, *supra* note 1, at 14; *see* Child Pornography Prevention Act § 121, 110 Stat. at 3009–27.

122. Liu, *supra* note 1, at 14*;* Child Pornography Prevention Act § 121, 110 Stat. at 3009–28.

Essentially, the CPPA broadened the scope of the ban set by *Ferber* by covering actual child pornography, as well as all three categories of virtual child pornography.[123] The ultimate goal of the CPPA was to destroy the market for child pornography, protect child victims, and prevent child molesters from feeding into sexual desires that could result in the manifestation of criminal activity.[124] By outlawing computer images that appeared to be real children, the CPPA casted a broad net and in the process was able to rectify the loopholes left by the *Ferber* decision.[125]

### 2. *Ashcroft v. Free Speech Coalition*

Soon after the introduction of the CPPA, *Ashcroft v. Free Speech Coalition*[126] reversed the Act in 2002.[127] The Supreme Court in *Ashcroft* found that virtual child pornography was not a compelling government interest, and that the CPPA was unconstitutionally overbroad and vague.[128] Ultimately, the Court held that virtual child pornography was protected under the First Amendment.[129] Particularly, *Ashcroft* focused on the unconstitutionality of the Act's language, such as the phrases "appears to be" and "conveys the impression."[130] The concern was that this language would allow the prosecution of individuals who created their materials without the use of real children.[131] Hypothetically, if a producer created a film in which he or she used a youthful-looking adult movie actor to play the role of a child, then that producer could possibly face punishments under the CPPA.[132] Similarly, this language would technically prohibit all virtual child pornography despite its possible literary, artistic, or scientific value.[133] For example, the Court cited Academy Award-winning movies, such as American Beauty, in which there

123. *See* Liu, *supra* note 1, at 14; Child Pornography Prevention Act § 121, 110 Stat. at 3009–28; New York v. Ferber, 458 U.S. 747, 748 (1982).

124. Liu, *supra* note 1, at 15; Child Pornography Prevention Act § 121, 110 Stat. at 3009–27.

125. *See* Liu, *supra* note 1, at 15; Child Pornography Prevention Act § 121, 110 Stat. at 3009–28; *Ferber*, 458 U.S. at 748.

126. 535 U.S. 234 (2002).

127. *But see* Child Pornography Prevention Act, § 121, 110 Stat. at 3009-28; Liu, *supra* note 1, at 32.

128. Ashcroft v. Free Speech Coal., 535 U.S. 234, 256 (2002); Liu, *supra* note 1 at 33; Child Pornography Prevention Act § 121, 110 Stat. at 3009-27.

129. *Free Speech Coal.*, 535 U.S. at 234, 258.

130. *Id.* at 256, 258; Hudson Jr., *supra* note 4.

131. Hudson Jr., *supra* note 4.

132. *Id.*; Child Pornography Prevention Act § 121, 110 Stat. at 3009–26.

133. *Free Speech Coal.*, 535 U.S. at 261, 265.

are portrayals of teenage sexual activity as well as sexual relations between teenagers and adults.[134] Such films would likely fall under some of the Act's prohibited content.[135] In addition, the Court distinguished its decision from that of *Ferber's*, noting that virtual child pornography records no actual crime and therefore creates no victims.[136] The issue of morphing was not fully considered, as the respondents had not challenged that specific provision in the Act.[137] However, the Court's dicta indicated that morphed child pornography still implicated real children and therefore was more aligned with the images presented in *Ferber*.[138] Whether this comparison meant that morphed child pornography was also unprotected by the First Amendment was not made clear.[139] Justice O'Connor concurred in part in regards to the CPPA being unconstitutional when applied to material containing youthful-looking actors.[140] However, she dissented in part, acknowledging that there was a clear concern for the rapidly advancing technological tools being used to create virtual child pornography and that the CPPA's ban on virtual child pornography was not overbroad.[141] Justice Scalia also agreed with O'Connor's opinion that the CPPA's ban on child pornography was not overbroad.[142]

### 3. The PROTECT Act

The Court's decision in *Ashcroft* was nothing short of controversial.[143] For some, the decision meant that free speech and the First Amendment were being protected to the fullest extent.[144] For others, the Court's decision left questions on the definitive legality of virtual child pornography.[145] In response to the decision in *Ashcroft*, Congress considered a more narrowly tailored approach to the provisions struck down in the CPPA.[146] On April 03, 2003,

