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Our Mission

The Tri-Co Law Review is an undergraduate law journal dedicated to the publication of student legal scholarship from the Tri-Co community and beyond. The Law Review seeks to provide a forum for perspectives on issues arising within various fields in and surrounding law, ranging from topics like criminal procedure to legal interpretations of religious texts. By focusing on the editing and publishing of undergraduate scholarship, the Tri-Co Law Review seeks to cultivate those perspectives and to educate the Tri-Co community and the public.

Campaign Finance Law:

Buckley, Rollback, and Ramifications

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I. Background

The first major regulation of campaign finance began in 1910, following Congress's passage of the Federal Corrupt Practices Act (FCPA). Despite some constitutional challenges, the FCPA mostly regulated campaign finance until 1971 when Congress passed the Federal Election and Campaign Act (FECA). This act, among other things, limited how much money campaigns could spend on broadband advertising.[1]After it was amended in the wake of the Watergate Scandal, the Supreme Court ruled in *Buckley v. Valeo,* 424 US 1 (1976), that major parts of the Federal Elections Campaign Act were in violation of the First Amendment, changing campaign finance law forever.

Though much time can be dedicated to pre-Buckley campaign finance alone, this report will be dedicated to two distinct eras of campaign finance law. The first era in this report, which I will refer to as "the Buckley Era," denotes the time period of law following *Buckley* but preceding *Citizens United*. For the Buckley Era, the report will focus on two distinct cases: *Buckley v. Valeo* and *McConnell v. FEC,* 540 U.S. 93 (2003), roughly outlining the legal doctrine surrounding campaign finance and its relation to the Constitution. The next era, which I will refer to as "The Rollback," denotes the time period around and following *Citizens United* ruling. For this era, the report will focus on the following cases: *Wisconsin Right to Life v. FEC,* 551 U.S. 449 (2007); *Citizens United v. FEC,* 558 U.S. 310 (2010); and *McCutcheon v. FEC,* 572 U.S. 185 (2014). Here, the report will outline how in the name of the First Amendment, the Supreme Court acutely eroded the power of the government to regulate elections. Finally, the report will

[1] "The Federal Election Campaign Laws: A Short History." Transition.fec.gov, Federal Election Commission , transition.fec.gov/info/appfour.htm.

focus on the effects on elections as a result of these rulings, as well as reactions and activism in response to combat campaign excesses.

II. The Buckley Era

After the Watergate scandal, there was immense pressure on Congress to strengthen the newly passed FECA. New amendments included limits on individual and group campaign contributions[2]; limits on campaign expenditures done by individuals[3], candidates, the candidates, or "anyone relative to a clearly identified candidate; " and created obligations for political campaigns to report individual contributions.[4] The amendments also created the FEC, the regulatory body currently responsible for governing elections. Shortly following these developments, U.S. Senator James Buckley led a lawsuit challenging the constitutionality of these amendments.[5] The Supreme Court ruled on the issue two years later in 1976, marking a landmark change in campaign finance law.

In its ruling, the Court recognized that the government did in fact have a compelling interest in preventing "the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions."[6] Given this, the Court found contribution limits to be "appropriate legislative weapons" in achieving this goal; however, it did not find expenditure limits to be the same. For

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[2] An expenditure is any kind of purchase, payment, distribution, loan, etc, made for the purpose of influencing an election for Federal office, see 11 CFR § 100.111. If I were a political candidate and I spent money on a commercial for myself, that would be an expenditure.

[3] A contribution is a gift, subscription, loan, etc made by any person for the purpose of influencing any election for Federal office, see 11 CFR § 100.52. The difference between this and an expenditure is that contributions are given to someone else to spend, e.g. a donation, while expenditures are money that is actually spent on some kind of object intended to influence an election.

[4] *Buckley v. Valeo*, 424 US 1 (1976)

[5] Hamburger, Tom. "James Buckley, Conservative Politician and U.S. Senator, Dies at 100." Washington Post, 19 Aug. 2023, www.washingtonpost.com/obituaries/2023/08/18/james-buckley-valeo-obit/. Accessed 3 Dec. 2023.

[6] *Buckley,* p. 3

expenditure limits, the Court ruled that they "impose direct and substantial restraints on the quantity of political speech." Because "virtually every means of communicating ideas in today's mass society requires the expenditure of money," it was ruled that those limits violate the First Amendment.[7] The Court also found that disclosure limits were Constitutional.

This decision is significant for a number of reasons. First, the Court here explicitly refutes that contributions and expenditures are non-speech conduct comparable to flag-burning.[8] By doing so, it places this issue squarely under the jurisdiction of the First Amendment, making it subject to strict scrutiny. Second, it establishes that there is a compelling government interest in preventing corruption and the appearance of corruptio - a precedent that is cited in almost every subsequent case. Third, by finding contribution limits constitutional, the Court declares that the expression conveyed through contributions is not substantial enough to override the governmental interest in preventing corruption. This also implies that the quality and quantity of speech expressed through expenditures is much greater than through contributions, shedding light on the Court's perception of the First Amendment in relation to campaign finance.

In response to the growing prevalence of soft money, or money outside FECA jurisdiction purportedly raised for "party building" but instead used for campaigns, Congress in 2002 passed the Bipartisan Campaign Reform Act (BCRA). This law, among other things, regulated the raising and spending of soft money, raised contribution limits, forced parties to choose between coordinated and independent expenditures, and

[7] *Ibid*, p. 39
[8] *Ibid*, p.16

defined as well as regulated "electioneering communications.[9]" Following its enactment, multiple groups, including the ACLU and Mitch McConnell, filed suit challenging the constitutionality of the BCRA.

Surprisingly, the Court largely upheld the statute, finding that restrictions on soft money were closely drawn enough to be constitutional.[10] The court found that the government had a compelling interest in preventing corruption, "not limited to the elimination of quid pro quo… [also extending] to undue influence on an officeholder's judgment, and the appearance of such influence."[11] This, in the Court's opinion, justified the government's efforts in preventing circumvention of contribution limits through soft money, not just traditional corruption. Additionally, the Court upheld the provision restricting electioneering communication funding by political parties and corporations from their treasuries, finding that the statute does not "violate equal protection by discriminating against political parties in favor of special interest groups."[12] However, the Court did find that party choice provisions - which made a political party choose between independent and coordinated expenditures[13] - were unconstitutional because they burdened a political party's freedom of speech done through expenditures. It also found that restricting contributions from minors altogether violated their First Amendment rights as well.

The Buckley Era can generally be characterized by a Supreme Court that rarely tolerated expenditure limits but tolerated contribution limits. It recognized

[9] Generally, electioneering communications are any communications that refer to a clearly identified candidate, are publicly distributed 60 days before a general election/30 days before a primary, and for Congressional elections, targeted to a specific electorate. See 11 CFR § 100.29.

[10] "McConnell v. FEC." FEC.gov, www.fec.gov/legal-resources/court-cases/mcconnell-v-fec/.

