Bellarmine Law Society Review

Volume XV — Issue II

Fall 2025

BELLARMINE LAW SOCIETY REVIEW
VOLUME XV, ISSUE NO. II

MASTHEAD

Simon K. Hoefling
Editor-In-Chief

Jessica K. Orrell
Managing Editor

Lola Milazzo, Sarah Patel, Lily Hillis, Alisa Fixler, Syesha Swani, Genevieve Morrison, Jocelyn Tucker, Sabrina Reyes, Tim Niemann, and Logan Corvisiero
Associate Editors

BELLARMINE LAW SOCIETY REVIEW

VOLUME XV, ISSUE NO. II

TABLE OF CONTENTS

Cover art courtesy of Ryan Milligan

Bellarmine Law Society Review

Volume XV | Issue II

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

Simon K. Hoefling
Boston College, hoeflisi@bc.edu

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

SIMON K. HOEFLING

It is my pleasure to present the second issue of Volume XV of Boston College's *Bellarmine Law Society Review*. I am delighted to step into the role of Editor-in-Chief, and I am joined by our new Managing Editor, Jessica K. Orrell. We are both grateful for the opportunity and excited to help promote undergraduate legal scholarship at Boston College and beyond. I would also like to welcome our new associate editors to the team: Lily Hillis, Genevieve Morrison, Jocelyn Tucker, Sabrina Reyes, Tim Niemann, and Logan Corvisiero. We are confident that their contributions will strengthen the quality and consistency of the *Review*.

For this fall edition, we are featuring four papers from authors inside and outside of the Boston College community. First, Valerie Kandel of Cornell University undertakes a topical exploration of the use of AI in hiring and how it may perpetuate discrimination against disabled individuals, ultimately presenting a thorough policy framework for ensuring that these communities are not disparately affected by AI tools. Next, Joseph Murphy of Boston College, a second-time author for the *Review*, discusses how arbitration clauses in terms of service agreements can restrict legal action against companies, raising important questions about the scope and fairness of these clauses. After that, Kiruthiga Balamurugan of Georgetown University examines the constitutional issues around the ban of TikTok, utilizing both state and federal cases to unpack and understand the Supreme Court ruling that upheld the Biden administration's ban of the app. Finally, Cindy Toh of Stanford argues that the Supreme Court's decision in *Dobbs v. Jackson* (2022) created a new rule of law rooted in new textualism and characterized by skepticism towards stare decisis.

These works represent a broad range of topics and reflect the inter-disciplinary orientation of the *Bellarmine Law Society Review*, illustrating how law intersects with every aspect of life. We are excited to feature contributions from three authors at universities outside Boston College, reflecting our commitment to expanding the *Review's* reach and promoting undergraduate legal writing nationwide. This cycle brought in many high-quality submissions, and we are proud that the pieces selected for this issue showcase that standard of excellence. We hope that this broader scope will foster greater engagement with the *Review* and encourage deeper legal discourse. To both first-time and longtime readers, we thank you for your support and hope you enjoy this edition of the *Bellarmine Law Society Review*.

Bellarmine Law Society Review

Volume XV | Issue II Article I

Equal Access or Algorithmic Barriers?: AI and the Fight for Disability-Inclusive Hiring

Valerie Kandel
Cornell University, vmk29@cornell.edu

EQUAL ACCESS OR ALGORITHMIC BARRIERS?: AI AND THE FIGHT FOR DISABILITY-INCLUSIVE HIRING

VALERIE KANDEL[1]

Abstract: This paper examines how artificial intelligence (AI) hiring tools, while marketed as objective and free of bias, perpetuate structural discrimination against individuals with disabilities. By tracing the historical legacy of ableism in employment, from early personality testing to modern algorithmic screening, the paper situates AI-driven recruitment and selection within a broader pattern of exclusion. It argues that biases embedded in AI design, misrepresentative training data, and inaccessible application processes reproduce barriers that the Rehabilitation Act and Americans with Disabilities Act sought to eliminate. Through the case of *Mobley v. Workday*, the paper highlights the legal and ethical challenges of algorithmic discrimination, including diminished transparency, accountability, and informed consent. Ultimately, it proposes a four-part framework for disability-inclusive AI governance: increasing diversity in AI development and training, mandating auditing and impact assessments, enforcing privacy and consent protections, and requiring human oversight in employment decisions. The paper concludes that equitable AI hiring demands proactive policy intervention and renewed enforcement of disability rights principles to ensure true inclusion in the digital labor market.

I. Introduction

When applying for a job, most individuals are already nervous about being judged by a hiring manager. But for an individual with a disability, this feeling may be heightened by fears of discrimination in the hiring process. Biases, stereotypes, and accessibility challenges that exist in traditional hiring processes can cause many barriers for otherwise qualified individuals. When one introduces artificial intelligence (AI) hiring technology into the mix, another layer of

[1] Valerie Kandel is a junior at Cornell University's School of Industrial and Labor Relations, pursuing a Bachelor of Science with intended minors in Business, Law and Society, and Information Ethics, Law, and Policy. She serves as an Undergraduate Research Fellow under Professor Virginia Doellgast, studying the impacts of artificial intelligence on labor in the telecommunications and video game sectors. Valerie's academic and professional interests focus on employment and disability law, as well as the governance of emerging technologies in the workplace. She plans to attend law school to further explore the intersection of law and policy with labor, technology, and workers' rights.

uncertainty and the possibility of exclusion are added. AI software vendors market these tools as a solution to eliminate human biases and move towards equal treatment, but this may not be the case in practice.

Take the example of a model individual, who has been diagnosed with an anxiety disorder, depression, or any other mental-health related disability. Just like anyone else looking for a job, they check popular listing websites such as LinkedIn, Indeed, or ZipRecruiter until they finally find a position that seems interesting, pays well, and matches their qualifications. The individual applies, submitting all the necessary materials, and then has to go through a sequence of hiring processes, such as a video interview, where they are scored on their answers. The "key attributes for the role, such as collaborative teamwork skills, patience in customer service, and past managerial experience" are all evaluated, not by a hiring manager, but instead by an AI algorithm.[2] These tools are supposed to analyze data from application materials, including any videos or other personality assessments that candidates are invited or sometimes required to take. Based on their use of key words, phrases, or microexpressions in the written or video materials, candidates are given a score that is then used by the hiring manager or even another AI tool to select who will ultimately get the job.[3]

For a person with a disability, however, the experience and outcomes during the hiring process may be different. For instance, in a video interview, they might struggle to make eye contact or answer all the questions within a time limit because this creates a stressful situation or they could not focus due to an attention deficit disorder.[4] Or, some video interviews or personality tests may ask about how optimistic the candidate is, which candidates with

[2] Moss, Haley. "Screened Out Onscreen: Disability Discrimination, Hiring Bias, and Artificial Intelligence." *Disability Law Journal* 4, no. 1 (January 1, 2023). https://research.ebsco.com/linkprocessor/plink?id=306c7863-ba12-35f2-8d89-4d221120d4bd.
[3] Ibid., 144.
[4] Ibid.,144.

depression may struggle with. The AI may then pick up on any microexpressions that display fear or a lack of confidence or comfort. Then, when it comes to deciding which candidates should be invited back for the next round of interviews, or ultimately be selected for the position, this individual may not be chosen. Disparate outcomes like this are unfortunately becoming all too common for individuals with disabilities, especially as AI becomes more ingrained within every step of the recruitment and selection processes.

This was the case for Derek Mobley, an African American male over the age of forty with diagnosed anxiety and depression. Mobley had been looking for a job and continuously faced rejections, despite being qualified for the jobs he applied for. Mobley began to realize that he and likely many other candidates had been discriminated against based on factors such as race, age, and having a disability by Workday's AI-powered applicant screening tools that many firms use for recruitment. Mobley's legal team argued that an AI hiring tool must have been used in his application process because he received rejections outside of business hours and decisions were made a very short time after he applied. For instance, "the opinion notes one allegation that 'Mobley received a rejection at 1:50 a.m., less than one hour after he had submitted his application.'"[5] Mobley's legal case focused on the level of human involvement compared to AI algorithms throughout these processes. His situation raised awareness about the very real and undiscussed issues with implementing AI systems in the hiring process without understanding the breadth of problems it may introduce, including the consequences of limited human oversight.

Mobley's case, which became a large-scale class action lawsuit, has the potential to

[5] See, Rachel V., and Annette Tyman. "Mobley v. Workday: Court Holds Artificial Intelligence Service Providers Could Be Directly Liable for Employment Discrimination Under 'Agent' Theory." *Employee Relations Law Journal* 50, no. 3 (December 1, 2024): 41–43. https://research.ebsco.com/linkprocessor/plink?id=6563a2aa-dcea-3ef6-8a0a-5d7c4e01570e.

disrupt a rapidly growing industry that has been creating disparate outcomes for minority candidates, while asserting that this is a fair and unbiased method. As of now, existing employment laws and other regulations fall short of effectively protecting marginalized groups, especially the disabled community, from the effects of discriminatory hiring practices when AI technologies are used in the hiring process.[6] This has continued due to a lack of research, political discourse, and legal cases being filed against companies using AI. Since many individuals face negative outcomes related to AI, often unknowingly, there needs to be a deeper analysis and understanding of this topic.

While many AI vendors and employers claim that these technologies allow for unbiased and objective sourcing, assessment, and selection of candidates, I will argue that the current uses of these tools disparately impact candidates with disabilities in hiring practices and employment outcomes. In my paper, I consider the current landscape of hiring discrimination, beginning with barriers that the disability community has faced historically, which led to the initial creation of laws aimed to protect their employment rights. Afterwards, I will critically evaluate the state of these existing laws through their gaps or failures to adequately address the needs of this community. From there, I transition to a discussion about how these existing conditions and laws fit into the new context created by AI-based hiring tools. I will examine the emergence of AI use in hiring, starting with factors that contributed to the popularity of AI for hiring purposes, and then provide a broad overview of how these technologies work, focusing on their learning or training processes. Before transitioning to how discrimination can occur through these tools, I will briefly address how companies have been implementing these AI technologies into their

[6] Marshall, Romaine C., et al., "Artificial Intelligence and Employment Law." *Employee Relations Law Journal* 50, no. 1 (June 1, 2024): 27–33. https://research.ebsco.com/linkprocessor/plink?id=37dcfcf4-a3e5-38ca-a0b5-63f14a317c7e.

hiring practices. In addressing the potential for disability discrimination, I focus on algorithmic biases that emerge from the embedded values within AI development, the effects of misrepresentative or biased data introduced during the learning process, and specific accessibility issues that may arise when these tools are used. At the end of this section, I will introduce the argument of how companies' choices made when implementing AI hiring tools also have an impact on hiring outcomes. Subsequently, I will discuss the relevant ethical considerations behind these disparate outcomes, including a loss of privacy and a lack of informed consent leading to a power imbalance, a lack of transparency and accountability, a lack of sufficient human oversight, and a general lack of inclusivity and diversity in employment outcomes. By analyzing legal, technical, social and policy-related factors, this paper will ultimately advocate for a set of potential solutions that can be a part of a disability inclusivity framework in AI-powered hiring practices.

To move toward equality in hiring practices outcomes, I will first review the recent policy initiatives to fill legal gaps, as well as guidelines by the Equal Employment Opportunity Commission (EEOC), to see how these materials set the stage for my proposed guidance or framework to address any more specific gaps. Afterwards, I intend to outline my proposed solution framework, which has been created with the previously evaluated ethical considerations in mind. This framework will focus on inclusivity and ethical application of AI technologies in hiring processes, but specifically emphasize participation and more accountability by the government, companies and AI vendors. My guidelines will prioritize and reflect the values of accessibility, transparency, and accountability for companies utilizing these technologies. Furthermore, through my chosen approach, I will promote more expansive and enforceable reforms, including mandated auditing and AI impact assessments and the requirement of human

involvement in hiring practices, to reinforce equity and inclusion. By addressing these critical gaps and proposing more actionable reforms, my framework aims to create a more equitable hiring landscape that upholds the rights of all members of the disability community.

II. Historical Barriers to Hiring for Individuals with Disabilities

This section will involve a review of the barriers that individuals with disabilities have faced in the hiring process. First, I will provide a brief overview of the legacy of selection assessments such as personality tests that have historically discriminated against members of the disability community. Though I will specify that ableist notions have existed for centuries, the majority of this analysis will focus on key legislation that aimed to prevent hiring discrimination for individuals with disabilities. Sections of the Rehabilitation Act, Americans with Disabilities Act, and its added amendments will be situated into the proper historical context. Then, I will briefly review the strengths and limitations of this existing legislation in how they protect the rights of disabled individuals. After considering all of these relevant barriers and legislative attempts to rectify them, I will transition to a discussion about how these historical issues associated with traditional hiring methods have persistent legacies in modern AI-powered hiring methods.

Historically, individuals with disabilities have faced a legacy of negative stigma from "biased assumptions, harmful stereotypes and irrational fears," causing the disability community to experience pervasive "social and economic marginalization."[7] These perceptions, which have unfortunately existed for centuries, not only questioned disabled individuals' ability to care for

[7] Anti-Defamation League. "A Brief History of the Disability Rights Movement." ADL, November 22, 2024. https://www.adl.org/resources/backgrounder/brief-history-disability-rights-movement#:~:text=In%20the%201800s%2C%20people%20with,entertainment%20in%20circuses%20and%20exhibitions.

themselves, but on a larger scale, to contribute to society.[8] Employment discrimination can be traced back to the industrial turn of the 19th century, when individuals with disabilities were either not permitted to work due to biases, fears, and stereotypes, instead being institutionalized for most of their lives, or being forced to "serve as ridiculed objects of entertainment in circuses and exhibitions."[9] While this overview of the profound struggles and exclusion faced by generations of people with disabilities is brief, it allows us to consider how individuals with disabilities, who are otherwise perfectly qualified to work, were historically marginalized in employment sectors and how the legacies of this have persisted within the 21st century.

For the most part, disparate treatment persisted unaddressed until the 1960s when the civil rights movement began. This movement brought more awareness to the fact that minority groups, including people with disabilities, faced unfair challenges and treatment in employment due their membership in a protected class. A major contributing factor for unequal outcomes for minority job candidates was due to the fact that "in the 1960s, virtually all hiring procedures were designed with white middle-class men in mind and policymakers and testing experts recognized that new instruments needed to be created to facilitate equal access."[10] These new hiring methods emerged in the form of personality assessments, which were part of a lucrative industry that benefited employers. These tests were portrayed as a scientific hiring method, despite lacking empirical support, and instead were accompanied by a number of ethical concerns that eventually caught the attention of lawmakers.[11]

The first employment protections for marginalized groups were in the Civil Rights Act (CRA) of 1964, specifically Title VII, which prohibited employers "from engaging in two forms

[8] Ibid.
[9] Ibid.
[10] Kassir, Sara, Lewis Baker, Jackson Dolphin, and Frida Polli. "AI for Hiring in Context: A Perspective on Overcoming the Unique Challenges of Employment Research to Mitigate Disparate Impact." *AI and Ethics* 3 (2023): 845–68. https://doi.org/10.1007/s43681-022-00208-x.
[11] Ibid., 847.

of discrimination: disparate treatment (e.g., intentional exclusion of a person because of their identity) and disparate impact (e.g., unintentional disadvantage of a protected class via a facially neutral procedure)."[12] This act was the first of its kind to address discriminatory personality tests and disparate hiring outcomes in general, but unfortunately, its protections did not expand to cover individuals with disabilities. Continued anger with disparities in hiring was a major motivating factor for disability rights activists, who fought in the years following the CRA's passage to create legislation that would protect the disability community.

The Rehabilitation Act of 1973 was the first legislation of its kind specifically aimed at protecting the rights of individuals with disabilities to help better integrate them into the workforce. Section 504 of the Act "prohibits discrimination against individuals with disabilities in any program or activity receiving federal financial assistance."[13] While this legislation was revolutionary for its time and did have some positive effects, for the most part it fell short in regards to compliance and positively integrating individuals with disabilities. This legacy of hiring discrimination did not lessen into the 1990s, as many companies still made decisions based on the negative perceptions of hiring managers.[14] Employers exhibited much "discomfort" towards job candidates with disabilities, expressing concern that hiring these individuals would lead to increased costs in accommodations.[15] Despite disability rights activism and Section 504, persistent ableism within society continued to create barriers to employment for individuals with disabilities, highlighting the need for further legislation to protect the rights of the disability community.

This more comprehensive law came in the form of the Americans with Disabilities Act

[12] Ibid., 845.
[13] Moss, "Screened Out Onscreen," 167.
[14] McFarlin, Dean, James Song, and Michelle Sonntag. "Integrating the Disabled into the Work Force: A Survey of Fortune 500 Company Attitudes and Practices." *Employee Responsibilities & Rights Journal* 4 (June 1991): 107–23. https://doi.org/10.1007/BF01390353.
[15] Ibid., 110.