134. *Id.* at 248.
135. *Id.* at 247–48.
136. *Id.* at 250; *see* New York v. Ferber, 458 U.S. 747, 748 (1982).
137. *Free Speech Coal.*, 535 U.S. at 242.
138. *Id.* at 242.
139. *See id.*
140. *Id.* at 261 (O'Connor, J., concurring in part and dissenting in part); Child Pornography Prevention Act § 121, 110 Stat. at 3009-28.
141. *Free Speech Coal.*, 535 U.S. at 263–64 (O'Connor, J., concurring in part and dissenting in part); Child Pornography Prevention Act § 121, 110 Stat. at 3009–26.
142. *Free Speech Coal.*, 535 U.S. at 263, 267 (Scalia, J., concurring in part and dissenting in part); Child Pornography Prevention Act § 121, 110 Stat. at 3009–26.
143. Slocum, *supra* note 59, at 654.
144. *Id; Free Speech Coal.*, 535 U.S. at 238.
145. Slocum, *supra* note 59, at 654.
146. *Id.* at 655; *see Free Speech Coal.*, 535 U.S. at 238.

Congress passed an act entitled "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003" ("PROTECT Act"), which sought to correct many of the CPPA's provisions.[147] The Act cleared up some of the issues that were determined to be First Amendment violations.[148] In regard to the virtual child pornography provisions of the Act, the PROTECT Act replaced some of the CPPA's unconstitutional language.[149] For example, "appears to be . . . a minor" was replaced with "indistinguishable from that of a[n] [actual] minor."[150] Thus, the PROTECT Act allowed for the prosecution of virtual child pornography that was so realistic that it would be impossible to determine whether the child being used was real or computer-generated.[151]

Similarly, the Act also defined virtual child pornography in a way that does not impose on material which may have artistic or literary value.[152] Although the new definitions and provisions narrowed prior law, the Act also broadened prior affirmative defenses to virtual child pornography.[153] The CPPA granted an affirmative defense for cases that involved youthful-looking actors; however the PROTECT Act grants an affirmative defense for any cases in which there was no actual child used in the production of the material.[154] The Act seemingly portrayed Congress' new goal of prohibiting virtual child pornography only to the extent that it will prevent the production of real child pornography.[155] Congress also asserted that child pornography images that were being trafficked as of 2003 were produced through the actual abuse of children.[156] Some critics of the PROTECT Act's provision on virtual child

147. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, § 1(a), 117 Stat. 650, 650; Slocum, *supra* note 59, at 655.

148. Hudson Jr., *supra* note 4; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. 650.

149. Slocum, *supra* note 59, at 655; Child Pornography Prevention Act, § 121, 110 Stat; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

150. Slocum, *supra* note 59, at 655–56; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, § 502, 117 Stat. at 678.

151. *See* Slocum, *supra* note 59, at 648; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

152. *See* Slocum, *supra* note 59, at 656; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

153. *See* Slocum, *supra* note 59, at 657; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

154. *See* Slocum, *supra* note 59, at 657–58; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

155. *See* Slocum, *supra* note 59, at 658; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

156. *See* Slocum, *supra* note 59, at 658.

pornography believe that Congress is attempting to remedy an issue that does not yet exist.[157] However, Justice O'Connor's dissent in *Ashcroft* notes that the Court's cases "do not require Congress to wait for harm to occur before it can legislate against it."[158]

Although the PROTECT Act is able to prohibit some computer-generated images that are indistinguishable from real children and protect work that is deemed artistically valuable, it still fails to recognize the gray areas of virtual child pornography where the sexual abuse of real children is not needed.[159] Morphed child pornography is a category which usually does not implicate the live abuse of real children, but certainly contributes significant harms to its victims.[160] Additionally, the attainability of editing applications and software has dramatically increased since 2003, to the point where morphed child pornography can likely be created with the use of just a smartphone.[161] Thus, the PROTECT Act neglects to provide a uniform and multifaceted approach to the varying areas of virtual child pornography.[162]

## IV. THE CIRCUIT SPLIT ON MORPHED CHILD PORNOGRAPHY

### A. *Arguments Against the First Amendment's Protection of Morphed Child Pornography*

The United States Court of Appeals for the Second Circuit established morphed child pornography is not afforded First Amendment protection.[163] The main argument put forth by the Court had to do with the overwhelming emotional and reputational harm that morphed child pornography imposes on victims.[164] Although the United States Court of Appeals for the Sixth Circuit did not answer a First Amendment question, it was still able to establish that

157. *See* Slocum, *supra* note 59, at 665; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

158. Ashcroft v. Free Speech Coal., 535 U.S. 234, 264 (2002) (O'Connor, J., concurring in part and dissenting in part).

159. *See* Slocum, *supra* note 59, at 656–57; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

160. *See* United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).