[11] *McConnell v. FEC*, 540 U.S. 93 (2003)

[12] *McConnell*, p. 102

[13] A coordinated expenditure is any expenditure made by someone other than the campaign, the candidate, or any of their agents at the request of the candidate, campaign, or any of their agents. See 11 CFR § 109.20 & 109.21 for more information.

expenditures as essential to speech, forcing any burden on it and thus the First Amendment to be examined with strict scrutiny. Given this, most burdens on expenditures weren't tolerated by the Supreme Court, and most entities were free to spend the contributions they received. On the other hand, the Court felt that political contributions were less essential to free speech, only requiring burdens on it to be "closely drawn" instead. In most circumstances this permitted limitations on contributions, allowing the BCRA to prevent entities from soliciting, donating, and spending money outside of FECA regulation. It also recognized a compelling government interest in preventing not only *quid pro quo* corruption, but all types of corruption real and apparent. This ability to regulate soft money and contributions helped limit campaign spending, which eventually exploded following the *Citizens United* decision.

III. Contemporary Erosion – The Rollback

Although the Court did uphold the majority of the BCRA, campaign finance regulation quickly began to erode following the departure of Justice Breyer. As mentioned earlier, the BCRA's restrictions on electioneering communications made from treasury funds were upheld by the Supreme Court. In 2007, the advocacy group Wisconsin Right to Life (WRTL) felt that this prohibition was unconstitutional as applied, arguing that it violated their First Amendment rights and that the ads they produced were "genuine issue," not "express advocacy[14]" ads.

Unfortunately, the Supreme Court agreed. The Supreme Court found that "Because WRTL's ads may reasonably be interpreted as something other than an appeal

[14] Generally refers to any advertisement that could be generally interpreted by a reasonable mind as a call to action to either vote for or against a clearly identifiable candidate. See 11 CFR § 100.22 for more information.

to vote for or against a specific candidate, they are not the functional equivalent of express advocacy, and therefore fall outside *McConnell's* scope."[15] By interpreting WRTL's ads as being outside the scope of electioneering communications, the Court effectively delineated a new type of advertisement free from any FEC regulation: the "genuine issue ad." If the ad doesn't explicitly call for the defeat or election of a candidate, the compelling government interest that warranted the regulation of express advocacy no longer applies, and the ads can be financed close to an election, and with general funds instead of segregated funds. This effectively created a loophole in the BCRA's electioneering communications statute, allowing political organizations to slightly tweak the wording of an advertisement in order to reclassify it as "genuine issue" and fund it when and as they please.

Citizens United was even more of an upheaval than *WRTL*. In this case, two major cases were overturned: *Austin v. Michigan State Chamber of Commerce* and *McConnell*. In *Austin*, the Court upheld that corporations - excepting certain types of organizations[16] - could not use general treasury funds for any kind of expenditures in connection with certain elections. Additionally, as mentioned before, key parts of *McConnell* upheld the government's right to prevent corporations from using treasury funds in connection with electioneering communication expenditures. However, after

[15] *Wisconsin Right to Life v. FEC*, 551 U.S. 449 (2007)
[16] See *FEC v. Massachusetts Citizens for Life (MCFL) Inc.* 479 US 238, (1986) and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). The former found that while governments have a compelling interest in preventing *quid pro quo* and other forms of corruption, the type of nonprofit that MCFL was did not serve a high enough risk of engendering corruption through general treasury spending, making expenditure restrictions on it not sufficient enough to meet strict scrutiny. *Austin* found that the rule applied to the Michigan Chamber of Commerce was constitutional because the type of spending it was prevented from doing served a compelling government interest because of the type of corporation it was.

Citizens United (a nonprofit organization that made a "movie" about Hillary Clinton) filed suit because they wanted to air their movie close to an election, everything changed.

Originally, the suit they filed was a challenge to the BCRA statute regulating electioneering communications as applied to Citizens United, but the Court decided to take it a step further. The Court disagreed with Citizens United's assertion that their movie wasn't an electioneering communication like asserted in *WRTL*, instead finding that the portions of *Austin* and *McConnell* allowing for any sort of corporate expenditure provisions must be overruled.[17] Despite previous concerns of election distortion, inequality of resources, and corruption recognized by *MCFL* and *Austin* as compelling government interests to warrant certain expenditure restrictions, the court found that any expenditure restrictions "based on a speaker's identity, including its "identity" as a corporation" constituted violations of the Freedom of Speech.[18] Because of this decision, any restriction on a group's ability to spend money during an election was now unconstitutional, undermining the entire previous body of legal cases allowing for the regulation of corporations and their elections expenditures. This decision, combined with the *Speechnow v. FEC* decision (to be discussed later), which reduced restrictions on contributions PACs can receive, opened up the doors to Super PACs and unprecedented levels of spending in elections.

The final Supreme Court case to be discussed, *McCutcheon v. FEC*, constitutes another major upheaval. When businessman Sean McCutcheon learned of the biennial aggregate contribution limit for political donations,[19] he and others challenged the

[17] *Citizens United v. FEC,* 558 U.S. 310 (2010), p. 3
[18] *Citizens United*, Justice Stevens, dissenting, p. 3
[19] 2 U.S.C § 441a (FECA amended by BCRA) provided two types of contribution limits: (1) Base limits which limited how much money a donor may contribute to one given candidate, and (2) aggregate limits

BCRA provision on its face. Undoing even more precedence, the Court found that "The aggregate limits do not further the permissible governmental interest in preventing quid pro quo corruption or its appearance."[20] In the court's opinion, because aggregate contribution limits don't prevent *quid pro quo* corruption, then even the modest burden that this limit places on the Freedom of Speech is not warranted whatsoever. Not only does this decision ignore the rationale in *McConnell* that the government has a compelling interest in preventing corruption beyond the *quid pro quo* form, it also overrules the reasoning in *Buckley* that upheld aggregate and base contribution limits in 1976.

The Rollback era can be summed up just by using its title: the rolling-back of almost 40 years of Supreme Court precedence. *WRTL,* though only relevant for 3 years, served as foreshadowing for what was to come. *Citizens United* abandoned precedent allowing for the government to regulate independent expenditures of corporations in any context, ironically making the loophole created by *WRTL* irrelevant. Combined with *McCutcheon's* abandonment of the compelling government interest to regulate non *quid pro quo* corruption, aggregate contribution limits, and the *Speechnow v. FEC* decision, the Court opened up the doors to the Super PAC and, in Justice Breyer's words, "eviscerate[d] our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve."[21]

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which capped the aggregate sum of all donations that a donor may contribute to candidates or committees in a given cycle. Cited from *McCutcheon* syllabus p. 1.