(ADA) of 1990, which "made discrimination in hiring, terminations, promotions, and wages based on disability illegal [and] also required employers to provide reasonable accommodations."[16] The ADA prohibits an employer from using any selection criteria that unfairly discriminates against or screens out disabled candidates, "unless the criteria is 'job-related' and 'consistent with business necessity.'"[17] Additionally, sections of the ADA have made illegal standardized tests or personality assessments that discriminate against individuals with disabilities.[18] After the ADA was passed, courts narrowed the intention of the Act by focusing more on individuals who could be covered by the law's language, rather than more important protections from discrimination. The ADA Amendments Act of 2008 (ADAAA) overruled these cases and instead "expanded the definition of disability under the ADA."[19] The ADAAA made the disability definition requirement less strict and offered coverage to other impairments as they were experienced without "mitigating measures."[20] Yet, despite all this progress, research still shows that gaps persist in protections for individuals with disabilities in the workplace and in hiring.

While all of these laws had positive intentions to bolster hiring and employment outcomes for individuals with disabilities, unfortunately enforcement and implementation is still inconsistent due to the presence of stigma. Employers still express concern over "the added cost of reasonable accommodations which imposes additional hiring costs," which is not a challenge faced by any other minority group in this sector.[21] Despite the many years these laws have existed, hiring discrimination has persisted, as evidenced by the U.S. unemployment rate, which

[16] Armour, Philip, Patrick Button, and Simon Hollands. "Disability Saliency and Discrimination in Hiring." *AEA Papers and Proceedings* 108 (2018): 262–66.
[17] Moss, "Screened Out Onscreen," 189.
[18] Ibid., 190.
[19] Armour et al., "Disability Saliency," 262.
[20] Ibid., 262.
[21] Ibid., 263.

remains at 7.2% for individuals with disabilities, and is double the 3.5% rate for those without a disability.[22] Statistics like this show evidence of a discrepancy in employment outcomes persisting even in the modern era. A major contributing factor in this inequality can be found due to gaps in the protections of disability discrimination legislation, which largely involve self-evaluation and voluntary compliance and therefore are difficult to critically evaluate.[23] This also has repercussions for the modern employment landscape with its own unique challenges.

As AI-powered recruitment and selection tools become more prevalent in hiring practices, the existing perspectives and tools remaining from the past hiring landscape must be considered and questioned in how they apply to modern practices. Traditional hiring methods were largely based on problematic hiring practices and personality tests that originally created unfair circumstances for minority candidates. Now, these traditional tools have been built into modern AI hiring systems, which use subjective measures while referring to them as objective. As these tools become increasingly popular, however, research shows they tend "to have an outsized discriminatory effect on job seekers with all types of physical and mental disabilities."[24] Such evidence demonstrates that while the technology may seem facially neutral, it encompasses the historically problematic validity and disparate impact concerns that the aforementioned laws were intended to protect against.[25]

There are currently few mechanisms for applying existing laws, which already have their own set of gaps and issues, to the emerging problems within AI-powered technologies. Once again, voluntary compliance seems to be the only enforcement measure in place. This is

[22] Bureau of Labor Statistics, U.S. Department of Labor. "Persons with a Disability: Labor Force Characteristics - 2023," News Release, (2024).
[23] Kassir et al., "AI for Hiring in Context."
[24] Brown, Lydia X. Z. "Hiring Discrimination by Algorithm: A New Frontier for Civil Rights and Labor Law." *Human Rights* 49, no. 1/2 (October 1, 2023): 16–18. https://research.ebsco.com/linkprocessor/plink?id=9f496cb2-c514-3553-9499-8faf2d73e14c.
[25] Kassir et al., "AI for Hiring in Context," 848.

especially concerning when we consider that most employers "had never tried to articulate their job performance goals in a systematic fashion, to develop selection devices carefully targeted to serve those goals, or to measure the success of such devices by validity studies."[26] Therefore, not only is an analysis of the existing legal protections for job candidates with disabilities necessary, but so is a critical review of these new AI hiring tools to see how policymakers can tackle new barriers that current laws fall short of addressing.

III. Emergence of AI Use in Hiring

This section will offer some background information into the AI-related nature of this topic, beginning with a discussion of the contributing factors that have led to AI adoption in recruitment and selection practices by top firms. Additionally, I will also briefly introduce the AI neutrality argument, before explaining, in broad terms, how AI hiring tools function, including their learning and training processes. This background emphasizes how even data-driven AI systems are rooted in human decision-making processes, spelling issues with presumed neutrality from these tools. Lastly, I will explore the different ways that AI is utilized by hiring managers, before addressing how disparate outcomes can occur along each step of the hiring process.

IIIa. Contributing Factors of AI Adoption for Hiring

Research from industry research leaders, such as the Society for Human Resource Management, shows that "about 79 percent of employers were using some kind of automated tool in their hiring process as of February 2022—and that was before generative artificial intelligence (AI) tools like ChatGPT were in the headlines."[27] There are many reasons why AI use has skyrocketed in recent years, but especially for recruitment purposes. AI tools have

[26] Ibid., 848.
[27] Brown, "Hiring Discrimination by Algorithm."

benefits for improving efficiency in time-to-hire and filling empty positions rapidly, which reduces costs.[28] These tools have also allowed recruiters to act more strategically and focus on "big picture items," such as "building valuable relationships," while AI systems focus on more menial, time-consuming tasks.[29] Furthermore, AI can be implemented in all stages of the hiring process, which allows for more flexibility, personalization, and overall coordination. There are also many competitive advantages of AI, which allows hiring managers to have a larger applicant pool and use autonomous systems that can identify the most qualified candidates most efficiently.[30] For top firms that want to stand out by bringing in top talent, this is a major motivating factor.

Employers and AI vendors also cite another argument in favor of using AI hiring systems. They claim that "automated hiring tools increase equity by neutralizing the human factor in biased, discriminatory treatment."[31] Essentially, they argue that decreasing human involvement in decision-making also limits human biases. However, it is important to consider that "many vendors rely on poorly defined concepts of bias that obscure how AI can reflect and even exacerbate bias."[32] While many employers and "vendors contend that their tests are predictively valid and in line with business necessity, little independent evidence supports these claims," causing AI and employment researchers to call these systems into question.[33] Reviewing the AI creation and learning processes is instrumental in understanding the concerns with this neutrality theory and seeing if they actually have merit. If so, firms may be implementing a

[28] Beaumont-Oates, William. "AI Recruitment and How It Works." Thomas.Co, 2024. https://www.thomas.co/resources/type/hr-blog/ai-recruitment-and-how-it-works.
[29] Ibid.
[30] Cruz, Ignacio Fernandez. "How Process Experts Enable and Constrain Fairness in AI-Driven Hiring." *International Journal of Communication (Online)* 18 (January 1, 2024): 656. https://research.ebsco.com/linkprocessor/plink?id=e514767f-4700-3f15-9a31-7d7a9f9fbb61.
[31] Brown, "Hiring Discrimination by Algorithm."
[32] Tilmes, Nicholas. "Disability, Fairness, and Algorithmic Bias in AI Recruitment." *Ethics and Information Technology* 24, no. 2 (n.d.). https://doi.org/10.1007/s10676-022-09633.
[33] Ibid., 20.

biased technology that discriminates against marginalized individuals, like those with disabilities, in violation of existing laws.

IIIb. How AI Hiring Tools Work

Early AI development began in the 1950s with "problem solving and symbolic" intentions and in the 1960s, expanded to creating autonomous systems that could "mimic basic human reasoning."[34] These early models developed into the advanced algorithms we see in AI today, which work by "[automating] repetitive learning and discovery through data."[35] Modern AI tools have been created to perform "frequent, high-volume, computerized tasks," without human oversight.[36] As many different types of AI systems have evolved over recent years, their capabilities in data processing and pattern recognition have proven themselves limitless in their application to almost any task. This functionality is made possible by its learning and training process.

Developers teach these AI technologies by introducing essentially infinite amounts of data to their early systems. The AI gains knowledge "by combining large amounts of data with fast, iterative processing and intelligent algorithms," and "learn[s] automatically from patterns or features in the data."[37] This is a simplified explanation of how AI tools function, but it is necessary to understand that AI systems are never truly able to create or process information or make judgments on their own. Even newer generative AI tools simply transform existing data created by humans into new forms by using existing components.

Other functionalities of AI systems that may seem self-sustaining are still built on existing data and human decision-making processes that have been codified. For instance,

[34] SAS Institute. "Artificial Intelligence: What It Is and Why It Matters." SAS Institute. Accessed November 16, 2024. https://www.sas.com/en_us/insights/analytics/what-is-artificial-intelligence.html.
[35] Ibid.
[36] Ibid.
[37] Ibid.

"natural language processing (NLP) is the ability of computers to analyze, understand and generate human language, including speech."[38] While developers may be building human qualities into the code of AI systems, their ability to make decisions or analyze data is still based on how data shows a human would act. Furthermore, all current AI abilities, such as computer vision, still rely on "pattern recognition and deep learning to recognize what's in a picture or video."[39] Due to its ability to rapidly mirror human behavior in various tasks, implementation of these technologies has been increasingly widespread. Not only can their impacts be found within many different industries and companies, but also in various parts of their employment practices.

IIIc. Use of AI in Recruitment and Selection Processes

With the endless possibilities for AI, companies have found many ways to integrate AI technology into their hiring practices to cut costs and increase productivity. These technologies range from those developed in-house by companies for their own personal use to those by third party companies or vendors that create hiring platforms for employers. Hiring managers have been incorporating various AI systems into every stage of recruitment and selection, using these tools to assist them with initial candidate identification, as well as "outreach, screening, assessment, and [even] facilitation" throughout the hiring process.[40]

First, companies may utilize AI to create job descriptions to help them locate the best candidates that could potentially match a role they are looking to fill. AI tools are often used to "identify the pool of active and passive candidates (e.g., via LinkedIn) or to (re-)discover top talents in the pool of former candidates via their internal automated tracking system."[41] This may also include the "targeted advertisement of open positions" based on patterns they recognize in

[38] Ibid.
[39] Ibid.
[40] Hunkenschroer and Luetge, "Ethics of AI-Enabled Recruiting and Selection," 991.
[41] Ibid., 992.

individuals on popular job platforms or from past applicants.[42] Once top candidates are identified, resume reviews are used to thin out the number of potential interviews. AI implementation in this stage may involve scanning documents for key terms and recognizing important qualities which can be used "to score or rank candidates" and "[match] candidates [to] job openings to identify best fit."[43] However, newer AI technologies may "go even further and use ML to make predictions about a candidate's future job performance based on signals related to tenure or productivity, or the absence of signals related to tardiness or disciplinary action." [44] Next, companies will likely perform screening, for which AI is the perfect tool, since it can "complete laborious and repetitive tasks which also means it is perfect to do things such as background checks which lowers both errors and bias," at least according to AI vendors.[45] AI tools can also be used for social media screenings, which involve "scraping [and] analytics of social media postings for psychological profiles" or anything else that the employer may find problematic.[46] Once the system identifies and screens the best potential candidates, companies will likely employ a variety of practices to further evaluate them before making final decisions.

Candidates may be assessed in many ways, such as directly being asked to take personality tests, the results of which the employer will assess.[47] There may also be "simulations, games, [or] tests" used to "assess certain skills, capabilities and traits."[48] Hiring managers may also perform a "linguistic analysis of writing samples [and] web activity."[49] AI tools may even adapt traditional interviews with more modern methods. Not only does AI increase efficiency for communication and facilitation purposes such as "setting up interview times and using chatbots,"

[42] Ibid.
[43] Ibid., 992.
[44] Ibid.,992.
[45] Beaumont-Oates, "AI Recruitment and How It Works."
[46] Hunkenschroer and Luetge, "Ethics of AI-Enabled Recruiting and Selection," 992.
[47] Beaumont-Oates, "AI Recruitment and How It Works."
[48] Hunkenschroer and Luetge, "Ethics of AI-Enabled Recruiting and Selection," 992.
[49] Ibid., 992.

it can even help automate interviews.[50] Hiring managers can use "structured video interviews, [where] AI technology replaces a human interviewer and asks the candidate a short set of predetermined questions."[51] The AI is then used not only to "evaluate the actual responses, but also make use of audio and facial recognition software to analyze additional factors such as the tone of voice, microfacial movements, and emotions to provide insights on certain personality traits and competencies."[52] These and other methods allow employers to build an entire profile of a candidate and see how they would fit as a potential employee within their organization.

By using information obtained throughout all of the prior steps of the recruitment process, employers may even use AI tools to help them ultimately select candidates. All of the aforementioned data can "feed into algorithms, and are weighed and statistically [analyzed] to make predictions about job performance."[53] This may involve candidates being scored to see how they compare to "past employees [and] testing for personality traits associated with strong performance" in that specific company.[54] Companies often use this information to make final decisions about which candidates to hire. Even after firms utilize AI to help select their candidates, the involvement of AI technologies does not end there. The tools may be further used to communicate "where applicants stand in the [hiring] process" and explain their next steps as well as in "scheduling of interviews [and] sending of job offers."[55] Once candidates are selected, some firms even implement these technologies in employee onboarding, further reinforcing how prevalent AI-powered practices are within every part of the hiring process.

[50] Beaumont-Oates, "AI Recruitment and How It Works."
[51] Hunkenschroer and Luetge, "Ethics of AI-Enabled Recruiting and Selection," 992.
[52] Ibid., 992.
[53] Kelan, Elisabeth. "Algorithmic Inclusion: Shaping the Predictive Algorithms of Artificial Intelligence in Hiring." *Human Resources Management Journal* 34, no. 3 (2023): 694–707. https://doi.org/10.1111/1748-8583.12511.
[54] Tilmes, "Disability, Fairness, and Algorithmic Bias", 20.
[55] Hunkenschroer and Luetge, "Ethics of AI-Enabled Recruiting and Selection," 992.

IV. Potential for Disability Discrimination in AI-Driven Hiring

In this section, I intend to lay out how the algorithms, AI systems, and practices introduced in the prior sections may directly contribute to disparate outcomes for members of the disability community. First, I will begin with algorithmic biases that may inadvertently screen out disabled candidates due to designer biases that are then built or embedded into the programs, either intentionally or unintentionally. Next, I will focus on how problematic data may lead to discrimination in the hiring process as well. Additionally, I will introduce an under-researched argument against AI hiring practices, which is that these tools create accessibility issues that are not being sufficiently accommodated. I will then address how companies' choices in how to implement AI may also contribute to disparate effects. Lastly, I will transition to a review of the ethical repercussions of this technology and how they situate the necessity for policy initiatives.

IVa. Algorithmic Biases Against Disabled Candidates

While AI has been intentionally designed to become largely self-sustainable, humans remain a necessary part of their functions and learning processes. Therefore, they are still responsible for values that become inherently built into the technologies, as per the embedded values theory. This theory asserts that all technology is "not morally neutral and that it is possible to identify tendencies in them to promote or demote particular moral values and norms."[56] This viewpoint considers that all technological systems contain "built-in consequence[s]" created by human decision-making and thought processes.[57] If we connect this viewpoint to AI tools, because they are modeled after and taught from human data, they should be subject to critical ethical analysis. This is even more urgent if we consider that these AI tools, specifically for

[56] Brey, Philip. "Values in Technology and Disclosive Computer Ethics." In *The Cambridge Handbook of Information and Computer Ethics*. Cambridge: Cambridge Univ Pr, 2010. https://research.ebsco.com/linkprocessor/plink?id=1dfb4e1c-59f9-31aa-8953-ac4f34ca4887.
[57] Ibid., 42.

hiring and decision-making, are being labelled as objective and free from "human biases" when this is very far from the truth. In practice, research shows that "AI may equally replicate and amplify such bias and embed it in technology."[58]

So, while the neutrality argument examined earlier in this paper sounds ideal in theory, we cannot ignore that "technology—even and especially algorithmic technology—does not exist apart from the social, cultural, and political context in which it is created."[59] Moreover, we must realize the very real possibility that "algorithmic technologies are built on and reflect the pre-existing biases and prejudices of the people and companies that create and purchase them."[60] These biases do not just manifest themselves as AI systems automatically discriminating against candidates with certain protected characteristics. Instead, this may involve "a disproportionate distribution of prediction errors, a faulty design of the AI architecture," or other problematic search terms or processes.[61] Essentially, algorithmic biases exist when developers' personal stereotypes or biases may have been unintentionally built into the code of AI systems. This result leads to facially neutral decision-making processes having adverse effects on a certain group.

There are many striking examples of these types of algorithmic biases within AI used for hiring purposes. For instance, in one automated resume screening tool, "the two characteristics the algorithm most strongly associated with successful job performance were having the first name Jared (a name coded as white and male) and having played high school lacrosse (a sport that often connotes access to wealth privilege)."[62] This shows how the biased judgements of AI developers rooted in traditional perceptions of a successful candidate may unintentionally screen

[58] Kelan, "Algorithmic Inclusion," 694.
[59] Brown, "Hiring Discrimination by Algorithm."
[60] Ibid.
[61] Buyl, Maarten, et al. "Tackling Algorithmic Disability Discrimination in the Hiring Process: An Ethical, Legal and Technical Analysis." *Proceedings of the 2022 ACM Conference on Fairness, Accountability, and Transparency*, June 20, 2022, 1071–82. https://doi.org/10.1145/3531146.3533169.
[62] Brown, "Hiring Discrimination by Algorithm."

out marginalized candidates who do not share these experiences or qualities that are completely irrelevant to the job at hand. Furthermore, for individuals with disabilities in particular, these resume review systems may "penalize candidates for long gaps between jobs" or "for lacking leadership experience, even though people from marginalized communities might be less likely to obtain that very experience due to discrimination and exclusionary workplace cultures."[63]

These few examples already show how these algorithms constantly perpetuate existing biases unintentionally held by developers within their workplaces. This also applies specifically to the topic of intersectionality, as "discriminatory patterns evidenced in automated hiring tools can impact people in every marginalized community, with an exponentially negative impact on those who belong to more than one marginalized group."[64] Currently, there are many unseen issues with current algorithms because most operate behind the scenes and candidates are not usually aware that they are being penalized by these supposedly "unbiased" AI systems for experiences that are simply a part of having a disability. As we continually realize the problems present within these systems, we should consider other ways that AI hiring methods are perpetuating problematic practices of the past.