161. *See* Sternberg, *supra* note 27, at 2788.

162. *See* Slocum, *supra* note 59, at 656–57; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

163. United States v. Hotaling, 634 F.3d 725, 730 (2d Cir. 2011).

164. *Id.*

morphed child pornography constitutes an immediate injury to those victims involved.[165]

### 1. The Second Circuit and *Hotaling*

In *United States v. Hotaling*,[166] the defendant admitted to possessing sexually explicit images of six female minors that had been digitally morphed.[167] The heads of the minors had been cropped out of their original photographs and then superimposed on the images of partially nude bodies of adult females engaging in sexual conduct.[168] One of the photographs contained the face of the defendant superimposed on a nude male's body engaging in sexual intercourse with a female bearing the face of one of the child victims.[169] There were also images of the victims faces that were superimposed on bodies that were shackled, leashed, and restrained.[170] Some of the images were taken from pictures of the defendant's daughters with their friends.[171] The pictures were held in digital index folders and were labeled with a pornographic website uniform resource locator ("URL").[172] Additionally, the pictures were titled with the victims' actual names.[173] The defendant asserted that no actual children were ever harmed when he created the images and that no sexual activity took place.[174] He challenged the state statute as being overbroad and vague.[175] Similarly, the defendant claimed the images were a way for him to enjoy his sexual fantasies without hurting anyone and therefore, his actions should be protected under the First Amendment's Free Speech Clause.[176]

The court acknowledged the Supreme Court's ruling in *Ferber*, citing the government's compelling interest in protecting minors from the emotional trauma of child pornography.[177] In the same manner, the court acknowledged dicta brought forth by the Supreme Court in *Ashcroft*, which indicates that morphed images, although technically considered virtual child pornography,

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165. Doe v. Boland (*In re* Boland), 946 F.3d 335, 341–42 (6th Cir. 2020).
166. 634 F.3d 725 (2d Cir. 2011).
167. *Id.* at 727.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Hotaling*, 634 F.3d at 727.
172. *Id.*
173. *Id.*
174. *Id.* at 727, 729.
175. *Id.* at 727.
176. *Hotaling*, 634 F.3d at 727.
177. *Id.* at 728–729; New York v. Ferber, 458 U.S. 747, 748 (1982).

more adequately resembled the images discussed in *Ferber*.[178] In other words, morphed images still include real children and therefore, still pose a threat to the overall emotional and reputational security of children.[179] Ultimately, the court reasoned that the photographs did implicate the recognizable faces of minors and therefore caused great psychological and reputational harm to those victims.[180] Thus, sexually explicit images that bear the faces of identifiable children are not afforded protection under the First Amendment.[181]

### 2. The Sixth Circuit and *Boland*

In *Doe v. Boland*,[182] the defendant was an attorney and expert witness who was working as a technology expert for individuals that were charged with the possession of child pornography.[183] In an attempt to make the argument that children in pornographic images were indistinguishable from computer-generated children, the defendant took online images of two young girls and morphed them to create images of the two girls engaging in sexual acts. [184] Ultimately, his argument was that if he could easily create these doctored images, then certainly his clients could have downloaded doctored material as well.[185] The defendant presented his images in federal court as an expert witness and was subsequently told by a judge to delete the images.[186] Instead, he kept the images and called federal prosecutors in his hometown to determine if the images were in fact illegal.[187] Ultimately, he was found criminally and civilly liable for the images.[188] The defendant claimed he did not intend to willfully or maliciously injure the minors, but instead he was simply creating images that would be used as exhibits in court.[189]

The court reasoned that there is a substantial certainty of injury when the faces of identifiable minors are used for the purpose of creating morphed child pornography.[190] It was noted that there is a legal presumption of injury