[20] *McCutcheon v. FEC*, 572 U.S. 185 (2014)

[21] *McCutcheon*, Justice Breyer, dissenting p. 2

IV. Ramifications and Responses

It would be unwise to discuss the effects of these decisions without first addressing the district court decision of *Speechnow v. FEC,* No. 08-5223 (2010). Speechnow, a non-profit unincorporated association formed to pool independent expenditure resources for express advocacy, filed a complaint in District Court that the requirement forcing it to register as a political committee, and thus fall under the jurisdiction of FECA contribution limits, was unconstitutional. The District Court denied their request for a preliminary injunction, but Speechnow appealed, and The U.S. Court of Appeals in D.C. ruled in their favor.

The Appellate court ruled that requirements placed on Speechnow were unconstitutional as applied. In light of the *Citizens United* decision and the end of the compelling government interest to prevent anything other than *quid pro quo* corruption, which the Supreme Court held wasn't caused by independent expenditures, the Appeals Court ruled that "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption," finding that there was no government interest in restricting contributions to Speechnow, making any controls placed on it a violation of its First Amendment rights.[22] Though it would be required to register as a political committee, and accept the associated disclosure obligations, Speechnow and organizations like it were able to receive as much money as they pleased, and due to *Citizens United*, and there were no limits to how much they could spend.

Following these decisions, a new type of spending organization was born. Organizations like Speechnow, referred to as "Super PACs," could now accept and spend

[22] *Speechnow v. FEC,* No. 08-5223 (2010), p. 14

as much money as they wanted.[23] In a 2016 CRS report, they found that since the *Citizens United* decision, Super PACs have spent "almost $1.4 billion as of June 2016… toward IEs [independent expenditures] supporting or opposing federal candidates."[24] In just three election cycles, *Citizens United* managed to add $1.4 billion dollars to politics. In the 2019-20 cycle alone, independent expenditure only committees, the official name for Super PACs, spent "$198.6 million of all independent expenditures disclosed to the Commission."[25] The creation of the Super PAC has added an extraordinary amount of money to politics, but it's not just them doing the spending.

Following *Citizens United* and *McCutcheon*, billionaire spending has exploded as well. In the year 2008, total contributions from billionaires totalled ~$16 million dollars, or 0.3% of all donations (Americans for Tax Fairness Data Set)[26]. In 2020, after the end of aggregate contribution limits, contribution limits to Super PACs, and independent expenditure limits, billionaires in total spent around $1.2 billion dollars in contributions, consisting of 9.3% of all contributions. These decisions have opened up the door for almost unlimited political spending in elections, almost negating the purpose of the campaign finance law preceding them.

In response to, in Justice Breyer's words, the "total evisceration" of U.S. campaign finance law, there has also been considerable legislative resistance. In Montana, the State Supreme Court found that the *Citizens United* decision did not apply to its campaign finance laws, but this was quickly overruled by the Supreme Court,

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[23] Garret, Sam, "The State of Campaign Finance Policy: Recent Developments and Issues for Congress," (CRS Reports No. R41542), September 12, 2023.

[24] Garret, Sam, "Super PACs in Federal Elections:Overview and Issues for Congress," (CRS Reports No. R42042), September 12, 2023.

[25] Statistical Summary of 18-Month Campaign Activity of the 2019-2020 Election Cycle." *FEC.gov*, Federal Election Commission, 18 Sept. 2020.

[26] This is a data set assembled by Americans for Tax Fairness, Opensecrets.org, the Center for Open and Responsive Politics, and the Forbes List of Billionaires. You can view the dataset here, there are some really interesting figures that I wasn't able to include in this paper.

in *American Tradition Partnership, Inc. v. Bullock,* 567 U.S. 516 (2012). Instead of opting to attempt reform through the courts, Common Cause reports "Since 2010, 19 states and nearly 800 local governments have called on Congress to pass a constitutional amendment to overturn Citizens United and similar decisions."[27]Additionally, there have been various attempts to introduce a constitutional amendment in the House of Representatives. As recently as the 118th Congress, House Democrats led by Adam Schiff have "introduced an amendment to overturn the Citizens United ruling every year since 2013."[28] However, resistance against these rulings hasn't been limited to government action alone.

There also has been a significant grassroots movement in response to the decisions as well. Organizations like Common Cause frequently file complaints with the FEC against violators of campaign finance laws. Common Cause has filed a complaint with the FEC against a Bernie Sanders campaign non-profit violating FECA[29] as well as against the Trump campaign's illegal payments to Stormy Daniels.[30] Additionally, Common Cause complaints have made it to Court, such as in the case of *Common Cause Georgia, et al. v. FEC,* where Common Cause took the FEC to court over its refusal to enforce disclosure obligations for a Georgia campaign organization. Through litigation and other grassroots protests, Common Cause and organizations like it resist the erosion of campaign finance law.

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[27] "Citizens United & Amending the U.S. Constitution." *Common Cause*, www.commoncause.org/our-work/money-influence/campaign-finance/citizens-united-amending-the-u-s-constitution/.
[28] Sforza, Lauren. "Democrats Introduce Constitutional Amendment to Reverse Citizens United Campaign Finance Ruling." *The Hill*, 19 Jan. 2023
[29] *Common Cause v. Our Revolution,* MUR No. 7683, 2016
[30] *Common Cause v. Trump & Cohen*, Mur No. 7313, 2018

V. Conclusion

In the name of the First Amendment, campaign finance has fallen a long way since the Buckley Era. Though there was compelling government interest to regulate contributions and some expenditures, the "Rollback" declared that there was no compelling government interest to regulate independent expenditures of any kind, opening the door to unlimited spending. This, combined with the end of restrictions on contributions to organizations that only make independent expenditures, eviscerated any cap that may have existed on spending. Now, elections have been the most expensive they have ever been in history, and it is certain that 2024's elections will break spending records - after "the Rollback," it is constitutionally mandated to be so.

Ambiguity in Healthcare Post-*Loper Bright Enterprises v. Raimondo*

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Abstract

The Supreme Court's recent overruling of *Chevron* has frequently been portrayed as the death knell of federal agencies. This paper offers a less dire, more practical explanation of what happens to the healthcare industry in the wake of *Loper*. Specifically, this paper examines potential areas of legal conflict in relation to the functions of the U.S. Department of Health and Human Services (HHS), the Centers for Medicare and Medicaid Services (CMS), and the U.S. Food and Drug Administration (FDA). These issues include the problems caused by judicial partisanship, patient Medicare reimbursement rates, restrictions on pharmaceutical trials, and issues related to drug development for rare diseases. This paper does not assess the merits of the *Loper* decision; its purpose is solely to identify and discuss issues that must now be addressed as a result of *Chevron*'s reversal.