IVb. Effects of Misrepresentative or Inaccurate Data

Aside from personal biases that developers may unknowingly code into AI systems, the data these tools learn from might also lead to discriminatory outcomes for the disability community. As previously explained, AI tools are designed to make decisions and recognize patterns based on data introduced during their learning processes. However, this could be problematic if we consider that the "datasets used for machine learning may contain historical biases, unrepresentative data and collection bias" and may also result in candidates with

[63] Ibid.
[64] Ibid.

disabilities being unfairly screened out.[65] Issues occur when algorithms are created or trained using historical data from past or current employees from that company that does not positively or accurately reflect their experiences. For instance, if a company does not have any workers with disabilities or other protected characteristics, the system may not match these types of candidates with this position, and may rank them lower or even screen them out.

Another related issue is when "underlying data may be unrepresentative of the wider population," which means that the AI tools may be unsure how to score candidates and may just screen them out instead.[66] Since white individuals' faces are predominantly used to train AI for video interviews, research shows that these tools did not easily recognize the faces of black women and often scored them lower.[67] This could also be the case for those with impairments affecting their facial appearance or expressions. Or, if interview tools do not contain data from individuals with speech or communication disorders, AI may interpret them incorrectly, which could lead to negative employment outcomes. This could also connect to collection bias issues, especially if individuals with disabilities are not being included or positively represented in these datasets because data collection methods are inaccessible. Data-related issues are a pretty large area of concern as "AI-supported hiring may thus give rise to biases owing to the domination of underlying datasets by specific groups," once again perpetuating existing disparities.[68]

IVc. Review of Specific Accessibility Issues

Another problem with AI-powered hiring methods are accessibility issues that could pose barriers to individuals with disabilities using such systems. It is becoming apparent that "some automated hiring tools—like gamified tests that assume a neurotypical, sighted candidate with an

[65]Kelan, "Algorithmic Inclusion," 697.
[66] Ibid., 699.
[67] Ibid., 699.
[68] Kelan, "Algorithmic Inclusion," 697.

ordinary range of motion—are outright inaccessible for users with disabilities."[69] Despite little research being put into investigating this issue further, it seems rather obvious that some "disabilities may render the standard hiring process simply inaccessible, e.g., mutism if verbal communication is part of the assessment."[70]

Likely due to the fast-paced and often impersonal nature of AI hiring methods, employers are clearly not putting time into finding alternative means of assessing these candidates. Since "employers may not provide adequate alternative assessments, modifications, or accommodations," oftentimes these applicants slip through the cracks.[71] This is frankly unacceptable, especially when employers are legally obligated to provide job candidates with accommodations, "even if the tools are procured through outside vendors."[72] However, once again, there is a clear lack of research investigating accessibility challenges that may result from AI hiring methods, which also presents a challenge for employers being aware of further potential of disparate impact.

IVd. Implementation by Companies and its Impacts

Even though algorithms are a concern, regardless of whether or not they are mitigated, "the promise of equity-driven, nondiscriminatory hiring algorithms is still a promise rather than a reality because bias can creep in consciously and unconsciously from employer practices rather than the technology itself."[73] Therefore, it is important to remember that "AI-based hiring decisions in organizations are context dependent and blend the capabilities of algorithmic-powered tools with choices and judgments made by process experts."[74] How employers and

[69] Brown, "Hiring Discrimination by Algorithm."
[70] Buyl et al., "Tackling Algorithmic Disability Discrimination," 13.
[71] Brown, "Hiring Discrimination by Algorithm."
[72] Engler, Alex. "The EEOC Wants to Make AI Hiring Fairer for People with Disabilities." Brookings, 2022. https://www.brookings.edu/articles/the-eeoc-wants-to-make-ai-hiring-fairer-for-people-with-disabilities/.
[73] Cruz, "How Process Experts Enable and Constrain Fairness," 656.
[74] Ibid., 656.

hiring managers decide to utilize AI, such as by setting specific search or evaluation criteria, influences how their candidate pool is created. Additionally, we can also consider that the "the applied pressure for efficient, fast, and quality candidate sourcing, recruiters often trade off systematic and fair sourcing practices for inconsistent […] and implicit personal judgments or stereotypes about candidates."[75] When employers trust AI recruitment methods wholly without checking their validity, many additional ethical risks can arise. This is especially true if we consider that most existing legal protections involve some level of voluntary compliance, which is certainly not being fulfilled within the current AI-powered hiring landscape.

IVe. Ethical Considerations and Necessity for Policy Change

Considering all of the potential for discrimination present within these AI-powered hiring methods, a comprehensive ethical review is necessary before we can begin to address how to fill in the relevant gaps in law and policy. Now that we have reviewed the direct effects of how these tools can screen out candidates with disabilities, it is important to focus on other ethical considerations that emerge from these practices.

First, many researchers discuss the loss of privacy or "lack of informed consent" that may exist surrounding AI tools.[76] For AI regulation on its own, but especially in hiring, "the informed consent requirement is not yet well implemented [...] rendering the protection of personal privacy an ethical challenge."[77] One dimension of this is the "active debate about the extent to which it is ethically appropriate to use social media information for personnel selection purposes."[78] Of course, "legally, social media content is public data, but it is questionable whether it is ethical to mine social media data for hiring purposes" when consent has not been given for analysis in an

[75] Ibid., 657.
[76] Hunkenschroer and Luetge, "Ethics of AI-Enabled Recruiting and Selection," 995.
[77] Ibid., 995.
[78] Ibid., 995.

employment context.[79] Additionally, there could be an issue with private medical information that is submitted to these companies for accommodation purposes being utilized for AI training purposes without providers' permission or knowledge and causing a confidentiality concern. The overall ethical issue that is created here is that "applicants in the job market generally hold less power than employers."[80] It is becoming increasingly obvious that "even if applicants are informed enough to consent to the process, they may not be able to opt out without being disadvantaged in the process."[81] Another large part of this issue is whether employees are being made aware of the fact that AI is being utilized by employers.

Another ethical consideration that has been raised surrounds firms' "ability to establish transparency by providing applicants with updates and feedback throughout the process and in a timely fashion" when they use AI hiring technologies.[82] Despite the fact that creating feedback opportunities for candidates to see why they were rejected should be much easier when utilizing AI, a lack of transparency still prevails. A clear challenge presented is that "the predictive and decision-making processes of algorithms are often opaque, even for the programmers themselves.[83] It has been uncommon for AI vendors or firms to provide qualitative or quantitative reports to show how these decisions are made. Researchers have expressed how this transparency is "ethically critical in the personnel selection context, due to its high relevance for people's lives, and because this kind of black-box system may remain unchallenged, thereby obscuring discrimination."[84] The secondary part of this ethical concern is that employers feel a lack of responsibility and accountability when they use these tools, especially when they were created by vendors. Then the larger issue is that nobody is ensuring that these tools are being

[79] Ibid., 995.
[80] Ibid., 995.
[81] Ibid., 995.
[82] Ibid., 997.
[83] Ibid., 997.
[84] Ibid., 997.

fairly used for decision-making or questioning who would be liable for disparate outcomes.[85]

Since AI tools themselves obviously cannot be held accountable, many ethicists assert that "it should be a human agent who is ultimately responsible for the decision made when selecting an employee."[86] This shows another underlying issue, which is the lack of human oversight in these procedures. Though it is difficult to identify whether a human or a computer is making the final decision in most of these companies' practices, many claim "that AI has already taken over the automated decision-making process, forwarding or rejecting candidates."[87] If human intervention in these procedures continues to decline, this could mean other issues for individuals facing disparate outcomes, as there would be even less oversight for equality in hiring practices.

The overarching concern accompanying all of these considerations is how these tools can result in a decreased level of diversity and representation within companies. AI ethicists are concerned that "a systematic bias through AI could result in more homogeneity in organizations."[88] This is especially true if we consider that "a single decision-making algorithm" is making decisions based on code created by developers or data that is not necessarily inclusive or representative of diverse populations.[89] Also, these tools may be replacing a team of "several human decision makers with potentially differing views" which may also lead to less workplace diversity.[90] The prevailing worry from "disability advocates is that people with disabilities will be discouraged by digital assessments and drop out of the application process" completely.[91] Since firms may also be losing out on top talent if qualified applicants are being unfairly

[85] Ibid., 997.
[86] Ibid., 997.
[87] Ibid., 997.
[88] Ibid., 994.
[89] Ibid., 994.
[90] Ibid., 994.
[91] Engler, "The EEOC Wants to Make AI Hiring Fairer."

screened out for having disabilities, this creates a situation in which everyone faces a loss that should certainly be rectified by policy initiatives.

V. Potential Solutions and Framework for Improvement

In this final section of the paper, I will consider how all the arising issues evaluated previously and their accompanying ethical considerations spell out the need for policy initiatives that protect job candidates with disabilities during the hiring process. From there, I will briefly review recent policy and guidance frameworks which will assist me as I begin to create my own framework that would promote equitable hiring practices by adapting existing research into a set of recommended policy initiatives.

Va. Review of Recent Policy and EEOC Guidance

There have been attempts to fill the existing gap in legal protections surrounding AI-powered hiring methods; however, these have largely fallen short of addressing the needs of individuals with disabilities. For instance, in 2021 "the New York City Council passed the Automated Employment Decision Tool Law (AEDT)," which was credited as "a first-of-its-kind law on AI hiring discrimination."[92] While this law "stipulates that employers must conduct third-party bias audits for discrimination," which is a great start, the language only includes "race, ethnicity, or sex," which evidently fails to protect individuals with disabilities.[93] Based on the existing laws, "employers have no obligation to provide any meaningful notice, explanation, or opt-out process to job seekers and no obligation to regularly audit their software for discriminatory impact using external experts or to report the results of these audits and remediate

[92] Brown, "Hiring Discrimination by Algorithm."
[93] Ibid.

accordingly."[94] Further, a concern of disability activists is that when laws fall short of protecting marginalized groups, companies are "proliferating the market with tools that comply with the letter of the law but nonetheless discriminate."[95] So, it is important to consider the strengths of newer laws that, in theory, could fill in gaps left by existing legislation, and to examine how they can be improved to protect individuals with disabilities during all stages of the hiring process impacted by AI tools.

In addition to frameworks within these insufficient but well-intentioned recent laws, we can also consider guidance present within the EEOC's most recent set of AI-related employment guidance, which reviews how these systems may violate the ADA's accommodation and equal treatment requirements and how they plan on addressing them. Within this framework, "the EEOC recommends that employers train staff to quickly recognize and respond to accommodation requests with alternative methods of candidate evaluation, and notes that outsourcing parts of the hiring process to vendors does not automatically relieve the employer of its responsibilities."[96] While most of the EEOC recommendations address employer-related practices, as they are "ultimately responsible for ADA compliance," there is some guidance or discussion surrounding the practices of AI vendors.[97] This involves their assertion that even "when an algorithmic tool is 'validated' according to a vendor, it does not provide inculpability from discrimination" and employers should be sure to still question vendors to ensure they are also being accountable.[98]

Furthermore, a review of this guidance shows that these recommendations alone may "help employers make fairer choices, but the EEOC does not seem to be purely counting on the

[94] Ibid.
[95] Ibid.
[96] Engler, "The EEOC Wants to Make AI Hiring Fairer."
[97] Ibid.
[98] Ibid.

good graces of employers to execute the changes it thinks are necessary.[99] Instead, they "[provide] recommendations for job applicants who are being assessed by algorithmic tools," which involves encouragement to "file formal charges of discrimination with the EEOC if a candidate feels they were discriminated against by an algorithmic hiring process."[100] From there, they can conduct an investigation, then "[try] to negotiate an agreement, and failing that, may file a lawsuit against the employer" on the grounds that their tools were discriminatory and candidates may be entitled to damages.[101] This guidance is certainly a good start for policy, but more strict regulations expanding upon them are necessary.

Vb. Proposed Solution Framework

It is clear that organizations' and vendors' accountability is important and growing in discussion due to a sense of urgency in creating equality in an AI-powered hiring environment that is growing more popular by the day. Therefore, to address the root issues present in widespread use of AI-powered technologies in hiring, there needs to be a set of policies or initiatives implemented by the government, companies, and AI vendors.

First, I recommend that AI vendors increase diversity and inclusivity in the development of AI tools and through the resources used during learning processes. Initially, it would involve creating teams of more diverse individuals to make sure different backgrounds are represented in systems created.[102] This would directly target algorithmic biases, especially if these individuals are educated about the risks of implicit and explicit biases that may be built into their programs so they can prevent these issues ahead of time or raise questions when they arise through internal auditing procedures.[103] One successful approach has been seen in "AI software vendors

[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] Hunkenschroer and Luetge, "Ethics of AI-Enabled Recruiting and Selection," 999.
[103] Moss, "Screened Out Onscreen," 195.

[removing] any wording or phrases that can unconsciously predict the gender of a candidate from CVs to circumvent unconscious bias and improve equity."[104] If developers are able to be self-aware about potential problematic areas within their tools to protect individuals with disabilities in particular, this could have many positive outcomes.

Additionally, there should be a stronger effort to use more relevant and accurate data sources. However, this may connect to another issue of limited existing data surrounding the disability community, but it is also possible for them to weigh the data differently so it does not unintentionally discriminate against marginalized groups. For instance, there has been success in using "inverse weight propensity scores to re-balance groups for instance by taking into account how many black women older than 30 are in the dataset and then balance results internally."[105] Overall, more awareness of disability justice and intersectionality considerations during the early stages of AI development, even before the issues with implementation begin, would be an asset to preempt discriminatory outcomes.[106]

For the second prong of my recommended framework, external laws and internal policies must be created requiring accountability and transparency from companies. Many of the current issues surrounding AI in hiring could only be "addressed through rigorous coding protocols, job analysis and regular auditing of algorithms."[107] Therefore, stricter legislation and company policies should be created and enforced, requiring AI impact assessments and regular auditing to prevent disparate outcomes for the disability community. Research has suggested that risks can never be completely eliminated from AI tools, even with additional accountability from vendors. Therefore, as an additional check to ensure equality with these tools, AI ethicists assert that

[104] Hunkenschroer and Luetge, "Ethics of AI-Enabled Recruiting and Selection," 999.
[105] Kelan, "Algorithmic Inclusion," 701.
[106] Moss, "Screened Out Onscreen," 194.
[107] Kelan, "Algorithmic Inclusion," 701.

"technical due diligence regarding algorithmic design and implementation is crucial to keep this risk low."[108] Even when companies buy AI tools from vendors, "practitioners are strongly encouraged to refer to professional test standards and obtain critical information about the tools: for example, evidence that informs psychometric reliability, criterion-related validity and bias implications."[109] In simple terms, companies need to provide reports that explain what search terms they use, "why a candidate has been selected and the causality regarding which specific attributes can be associated with their success in a role."[110] A consistent theme among these recommendations involves ensuring explainability, transparency, and overall accountability from companies along every step of the process, as well as enforcing the legal requirement to provide accommodation, which should be more strictly regulated even within AI contexts.

For the third recommendation, there should be stricter laws and policies surrounding privacy and informed consent created and implemented by companies and vendors, just as they have to comply with traditional hiring practices.[111] Part of this involves private data being kept private by companies and not being included in AI hiring practices to evaluate or analyze candidates. This includes social media information and medical data alike, which should not be used for hiring purposes unless candidates are made aware and give their explicit consent. Lastly, "it should be always transparent to applicants whether they are communicating with another human or with AI" or if AI is being used to evaluate them, to increase the overall level of informed consent within these processes.[112] This would also help candidates remain vigilant so they can take appropriate action, such as reporting to the EEOC, if they feel that they have been unfairly discriminated against.

---

[108] Hunkenschroer and Luetge, "Ethics of AI-Enabled Recruiting and Selection," 994.
[109] Ibid., 999.
[110] Ibid., 1000.
[111] Hunkenschroer and Luetge, "Ethics of AI-Enabled Recruiting and Selection," 999.
[112] Ibid., 999.

Lastly, for the fourth prong, laws should reinforce human involvement in hiring processes. Cases such as *Mobley v. Workday* reinforce that allowing an AI tool to make final employment decisions is unacceptable and should be illegal. Therefore, a human review of all decisions made using AI would be necessary to ensure that ultimate candidate selection is not being unfairly determined by problematic AI tools. The most useful method would likely be the requirement of "AI ethics board with an oversight function[s], consisting of representatives of relevant stakeholders who debate the data and ethical dimensions of AI algorithms and agree on boundaries for AI technology in the company."[113] These boards, consisting of a diverse group of individuals, would perform "ethical audits" to ensure that ethical standards are being met and that no one faces disparate outcomes. Another element involves the requirement that AI vendors build into their tools the "ability to judge whether it can grant adequate accommodation."[114] If not, vendors should be required to inform companies using their tools to stay vigilant and make sure all users are accommodated.[115] This would limit adverse effects arising out of the impersonal and fast-paced nature of AI and confirm that these methods align with existing legal protections.