178. *Hotaling*, 634 F.3d at 729; *Ferber*, 458 U.S. at 748; *Free Speech Coal.*, 535 U.S. at 238.
179. *Hotaling*, 634 F.3d at 729–30.
180. *Id.*
181. *Id.* at 730.
182. 946 F.3d 335 (6th Cir. 2020).
183. *Id.* at 337.
184. *Id.*
185. *Id.*
186. *Id.*
187. *In re Boland*, 946 F.3d at 337.
188. *See id.* at 338.
189. *Id.* at 341.
190. *See id.* at 341–42.

when a child's identity is used in morphed pornography.[191] Thus, the injury begins at the moment the images are created.[192] The court drew similarities between morphed child pornography and defamatory statements, stating that both occur when an individual acts with the knowledge that substantial injury or harm is likely to occur.[193] Consequently, the court agreed that the presumption of injury in morphed child pornography was great.[194] It is clear that whatever causes great injury to minors cannot, on its face, be protected under the First Amendment.[195] The court held that the defendant had substantial knowledge that his actions would cause injury and harm to the victims.[196] Therefore, the defendant could not be released from his charge.[197]

### B. *Arguments in Support of the First Amendment's Protection of Morphed Child Pornography*

#### 1. The Eighth Circuit and *Anderson*

In *United States v. Anderson*,[198] the defendant sent unsolicited sexually explicit images to his half-sister's eleven-year-old daughter.[199] One of the pictures he had sent depicted an adult male and an adult female engaging in sexual intercourse with the caption: "this is what we will do."[200] The defendant had superimposed his own face onto that of the male's body and the victim's face onto the female's body.[201] Ultimately, he admitted that he created the image and sent it to the victim's Facebook account.[202] The defendant moved to dismiss his charges on the basis that the statute was unconstitutionally overbroad under the First Amendment.[203]

On appeal, the United States Court of Appeals for the Eighth Circuit reasoned that only visual depictions produced through the sexual abuse of a child fell under unprotected speech.[204] Although the court noted the decision

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191. *Id.* at 342.
192. *In re Boland*, 946 F.3d at 342.
193. *Id.* at 338–39.
194. *See id.* at 342.
195. *See id.* at 341–42.
196. *Id.* at 342.
197. *In re Boland*, 946 F.3d at 342.
198. 759 F.3d 891 (8th Cir. 2014).
199. *Id.* at 893.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Anderson*, 759 F.3d at 893.
204. *Id.* at 894.

in *Ferber*, the understanding was that *Ferber* focused on child pornography that was intrinsically related to child abuse and criminal conduct.[205] Furthermore, because no minor was abused in the production of the defendant's content, nor was there historical or Supreme Court case law addressing this issue, the defendant's material fell under protected speech.[206] In order to understand the Eighth Circuit's decision in *Anderson*, it is important to acknowledge the cases that drove the opposing party's arguments and the court's decisional reasoning.[207]

The state argued that *Anderson* was identical to *United States v. Bach.*[208] In *Bach*, the Eighth Circuit heard a case involving a morphed image which superimposed the face of a minor on the body of a minor posing in a sexually explicit manner.[209] Because the underlying image was still the body of a minor, the court reasoned that the material could not be protected by the First Amendment.[210] The underlying image was a record of criminal activity against a child, notwithstanding the face that was superimposed upon it.[211] However, the defense suggested that *Anderson* and *Bach* are completely different.[212] The main difference outlined by the defense was that in *Anderson* the underlying images were of adults engaging in sexual conduct, whereas in *Bach*, the underlying image was of a real child.[213] Thus, no children were attempted to be portrayed in creating the images in *Anderson*.[214] Without the presence of some sort of child abuse in the material, the defense advanced the opinion that the images in *Anderson* are protected by the First Amendment.[215]

The Court in *Anderson* used the Supreme Court's reasoning in *United States v. Stevens*[216] to support its argument that child pornography is only unprotected by the First Amendment when it displays the criminal abuse of children.[217] Additionally, the Court used *Stevens* to explain that the First Amendment's protections do not rely on a balancing test of costs versus benefits.[218] Instead, it reasoned that First Amendment protection depends