I. Introduction

On June 28, 2024, the United States Supreme Court overturned *Chevron U.S.A. v. Natural Resources Defense Council* in a monumental ruling that shifted power away from federal agencies.[1] While this shift has broad ramifications for *all* federal agencies, it is especially impactful on the U.S. Department of Health and Human Services (HHS), the U.S. Food and Drug Administration (FDA), and the Centers for Medicare and Medicaid Services (CMS). These agencies are especially susceptible to legal challenges as the various legislation that formed these agencies are extremely complex and, in multiple key areas, vague. The rationale behind this design was to create a system of

[1] *Loper Bright Enterprises v. Raimondo*, 600 U.S., pg. 1, (2023), https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf.

checks and balances to represent the various stakeholders in the healthcare system: patients, hospitals, the government, and the pharmaceutical industry.[2]

The *Chevron* ruling gave birth to what is called Chevron Deference: when the meaning of a piece of legislation is unclear, courts should defer to a federal agency's interpretation of that legislation. This deference was often invoked either when there was sufficient ambiguity in the law—often due to minor wording issues and definitions—or when the law was silent. "Legal silence" occurs when Congress gives a federal agency a broad directive yet does not specify exactly how the agency is supposed to go about achieving that goal. The specific cases that the Supreme Court used to strike down *Chevron* were *Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. Department of Commerce*, both of which focused on the application of *Chevron* in the regulation of fisheries. However, in the Supreme Court's six-three decision in *Loper*, they have made it so *Chevron* is not applicable regardless of the scenario or agency. Therefore, the United States Congress must act to resolve the legal issues and inevitable problems in healthcare by reexamining healthcare legislation and clarifying known vagueness before challenges against healthcare are raised. If not, ultimate decisions will be left to individual judges without the benefit of expertise in the relevant fields upon which they pass judgment. Such judicial decisions, therefore, may not align with the interests of the American public, for whom this legislation was designed.

II. Overturning *Chevron*

The legal justification for the overturning of *Chevron* is based on the Administrative Procedure Act (APA), passed in 1946, which explains the "agency

[2] Robert I Field, "Why Is Health Care Regulation so Complex?," *Pharmacy and Therapeutics* 33, no. 10 (October 2008): 607, https://pmc.ncbi.nlm.nih.gov/articles/PMC2730786/.

process for formulating, amending, and repealing a rule,[3]" for both formal and informal rulemaking as well as adjudication.[4] The core argument here, as explained in the opinion of the court, is that: "The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide 'all relevant questions of law' arising on review of agency action, §706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 does mandate that judicial review of agency policymaking and factfinding be deferential.[5]" Therefore, "*Held:* The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; *Chevron* is overruled.[6]"

Critically, the overturning of *Chevron* was not meant to reopen cases that have been decided under the *Chevron* doctrine. As the ruling explains, "By [overturning *Chevron*], however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to

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[3] "Administrative Procedure Act," §§ 551–559 § (1946), https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf.
[4] "Administrative Procedure Act," Legal Information Institute (Cornell Law School), accessed November 4, 2024, https://www.law.cornell.edu/wex/administrative_procedure_act.
[5] *Loper Bright Enterprises v. Raimondo*, 600 U.S., Opinion of the Court pg. 14, (2023), https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf.
[6] Ibid., Opinion of the Court pg. 1.

statutory *stare decisis* despite our change in interpretive methodology… Mere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding.[7]" *Stare Decisis* means to stand by what has been decided—essentially, that a case ruled based on *Chevron* is not automatically overturned by the court's ruling in *Loper*. However, within Justice Kagan's dissenting opinion in *Loper*, she argues that such a caveat is easily worked around by judges intent on repealing *Chevron* cases: "Courts motivated to overrule an old *Chevron*-based decision can always come up with something to label a 'special justification…' All a court need do is look to today's opinion to see how it is done.[8]" Justice Kagan's critique is strengthed by the court's previous ruling in *Corner Post Inc. v. Board of Governors of the Federal Reserve System*, which holds that "the Administrative Procedures Act's six-year statute of limitations for facial challenges of final regulations does not begin until the plaintiff is injured by the regulation,[9]" essentially "opening the floodgates for challenges to longstanding federal regulations.[10]" Weighing these two factors, this paper holds that, at minimum, some of the previous cases decided under *Chevron* will be reopened to judicial review due to the *Loper* decision.

III. Judicial Partisanship and Representativeness

The first and most prominent issue caused by the *Loper* decision is that it directs quasi-legislative power to individual, potentially partisan judges. The petitioner's brief in *Loper* argues that the issue with *Chevron* is that it conflicts with the landmark case

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[7] Ibid., Opinion of the Court pg. 14.
[8] *Loper Bright Enterprises v. Raimondo*, 600 U.S., Dissent pg. 31, (2023), https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf.
[9] Christopher Wright Durocher, "Corner Post, Inc. V. Board of Governors of the Federal Reserve System | ACS," American Constitution Society, July 1, 2024, https://www.acslaw.org/scotus_update/corner-post-inc-v-board-of-governors-of-the-federal-reserve-system/.
[10] Ibid.

Marbury v. Madison, suggesting that *Chevron* is an issue of judicial review. However, as Professor Richard J. Pierce of the George Washington School of Law explains—despite being a proponent of the decision—that is a misuse of *Marbury*: "The petitioner's brief in *Loper Bright*… challenges the *Chevron* doctrine by quoting *Marbury* out of context. The brief quotes *Marbury* and then states that a court's duty 'to say what the law is' must also 'include saying what the law is in close cases even when the authorities at issue are murky or silent…' Neither *Marbury* nor any other nineteenth-century opinion supports the argument that the courts, rather than agencies, must be the primary or sole authority of what the law is in cases of statutory silence or ambiguity that involve agency rulemaking.[11]" The nuance here is that overturning *Chevron* should not be viewed as returning power to the judiciary—this is a fundamentally new power with new consequences.

Whether or not that power is beneficial or legally justified under the APA is outside the scope of this paper. However, it is true that giving this power to the judiciary poses a representation issue. Along party lines, there is rising concern that overturning *Chevron* has given undue power to judges—who are, notably, appointed instead of elected. The idea that individual judges are now wielding this power concerns many in Congress, so much so that bills like the Stop Corporate Capture Act[12] and the Restoring Congressional Authority Act[13] have seen rejuvenated support or been proposed post-*Loper*. The increasing partisanship within the judiciary branch drives some of this concern. On the political left, for example, there has been a great deal of concern about

[11]Richard J. Pierce, Jr., "On Misciting Marbury," The Regulatory Review, January 29, 2024, https://www.theregreview.org/2024/01/29/pierce-on-misciting-marbury/.
[12] Elizabeth Warren, "Warren Leads Senate Response to End of Chevron Doctrine," Senate.gov, July 23, 2024, https://www.warren.senate.gov/newsroom/press-releases/warren-leads-senate-response-to-end-of-chevron-doctrine.
[13] Ron Wyden, "Restoring Congressional Authority Act," Pub. L. No. 4987 (2024), https://www.wyden.senate.gov/imo/media/doc/restoring_congressional_authority_act.pdf.