VI. Conclusion

As I have argued in this paper, the topic of AI and its rapidly growing negative impact on the disability community must be addressed. It is evident that the current state of legislation, from more outdated legislation to recent attempts to fill gaps, still falls short of making any real, lasting, and positive change. Based on the prevalence of AI in many companies, along every step of the hiring process, and on the legacies of human biases and personality tests that have been

[113] Ibid., 999.
[114] Buyl et al., "Tackling Algorithmic Disability Discrimination," 14.
[115] Ibid., 14.

built into these tools, there is a clear potential for discriminatory outcomes. Due to the clear barriers of perpetuated bias, improper data being used, and accessibility concerns, there needs to be a reaffirmed emphasis on inclusive hiring practices when AI is utilized during hiring.

With this in mind, it is important that nobody slips through the cracks and is unfairly screened out by AI systems or practices. To review the example of Derek Mobley's case, the plaintiff succeeded in showing that Workday was still liable for the disparate outcomes, despite not being an employer but instead a vendor for businesses, which "opens the door for a significant expansion of liability" for AI vendors in the hiring process.[116] Still, this decision reinforced how candidates may not even realize anything is amiss when instances of disparate impact are occurring behind the scenes. Drawing from Mobley's example, individuals with disabilities should also be aware of how AI tools can potentially discriminate against them based on their protected characteristics. This case also opens the doors for a very important discussion about how existing laws and regulations protect individuals from discrimination that may occur due to AI technology. Furthermore, it is imperative for lawmakers to review the functions of AI, including how they work, and how implicit biases may be built into their algorithms, or how disparities may occur when they are implemented by companies.

The potential for inclusive and fair hiring practices using AI-powered tools exists but requires more transparency, accountability, and use of positive data. Further, it necessitates more mindfulness by every involved party in considering how it could have disparate outcomes on the disability community. Additionally, it is important that we remember that concerns about biases within AI "[ignore] the fact that the original source of algorithmic bias is the human behavior it is simulating."[117] If we are concerned about the decisions being made by AI, we should first

[116] See and Tyman, "Mobley v. Workday," 43.
[117] Ibid., 994.

address the errors in human behavior within society that it unintentionally mirrors.[118] While my framework of suggestions would mitigate discriminatory effects from these tools, only once individuals with disabilities experience equal outcomes in hiring and employment can these biases be fully eliminated from AI-powered methods.

[118] Ibid., 994.

Bellarmine Law Society Review

Volume XV | Issue II Article II

Disney's Hidden Mouse Trap: The Arbitrariness of Arbitration Clauses

Joseph Murphy
Boston College, murpbdg@bc.edu

DISNEY'S HIDDEN MOUSE TRAP:
THE ARBITRARINESS OF ARBITRATION CLAUSES

JOSEPH MURPHY[1]

Abstract: With an increased reliance on technology and a surge in digital agreements, people have become desensitized to the binding nature of the terms to which they consent in everyday online interactions. This was made readily visible in the aftermath of the death of a woman named Kanokporn Tangsuan due to an allergic reaction in Disney Springs and how her widower found himself legally constrained by the Terms of Service of a free Disney+ trial that he had signed up for without second thought. This paper analyzes the case brought forth by Tangsuan's husband, Jeffrey Piccolo, the scope of arbitration clauses like those utilized by Disney, and how they restrict possible avenues of legal action. It brings into conversation the power imbalance often apparent in such legal clauses, the question of their continued validity on the basis of legal precedent, and why a reexamination of their prevalence in today's legal landscape is necessary.

The streaming platform Disney+ currently has over 150 million subscribers, and approximately half of Internet users with children under ten years old in the United States are subscribed to the platform.[2] With countless titles, and now encompassing the works of Marvel and LucasFilm, it is obvious why people would sign up for it. What many did not know was that they would be forfeiting their opportunity to pursue litigation if wronged as a condition of their subscription to Disney+. Disney has conveniently failed to mention in their advertising of the platform that the act of paying for this service, or even just signing up for a free trial, would restrict people's ability to take Walt Disney Company to court, as well as limiting discovery,

---

[1] Joseph Murphy is a senior at Boston College studying Political Science and Latin. Upon graduation, he hopes to attend law school, focusing specifically on the rule of law, employment and labor law, and administrative law. Joseph would like to extend special thanks to his parents and sisters for their constant and much-needed support, as well as to Professor Elizabeth Hendler for her guidance and mentorship throughout his undergraduate career.

[2] Tom Grater, "Half Of U.S. Families With Young Children Now Subscribe To Disney+ – Report." *Deadline* (blog), March 17, 2020. https://deadline.com/2020/03/half-of-us-families-young-children-subscribe-disney-report-1202885339/.

class actions, and other comprehensive remedies. After a New York University doctor died at a restaurant on Disney property and her family attempted to get restitution and justice for her death, Disney cited the Terms of Use agreed to on their Disney+ and Walt Disney Parks and Resort (WDPR) website as to why they could not pursue anything besides arbitration. This case raises many questions regarding the scope of these arbitration clauses, their applicability to this specific situation, and what this means in a wider sense regarding transparency in agreements and terms of service.

On October 5, 2023, Jeffrey Piccolo, his wife Kanokporn Tangsuan, and her mother dined at a restaurant in Disney Springs, which is an outdoor shopping and dining complex. They had chosen to eat at Raglan Road Irish Pub and Restaurant, specifically because "both WDPR and Raglan Road advertised and represented to the public that food allergies and/or the accommodation of persons with food allergies was a top priority and that patrons/guests could consult with a chef and/or special diets trained Cast Member before placing a food order."[3] Tangsuan had informed the group's server about her food allergies and was assured that the restaurant could properly accommodate them. After eating at Raglan Road Irish Pub and Restaurant, Tangsuan soon died of anaphylaxis resulting from elevated levels of nut and dairy. Piccolo filed a wrongful death lawsuit against Raglan Road and WDPR, but WDPR, in response, filed a Motion to Compel Arbitration and Stay Proceedings. It cited how Piccolo had no choice but to arbitrate because he had agreed to the Terms of Use when signing up for a free trial of Disney+ and using the WDPR website to buy park tickets for Epcot.[4]

Interestingly enough, despite their apparent ability to force arbitration, Disney decided to back down from this position. Disney Experiences Chairman Josh D'Amaro said in a statement:

---

[3] *Jeffrey J. Piccolo, as Personal Representative of the Estate of Kanokporn Tangsuan, Deceased, v. Great Irish Pubs Florida, Inc., et al.,* Case No. 2024-CA-001616-O (Ninth Judicial Circuit, May 31, 2024).
[4] Ibid.

> "At Disney, we strive to put humanity above all other considerations. With such unique circumstances as the ones in this case, we believe this situation warrants a sensitive approach to expedite a resolution for the family who have experienced such a painful loss. As such, we've decided to waive our right to arbitration and have the matter proceed in court."[5]

Whether this decision was made because of an emotional epiphany regarding the victim's "humanity" or because of the immense backlash and publicity incited by the case is an issue that will not be discussed by this paper.

Before discussing the relevant statutes and cases that would inform the analysis of Disney's position, it is important to examine the arbitration clause at the heart of the dispute and the Terms of Use as a whole. In the Disney Terms of Use, it does clearly and concisely state at the beginning that:

> "Any disputes between you and us, except disputes resolved in small claims court or relating to the ownership or enforcement of intellectual property rights, are subject to a class action waiver and must be resolved by individual binding arbitration. Please read the arbitration provision (Section 8. Below) as it affects your rights under this contract."[6]

Furthermore, within Section 8, there are two clauses to note regarding the applicability and longevity of this arbitration clause. Section 8, Clause F, entitled "Arbitration Agreement Survival," states, "This arbitration agreement will survive the termination of your relationship with Disney, including any revocation of consent or other action by you to end your engagement

[5] Michael Bartiromo, "Disney No Longer Trying to Dismiss Wrongful Death Lawsuit after Claiming Protections from Disney+ Usage Terms." *KXAN Austin*, August 24, 2024. https://www.kxan.com/news/national-news/disney-no-longer-trying-to-dismiss-wrongful-death-lawsuit-after-claiming-protections-from-disney-usage-terms/.

[6] "English – Disney Terms of Use – United States." Disney Terms Of Use. Accessed January 4, 2025. https://disneytermsofuse.com/english/.

with or use of any Disney Products or any communication with us."[7] This means that even if the agreement to the terms of use occurred in the pretense of entering into a free trial, the arbitration waiver forgoing one's ability to bring Disney to court reaches to infinity and beyond.

> Interestingly enough, Disney does have an "opt-out" clause, which states:
>
> "You may opt out of this arbitration agreement via mail. If you do so, neither party can force the other party to arbitrate. To opt out, you must notify us in writing no later than thirty (30) calendar days after first becoming subject to this arbitration agreement; otherwise you shall be bound to arbitrate Disputes on a non-class basis in accordance with this Agreement."[8]

In the relevant case, Piccolo had not notified Disney in writing of his unwillingness to be bound by the arbitration clause, but it is fair to assume that he, along with many others before the widespread coverage of this case, did not know of the binding aspect of the terms.

An area of interest in this case surrounds the location in which the incident occurred. Disney Springs, although utilizing the company name and being technically within Disney property, consists of many independent restaurants and stores that would seem to be outside of strict Disney management. Given the fact that Raglan Road is a third-party restaurant that is not owned by Disney but rather is a part of a mall-like complex, how could the plaintiffs be successful in their lawsuit against Disney? The plaintiff's complaint states, "Upon information and belief, DISNEY had control over the menu of food offered, the hiring and/or training of the wait staff, and the policies and procedures as it pertains to food allergies at DISNEY SPRINGS restaurants, such as RAGLAN ROAD."[9] Even though Raglan Road's status as an independent restaurant not owned by the Disney corporation might appear to limit liability and Disney's role

[7] Ibid.
[8] Ibid.
[9] *Piccolo v. Great Irish Pubs Florida, Inc., et al.*

in the case, the fact that Disney had control over various aspects of operation of Raglan Road makes them a viable and suitable candidate for Piccolo's wrongful death lawsuit.

From a perspective of precedent, WDPR's position of arbitration is supported. Originally in the case of *Discover Bank v. Superior Court of Los Angeles* in 2005, where Discover Bank had forced arbitration despite blatantly inflicting large amounts of damages to be dispersed amongst many consumers, the California Supreme Court ruled that "class action waivers," such as the one within Disney's Terms of Use, "in certain consumer arbitration agreements are unconscionable."[10] Yet, in the case of *AT&T Mobility LLC v. Concepcion* of 2011, in which customers of AT&T had claimed that the company engaged in fraudulent behavior regarding the promotion of a free phone offer, the Supreme Court decided that the Federal Arbitration Act, whose purpose was to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," preempted the *Discover Bank* rule.[11] Thus, "class-action waivers in consumer arbitration agreements are enforceable even where those waivers are unconscionable under applicable state law."[12]

Another case validating Disney's position is *Meyer v. Uber Technologies, Inc.*, which is particularly relevant given it relates to the validation of the arbitration clause of a company's Terms of Service. In *Meyer v. Uber Technologies Inc.*, the plaintiff-counter-defendant-appellee Spencer Meyer had alleged that the Uber application allowed third-party drivers to illegally fix prices; they had attempted to force arbitration because Meyer had made an Uber account and had thus agreed to an arbitration clause in the Terms of Service. The district court asserted that Meyer

[10] Smith, Steven, et al., "International Commercial Dispute Resolution." *The International Lawyer* 46, no. 1 (2012): 113–27. http://www.jstor.org/stable/23827354.
[11] Ibid., 114.
[12] Ibid., 114.

"did not have reasonably conspicuous notice of and did not unambiguously manifest assent to Uber's Terms of Service when he registered."[13]

Meyer's case was appealed to the United States Court of Appeals for the Second Circuit which emphasized the role of state contract law in determining the validity of the agreement and noted, "Where there is no evidence that the offeree had actual notice of the terms of the agreement, the offeree will still be bound by the agreement if a reasonably prudent user would be on inquiry notice of the terms."[14] The Second Circuit also commented on the fact that the signage of the Terms of Service occurred over the Internet, which adds layers of nuance, saying:

> "Courts around the country have recognized that [an] electronic [click] can suffice to signify the acceptance of a contract…[t]here is nothing automatically offensive about such agreements, as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement.'"[15]

Just as in the Disney Terms of Use, the Uber Terms have a hyperlink that direct the user to the specific sections and clauses. Even though this seems to add a barrier to the user, the Second Circuit noted that "a reasonable user would know that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not."[16] In the end, the Second Circuit vacated the initial order of the district court that denied the motion to compel arbitration and remanded the case to the district court to determine whether or not Disney had waived its rights to arbitration.

The manner in which Piccolo acted is also a major area of interest for the case. The capacity by which he acted when he originally signed Disney's Terms of Use, (when he signed

---

[13] "Meyer v. Uber Technologies, Inc., No. 16-2750 (2d Cir. 2017)," *Justia Law*, https://law.justia.com/cases/federal/appellate-courts/ca2/16-2750/16-2750-2017-08-17.html.
[14] Ibid.
[15] Ibid.
[16] Ibid.

up for the free trial or used the website to buy park tickets,) differs from the capacity by which he is acting when filing a lawsuit against WPDR and Raglan Road. Indeed, it was Jeffrey Piccolo who signed the agreement of Disney+ that included the arbitration clause. This does not extend to Piccolo's role in the lawsuit, though, as the plaintiff in the case is "Jeffrey J. Piccolo as Personal Representative of the Estate of Kanokporn Tangsuan, Deceased."[17] Kanokporn Tangsuan was the individual who was wronged by Disney, and it was Piccolo, not her, who entered the agreement with Disney. It is on her behalf and estate that Piccolo is bringing forth the lawsuit, and thus the arbitration clause is not truly applicable to the plaintiff in question.

Raglan Road and other restaurants in the Disney Springs complex have been highlighted in recent news as well because of their 'independent' status, which is of much interest with liability cases such as this one. In September 2024, workers of restaurants in Disney Springs banded together to demand better conditions, such as higher wages and benefits like health insurance. In reference to this situation, Jeremy Haicken, president of the Unite Here Local 737, which represents Disney employees said, "we've discovered that there is a second class of workers at Walt Disney World, those workers are the subcontracted employees of restaurants that are not operated by Disney…These are restaurants that are operated by subcontractors at Disney Springs."[18] Not only does Disney distance itself from issues arising within these establishments by designating them as independent, but it provides reason by which it can deny these workers the same rights and benefits granted to those who work within the Disney parks themselves.

This case brings the scope of Disney's agreement and the arbitration clause as a whole into question and public scrutiny. It seems unconscionable that agreeing to terms and conditions

---

[17] *Piccolo v. Great Irish Pubs Florida, Inc., et al.*

[18] James Wilkins, "'Second Class' in Disney Springs: Restaurant Workers Push for Better Pay, Benefits," *Tampa Bay Times*, September 19, 2024, https://www.tampabay.com/news/business/2024/09/19/second-class-disney-springs-restaurant-workers-push-better-pay-benefits/.

of a free trial of a streaming service means waiving the ability to litigate for damages and death caused by a restaurant at a Disney property. What does this mean going forward for entering into agreements with companies like Disney? Should consumers be more meticulous in their scanning of the terms of conditions, or should companies as expansive as Disney be forced to be more forthcoming and transparent with possible legal restrictions one may incur by entering into agreements with them?

Arbitration clauses have been criticized greatly for being situationally manipulative and skewed towards the larger entities including them. Drahozal (2001) notes concerns that arbitration clauses are "mandatory," referring to the fact that refusing to comply with these clauses precludes the obtaining of the good or service in question.[19] He also comments on the perception of arbitration itself as "unfair" because of "limited discovery, lack of a jury trial or a right to appeal, repeat-player advantages in selecting arbitrators, no class relief, and excessive fees unfairly disadvantage individuals bringing claims."[20] Finally, he considers the fears of arbitration clauses as "unfair" due to the fact that "clauses drafted by corporations provide for biased tribunals and distant locations for hearings, preclude recovery of attorneys' fees and punitive damages, shorten time limits for filing claims, and give the corporation, but not the individual, the ability to go to court for some or all claims."[21] He simultaneously assuages some concerns and claims that arbitration clause critics overlook information that would, to an extent, prevent corporations from abusing these clauses. He enumerates that business reputation's major role in how corporations operate in agreements and arbitration institutions' impetus to promote fairness as two constraining factors.[22] Regardless of whether or not fears of arbitration clauses

[19] Christopher R. Drahozal, "Unfair Arbitration Clauses," *University of Illinois Law Review* 2001, no. 3 (2001).
[20] Ibid.
[21] Ibid., 697
[22] Ibid., 766

are overstated, it is undeniable that their use could cause unimaginable damage if not put under strict scrutiny and regulation.