205. *Anderson*, 759 F.3d at 894; New York v. Ferber, 458 U.S. 747, 748 (1982).
206. *See Anderson*, 759 F.3d at 894.
207. *See id.*
208. 400 F.3d 622 (8th Cir. 2005); *see Anderson*, 759 F.3d at 894.
209. *Bach*, 400 F.3d at 624, 632.
210. *Id.* at 632.
211. *Bach*, 400 F.3d at 632.
212. *Id.*; *Anderson*, 759 F.3d at 895.
213. *Anderson*, 759 F.3d at 895; *Bach*, 400 F.3d at 632.
214. *Anderson*, 759 F.3d at 895.
215. *Id.* at 894–95.
216. 559 U.S. 460 (2010).
217. *Anderson*, 759 F.3d at 894.
218. *Id*; *Stevens*, 559 U.S. 460 at 464.

primarily on whether the content in question has been historically or traditionally prohibited by the courts.[219] In *Stevens*, the Supreme Court held that animal cruelty content was not automatically excluded from the First Amendment's protection, as there is no evidence of historical prohibitions against the depictions of animal cruelty.[220] Although *Stevens* focused on animal cruelty videos, the Eighth Circuit chose to apply this rhetoric to its morphed child pornography question in *Anderson*.[221] The court held that morphed child pornography should not be excluded from First Amendment protection because it lacks traditional and historical prohibition in the law.[222] Specifically, morphed child pornography does not present the abuse of real children—which has historically been required for First Amendment exemption—therefore, morphed child pornography should fall within the realm of protected speech.[223] The court expressed that morphing attempts to portray a minor, such as the case in *Bach*, and would thus qualify as an exemption from First Amendment protection because it would display the abuse of a child.[224] However, morphing that does not implicate a real minor, such as images of adults engaging in sexual relations with superimposed faces of children, would not qualify as an exception under the reasoning in *Anderson*.[225]

## V. THE CASE OF UNITED STATES V. MECHAM

In *United States v. Mecham*, the Fifth Circuit asked whether the First Amendment protects morphed child pornography.[226] The court notes that real child pornography goes unprotected under the First Amendment and that pornography created with youthful-looking adult actors or completely computer-generated children is protected.[227] However, the court acknowledges how morphed child pornography usually falls between these established categories.[228]

In *Mecham*, the defendant took his computer to a repair shop where it was discovered that he had used it to store thousands of images of nude adults

219. *Id.*
220. *Stevens*, 559 U.S. 460 at 481, 482.
221. *Id.*; *Anderson*, 759 F.3d at 894.
222. *Anderson*, 759 F.3d at 894.
223. *See id.*
224. *Id.* at 895; *Bach*, 400 F.3d at 632.
225. *Anderson*, 759 F.3d at 895–96.
226. *See* United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).
227. *Id.*
228. *Id.*

with the faces of children superimposed onto them.[229] After a search of his home, police obtained over 30,000 files of morphed child pornography.[230] All the images found used the faces of the defendant's grandchildren.[231] The defendant admitted that he had superimposed the faces of his four granddaughters onto the bodies of adults engaging in sexual intercourse.[232] The defendant claimed he had created the images and videos in anger after his daughter prohibited him from having any contact with his granddaughters.[233] The victims were of the ages of four, five, ten, and sixteen.[234]

The defendant had managed to email some of these videos to his oldest granddaughter.[235] One of the videos showed the sixteen-year-old victim's face superimposed onto the body of a female engaging in sexual intercourse with a male.[236] The defendant had superimposed his own face onto the body of that male.[237] This video also depicted explicit and disturbing animated scenes of the defendant ejaculating on the victim.[238] Another video contained a photo montage of images of the five-year-old victim's face cropped onto the bodies of females engaging in various sexual acts.[239]

The defendant contended that the charges against him should be dismissed because morphed child pornography is protected under the First Amendment.[240] Furthermore, the defendant argued that he could not be charged because no children were sexually abused in the production of the content.[241]

The court recognized that morphed child pornography is closer in relation to real child pornography, as the face of an identifiable minor is being used to depict sexual content.[242] Additionally, the Fifth Circuit did not neglect to review the arguments on both sides of the circuit split.[243] The court emphasized the importance of the lower court's actions during times when the Supreme Court's caselaw on an issue is not yet solidified.[244] Lower courts