President Trump appointing over one-quarter of the active federal judges during his first term.[14] Further, both the political left and right have raised concerns about "packing the courts" during the other side's administrations.[15]

In addition to concerns about representativeness across party lines, the general public also often feels that its voice is not heard within the judicial system. There is no clearer example of this representativeness issue than abortion. Firstly, as a result of the *Dobbs v. Jackson Women's Health Organization* decision that overturned *Roe v. Wade*, "public confidence in the U.S. Supreme Court reached its lowest point of the past half century. And by summer 2023, majorities of the public reported support for imposing term limits, mandatory retirement ages, and formal ethics policies.[16]" None of those issues have been addressed. Furthermore, *Dobbs* contradicts the wishes of a majority of Americans, as fifty-seven percent of Americans disapprove of the Supreme Court's decision to overturn *Roe v. Wade*.[17] This issue of a judiciary body acting against the will of the people does not stop with rulings, though, as judges tend to retire during the term of a president they prefer and are presumably replaced by a judge of similar constitution.[18] That practice concentrates power on a partisan basis that is strictly undemocratic.

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[14] John Gramlich, "How Trump Compares with Other Recent Presidents in Appointing Federal Judges," Pew Research Center, January 13, 2021, https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/.

[15] Walter Olson, "Packing the Supreme Court Would Be Bad for the Law," Cato Institute, October 16, 2020, https://www.cato.org/publications/commentary/packing-supreme-court-would-be-bad-for-law.

[16] Shawn Patterson Jr. et al., "The Withering of Public Confidence in the Courts," Judicature (Duke Law School, July 23, 2024), https://judicature.duke.edu/articles/the-withering-of-public-confidence-in-the-courts/.

[17] Pew Research Center, "Majority of Public Disapproves of Supreme Court's Decision to Overturn Roe v. Wade," Pew Research Center, July 6, 2022, https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/.

[18] Ian Prasad Philbrick, "The 2024 Stakes for Judges," *The New York Times*, October 31, 2024, https://www.nytimes.com/2024/10/31/briefing/the-2024-stakes-for-judges.html.

IV. Effects on HHS and CMS

To quantify the magnitude of *Loper*'s impact on healthcare, it is necessary to look at the functions of the agencies that provide healthcare services. First, the HHS and CMS are responsible for administering Medicare, Medicaid, and the Children's Health Insurance Program (CHIP). These programs combined cover over 150 million Americans, many of whom are senior citizens, children, low-income, or disabled.[19] Furthermore, it is these programs that are tasked with ensuring patients receive timely, effective, and affordable care. To do so, they need "transparency, accountability, and stability that result from the fact that the programs are administered by the Secretary of Health and Human Services ('Secretary'), acting through the Centers for Medicare & Medicaid Services ('CMS'), the expert agency with responsibility for implementing these famously complex statutes.[20]" In a post-*Loper* world, it may fall on a federal judge to make such decisions without any of the prerequisite expertise in healthcare. That is a monumental task to confer on a single person, let alone a non-expert. In his analysis, *Why Health Regulation Fails*, Professor Robert C. Clark of Harvard Law School explains that "the problem arises because it may not be wise for inexpert lay persons to regulate the expert actions of professionals. If regulation is done improperly, it may do more damage than simply letting the professionals do what they want.[21]"

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[19] *Brief of Amici Curiae* in *Loper Bright Enterprises v. Raimondo*, No. 22-451 (U.S. filed Oct. 4, 2023), Summary of Argument pg. 4, https://www.supremecourt.gov/DocketPDF/22/22-451/249812/20221213161132498_Loper%20Bright%20AC%20Brief%20with%20Motion%20%20Caption%20PDFA.pdf.

[20] *Brief of Amici Curiae* in *Loper Bright Enterprises v. Raimondo*, No. 22-451 (U.S. filed Oct. 4, 2023), Interest of Amici Curiae pg. 2, https://www.supremecourt.gov/DocketPDF/22/22-451/249812/20221213161132498_Loper%20Bright%20AC%20Brief%20with%20Motion%20%20Caption%20PDFA.pdf.

[21] Robert C. Clark, "Why Does Health Care Regulation Fail?," *Maryland Law Review* 41, no. 1 (1981), pg. 4, https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2473&context=mlr.

In healthcare, this issue is especially severe. In their brief to the Supreme Court, Amici Curiae, an advocacy group that represents the American Cancer Society, the National Health Law Program, and various other medical groups, explains that "Medicaid law is almost unintelligible to the uninitiated… describing Medicare as a massive, complex health and safety program . . . embodied in hundreds of pages of statutes and thousands of pages of often interrelated regulations.[22]" Even in less complex issues, the courts often are not as informed as they need to be to reach pragmatic decisions. Already, there have been empirical examples of the judiciary being unable to decipher these complicated, technical issues in their rulings: "The Supreme Court had to revise its opinion in a separate ruling, *Ohio v. Environmental Protection Agency*, after Justice Neil Gorsuch referred five times to nitrous oxide, otherwise known as laughing gas, when he actually meant to refer to nitrogen oxide, an air pollutant that the EPA was aiming to curb.[23]"

On a larger scale, Medicare and Medicaid reimbursement rates, limits, and coverage determinations are determined by the HHS and CMS. The CMS defers to recommendations from specialists within the American Medical Association's Relative Value Scale Update Committee in over ninety percent of cases.[24] However, these hearings are almost never public and could be legally challenged post-*Loper*.

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[22] *Brief of Amici Curiae* in *Loper Bright Enterprises v. Raimondo*, No. 22-451 (U.S. filed Oct. 4, 2023), pg. 10, https://www.supremecourt.gov/DocketPDF/22/22-451/249812/20221213161132498_Loper%20Bright%20AC%20Brief%20with%20Motion%20%20Caption%20PDFA.pdf.

[23] Nancy Vu, "Congress Braces for Change Following Supreme Court Ruling against Chevron Doctrine," Washington Examiner, July 15, 2024, https://www.washingtonexaminer.com/policy/energy-and-environment/3080596/congress-braces-change-following-supreme-court-ruling-chevron/.

[24] John Walker and Henry Roberts, "Post-Chevron Impacts on Health: Three Case Studies," American Action Forum, August 12, 2024, https://www.americanactionforum.org/insight/post-chevron-impacts-on-health-three-case-studies/.

Consequently, the cost of treatment could become an issue decided by a judge who lacks expertise in the complex process and factors that determine that number.

V. Effects on the FDA

Since *Loper*, all eyes have gone to the FDA, as it is one of the most stringent regulatory agencies. One vital function of the FDA is to ensure the quality of pharmaceutical trials. At the most basic level, overturning *Chevron* may give courts the power to reject the FDA's opinion on whether or not a drug has met the standards necessary to reach the market. To pass a trial, a drug must undergo an "adequate and well-controlled investigation,[25]" and a court might view that provision differently than the FDA and its host of experts. Furthermore, "deference under Chevron was critical to allow [the] FDA to use its expertise to administer very complex and technical programs that widely touch industry and health care consumers alike. In litigation challenging FDA's actions in recent years, courts deferred to the agency in considering patent-term extensions for drugs, requirements related to exclusivity periods, and compliance with Current Good Manufacturing Practices for facilities. Overturning Chevron could open the floodgates to challenges of a wide variety of FDA regulations.[26]" The FDA is already widely considered to be a very "slow" agency, but if it must now litigate its rulings, we can only predict that it will become slower. That means people whose lives depend on the timely release of life-saving drugs may be forced to wait through the grueling process of adjudication.