Although it is the consumer's duty to read through terms of service when entering into agreements, it seems truly unconscionable to slip something as far-reaching and substantial as an arbitration clause into something as inconspicuous as a free trial to a streaming service. The terms of a streaming service should pertain to the streaming service itself, not realms completely disconnected from the agreement at hand. Should someone be forbidden from bringing any lawsuit against Amazon if one used a week-long free trial to the Amazon Prime streaming service a number of years ago? It is completely unjust for companies to take advantage of the pages and pages of legal jargon that comprise the terms of even the most inconspicuous contracts. The average person would not even consider that subscribing to Disney+ in any capacity would hinder their legal rights vis-a-vis the Walt Disney Company, and to sift through the implications of such agreements would require the assistance of legal aid or one's own legal expertise. In order to ameliorate the divide between consumers' duties in assessing agreements and the underhand nature of such minute clauses, it should be a necessity that companies at a minimum summarize what is being asked of the individual for the sake of contract clarity.

Bellarmine Law Society Review

Volume XV | Issue II Article III

TikTok and the First Amendment: An Analysis of the Constitutional Debate Regarding a TikTok Ban

Kiruthiga Balamurugan
Georgetown University, kb1359@georgetown.edu

TIKTOK AND THE FIRST AMENDMENT: AN ANALYSIS OF THE CONSTITUTIONAL DEBATE REGARDING A TIKTOK BAN

KIRUTHIGA BALAMURUGAN[1]

Abstract: Government efforts to restrict or ban TikTok have consistently raised constitutional challenges across multiple levels of the judicial system, ultimately reaching the United States Supreme Court. This paper will trace the constitutional debate surrounding TikTok by examining key cases at each stage. It will begin with the executive actions initiated under the Trump administration, then turn to state level cases in Montana and Texas, and finally analyze how these precedents ultimately led to the Supreme Court's final decision at the federal level.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

— The First Amendment, United States Constitution

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.

— Supreme Court Justice Hugo Black, Concurrence in *New York Times Co. v. United States*

I. Introduction

Since 2020, few bills in Congress have received as much bipartisan support as a proposed ban on TikTok. Since its launch in 2016, TikTok—a social media app that allows users to create, share, and view short videos—has surged in popularity. In 2024, the app had over 170 million users in the United States and more than 1 billion monthly active users globally.[2] TikTok has become a vibrant platform for content creation and engagement, enabling small businesses to

[1] Kiruthiga Balamurugan is a junior at Georgetown University studying Government and Economics.
[2] "How many users on TikTok? Statistics & Facts (2024)," SEO, https://seo.ai/blog/how-many-users-on-tiktok#:~:text=TikTok%20Key%20Statistics-,TikTok%20has%20over%201%20billion%20monthly%20active%20users%20globally%2C%20with,and%2024%20seconds%20in%202024

promote themselves, allowing many individuals to build careers from their success and providing entertainment for millions. Despite the platform's widespread popularity, the U.S. government has repeatedly attempted to ban the app, citing concerns that, because it is owned by the Chinese company, ByteDance, Americans' data on the app may be at risk from the Chinese Communist Party.

Government efforts to restrict or ban TikTok have consistently raised questions about the limits of executive power and the protections guaranteed by the First Amendment. Each attempt to justify a ban has faced legal challenges across multiple levels of the judicial system, ultimately reaching even the highest level—the United States Supreme Court. In the Supreme Court's final decision, it unanimously upheld a law that would force TikTok to divest or be banned in the United States.[3] This paper will trace the constitutional debate surrounding TikTok by examining key cases at each stage of litigation. It will begin with the executive actions initiated under the Trump Administration, then turn to state-level challenges in Montana and Texas, and finally analyze how these disputes culminated in federal appellate and Supreme Court decisions.

II. Executive Actions Against TikTok

Towards the end of President Donald Trump's first term, a series of executive actions were undertaken to ban TikTok. The administration first publicly announced its consideration of the ban in July 2020, when former Secretary of State Mike Pompeo revealed that they were evaluating the possibility of prohibiting the app.[4] Later, on July 31, President Trump had made

[3] Antonia I. Tzinova, Andrew K. McAllister, and Sophie Jin, "U.S. Supreme Court Upholds TikTok Sale-or-Ban Law," Holland & Knight, January 17, 2025, https://www.hklaw.com/en/insights/publications/2025/01/us-supreme-court-upholds-tiktok-sale-or-ban-law.
[4] Quint Forgey, "'It's something we're looking at': Pompeo floats ban on TikTok," *Politico*, last modified July 7, 2020, https://www.politico.com/news/2020/07/07/mike-pompeo-tiktok-ban-350384.

broad claims to reporters regarding his intent to ban the app stating, "as far as TikTok is concerned we're banning them from the United States."[5] Later that year, on August 6th, Trump followed through with this claim by enacting Executive Order 13942, titled "Addressing the Threat Posed by TikTok." Executive Order 13942 essentially directed the Secretary of Commerce to prevent the app from being downloaded in mobile app stores and to prohibit all transactions between anyone under the jurisdiction of the United States and ByteDance—the parent company of TikTok.[6] In the Executive Order, Trump cited both the International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act as justification for this action. The order reads:

> "The spread in the United States of mobile applications developed and owned by companies in the People's Republic of China (China) continues to threaten the national security, foreign policy, and economy of the United States. At this time, action must be taken to address the threat posed by one mobile application in particular, TikTok."[7]

The order goes on to explain the exact security concerns that the app has prompted, referencing both TikTok's data collection process and the app's alleged censorship of political information. The order states:

> "TikTok automatically captures vast swaths of information from its users, including internet and other network activity information such as location data and browsing and search histories. This data collection threatens to allow the Chinese Communist Party access to Americans' personal and proprietary

[5] Ellen Nakashima, Rachel Lerman, and Jeanne Whalen, "Trump says he plans to bar TikTok from operating in the U.S.," *The Washington Post*, last modified July 31, 2020, https://www.washingtonpost.com/technology/2020/07/31/tiktok-trump-divestiture/.
[6] E.O 13942 of Aug 6, 2020.
[7] E.O 13942 of Aug 6, 2020.

> information—potentially allowing China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage."[8]

The order then explains how TikTok reportedly censors political content that is deemed sensitive by the Chinese Communist Party and references protests against China's treatment of Uyghur Muslims as an example of content that has been censored on the platform. This censorship is problematic to the United States government because "[TikTok] may also be used for disinformation campaigns that benefit the Chinese Communist Party, such as when TikTok videos spread debunked conspiracy theories about the origins of the 2019 Novel Coronavirus."[9] The order concludes by reinforcing that the threats that TikTok poses are indeed real, noting that the Department of Homeland Security, Transportation Security Administration, and the United States Armed Forces have banned the application from federal government phones and highlighting how the Indian government has banned TikTok in their country as well.

This executive action was one part of a broader effort to mitigate perceived threats from Chinese technology companies. Soon after the order against TikTok was enacted, President Trump also issued Executive Order 13943 targeting another Chinese-owned app, WeChat, which had raised similar national security concerns.[10] WeChat is an instant messaging mobile application with over 19 million users in the United States, predominantly among Chinese Americans who use it to stay in touch with family and friends in China.[11] Just like the Executive

[8] E.O 13942 of Aug 6, 2020.
[9] E.O 13942 of Aug 6, 2020.
[10] E.O 13943 of Aug 6. 2020.
[11] Vivian McCall, "What is WeChat? Everything you need to know about the popular messaging app, including how to sign up," *Business Insider*, last modified February 22, 2021, https://www.businessinsider.com/guides/tech/what-is-wechat.

Order targeting TikTok, the IEEPA and the National Emergencies Act were also cited to justify the President's ability to ban a mobile application.

Both Executive Orders were quickly challenged in court. In August 2020, TikTok filed a lawsuit, *TikTok v. Trump*, which was heard by the United States District Court for the District of Columbia. Likewise, another case, *U.S. WeChat Users Alliance v. Trump*, was brought before the United States District Court for the Northern District of California. In both cases, the plaintiffs won a preliminary injunction blocking the enforcement of the Executive Order as the courts found that the executive orders 1) showcased an overstep of authority under IEEPA and 2) created significant First Amendment implications on free speech.

IIa. International Emergency Economic Powers Act

To understand why the executive order oversteps its authority, it is important to understand what powers the IEEPA contains.The International Emergency Economic Powers Act is a U.S. federal law enacted in 1977 that grants the President broad authority to regulate and control economic transactions during national emergencies. This emergency statute falls under the umbrella of the National Emergencies Act.[12] Under IEEPA, the President can impose sanctions, block assets, and restrict trade with foreign entities or nations when there is a perceived threat to national security, foreign policy, or the economy. The act is designed to provide a flexible tool for responding to international crises, allowing the government to take swift action to protect U.S. interests.

In this case, the act was cited as justification to ban both TikTok and WeChat. To trigger the usage of IEEPA, there must first be a declaration of a national emergency or the situation must be linked to a previous national emergency declaration. Both orders were linked to a prior

[12] International Emergency Economic Powers Act, Public Law 223, U.S. Statutes at Large 91 (1977): 1625-1629.

Executive Order (EO 13873) titled "Securing the Information and Communications Technology and Services Supply Chain."[13] In this order, Trump claimed that a national emergency existed because:

> "foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology and services, which store and communicate vast amounts of sensitive information, facilitate the digital economy, and support critical infrastructure and vital emergency services, in order to commit malicious cyber-enabled actions, including economic and industrial espionage against the United States and its people."[14]

Therefore, while a ban of an app is an extreme route, under IEEPA, it is possible to "deplatform" an application.

However, the federal district court in *TikTok v. Trump* found that the Executive Order was an overreach of executive power given the Personal Communication Limitation and the Informational Materials Amendment Limitation of the Act. The Personal Communication Limitation states that the IEEPA does not have the authority to "regulate or prohibit, directly or indirectly… any… personal communication, which does not involve the transfer of anything of value."[15] This provision is designed to safeguard the free flow of personal communication, which is considered crucial for maintaining personal relationships and ensuring the free exchange of ideas. In this case, because users on TikTok utilize the app as a platform to communicate with one another through its direct messaging feature, this limitation applies. However, arguments on

[13] Gabrielle Supak, "Political Posturing or a Move towards 'Net Nationalism?': The Legality of a TikTok Ban and Why Foreign Companies Should Be Paying Attention," *North Carolina Journal of Law and Technology*, NexisUni.
[14] E.O 13943 of Aug 6. 2020.
[15] Supak, "Political Posturing."

the other side have raised the point that there is indeed a transfer of value since users exchange their data for the ability to use the application.

As for the Informational Materials Amendment Limitation, this provision pertains to the restriction of informational materials such as books, newspapers, and other printed or digital content. Under IEEPA, the President's powers cannot be used to restrict the dissemination of informational materials.[16] This means that while economic sanctions and other measures may be imposed, they cannot target or obstruct the exchange of informational content. In this case, the US District court found that TikTok's content met the definition of informational materials because the central feature of the app is sharing information in the form of short videos, thereby invoking this limitation.

Therefore, due to both the Personal Communication Limitation and the Informational Materials Amendment Limitation, it is clear how Trump's use of the IEEPA to justify an all-out ban of both platforms with an executive order would not suffice.

IIb. Implications of First Amendment Rights

Both US District courts also recognized implications of First Amendment rights given a ban of the respective platforms. In *U.S. WeChat Users Alliance v. Trump*, the plaintiffs relied strongly on a First Amendment argument claiming that the executive order banning WeChat infringed upon their free speech rights by disrupting their ability to communicate freely, particularly within communities that rely heavily on the app for both personal and professional interactions. The District Court in this case determined that the First Amendment challenge was indeed valid because "evidence demonstrated that 'WeChat is effectively the only means of communication for many' in the Chinese-speaking and Chinese-American community, and

[16] Ibid.

‘there are no viable substitute platforms or apps’” to communicate with other users of WeChat located in China.[17]

TikTok also made First Amendment challenges in its lawsuit as well claiming that it has First Amendment protections via the rights of content creators on the platform. While the rights of content creators on social media have not explicitly been identified by the Supreme Court, it is likely that their content would also be given First Amendment protections granted that the content is not part of an unprotected category of speech such as obscenity or “fighting words.” In litigation, however, the government expressed their belief that First Amendment rights are not at all implicated by a ban of the app. Nevertheless, both the US District Court in this case and lower state courts in subsequent cases have recognized the First Amendment arguments raised by TikTok’s lawyers.

After both lawsuits were granted a preliminary injunction, the suits were withdrawn when President Biden was elected into office and rescinded the executive orders targeting TikTok and WeChat. However, this transfer of power did not fully resolve the issue, as the Biden administration would also take further steps aimed at addressing the national security concerns that Chinese ownership of TikTok raises— moves which we shall examine in the next section.

III. PAFACA and Lower Court Rulings

During President Biden’s term, Congress passed the Protecting Americans From Foreign Adversary Controlled Applications Act (PAFACA). The bill was first passed by the House of Representatives on March 13, 2024, receiving bipartisan support with a vote of 352 to 65.

[17] Ibid.

Amongst those who voted against the bill, 50 were Democrat and 15 were Republican.[18] Then on April 23, 2024, the bill was passed by the Senate with a vote of 79–18. The bill was then signed by President Biden on April 24. This law would ban TikTok in the United States unless it fully divested from ByteDance (the Chinese-owned parent company) by January 19, 2025.[19] Although this law is aimed to target TikTok, just as Trump's executive order did, its approach differs in a significant way by calling for a divestiture rather than banning the app upfront. Nonetheless, even with this new approach, TikTok's lawyers continue to challenge the constitutionality of such a law, claiming that a divestiture still infringes upon First Amendment rights and arguing that a sale would be implausible given the timeline provided in the law. Their argument relies on the fact that any company or investors looking to buy TikTok would have to receive confirmation by the Chinese government whose officials have made it clear that they are opposed to a forced sale.[20]

Following the passing of the law, TikTok has filed for a petition for review of constitutionality in the United States Court of Appeals for the District of Columbia circuit. In their petition, TikTok argued that a "qualified divestiture" from ByteDance is not possible, and even if it was, a mandated divestment would not be constitutional anyway.[21] The petition states:

> "If upheld, it would allow the government to decide that a company may no longer own and publish the innovative and unique speech platform it created. If

[18] "HR 7521 - Protecting Americans from Foreign Adversary Controlled Applications Act - National Key Vote," Vote Smart, https://justfacts.votesmart.org/bill/36703/98368/protecting-americans-from-foreign-adversary-controlled-applications-act.
[19] Cristiana Lima-Strong, "Biden signs bill that could ban TikTok, a strike years in the making," *The Washington Post*, last modified 2024, https://www.washingtonpost.com/technology/2024/04/23/tiktok-ban-senate-vote-sale-biden/.
[20] Bobby Allyn, "President Biden signs law to ban TikTok nationwide unless it is sold," *NPR*, last modified 2024, https://www.npr.org/2024/04/24/1246663779/biden-ban-tiktok-us.
[21] Petition for Review of Constitutionality of the Protecting Americans from Foreign Adversary Controlled Applications Act, 2024, https://fingfx.thomsonreuters.com/gfx/legaldocs/xmpjrzberpr/frankel-tiktokban--complaint.pdf.

> Congress can do this, it can circumvent the First Amendment by invoking national security and ordering the publisher of any individual newspaper or website to sell to avoid being shut down."[22]

TikTok argues that PAFACA is inconsistent with the First Amendment because it states, "Congress shall make no law… abridging the freedom of speech."[23] In this case, the argument is that because Congress is attempting to dictate a private speech forum, as opposed to "broadcast television and radio stations, which require government licenses to operate because they use the public airwaves" it cannot be consistent with First Amendment protections.[24]

Moreover, TikTok claims that not only do users on the platform enjoy First Amendment protections but the platform itself does as well. They note how this argument was accepted by the government in an amicus brief filed in the case *Moody v. NetChoice LLC* quoting, "[w]hen [social media] platforms decide which third-party content to present and how to present it, they engage in expressive activity protected by the First Amendment because they are creating expressive compilations of speech."[25] They also cite the cases *Hurley v. IrishAm. Gay, Lesbian & Bisexual Grp. of Bos.* and *Miami Herald Pub. Co. v. Tornillo*, to highlight how TikTok's editorial control (the app's ability to decide what content to promote and the manner in which the content is promoted) makes the platform "more than a passive receptacle or conduit for news, comment, and advertising."[26] Therefore, they argue that TikTok's exercise of editorial control and judgment must be protected under the First Amendment and a law such as PAFACA which hinders TikTok's ability to carry out such editorial control is incompatible with Free Speech protections.

[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.

Furthermore, TikTok argues that even if the platform is not entirely banned but just forced to divest from its original ownership, this would still constitute an infringement of the First Amendment. They claim that under new ownership, the character of the app itself would be altered. This argument was noted by Supreme Court Justice Kagan during oral arguments in *Moody v. Netchoice LLC*, where she observed that the sale of the social media platform Twitter to Elon Musk had altered the character of the app. Kagan said, "Twitter users one day woke up and found themselves to be X users and the content rules had changed and their feeds changed, and all of a sudden they were getting a different online newspaper, so to speak, in a metaphorical sense every morning."[27] Under TikTok's argument they claim that by mandating the sale of TikTok to an entity with no connections to the Chinese Communist Party, Congress aims to alter the fundamental nature of the platform. They claim that this type of government action is exactly what the First Amendment was constructed to protect against.