229. *Id.*
230. *Id.*
231. *Mecham*, 950 F.3d at 260.
232. *Id.*
233. *See id.*
234. *Id.*
235. *Id.*
236. *Mecham*, 950 F.3d at 260.
237. *Id.*
238. *Id.*
239. *Id.* at 261.
240. *Id.*
241. *Mecham*, 950 F.3d at 263.
242. *Id.*
243. *Id.* at 265.
244. *Id.*

must not attempt to guess what the Supreme Court might decide, but instead should look to the underlying concerns of the Supreme Court in applicable past decisions.[245]

For example, both *Ferber* and *Ashcroft* focused on reputational and emotional harm to children.[246] The Court wanted to address *Stevens*, as this case supported the Eighth Circuit's decision in *Anderson* and had not been addressed by the Second or Sixth Circuits.[247] *Stevens* put forth the argument that the First Amendment's protections are not decided on a cost-benefit analysis or balancing test.[248] The court in *Mecham* found this statement irrelevant, stating that the Second and Sixth Circuits did not reach their decisions from a simple balancing testing of morphed child pornography, but instead reached their decisions based on their interest in preventing the reputational and emotional harm of children.[249] In the same manner, the court noted that *Stevens* focused on depictions of animal cruelty and only mentioned child pornography in passing.[250] This rhetoric alone cannot override the precedent of the court's concerns regarding child pornography.[251] Additionally, *Stevens* cannot reliably be used as the only justification for First Amendment protection of morphed child pornography, as it makes no mention of the emotional and psychological harm to children that the Supreme Court is trying to prevent.[252] If *Stevens* was attempting to make a significant doctrinal development of child pornography, it would not have been done in a case about animal cruelty videos.[253]

Finally, the court proposed that defining child pornography as only images that exhibit the real criminal abuse of a child would not only limit the prohibition of morphed child pornography, but of real child pornography as well.[254] The definition of real child pornography does not limit itself to pictures and videos depicting real child abuse.[255] On the contrary, real child pornography can be an image of a child in which genitals are exposed or even a cropped image of a child's genitals in which the child's face is not even

245. *Id.*

246. *See Mecham*, 950 F.3d at 265; New York v. Ferber, 458 U.S. 747, 758 (1982); Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002).

247. United States v. Stevens, 559 U.S. 460, 469–71 (2010); *see Mecham*, 950 F.3d at 264–65; *Anderson*, 759 F.3d at 891.

248. *See Mecham*, 950 F.3d at 264–65; *Stevens*, 559 U.S. at 464.

249. *See Mecham*, 950 F.3d at 265.

250. *Id.* at 265–66; *see Stevens*, 559 U.S. at 469, 471.

251. *See Mecham*, 950 F.3d at 265–66.

252. *See id.*; *Stevens*, 559 U.S. at 471.

253. *Mecham*, 950 F.3d at 266; *see Stevens*, 559 U.S. at 465–66, 471.

254. *Mecham*, 950 F.3d at 267.

255. *Id.* at 266.

shown.[256] This broad definition of child pornography has been used for decades to prosecute individuals even when there is no evidence that physical sexual contact occurred.[257] The court did not believe that the decision in *Ferber* was meant to constrict the definition of child pornography to only images which depict abuse, rather, it was only one of the Supreme Court's rationales in reaching its decision.[258] Regarding morphed child pornography, the Fifth Circuit recognized that *Ashcroft* and every other circuit case to address this issue had established that there was indeed a significant threat to the psychological well-being of children affected.[259] Ultimately, the court disagreed with the defendant's claim that morphed child pornography is protected under the First Amendment.[260]

## VI. CONCLUSION

The court in *Anderson* mistakenly interpreted the Supreme Court's rhetoric in *Stevens*.[261] *Stevens* differentiated the issue of child pornography from the issue of animal crushing videos, admitting that child pornography is always a *special case* due to its historical establishment as a long standing First Amendment exception.[262] Simply, the Court in *Stevens* was describing its inability to create another First Amendment exception category for animal crush videos, as there would be no historical support for such a ruling.[263] Although the Court in *Stevens* also suggests that there is little need for a cost-benefit analysis in child pornography due to its already established history, it is unlikely that the Court was envisioning the more controversial and gray area category of morphed child pornography.[264] A cost-benefit analysis would likely be essential for such a contested issue.[265] Such an analysis would show that morphed child pornography poses a significant harm to children and provides little to no benefit to society.[266] Under the reasoning in *Mecham*, if