Another problem with which the courts must grapple is the definition of "same drug." Just last year, an appellate court ruled in concurrence with the FDA in the case of

[25] "Code of Federal Regulations," Title 21, Chapter I, Subchapter D, Part 314, Subpart D, § 314.126 § (1938), https://www.ecfr.gov/current/title-21/chapter-I/subchapter-D/part-314/subpart-D/section-314.126.
[26] Zachary Baron et al., "Supreme Court Overrules Chevron Doctrine: Ripple Effects across Health Care," *Health Affairs Forefront*, July 19, 2024, https://doi.org/10.1377/forefront.20240717.807901/full/.

Jazz Pharmaceuticals, Inc. v. Avadel CNS Pharmaceuticals, LLC. on the issue of whether or not the two companies were producing the "same drug.[27]" The FDA grants companies, in this case, Jazz Pharmaceuticals, a period of time where only they may sell a proprietary drug if it treats a rare disease, in effect, a temporary monopoly—hopefully encouraging pharmaceutical companies to make drugs for these rare conditions. However, Avadel produced a drug that had the same active moiety (essentially, the same molecule responsible for the drug's function) yet only had to be taken once a day instead of twice a day.[28] For the FDA, this was enough to prove the drug's "clinical superiority," thus allowing Avadel to put their drug on the market, and the court agreed with the FDA. However, this case was decided during the *Chevron* era, and it is not infeasible to imagine that, had it been decided after *Loper*, the court might have ignored the FDA's opinion and prevented Avadel's drug from being sold.

The issues discussed thus far in relation to the FDA have not been politically charged. It is worth considering, though, whether political issues surrounding healthcare may impact the impartiality of a judge's ruling on particularly sensitive cases. Returning to the example of abortion, in June 2024, the Supreme Court ruled on *Food and Drug Administration v. Alliance for Hippocratic Medicine*, allowing for the FDA approval of the abortion drug Mifepristone. Many had feared the court would rule against the FDA as it has been known to take a negative view of abortion since the *Dobbes* ruling. In this case, they only ruled in favor of the FDA because *Alliance* lacked sufficient "standing to challenge FDA's actions regarding the regulation of

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[27] *Jazz Pharmaceuticals, Inc. v. Avadel Pharmaceuticals, LLC*, 19 F.4th 1387 (Fed. Cir. 2021), https://cafc.uscourts.gov/opinions-orders/23-1186.OPINION.2-24-2023_2085825.pdf.

[28] John Walker and Henry Roberts, "Post-Chevron Impacts on Health: Three Case Studies," American Action Forum, August 12, 2024, https://www.americanactionforum.org/insight/post-chevron-impacts-on-health-three-case-studies/.

mifepristone.[29]" "The Supreme Court was asked to determine whether the FDA acted lawfully when it approved mifepristone and took measures to ensure easy access to the drug. But the Court declined to do so because the doctors who challenged FDA's actions could not show that they had a legally recognizable stake in the dispute. The Court's rejection of that challenge, however, did not foreclose similar lawsuits in the future.[30]" While the court ruled in favor of abortion in *F.D.A. v. Alliance*, it should be expected that challenges to abortion, like this one, will continue to populate within the legal system. Returning to the issue of representativeness and judge bias, with *Chevron* gone, there is no consistent framework by which courts must rule on these questions. Individual judges are thus free to make decisions about abortion access based on their personal beliefs—posing a serious threat to the availability of abortion medication and, of course, medication as a whole.

VI. Conclusion

Chevron was meant to address ambiguity and legal silence. Now, that ambiguity has no framework by which it must be addressed, and it is largely left to the discretion and typically limited knowledge of individual judges. For such a complex, contentious issue as healthcare, leaving that final decision-making power in the hands of a judiciary with its own independent biases and lack of expertise is bound to result in harmful decisions. Furthermore, because judges are unelected officials, giving them the power to make legislative decisions is fundamentally undemocratic. While it may not be easy to accomplish, Congress's necessary course of action is simple: resolve these ambiguities with expediency so that American healthcare is not dominated by the judiciary.

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[29] Zachary Baron et al., "Supreme Court Overrules Chevron Doctrine: Ripple Effects across Health Care," *Health Affairs Forefront*, July 19, 2024, https://doi.org/10.1377/forefront.20240717.807901/full/.
[30] Andrew Twinamatsiko and Sheela Ranganathan, "Supreme Court Rejects Challenge to Abortion Medication, but at What Cost?," *Health Affairs Forefront*, June 21, 2024, https://doi.org/10.1377/forefront.20240620.339243/full/.

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Transgender Women in Women's Sports:

A Whole New Ballgame?

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Fall 2024

I. Introduction: Setting the Playing Field

This paper discusses the legal principles and arguments underpinning challenges to policies governing the inclusion of transgender women in historically cisgender female sports. From claims implicating the Equal Protection Clause of the Federal Constitution's Fourteenth Amendment to those reliant on Title IX of the Education Amendments of 1972, it charts recent juridical developments while situating them within the broader discourse surrounding transgender rights. Viewed objectively, transgender women and their allies are likely to succeed on the legal merits of their cause. However, recognizing both the unlikelihood of a near-term resolution and the hyperpolarized environment in which it is enveloped, this subject warrants constructive, nuanced consideration now, perhaps more than ever. What follows aspires to set the playing field for a deliberation worth contemplating in the days, weeks, and months ahead.

II. Legal and Legislative: Equal Protection & Title IX Post-Bostock

While still in its infancy, the legal and legislative landscape concerning transgender athletes in women's sports is fast developing and yet inextricably tied to the broader debate surrounding transgender rights and their application to a society conceived along gender binary lines. From so-called "bathroom bills" – legislation restricting access to public bathrooms and similar facilities based on sex assigned at birth – to bans or limitations on gender-affirming medical care and the sports-specific policies around which this article centers, reaching an acceptable and appropriate balance between protecting transgender individuals' rights and those of their cisgender counterparts splits public opinion.[1] It also strikes at the core of American liberties. Thus,

[1] See Kim Parker, Juliana Menasce Horowitz, and Anna Brown, "Americans' Complex Views on Gender Identity and Transgender Issues," Pew Research Center, June 28, 2022,

while just a half of a percent of American adults and 1.5% of American youth identify as transgender, the scope of transgender rights has bifurcated along largely partisan lines and produced conflicting results across the United States.[2] For example, while the Republican House of Representatives passed H.R. 734, the Protection of Women and Girls in Sports Act, during the current – 118th – Congressional session in a 219-203 party-line vote, this legislation was moot in the Democratic Senate and President Biden promised to veto it regardless.[3] In response to federal gridlock, many state legislatures have weighed in on this matter. Indeed, 2023 alone saw the enactment of over two hundred fifty trans-inclusive state bills among mostly Democratic-controlled legislatures, compared to a record 77 of over five hundred seventy trans-restrictive bills in primarily Republican state governments.[4] Of the latter, legislation directly or indirectly implicating transgender youth, including that which regulates public school policies, constitutes the majority.[5] Amidst 23 states restricting participation on school sports teams based on sex assigned at birth – and the likelihood of more during the 2024 legislative session – among other contentious laws, the associated legal fallout has

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https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues/.