The case *TikTok Inc. and ByteDance Ltd. v. Merrick* was heard by the D.C. Circuit Court of Appeals and then by the U.S. Supreme Court. Both courts ruled to uphold the law requiring ByteDance to divest or face a ban. Prior to the ruling, lower court decisions dealing with similar issues provided useful insight into how the case might be resolved. One such case took place in the United States District Court for the District of Montana, where Governor Gianforte signed legislation banning TikTok throughout the state. TikTok challenged the law and was granted a preliminary injunction by Judge Malloy.[28] Another relevant case emerged in Texas, where the U.S. District Court for the Western District of Texas dismissed a First Amendment challenge against Governor Abbott's order which banned TikTok from government and University of North

[27] Will Oremus, "Supreme Court revives debate over social media as a 'public square,'" *The Washington Pos*t, last modified February 28, 2024, https://www.washingtonpost.com/politics/2024/02/28/supreme-court-revives-debate-over-social-media-public-square/.

[28] Bobby Allyn, "Federal judge blocks Montana's TikTok ban before it takes effect," *NPR*, last modified 2023, https://www.npr.org/2023/11/30/1205735647/montana-tiktok-ban-blocked-state.

Texas (UNT) devices.[29] Examining these earlier cases helps clarify the legal landscape that informed the D.C. Circuit's and the Supreme Court's reasoning in *TikTok v. Merrick* and contextualizes its final decision to uphold PAFACA.

IIIa. Montana's TikTok Ban

In May of 2023, Montana enacted Senate Bill 419 (SB 419) into law. This law was aimed to target the usage of TikTok within the State. This was significant as it was the first state in the US to impose this type of statewide ban on a social media platform.[30] The legislation mandates that app stores, like Google Play and Apple's App Store, must not offer TikTok for download within the state of Montana. Furthermore, the law also bans the app from being used by individuals within the state who have already downloaded the app. The law is enforced by punishing app stores that fail to comply with the regulation and by imposing fines and penalties on TikTok itself if they continue to operate within the state. The preamble of the law states, "the People's Republic of China is an adversary of the United States and Montana and has an interest in gathering information about Montanans… TikTok gathers significant information from its users, accessing their data against their will to share with the People's Republic of China."[31] This demonstrates that Montana shares similar security interests with Congress in banning the app, as the justification closely resembles that cited for PAFACA. The bill then goes on to explain another issue that Montana has with TikTok, writing that:

> "TikTok fails to remove, and may even promote, dangerous content that directs minors to engage in dangerous activities, including but not limited to throwing

[29] Adam Chan, "Why TikTok's Victory in Montana Might be Bad News for the Platform," *LawFare*, last modified 2024, https://www.lawfaremedia.org/article/why-tiktok-s-victory-in-montana-might-be-bad-news-for-the-platform#:~:text=Judge%20Donald%20W.,a%20major%20win%20for%20TikTok.
[30] Allyn, "Federal judge," *NPR*.
[31] An Act Banning TikTok in Montana, SB 419 (Mont. 2023), https://leg.mt.gov/bills/2023/billpdf/SB0419.pdf.

> objects at moving automobiles, taking excessive amounts of medication, lighting a mirror on fire and then attempting to extinguish it using only one's body parts… licking doorknobs and toilet seats to place oneself at risk of contracting coronavirus, attempting to climb stacks of milk crates, shooting passersby with air rifles, loosening lug nuts on vehicles, and stealing utilities from public places."[32]

In contrast with national security concerns, these issues raised by Montana focus on a more public safety consideration. Finally, SB 419 asserts that the law would become effective on January 1, 2024 unless "TikTok [is] acquired by or sold to a company that is not incorporated in any other country designated as a foreign adversary" before that date.[33] Therefore, in that sense, it is once again similar to PAFACA as the law will lift the ban if TikTok divests from its Chinese ownership.

TikTok challenged the legality of the bill, and on November 30, 2023, the US District Court for the District of Montana preliminarily enjoined its enforcement, citing various constitutional concerns including First Amendment challenges, Supremacy Clause and preemption issues, and the Commerce Clause.[34]

Firstly, TikTok asserts that SB 419 unconstitutionally violates its First Amendment rights by banning the platform on a content-based justification. TikTok contends that it has a right to exercise editorial judgment and its users have the right to convey speech on the platform as they wish. These challenges are similar to those raised against the Trump administration's Executive Orders against TikTok and WeChat. Secondly, TikTok's preemption argument rests on the Supremacy Clause of the Constitution which establishes that in the case where state law is in conflict with a specific federal law, federal law must preempt the conflicting law—this is known

[32] Ibid.
[33] Ibid.
[34] Chan, "Why TikTok's," *LawFare*.

as conflict preemption. In some areas, federal interests may entirely dominate the field, making state legislation invalid in those areas—this is known as field preemption. TikTok argues that the matter of regulating a foreign-owned app for national security reasons by a state is federally preempted because it interferes with the reserved powers for the federal government over foreign affairs. Lastly, TikTok's final challenge includes the Commerce Clause. This clause of the Constitution allows for Congress to regulate interstate and foreign commerce—and restricts states from doing so. Therefore, TikTok argues that although the ban proposed in SB 419 is state specific, it "risks disrupting the flow of travel and commerce between states."[35] On the basis of these claims, TikTok was granted a preliminary injunction against Montana's argument that SB 419 was a valid exercise of Montana's police powers. The District Court found TikTok's arguments compelling enough to determine that their case would likely succeed on its merits, which justified the granting of the injunction.

With respect to the First Amendment argument that was brought up, the Court found that the law did indeed violate free speech protections from both a strict scrutiny and intermediate scrutiny analysis. Both strict scrutiny and intermediate scrutiny are standards of judicial review used to evaluate the constitutionality of laws. Strict scrutiny is the most rigorous level of judicial review and is applied when the law in question affects a fundamental constitutional right. Under strict scrutiny, a law must serve a compelling government interest and be narrowly tailored to achieve that interest using the least restrictive means possible. Intermediate scrutiny, on the other hand, is less rigorous. Under intermediate scrutiny the law only has to serve an important government purpose and be substantially related to that interest. While both standards are designed to ensure that laws do not unjustifiably infringe on individual rights, strict scrutiny sets a higher bar than intermediate scrutiny does. In this case, there is no question that free speech is a

[35] Ibid.

fundamental right, which is why TikTok asserted that the Court must review the case using strict scrutiny analysis. However, the Court chose to analyze the case from an intermediate level, finding that the law was not affecting TikTok in a content-based manner but was instead content-neutral. If the law against TikTok was content-based, it means the government is targeting the message or the substance of the speech itself and discriminating based on the specific viewpoint of the speech in question. On the contrary, content-neutral restrictions do not address the substance of the message but rather target something else and happen to restrict speech as a consequence. Because free speech is a fundamental right, laws that regulate speech based on their content are evaluated from a strict scrutiny perspective, while content-neutral regulations are evaluated using intermediate scrutiny. Although SB 419 does specify specific content on TikTok that Montana takes issue with, due to the fact that the law bans the entire app and not just that specific content, the Court decided that SB 419 is more of a content-neutral restriction and therefore should be analyzed under intermediate scrutiny. The District Court Judge Donald W. Molloy explained this decision, writing that neither TikTok's argument for strict scrutiny because the law is content-based or Montana's argument for intermediate scrutiny because the law is content-neutral "is completely accurate, but the State's is closer to the legal mark."[36]

The test that is used for evaluating speech under intermediate scrutiny is the O'Brien test. *United States v. O'Brien* was a case decided by the Supreme Court that established a test to evaluate the constitutionality of content-neutral restrictions on speech, such as a law banning the burning of a draft card. In *O'Brien*, the Supreme Court determined that:

> "a government regulation is sufficiently justified if: 1) it is within the constitutional power of the government, 2) it furthers an important or substantial

[36] Ibid.

> governmental interest, 3) the governmental interest is unrelated to the suppression of free expression, and 4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[37]

Starting with the second criteria, Montana's lawyers argued that the government did indeed have an important interest in protecting the data of their citizens from a "foreign adversary" and that this interest is indeed unrelated to the suppression of free speech. However, this interest was deemed invalid by Judge Malloy as he rejected the notion that national security was a legitimate state interest, writing that, "the State posits there is nothing precluding a state from legislating in the field of national security. The Founding Fathers may have viewed that proposition skeptically considering the Constitution's particular provisions."[38]

Irrespective of whether Montana's or Judge Malloy's argument is more compelling, Judge Malloy also asserts that SB 419 fails the fourth criteria of the O'Brien test as he found that Montana had failed to demonstrate that it was not burdening more speech than necessary to achieve its interest. To this point, Montana's lawyers had asserted that TikTok had not been compliant with a multistate investigation into the security of the platform but Malloy claimed that it was "unclear how this single investigation into TikTok warrants a complete ban on the application."[39] Judge Malloy then further justified this conclusion by explaining that Montana offered no evidence to show that TikTok is similar enough to other social media platforms to demonstrate that SB 419 still leaves alternative channels of communication open for the public.

Lastly, in regards to the first criterion of the O'Brien test—that government regulation is within the constitutional power of the government—Judge Malloy held that SB 419 was not within the state government's powers, upholding TikTok's arguments that the law is

[37] *United States v. O'Brien*, 391 U.S. 367 (1968).
[38] Chan, "Why TikTok's," *LawFare*.
[39] Ibid.

unconstitutional for violating both the Supremacy Clause and the Commerce Clause of the Constitution. Therefore, following this logic, Judge Malloy granted the preliminary injunction which enjoined the law from taking effect.

IIIb. Texas' TikTok Ban

A case against TikTok also emerged in the state of Texas. Just like Montana, Texas wanted to impose restrictions on the platform in fear of user data being accessed by the Chinese government. This Texas law known as Senate Bill 1195 (SB 1195) was aimed at limiting the use of TikTok on state government devices and networks and from the University of North Texas (UNT) devices as opposed to an all-out ban like SB 419 in Montana. After SB 1195 was enacted on May 26, 2023, the Coalition for Independent Technology Research—a group of "academics, journalists, civil society researchers, and community scientists committed to advocating for and organizing in defense of research that is ethical, transparent, and privacy-preserving"[40]—challenged the legality of the ban in the U.S. District Court for the Western District of Texas for "blocking TikTok-related teaching research and teaching in classrooms."[41] The judge overseeing this case, Robert L. Pitman, had been very sympathetic to First Amendment challenges in previous cases he had dealt with, but that did not stop him from dismissing the First Amendment challenges against Texas in this case.

In his analysis of the case, Judge Pitman recognized the importance of the First Amendment's "extra protection" for public university faculty as their unique position makes them both academics as well as public employees.[42] The plaintiffs in the case requested that a First Amendment test which is generally used for public employees be utilized in this case. This

[40] Coalition for Independent Technology Research, https://independenttechresearch.org/about-us/.
[41] Chan, "Why TikTok's," *LawFare.*
[42] Ibid.

test would limit speech restrictions to those "necessary for their employers to operate efficiently and effectively."[43] Under this test, the plaintiffs would likely win because public university faculty would still be able to teach effectively with TikTok's presence. However, Judge Pitman rejected this test and instead employed the more lenient "nonpublic forum" test.[44] This test requires that the regulation needs to only be "reasonable in light of the purpose which the forum serves."[45] Under this test, Pitman found that a regulation of university-owned devices is reasonable because of Texas' security concerns of data privacy. Moreover, Pitman distinguished this case from Montana's ruling, arguing that the Montana law was more sweeping as it banned TikTok entirely in the state while the Texas law only regulated TikTok on its own governmental property. Therefore, while the Montana law needed to be inspected with intermediate scrutiny, Texas' law did not.

IV. Applying Precedent Decisions to PAFACA

Although these lower court rulings offer crucial insights into the federal courts' interpretations of the constitutionality of PAFACA, it is important to recognize that the federal law is distinguished from the state cases in Montana and Texas in significant ways. In Texas, the ruling was highly dependent on the fact that the TikTok ban only applied to government devices. In contrast, PAFACA aims to ban TikTok on all devices in the United States (similarly to the Montana statewide ban). Nevertheless, the federal case is also distinguished from Montana's because many of TikTok's strong arguments in that case no longer apply at the federal level. For example, both the Supremacy Clause argument and the Commerce Clause argument would no

[43] Ibid.
[44] Ibid.
[45] Ibid.

longer apply. Furthermore, because Montana's statute highlighted the concern that TikTok "fails to remove, and may even, promote, dangerous content that directs minors to engage in dangerous activity" and went on to list specific examples of this content, TikTok was also able to make the argument that the statute was in fact content-based and therefore would require a heightened level of scrutiny.[46] This argument would not apply at the federal level since the language of PAFACA does not mention targeting dangerous content on the platform but is rather more focused on the national security concern that the app poses due to its Chinese-based ownership. Moreover, in the Montana case, Judge Malloy was able to dismiss the argument that national security could be considered an important state interest.[47] However, at the federal level, national security is without a doubt a considerable interest which explains the Supreme Court's decision to ultimately uphold PAFACA even if it means potentially limiting First Amendment protections for the sake of national security.

Yet, despite this outcome TikTok maintains a compelling argument. Even under the intermediate scrutiny standard (O'Brien test), the government must demonstrate that any incidental restriction on First Amendment freedoms is no greater than necessary to advance its interest. In this case, it could be argued that PAFACA represents an overreach by mandating that TikTok completely divest from its original ownership to continue operating in the United States. Instead of this drastic measure, an argument could be made that the government should focus on imposing regulations specifically targeting the data collection practices of TikTok rather than shutting down the platform entirely.

Furthermore, TikTok has shown that it is willing to cooperate to remedy the government's security concerns. During TikTok CEO Shou Chew's first appearance before Congress, he

[46] An Act Banning TikTok in Montana, SB 419.
[47] Chan, "Why TikTok's," *LawFare*.

explained Project Texas, the plan the company had developed through several discussions with CFIUS (Committee on Foreign Investment in the United States) to address the government's concerns. CFIUS is an "interagency committee with authority to review, block, and where necessary compel investment of foreign acquisitions of US business."[48] At the hearing, Chew told Congress members:

> "our approach has never been to dismiss or trivialize any of [your] concerns. We have addressed them with real action now. That's what we've been doing for the past two years, building what amounts to a firewall. The seals of protected US user data from unauthorized foreign access. The bottom line is this: American data stored on American soil by an American company overseen by American personnel. We call this initiative Project Texas."[49]

Since then, TikTok has implemented many of Project Texas' features to show the company's real dedication to this issue. For example, TikTok transferred US user data to the cloud infrastructure of Oracle, a US company.[50] Moreover, TikTok launched a campaign to educate their users about data security and Project Texas. On their website, TikTok writes:

> "Project Texas puts the concepts of transparency and accountability into action by addressing national security concerns head-on with concrete, measurable solutions. The framework has five key pillars: Independent Governance, Data Protection and Access Control, Software Assurance, Content Assurance, and Monitoring and Compliance. This approach is designed to address concerns that have been raised in the U.S. about TikTok, while also allowing us to continue to

[48] Ibid.
[49] Christianna Silva, "What is Project Texas, TikTok's best chance to avoid a ban?," *Mashable*, last modified 2023, https://mashable.com/article/project-texas-tiktok#:~:text=Project%20Texas%20would%20restructure%20much,city%20(Austin%2C%20Texas).
[50] Matt Perault, "What Happened to TikTok's Project Texas?," *LawFare*, last modified 2024, https://www.lawfaremedia.org/article/what-happened-to-tiktok-s-project-texas.

offer a globally interoperable service. We have already proactively implemented substantial portions of this framework, and we look forward to continuing our work to further ensure peace of mind for our community and our stakeholders."[51]

Given the existence of this alternative route for TikTok to address the government's security concerns, it can be argued that the Supreme Court's ruling to uphold PAFACA was too deferential to the government without concrete evidence of legitimate national security concerns.

Ultimately, the United States Supreme Court upheld PAFACA, confirming that a divestiture from ByteDance was indeed a constitutional means of advancing national security concerns. Despite this legal defeat, TikTok was never completely banned in the United States. Although US users were temporarily unable to access the app for a few hours following the January 19 divestiture deadline, President Trump, upon assuming office the next day issued an Executive Order halting enforcement for 75 days[52] to allow for alternate solutions to be explored.[53]

Overall, the outcome of this long-standing legal battle involving TikTok carries implications that are significant for far more than one single social media platform. This decision impacts not only TikTok but sets an important precedent for future disputes involving foreign-owned technology companies and the ongoing effort to balance security interests with constitutional protections for speech. Furthermore, the fact that PAFACA was never fully enforced also reveals important implications regarding separation of powers. Despite the legislative and judicial branch demonstrating a need for regulation, the final outcome still

[51] "TikTok's Commitment to U.S. National Security," TikTok U.S. Data Security, https://usds.tiktok.com/usds-about/.
[52] Although the initial order was for 75 days, President Trump would later extend this even further. Currently, it has been extended until December 16, 2025.
[53] Jamali, Lily. 2025. "President Trump Signs Executive Order Delaying TikTok Ban." *BBC News*, January 21, 2025. https://www.bbc.co.uk/news/articles/cd0j24rj4ryo.

depended on the political choices of the executive branch, underscoring how intertwined law and policy have become.