256. *Id.*
257. *Id.*
258. *Id.*; *see* New York v. Ferber, 458 U.S. 747, 750–51, 764 (1982).
259. Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002); *Mecham*, 950 F.3d at 267.
260. *Mecham*, 950 F.3d at 267.
261. United States v. Stevens, 559 U.S. 460, 471 (2010); United States v. Anderson, 759 F.3d 891, 894 (8th Cir. 2014).
262. *Stevens*, 559 U.S. at 471–72.
263. *See id.* at 471.
264. *See id.*
265. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 236, 251–53 (2002).
266. United States v. Mecham, 950 F.3d 257, 263–64 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).

a cost-benefit analysis was deemed irrelevant and the concern was solely based on harm to children that was expressed in *Ferber*, morphing would still not fall under protected speech.[267]

Admittedly, child pornography, whether real, virtual or morphed, is a difficult topic to address.[268] In the past, child sexual abuse was often ignored.[269] However, the new digital age has also provided some sort of transparency on the true magnitude of this issue.[270] It is important to acknowledge that child sexual abuse content does not always arise out of situations that were abusive or harmful.[271] The production of sexual images with the use of an identifiable minor constitutes abuse in itself.[272]

Consequently, American jurisprudence has indicated that the government has a compelling interest in safeguarding the overall well-being of our youth.[273] It is established that *real* child pornography causes extreme psychological and reputational harm to its child victims.[274] Virtual child pornography does not always implicate real children getting abused.[275] Thus, it is also established that non-obscene virtual child pornography is protected by the First Amendment.[276]

However, the issue still stands with morphed child pornography.[277] When the identities of real children are implicated in the production of sexually explicit imagery, it would be unreasonable to believe that no harm has occurred.[278] It is essential to acknowledge that child sexual abuse images do not always arise out of situations of abuse themselves.[279] It is quite possible to be a victim of child pornography without ever even knowing it.[280] If we follow the reasoning in *Ferber*, the Court's concern was exclusively on the direct and indirect harm that pornography has on the psychological,

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267. *See id.* at 264–65; New York v. Ferber, 458 U.S. 747, 764 (1982); WORTLEY & SMALLBONE, *supra* note 25, at 123.

268. WORTLEY & SMALLBONE, *supra* note 25, at 9, 123.

269. *See id.* at 123.

270. *See id.* at 72.

271. *See id.*

272. *See Ferber*, 458 U.S. at 759; United States v. Mecham, 950 F.3d 257, 263 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).

273. *Mecham*, 950 F.3d at 262.

274. Liu, *supra* note 1, at 8.

275. *Id.* at 3; *see Mecham*, 950 F.3d at 260

276. *See Mecham*, 950 F.3d at 260; Ashcroft v. Free Speech Coal., 535 U.S. 234, 251 (2002).

277. *See Mecham*, 950 F.3d at 260; *Free Speech Coal.*, 535 U.S. at 249.

278. *See* WORTLEY & SMALLBONE, *supra* note 25, at 72.

279. *See id.*

280. *Id.*; *Ferber*, 458 U.S. at 756–57.

reputational, and emotional well-being of child victims.[281] These same harms are present with morphed images as well.[282] The circulation of morphed images is simply another way of disguising exploitation and child abuse.[283] The importance of free speech cannot be used to justify harm and abuse to children.[284] If we are a nation that refuses to protect the sanctity of our youth under the guise of freedom, then we are inherently saying those freedoms are more important than the lives of the people that they were designed to protect.[285] The Supreme Court's guidance to lower courts on how to address this issue uniformly is insufficient and current legislation has failed to cover the plethora of issues that may arise from virtual child pornography.[286] The absence of clear precedent calls for judicial review at the Supreme Court level that aligns with the current majority view of the circuits.[287]

281. *See Ferber*, 458 U.S. at 756–57; *Mecham*, 950 F.3d at 262.
282. *See Free Speech Coal.*, 535 U.S. at 242; *Mecham*, 950 F.3d at 267.
283. *Free Speech Coal.*, 535 U.S. at 242.
284. *See id.* at 251.
285. *See Ferber*, 458 U.S. at 761–62; Slocum, *supra* note 59, at 656–57.
286. *See* Slocum, *supra* note 59, at 685.
287. *See id.* at 663–64, 666.


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