[2] Jody L. Herman, Andrew R. Flores, and Kathryn K. O'Neill, "How Many Adults and Youth Identify as Transgender in the United States?," *The Williams Institute*, June 2022, https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/.; "These views differ even more sharply by partisanship. Democrats and those who lean to the Democratic Party are more than four times as likely as Republicans and Republican leaners to say that a person's gender can be different from the sex they were assigned at birth (61% vs. 13%)." Parker, Horowitz, and Brown, "Americans' Complex Views."

[3] H.R.734 – 118th Congress (2023-2024): Protection of Women and Girls in Sports Act of 2023, H.R.734, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/734.; Executive Office of the President, "Statement of Administration Policy," April 17, 2023, https://www.whitehouse.gov/wp-content/uploads/2023/04/SAP-HR-734.pdf.

[4] HRC Foundation, "2023 State Equality Index: A Review of State Legislation Affecting the Lesbian, Gay, Bisexual, Transgender and Queer Community and a Look Ahead at 2024," *The Human Rights Campaign Foundation*, 2024, https://reports.hrc.org/2023-state-equality-index?_ga=2.187207082.300447684.1706811924-465285443.1704472908.; Nicole Narea and Fabiola Cineas, "The GOP's coordinated national campaign against trans rights, explained," *Vox*, April 6, 2023, https://www.vox.com/politics/23631262/trans-bills-republican-state-legislatures.

[5] HRC Foundation, "2023 State Equality Index."

been equally ferocious and notably incongruous.[6] This section distills recent legal developments concerning policies on transgender women in women's sports, putting them into dialogue with the debate over transgender rights generally.

While various claimants of have sought enjoinment of policies permitting student-athletes to compete on single-sex sports teams according to their gender identity, many legal cases involve objections to state bills that categorically exclude transgender women from public secondary and post-secondary women's sports teams by virtue of their sex assigned at birth.[7] Within the latter, claimants typically allege violations of the Equal Protection Clause of the federal Constitution's Fourteenth Amendment and Title IX of the Education Amendments of 1972.[8] Under the Equal Protection Clause, analysis of challenged policies undergo "one of three tiers of scrutiny depending on the type of classification at issue," distinctions consequential insofar as each level of scrutiny entails a different standard more or less favorable to the governmental status quo.[9]

Under equal protection claims, the question at issue is whether transgender individuals comprise a quasi-suspect class and whether challenged policies classify on the basis of sex – either subjects the respective law to the more demanding heightened scrutiny over rational-basis review. With the Supreme Court yet to designate

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[6] HRC Foundation, "2023 State Equality Index."; see, for example, The Associated Press, "Utah joins 10 other states in regulating bathroom access for transgender people," *NBC News*, January 31, 2024, https://www.nbcnews.com/nbc-out/out-politics-and-policy/utah-joins-10-states-regulating-bathroom-access-transgender-people-rcna136521.

[7] Madeline W. Donley, "Regulating Gender in Schools Sports: An Overview of Legal Challenges to State Laws," *Congressional Research Service*, January 2, 2024, https://crsreports.congress.gov/product/pdf/LSB/LSB10993.

[8] Donley, "Regulating Gender in Schools Sports."; "The 14th Amendment and the Evolution of Title IX," Administrative Office of the United States Courts, accessed April 2, 2024, https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix. ("The 14th Amendment provides, in part, that no state can 'deny to any person within its jurisdiction *the equal protection* of the laws.'") (emphasis added).

[9] Donley, "Regulating Gender in Schools Sports."

transgender individuals as a quasi-suspect class akin to sex, lower courts have engaged in such analysis – namely, determining whether transgender individuals (1) have faced historical discrimination; (2) hold "obvious, immutable, or distinguishing characteristics that define them as a discrete group;" (3) represent "a minority or [are] politically powerless;" and (4) possess "a defining characteristic that 'frequently bears [a] relation to ability to perform or contribute to society.'"[10] However, the Court has cautioned that "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers," to create new suspect classes and thereby apply heightened scrutiny.[11] Nonetheless, lower courts have differed over recognizing transgender individuals as a quasi-suspect class.[12] In *M.A.B. v. Board. of Education of Talbot County* and *Grimm v. Gloucester County School Board*, consistent with the "overwhelming majority of courts to consider the question," district courts analyzing restrictive bathroom and locker room policies determined that "transgender status itself is at least a quasi-suspect classification," finding that all four factors had been met.[13]

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[10] Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976); Bowen v. Gilliard, 483 U.S. 587, 602 (1987); *id.*; *id.*; M.A.B. v. Board. of Education of Talbot County, 286 F. Supp. 3d 704, 719-20 (D. Md. 2018) (citing Frontiero v. Richardson, 411 U.S. 677, 683 (1973)).

[11] City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441-42 (1985) (holding that intellectual disability is not a quasi-suspect class); see also Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (holding that age is not a quasi-suspect class); San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) (holding that poverty is not a suspect class).

[12] Michael J. Lenzi, "The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies," *American University Law Review* 67, no. 3 (2018): 878, http://digitalcommons.wcl.american.edu/aulr/vol67/iss3/4.

[13] M.A.B. v. Board of Education of Talbot County, 286 F. Supp. 3d 704, 721 (D. Md. 2018) (citing Doe v. Trump, 275 F. Supp. 3d 167, 208-09 (D.D.C. 2017)).; Grimm v. Gloucester County School Board, 302 F. Supp. 3d 730, 749 (E.D. Va. 2018); L. W. v. Skrmetti, 3:23-cv-00376, 22 (M.D. Tenn. Jun. 28, 2023); see also Ray v. McCloud, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020); F.V. v. Barron, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); Evancho v. Pine-Richland School District, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); Board of Education of the Highland Local School District v. U.S. Department of Education, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016); Adkins v. City of New York, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y.

However, in cases such as *Adams v. School Board of St. Johns County*, various lower courts have expressed "grave 'doubt' that transgender persons constitute a quasi-suspect class," concluding, among other things, that transgender individuals are not a "discrete group" because the word "transgender" has ambiguous meaning nor are they "politically powerless" with the support of the Biden administration and a large number of states.[14] In its petition for a writ of certiorari in what likely will be a landmark Supreme Court decision in *United States v. Skrmetti* (considering the permissibility under the Equal Protection Clause of a Tennessee bill outlawing gender-affirming medical care), the Department of Justice counters that claiming "the position of some transgender persons in society 'has improved markedly in recent decades,'…does not suggest that transgender persons as a class wield political power," also disputing that transgender individuals cannot be easily categorized.[15] For example, the Department of Justice notes that the existence of widespread anti-trans legislation dampens the assertion that whatever political influence transgender individuals – defined on the basis that "their gender identities do not align with their respective sexes assigned at birth" – collectively possess, thereby relieves courts of otherwise appropriate legal protections.[16] Courts further disagree over whether policies impermissibly classify on the basis of sex, another determinant of heightened scrutiny's applicability to equal protection claims.