Bellarmine Law Society Review

Volume XV | Issue II Article IV

New Textualism in Constitutional Interpretation: *Dobbs v. Jackson* (2022) and Its Creation of a New Rule of Law

Cindy Toh
Stanford University, cindytoh10@gmail.com

NEW TEXTUALISM IN CONSTITUTIONAL INTERPRETATION: DOBBS V. JACKSON (2022) AND ITS CREATION OF A NEW RULE OF LAW

CINDY TOH[1]

Abstract: On June 24, 2022, the U.S. Supreme Court decided *Dobbs v. Jackson* (2022). *Dobbs* overturned *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), precedents legalizing the constitutional right to an abortion. Its overturning of these precedents marks a seismic shift in the U.S. Supreme Court's abortion jurisprudence from a pro-precedent stare decisis doctrine to a precedent-skeptical new textualist doctrine. By undercutting the stare decisis principle that past abortion cases had used to fulfill the rule-of-law criteria of legal rule stability, predictable rule application, and neutral and objective adjudication, *Dobbs* subverts precedent notions of the rule of law but does not dismantle the principle. Instead, it creates a new rule of law that meets its constitutive criteria by de-emphasizing stare decisis and placing greater emphasis on historical stability, adherence to the constitutional text, and consideration of the context surrounding constitutional drafting. *Dobbs* underscores that a new rule of law seeks to turn back in time by achieving the rule of law's constitutive criteria in a manner that revises the past. It premises future abortion jurisprudence on a 248-year-old text written at a time when the law failed to recognize the rights of all people. In doing so, *Dobbs* puts the rights of women and marginalized communities at stake, illuminating the need for lawyers, judges, and advocates to uphold a rule of law that looks to the present and lives up to the ideals of equality and justice for all.

I. Introduction

I was halfway across the world in Singapore the day the United States Supreme Court

[1] Cindy Toh is an undergraduate at Stanford studying Economics, with interests at the intersection of law, finance, and global affairs. She serves as a founding board member of the Cardinal Aligned Investing Initiative, Financial Officer at Stanford Women in Law, Analyst at the Charles R. Blyth Fund, Community Events and Engagement Officer at the Stanford Myanmar Student Association, and Director of Co-Sponsorships at the Stanford Speakers Bureau. A TEDx speaker, Cindy's work on new textualism in *Dobbs* and its rule-of-law impacts was nominated for the Boothe Prize in First-Year Writing, Stanford's award for excellence in first-year writing. Professionally, Cindy has interned at the US-ASEAN Business Council and the international law firm Baker McKenzie.

decided *Dobbs v. Jackson* (2022). *Dobbs* ruled that abortion would no longer be a constitutional right and overturned *Planned Parenthood v. Casey* (1992) and *Roe v. Wade* (1973), precedents legalizing the constitutional right to an abortion.[2]

As a Buddhist, I morally oppose abortion and would seldom, if ever, seek one for myself. But as a survivor of abuse who experienced the pain of being stripped of her bodily autonomy, I fervently hold that one has the right to make fundamental personal decisions, such as the decision to terminate a pregnancy. Having also lived under an autocracy that does not premise its governance on the rule of law, I worried that *Dobbs's* negation of long-standing laws that legalized abortion would inadvertently erode the rule of law. Yet simultaneously, it seemed inconceivable that a single judicial decision could thwart a principle on which the American legal system has been grounded for centuries and whose promulgation shapes how we are held accountable to the law.[3]

The rule of law is defined by its constitutive criteria of "(1) stability of legal rules, (2) transparency and predictability of rule application, and (3) neutrality and objectivity for judges predictably applying the stable rules."[4] As this definition is deployed within the context of constitutional interpretation, its use is warranted when discussing the rule of law in cases such as *Dobbs* that concern constitutional matters.[5]

Leading jurisprudential scholars such as William Eskridge, Jr. have also considered this

---

[2] Oyez, "Dobbs v. Jackson Women's Health Organization," *Oyez*. Accessed November 25, 2024. https://www.oyez.org/cases/2021/19-1392.
[3] National Archives, "Declaration of Independence," National Archives (The U.S. National Archives and Records Administration), Accessed November 30, 2024, https://www.archives.gov/founding-docs/declaration-transcript.
[4] William N. Eskridge, Jr., Brian G. Slocum, and Kevin Tobia, "Textualism's Defining Moment," *Columbia Law Review* 123, no. 6 (2023): 1624.
[5] Ibid., 1611, 1614-16.

definition to serve as the "normative foundation" for textualism, a doctrine rooted in adherence to the Constitution's plain text.[6] New textualism, a branch of this doctrine, has become increasingly prevalent among Supreme Court justices and state and federal judges and is evident in landmark cases such as *Dobbs* that affect future privacy jurisprudence.[7] An analysis of new textualist interpretations in *Dobbs* will thus guide my exploration of the rule of law. Espoused by the justices who wrote *Dobbs's* majority and concurring opinions, new textualism calls for interpretations to be based on "the text, the whole text, and nothing but the text."[8] Its proponents, while not entirely ignoring precedents, believe in narrowly construing them and are more willing to overturn them when they are inconsistent with constitutional text.[9] They are less likely to derive statutory meaning from precedents when the constitutional text does not answer legal questions. This mode of interpretation marks a seismic shift from how prior abortion cases followed stare decisis, a constitutional principle under which judges heed precedents in answering such questions.[10] *Casey* followed this precedent method by upholding the right to an abortion as per the precedent set by *Roe*, and judges have grounded their decisions in subsequent abortion cases on these two precedents.[11]

Although the existing literature pinpoints the transition from a pro-precedent past to a new textualist present, it has not fully uncovered how specific parts of the *Dobbs* decision have

[6] Brandon J. Murrill, "Modes of Constitutional Interpretation," Congressional Research Service, March 15, 2018, https://crsreports.congress.gov/product/pdf/R/R45129.
[7] Eskridge, et al., "Textualism's Defining Moment," 1611, 1614-16.
[8] Ibid., 1613; Clint Bolick, "The Case for Legal Textualism," Hoover Institution, February 27, 2018, https://www.hoover.org/research/case-legal-textualism.
[9] Eskridge, et al., "Textualism's Defining Moment," 1678-79.
[10] Bolick, "Case for Legal Textualism"; Murrill, 10; Timothy Oyen, "Stare Decisis," Legal Information Institute, June 5, 2017, https://www.law.cornell.edu/wex/stare_decisis.
[11] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113, 129 (1973).

contributed to these changes and to the overall landscape of constitutional interpretation and the rule of law. How *Dobbs* influences the rule of law's constitutive conditions remains to be discovered. The majority of justices in *Dobbs* and pro-life organizations such as Christ for All have contended that *Dobbs's* overruling of *Roe* and *Casey* is compatible with the rule of law.[12] Meanwhile, the dissenting justices and pro-choice organizations such as the Center for Reproductive Rights, condemned the *Dobbs* decision for being an affront to the rule of law.[13] Current scholarship highlights contrasting perspectives on whether *Dobbs* promotes or subverts the rule of law but does not provide a definitive indication of its effects on this principle.

To identify how elements of the *Dobbs* decision shape the landscape for constitutional interpretation and the rule of law in abortion cases, I will analyze the case's majority and concurring opinions, the joint dissent, and the existing literature on new textualism and constitutional interpretation. These sources illuminate how *Dobbs* has redefined what it means to interpret the Constitution and reshaped how constitutional interpretation will occur in future abortion jurisprudence. Synthesizing these sources, I will examine how the *Dobbs* majority's new textualist approach constitutes a substantial shift from the previous deployment of stare decisis and how this shift impacts *Dobbs's* promulgation of the rule of law. Based on this exploration, I posit that *Dobbs* thwarts prior notions of the rule of law; it undermines the stare decisis principle that earlier abortion cases had used to fulfill the rule-of-law criteria of legal rule stability, predictable rule application, and neutral and objective adjudication. I will then argue that, by

[12] John Avery, "Dobbs v. Jackson: A Victory for Life and Liberty - Christ over All," Christ Over All, 2023, https://christoverall.com/article/concise/dobbs-v-jackson-a-victory-for-life-and-liberty/.; Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).
[13] Center for Reproductive Rights, "Precedent and the Rule of Law: Spotlight on Dobbs v. Jackson Women's Health," Center for Reproductive Rights, November 17, 2021, https://reproductiverights.org/supreme-court-case-mississippi-abortion-ban-rule-of-law/.

undercutting these past conceptions, *Dobbs* creates a new rule of law that meets the above criteria by de-emphasizing stare decisis and placing greater emphasis on historical stability, adherence to the constitutional text, and consideration of the context surrounding constitutional drafting.

II. *Dobbs's* Subversion of the Rule of Law in its Precedent Notions

I will delve into *Casey*'s stare decisis grounds and then examine the majority, concurring, and dissenting opinions in *Dobbs* through a stare decisis lens. *Casey's* grounds model an interpretive approach that promulgates the rule of law as it was once conceived, so an investigation of *Dobbs* through the lens of these grounds would best inform its implications on earlier conceptions of the rule of law.[14] These analyses will reveal that *Dobbs* thwarts previous notions of the rule of law by compromising precedent's ability to bring about legal rule stability, predictable rule application, and fair judicial decision-making.[15]

IIa. Dobbs's *Erosion of Precedential Legal Stability*

Judges who followed the interpretive approach used in earlier abortion cases believe that legal rule stability turns on precedential stability. They therefore hold that an increased willingness to overrule precedents hinders legal rule stability, contrary to the rule of law as it was once understood.

Casey and the joint dissent in *Dobbs* exemplify the above interpretive approach in which

[14] *Dobbs*, 597 U.S., 2321, 2348.
[15] Eskridge, et al., "Textualism's Defining Moment," 1624.

precedents were retained to keep legal rules on abortion stable. The justices primarily rooted *Casey*'s verdict in *Roe*'s central holding that states cannot abridge a woman's constitutional right to an abortion before viability.[16] By maintaining *Roe, Casey* deemed it to be a "settled" law and ensured that future abortion jurisprudence would retain its holdings, keeping the legal rules prescribed by *Roe* stable.[17] Later, in *Dobbs's* joint dissent, the dissenting justices claimed that 20 post-*Roe* abortion cases reaffirmed *Roe* and *Casey*; thus, these precedents were again stabilized as legal rules.[18] On account of how preceding cases have turned *Roe* and *Casey*'s precedents into legal rules on abortion, *Dobbs's* overruling of these precedents not only struck down these two rules but also destabilized the 20 precedents that further established legal rules for abortion. Henceforth, *Dobbs* undermines traditional notions of the rule of law by not heeding precedents to keep legal rules on abortion stable.

Dobbs's reversal of *Roe* and *Casey* has also invalidated precedents that established legal rules in privacy jurisprudence. Because *Roe* and *Casey* themselves relied on the constitutional right to privacy under the Fourteenth Amendment's Due Process Clause, they were crucial to upholding privacy cases that have come before the Supreme Court, in addition to those on abortion.[19] As noted in Acting U.S. Solicitor General Brian Fletcher's amici curiae supporting the respondents, *Dobbs's* invalidation of *Roe* and *Casey* not only rejected the legal rules steadily retained throughout abortion cases but also those serving as the "constitutional foundation for

[16] *Casey*, 505 U.S., 846; *Roe*, 410 U.S., 129; *Dobbs*, 597 U.S., 2238.
[17] *Dobbs*, 597 U.S., 2320.
[18] *Dobbs*, 597 U.S., 2320.
[19] U.S. Constitution, amend. XIV, sec. 1.; William N. Eskridge, Jr., "Reliance Interests in Statutory and Constitutional Interpretation," *Vanderbilt Law Review* 76, no. 3 (April 2023): 688-89.

most of the leading privacy cases in the last half-century."[20] Ultimately, *Dobbs* destabilized subsequent rulings concerning privacy, eroding a traditional notion of the rule of law that uses precedents to promote legal rule stability.

Arizona Supreme Court Justice Clint Bolick and the U.S. Supreme Court's new textualist justices may posit that although precedents can promote legal rule stability, judges should fulfill this criterion by prioritizing obedience to rules in constitutional texts over those prescribed by precedents; doing so ensures that judges "take an oath" to the Constitution, not to stare decisis.[21] Based on this perspective, Justice Bolick and the new textualist justices would postulate that *Roe* and *Casey* hinder legal rule stability because they confer rights nonexistent in the Constitution.[22] *Dobbs's* reversal of such decisions would accordingly uphold former conceptions of the rule of law, in which following the constitutional text, not just precedents, achieves legal rule stability.

Legal rule stability is premised on abiding by provisions in constitutional texts when they directly answer legal questions. In abortion cases, however, the Constitution provides no direct answers to whether abortion is a right by not discussing the issue, a reality to which *Dobbs's* new textualist justices admit.[23] While judges follow the Constitution in such a scenario, they would also turn to stare decisis in unpacking legal questions on abortion. Precedent notions of the rule of law would hence hold that adherence to precedent is a prerequisite for promoting legal rule stability.[24] By invalidating precedents, *Dobbs* deviates from how judges used to maintain legal

[20] Eskridge, Jr., "Reliance Interests in Statutory and Constitutional Interpretation," 688-89; Brief for the United States as Amici Curiae Supporting Respondents at 4, *Dobbs v. Jackson Women's Health Org*., 597 U.S. 215 (2022).
[21] Bolick, "Case for Legal Textualism."
[22] *Dobbs*, 597 U.S., 2234, 2236-37, 2258, 2279.
[23] Ibid., 2240, 2305.
[24] Ibid., 2235, 2236, 2240, 2242; Sam Capparelli, "In Search of Ordinary Meaning: What Can Be Learned from the Textualist Opinions of Bostock v. Clayton County?," *The University of Chicago Law Review* 88, no. 6 (2021): 1456.

rule stability in abortion cases, ultimately thwarting former conceptions of the rule of law that root themselves in precedential stability.[25]

IIb. Dobbs *and Predictable Rule Application*

With *Dobbs* overturning some precedents and maintaining others, lawyers and judges seeking to understand its rationale could face challenges in determining when to employ them. Such barriers render the implementation of abortion precedents less foreseeable and thus undercut a critical standard for promulgating the rule of law as it used to be conceived.

To facilitate the predictable application of rules, judges had previously ensured that every decision could be traced back to precedents that preceded a case. This precedential conformity is conspicuous when they maintained *Roe's* central holding that abortion qualifies as a constitutional right in *Casey* and the 20 subsequent post-*Roe* abortion cases.[26] Because *Roe* and *Casey* were the foundation for most abortion cases that succeeded them, a lawyer or judge could once anticipate that these precedents would be implemented whenever an abortion case came before the Court.

Dobbs does not predictably deploy precedents. Even while striking down abortion precedents such as *Roe* and *Casey*, it heeds precedents rooted in historical legal sources, such as *Washington v. Glucksberg* (1997), to apply the ordered liberty rationale used to determine the constitutionality of rights unmentioned in the Constitution.[27] Abortion cases had not ubiquitously employed *Glucksberg* as the main basis of their decision, yet the majority incorporated it over

[25] Eskridge, et al., "Textualism's Defining Moment," 1611, 1614-16, 1624.
[26] *Casey*, 505 U.S., 846; *Roe*, 410 U.S., 129; *Dobbs*, 597 U.S., 2241, 2333
[27] *Dobbs*, 597 U.S., 2242, 2300; *Washington v. Glucksberg*, 521 U.S. 702 (1997).

reliably embedded abortion precedents.[28] These precedential applications in *Dobbs* denote a substantial pivot from a reliable implementation of abortion precedents to one that draws upon a more fundamentalist constitutional interpretation. Lawyers who had anticipated *Roe* and *Casey*'s application in preceding abortion cases and judges who had routinely deployed them could thus have been unlikely to foretell *Dobbs*. In this regard, *Dobbs* compromised the inferable application of rules surrounding abortion and thus the rule of law in its traditional notion.

IIc. Dobbs *and Impartial Adjudication*

The neutrality and objectivity of abortion decisions previously hinged on judges' use of stare decisis, a doctrine that discerns ordinary meaning based on a term's application in earlier cases.[29] Justice Sandra Day O'Connor, for instance, employed the precedent set by *Roe* in *Casey* despite her personal opposition to abortion.[30] Thus, her precedential conformity removed judicial discretion from her decision-making in accordance with the rule of law as it used to be perceived.

Unlike *Casey, Dobbs* declares that stare decisis "cannot be absolute."[31] It diverges from this previous practice of deploying precedents to execute impersonal adjudication.[32] Judges, such as the dissenting justices who espouse the stare decisis doctrine, would find that the ability to strike down unfavorable precedents "spell[s] the end of any precedent with which a bare majority

---

[28] *Casey*, 505 U.S., 846; *Roe*, 410 U.S., 129.
[29] David A. Strauss, "New Textualism in Constitutional Law," *George Washington Law Review* 66 (1997): 1157.; Tara Leigh Grove, "Is Textualism at War with Statutory Precedent?," *Texas Law Review* 102, no. 4 (April 10, 2024): 652, 658.; Capparelli, "In Search of Ordinary Meaning," 1457-58; *Dobbs*, 597 U.S., 2319-20, 2333.
[30] Evan Thomas, "How Supreme Court Justice Sandra Day O'Connor Helped Preserve Abortion Rights," *The New Yorker* (2025 Condé Nast, March 27, 2019), https://www.newyorker.com/news/news-desk/how-the-supreme-court-justice-sandra-day-oconnor-helped-preserve-abortion-rights.; *Casey*, 505 U.S., 865, 870, 912.
[31] *Dobbs*, 597 U.S., 2307.
[32] Grove, "Is Textualism at War with Statutory Precedent?," 652, 658.

of the present Court disagrees."[33] They would consequently hold that future abortion decisions could become less fair in that they are more likely to align with judges' personal opinions over precedents.

This assertion has already been apparent in how the majority's ruling in *Dobbs* is consistent with its members' long-established opposition to abortion.[34] Public statements from Justice Samuel Alito have revealed how he is "particularly proud" of his work to oppose *Roe*.[35] Justice Amy Coney Barrett has long believed that abortion is "always immoral," as per a 1998 law review article.[36] These statements insinuate that the justices in the majority adjudicated *Dobbs* in a manner that aligns with their charged personal viewpoints over precedents that do not. This departure from precedents signifies that *Dobbs* did not achieve impartiality as understood by former conceptions of the rule of law.

III. *Dobbs's* Creation of a New Rule of Law

Although the new textualists' interpretation of *Dobbs* is inconsistent with the rule of law as it was conceived, it does not entirely undermine this principle. Textualism, at its core, was founded on the rule of law, and the six new textualists who produced *Dobbs's* majority opinion inherently support this principle.[37] *Dobbs* therefore continues to uphold the rule of law, notwithstanding that its majority defines this principle differently from how judges did in the

[33] *Dobbs*, 597 U.S., 2279-80, 2307, 2334, 2336.
[34] Ibid., 2335.
[35] Chris Michael, "US Supreme Court Justices on Abortion—What They've Said and How They've Voted," *The Guardian*, May 4, 2022.
[36] Ibid.
[37] Eskridge, et al., "Textualism's Defining Moment," 1624, 1694.

past. This contrast suggests that *Dobbs* creates a new rule of law. The justices who decided *Dobbs* consulted extratextual historical sources to achieve legal rule stability through historical rather than precedential stability. They ensure that one can infer the application of rules by devising a system grounded in constitutional texts and more stringent guidelines for precedential analysis. They ensure fair adjudication in accordance with the rule of law by contextualizing constitutional texts with broader constitutional history to discern the ordinary meaning of terms.

IIIa. Dobbs's *Promotion of Legal Rule Stability through Historical Stability*

The new textualist interpretations in *Dobbs* have established that maintaining historical stability ensures the stability of legal rules on abortion. By continuing to fulfill a condition necessary to uphold the rule of law, yet doing so in a way that revises the past, they demonstrate how *Dobbs* creates a new rule of law.

Dobbs reiterates that rights not mentioned in the Constitution should be guaranteed only if they are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," a stark juxtaposition with previous uses of precedent to confer constitutional rights in abortion cases.[38] To make such a determination, new textualists turn to extratextual, historical sources directly tied to the Constitution's creation, such as founding documents and the Federalist Papers.[39] From these consultations, they concluded that abortion is neither an "ordered liberty" nor part of "the Nation's history or tradition," given its lack of mention in the

[38] *Dobbs*, 597 U.S., 2235, 2242-44, 2246-48, 2253, 2257, 2259-60, 2282-83, 2300, 2304, 2319.
[39] Ryan Fortson, "Principle Originalism—the Third Way: A Jurisprudential Response to Dobbs v. Jackson Women's Health Organization," *American University Journal of Gender, Social Policy & the Law* 32, no. 1 (2023): 115, 118–19.

aforementioned sources, lack of discussion as a constitutional matter until a few years before *Roe*, and lack of legalization by historical common law sources that informed constitutional drafting.[40] The majority consequently found *Roe* and *Casey* to depart from legal rules on abortion established in the broader historical context of when the Constitution was written. Their reversal of these precedents in *Dobbs* accordingly substantiates presently promulgated legal rules with those that existed when the Constitution was first drafted. Ultimately, *Dobbs* establishes a new rule of law in which historical rather than precedential stability governs legal rules, hinting at a revisionist worldview through which the Constitution is interpreted in abortion jurisprudence.

To skeptics of new textualism, such as the dissenting justices in *Dobbs*, the doctrine's approach of bringing about legal rule stability through historical stability is not without its pitfalls. They assert: "[T]he constitutional 'tradition' of this country is not captured whole at a single moment. Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents."[41] That is, they believe that upholding historical stability requires precedential stability because precedents have been embedded throughout American legal history and have subsequently served as a fixture in constitutional interpretation. Undermining this fixture would accordingly erode the legal rule stability constitutive of the rule of law.

The justices rightfully underscore the importance of precedents in maintaining historical stability. However, their assertion overlooks the new textualist majority's acute awareness of this significance and its unwillingness to wholly object to following precedents. The majority embedded *Glucksberg* in *Dobbs*, provided that its legal rules aligned with those in sources that

[40] Ibid., 118; *Dobbs*, 597 U.S., 2235, 2248-49, 2252-54.
[41] *Dobbs*, 597 U.S., 2326, 2329-32; Fortson, "Principle Originalism—the Third Way," 144.

informed the United States' "history and tradition."[42] Conversely, they invalidated *Roe* and *Casey,* the abortion precedents in question, due to their inconsistency with such history and tradition.[43] The justices' deliberation of these precedents demonstrates how they indeed weigh a precedent's role in defending historical stability but only implement them if they are consistent with legal sources that have played a role in shaping the country's "history and tradition" and "scheme of ordered liberty."[44] In this sense, *Dobbs* still upholds the historical stability essential to legal rule stability and forms a new rule of law instead of chipping away at it.

Similar to *Dobbs's* dissenting justices, constitutional scholar Ryan Fortson would contend that the new textualist approach, which seeks to achieve legal rule stability through historical stability, does not yield a new rule of law but instead compromises the principle as a whole. Fortson substantiates such a claim with how the *Dobbs's* majority "could not agree on which history to rely upon, with [Justice] Alito looking to legal interpretations of abortion during and around the time of the ratification of the Fourteenth Amendment and [Justice Clarence] Thomas harkening back to understandings of the concept of liberty at the time of the Founding four score prior."[45]

Though not without its merits, Fortson's argument ignores that historical stability does not mandate judges to use the same sources in interpreting the Constitution. Rather, it requires them to consistently corroborate their interpretations with laws that have been vital to the United

[42] Randy E. Barnett and Lawrence B. Solum, "Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition," *Northwestern University Law Review* 118, no. 2 (January 27, 2023): 449-50, 460-61.; *Dobbs*, 597 U.S., 2261-62, 2279-80.
[43] *Dobbs*, 597 U.S., 2234, 2237, 2242, 2246.
[44] Ibid., 2235, 2242-43, 2246-48, 2253, 2259-60, 2282-83, 2300, 2304.
[45] Ibid., 2249-54, 2300-01; Fortson, 139.

States' "history and tradition" and "scheme of ordered liberty."[46] The new textualist justices followed this approach in unpacking the Constitution in *Dobbs*. The sources they turned to, though divergent, were produced during the drafting of the Constitution. The justices' reversion to this era indicates that they endeavored to align their constitutional interpretations in abortion cases with broader constitutional history. On account of this compatibility, they enabled *Dobbs* to stabilize legal rules through historical stability. Satisfying a rule-of-law criterion differently from prior cases, *Dobbs* ultimately produces a new rule of law that looks to history rather than the present in deliberating abortion cases.

IIIb. Dobbs's *New System of Precedential Construal*

Despite new textualist judges' increased willingness to overturn precedents, *Dobbs* does not entirely ignore them and still provides an alternative approach to predicting their application in abortion cases. Bearing this premise in mind, this sub-section will unravel how it promotes this rule-of-law criterion through a two-fold process. Part I will delve into how *Dobbs* emphasizes increased obedience to constitutional texts under the principle of constitutional supremacy and sets a standard in which this adherence foretells precedential implementation in abortion cases. Part II will look into how *Dobbs* critically evaluates the strength of a precedent's grounds and its concrete reliance interests to create a predictable, systematic approach to precedential construal. Both parts reveal that *Dobbs* has set a formulaic structure for inferring the implementation of abortion-related precedents and, in doing so, generates a new rule of law.

1. Constitutional Supremacy

[46] *Dobbs*, 597 U.S., 2235, 2242-43, 2246-48, 2253, 2259-60, 2282-83, 2300, 2304.

To the new textualist justices in *Dobbs*, cases should focus on "settling right" and upholding the Constitution over precedents as per the principle of constitutional supremacy because stare decisis is not an "inexorable command."[47] In line with this view, they overruled *Roe* and *Casey* in *Dobbs,* given their violation of the Constitution's lack of a stance on abortion. They justified doing so by citing *Brown v. Board of Education* (1954), which similarly overruled *Plessy v. Ferguson* (1896), a precedent that contravened the Constitution.[48] *Dobbs's* incorporation of legal rules from the Constitution and rejection of precedents set a standard in which predictable rule implementation in abortion cases hinges on constitutional supremacy.[49] Since *Dobbs* meets this criterion differently from earlier abortion cases, it creates a new rule of law that bases itself on fundamental legal texts over precedents.

2. Systematic Precedent Construal Approach

Dobbs's majority opinion criticizes *Roe* and *Casey* for being grounded on precedents that established the rights to interracial marriage, contraception, same-sex marriage, parochial education, and German language education, none of which are abortion-related.[50] Given these precedents' irrelevance to *Roe* and *Casey*, the majority concluded that abortion is not a constitutional right and therefore *Roe* and *Casey* warranted reversal. *Dobbs* consequently implies that future abortion cases will only embed precedents if they are corroborated by pertinent precedents.

---

[47] Ibid., 2237, 2239, 2261-62, 2278, 2334.
[48] Ibid., 2237, 2239, 2262, 2278-79, 2307, 2309, 2341.
[49] Ibid., 2252-53; Robin Charlow, "American Constitutional Analysis and a Substantive Understanding of the Rule of Law," in *The Legal Doctrines of the Rule of Law and the Legal State* (Rechtsstaat) (Springer, 2014), 251-66.
[50] *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Dobbs*, 597 U.S., 2234, 2257, 2267-68

In addition to relevant precedential support, *Dobbs* has established that judges are to demonstrate a precedent's implication of concrete reliance interests before implementing it in an abortion case.[51] The majority found insufficient proof of individuals being worse off due to *Roe* and *Casey's* reversal than with these precedents not existing in the first place because abortion is generally an "unplanned activity" and reproductive planning allows individuals to prevent themselves from being worse off, regardless of whether *Roe* and *Casey* exist.[52] On account of this finding, the majority indicates that *Roe* and *Casey* do not carry concrete reliance interests, and future abortion cases will only employ precedents when they hold such interests.

By instituting the conditions that warrant precedential deployment in future abortion cases, *Dobbs* has provided a formula for foretelling such application. It ultimately creates a new rule of law that drives the predictable employment of precedents on abortion more stringently than in prior cases such as *Casey*.

IIIc. Dobbs's *Implications on Impartial Adjudication*

The new textualist justices in *Dobbs* determined the Fourteenth Amendment's ordinary meaning by referring to the context within which the Constitution was written.[53] They explained doing so by pointing to how judges are more prone to "cherry-pick" precedents when "interpreting other statutes than the one in question."[54] Because their approach denotes a shift from earlier uses of precedent in rendering unbiased adjudication, *Dobbs* yields a new rule of

[51] *Dobbs*, 597 U.S., 2238-39, 2265, 2276-77.
[52] Ibid., 2238-39, 2265, 2276-77; *Casey*, 856; Rachel Bayefsky, "Tangibility and Tainted Reliance in Dobbs," *Harvard Law Review Forum* 136 (May 25, 2023): 387–88.; Nina Varsava, "Precedent, Reliance, and Dobbs," *Harvard Law Review* 136, no. 7 (May 10, 2023): 1847, 1863–64.
[53] *Dobbs*, 597 U.S., 2257-58, 2261; U.S. Constitution, amend. XIV, sec. 1.
[54] Capparelli, "In Search of Ordinary Meaning," 1464.

law.

These justices harnessed the "objective evidence of law[s]" from when the Constitution was drafted to adjudicate the constitutionality of abortion in *Dobbs* without favor, especially given the Constitution's lack of a stance.[55] A consultation of common law sources from 1864, the year of the Fourteenth Amendment's drafting, led them to discover that 28 out of 37 states had then criminalized pre-quickening abortions and that most states had criminalized abortion at all stages of pregnancy.[56] Based on this objective evidence, the justices concluded that the drafters did not intend abortion to be a constitutional right and that the ordinary meaning of "rights" and "liberty" in the Fourteenth Amendment does not encompass abortion.[57] Their means of judicial decision-making suggest that they turned to historical sources on the Constitution's authorial intent over traditionally consulted precedents in pursuit of unprejudiced adjudication. Their doing so enabled *Dobbs* to produce a new rule of law that reverted to history rather than focusing on more recent precedents.

The dissenting justices and other critics of *Dobbs's* majority opinion would postulate that the majority's new textualist doctrine enables judges to use the guise of constitutional text to insert the judicial discretion and "unguided speculation" constrained by a prior interpretive approach rooted in stare decisis.[58] To them, interpretations laden with judicial discretion are biased, compromising the rule of law instead of producing a new one.

This contention accurately characterizes that text's guise and indeed presents an

[55] Eskridge, "Reliance Interests," 737.
[56] Barnett and Solum, "Originalism after Dobbs, Bruen, Kennedy," 460-61; *Dobbs*, 597 U.S., 2252-53.
[57] *Dobbs*, 597 U.S., 2242-43; U.S. Constitution, amend. XIV, sec. 1.
[58] *Dobbs*, 597 U.S., 2326; Capparelli, "In Search of Ordinary Meaning," 1458.

opportunity for judges to bring about judicial discretion. The view that abortion is not a constitutional right is admittedly congruous with Justices Alito and Barrett's standpoints.[59] Yet, Justice Brett Kavanaugh's concurring opinion and the majority opinion's conclusion signal how *Dobbs* is neither pro-choice nor pro-life, akin to the Constitution, and gives voters the ultimate discretion on abortion.[60] This position is incompatible with Justices Alito and Barrett's personal opposition to abortion.[61] Furthermore, the justices looked to objective evidence, such as documents contextualizing the Constitution's drafting, to support their decision, and hence their decision-making was grounded in evidence beyond the text. In this respect, they adjudicated *Dobbs* without favor, in accordance with the rule of law. Their use of the context surrounding the drafters' intent, rather than judges' use of stare decisis in earlier cases, implies that *Dobbs* has led to a new rule of law—one that seeks to revisit the past rather than remain in the present when mulling abortion cases.

IV. Conclusion

Dobbs v. Jackson (2022) has illustrated the constancy of the rule of law's underlying standards: legal rule stability, predictable rule application, and impartial adjudication. However, how it satisfies each standard differs from that of previous abortion cases. *Dobbs* has shown that such a sizable shift stems from fundamental differences in how constitutional interpretation in pre- and post-*Dobbs* abortion cases views stare decisis and constitutional supremacy: both follow the constitutional text and do not oppose heeding precedent, yet the latter champions greater

[59] Michaels, "US Supreme Court Justices on Abortion."
[60] *Dobbs*, 597 U.S., 2279, 2305.
[61] Michaels, "US Supreme Court Justices on Abortion."

obedience to the text and diminished reluctance to overrule precedent.

With these changes apparent in the new textualist doctrine that justices used to decide *Dobbs*, *Dobbs* has chipped away at what the rule of law once meant. It has impeded the notion that abiding by precedents keeps legal rules stable, yields the predictable incorporation of rules, and achieves unprejudiced adjudication. Yet, at the same time, the rule of law serves as the basis of textualism, and the six new-textualist Supreme Court justices do not interpret texts and statutes with the intent to subvert them. A new rule of law ultimately emerges from *Dobbs.* This new rule of law now harnesses historical stability to maintain the stability of legal rules on abortion. It infers a rule's implementation in abortion jurisprudence by using constitutional supremacy alongside a formula that weighs a rule's supporting precedents and concrete reliance interests. It discerns ordinary meaning from the context of constitutional drafting to accomplish unbiased adjudication in abortion cases.

Dobbs has signified that the rule of law persists, given its fixture as a principle defining the American legal system. Yet, it has simultaneously underscored that a new rule of law seeks to turn back in time by premising future abortion decisions on a 248-year-old text—a text drafted at a time when the law failed to fully recognize the rights of all people and whose reliance interests and ordinary meaning diverge from those of today. If a new rule of law swings the pendulum of progress back by 248 years, it will lead abortion decisions to no longer reflect present-day American society, putting the rights of women and marginalized communities at stake. The question now becomes: how can we maintain a new rule of law while ensuring that judicial decisions reflect the present context? How can we reshape this new rule of law to live up to the ideals of equality and justice for all?

The broader landscape finds these questions to be nebulous. Yet, it has revealed that as long as the rule of law grounds the American legal system, it can persist, with the potential to reinvent itself into new rules of law. Just as a new rule of law can set a country back by 248 years, it has the power to propel it forward. Now is the time for lawyers, judges, and advocates to uphold a rule of law that looks to the present and lives up to the ideals of equality and justice for all.