2015); Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (all holding that transgender individuals are a quasi-suspect class).

[14] Adams v. School Board of St. Johns County, 57 F.4th 791, 805 n.5 (11th Cir. 2022); L. W. v. Skrmetti, No. 23-5600/5609, page 34 (6th Cir. 2023); see also Eknes-Tucker v. Governor, of the State of Alabama, 80 F.4th 1205, 1230 (11th Cir. 2023); Kaeo-Tomaselli v. Butts, CIV. NO. 11-00670 LEK/BMK, 11 (D. Haw. Jan. 31, 2013); Braninburg v. Coalinga State Hospital, No. 1:08-CV-01457-MHM, (E.D. Cal. Sep. 6, 2012); Jamison v. Davue, No. CIV S-11-2056 WBS DAD P, 6 (E.D. Cal. Mar. 22, 2012) (all finding that transgender individuals are not a suspect or quasi-suspect class).

[15] Petition for Writ of Certiorari at 25, United States v. Skrmetti, 83 F.4th 460 (No. 23-477) (citing Frontiero v. Richardson, 411 U.S. 677, 685 (1973)).

[16] Brief for Petitioner at 29-31, United States v. Skrmetti, 83 F.4th 460 (No. 23-477).

The Supreme Court has consistently recognized that heightened scrutiny necessarily follows under "[l]egislative classifications based on gender…[because] [t]hat factor generally provides no sensible ground for differential treatment" and often implicitly relies on gender stereotypes.[17] Lower courts have generally agreed that legislation restricting access or participation based on biological sex is "inherently based upon a sex-classification," given its provisions "cannot be stated without referencing sex."[18] However, some stakeholders reason that challenged bills apply "evenhandedly…regardless of sex", "do not mention transgender status" explicitly, or reflect "the fact that the sexes are not similarly situated in certain circumstances" and thus abide by the Equal Protection Clause, while many lower courts have dismissed such claims.[19] In practice, challenged bills arguably isolate transgender students for "fail[ure] to conform to the sex-based stereotypes associated with their assigned sex at birth," which courts have found "insufficient to sustain a classification."[20] Equally questionable is the justification proffered by states that transgender women are receiving equal treatment to those they are "similarly situated with: 'biological males,'" given that, as *Grimm* held, "embedded in the… [legislative body's] framing is its own bias: it believes that…gender identity is a choice, and it privileges sex-assigned-at-birth over…medically

[17] City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985); United States v. Virginia, 518 U.S. 515, 533 (1996); see also Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

[18] Whitaker v. Kenosha Unified School District No. 1 Board of Education, 858 F.3d 1034, 1051 (7th Cir. 2017); Adams v. School Board of St. Johns County, 57 F.4th 791, 801 (11th Cir. 2022).

[19] L. W. v. Skrmetti, No. 23-5600/5609, page 23 (6th Cir. 2023); Application (22A800) to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit, West Virginia v. B.P.J., No. 23-1078, Dkt. 50 (4th Cir. Feb. 22, 2023) (No. 23-1078); Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 469 (1981).

[20] Whitaker v. Kenosha Unified School District No. 1 Board of Education, 858 F.3d 1034, 1051 (7th Cir. 2017); see also Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011) ("Accordingly, governmental acts based upon gender stereotypes—which presume that men and women's appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny because they embody 'the very stereotype the law condemns.'") (citing J.E.B v. Alabama ex rel T.B., 511 U.S. 127, (1994)).

confirmed, persistent and consistent gender identity."[21] In fact, since most challenged sports-related policies implicate only transgender women rather than all transgender individuals, one court concluded that "[t]he singling out of transgender females is unequivocally discrimination on the basis of sex," a reality exacerbated when considering how few transgender women there are in the first place.[22] Further, "the very purpose of heightened scrutiny is to identify those sex-based classifications that reflect legitimate and appropriately tailored responses to 'enduring' physical differences between men and women," though it should be noted that many lower courts have concluded that "the [alleged] 'absolute advantage' between transgender and cisgender women athletes is based on overbroad generalizations without factual justification."[23] In sum, with the likelihood of applying heightened scrutiny based on transgender individuals as a quasi-suspect class or on an act's sex-based classification, states and school boards face difficult hurdles in meeting the burden of linking an important governmental interest – "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes" – to categorical policies that, in practice, hardly seem "substantially related" to their stated goals.[24] Given their

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[21] B. P. J. v. West Virginia State Board of Education, 550 F. Supp. 3d 347, 353-54 (S.D.W. Va. 2021) (finding that "Plaintiff is not most similarly situated with cisgender boys; she is similarly situated to other girls."); Grimm v. Gloucester County School Board, 972 F.3d 586, 610 (4th Cir. 2020); see also Adams v. School Board of St. Johns County, 318 F. Supp. 3d 1293, 1317 (M.D. Fla. 2018) ("There is no evidence to suggest that his identity as a boy is any less consistent, persistent and insistent than any other boy."); Mississippi University for Women v. Hogan, 458 U.S. 718, 725 (1982) ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.").

[22] A.M. v. Indianapolis Public Schools, 1:22-cv-01075-JMS-DLP, 21 (S.D. Ind. Jul. 26, 2022).

[23] Petition for Writ of Certiorari, United States v. Skrmetti, 83 F.4th 460 (No. 23-477) (citing United States v. Virginia, 518, 533 U.S. 515 (1996)); Hecox v. Little, 479 F. Supp. 3d 930, 982 (D. Idaho 2020); see also A.M. v. Indianapolis Public Schools, 1:22-cv-01075-JMS-DLP, 24 (S.D. Ind. Jul. 26, 2022) ("The harm the State suggests could occur - that biological girls will be forced to compete against transgender girls who allegedly have an athletic advantage - is speculative…"); B. P. J. v. West Virginia State Board of Education, 550 F. Supp. 3d 347, 355-56 (S.D.W. Va. 2021) ("At this preliminary stage, B.P.J. has shown that she will not have any inherent physical advantage over the girls she would compete against on the girls' cross country and track teams.").

[24] United States v. Chapman, 666 F.3d 220, 226 (4th Cir. 2012) ("Under intermediate scrutiny, the government bears the burden of establishing a reasonable fit between the challenged statute and a

extremely small representation, "[i]t appears untenable that allowing transgender women to compete on women's teams would substantially displace female athletes," nor is it "clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women."[25]

Similar analysis holds within the realm of Title IX, albeit bolstered by the Supreme Court's decision in *Bostock v. Clayton County*, concluding that "it is impossible to discriminate against a person for being…transgender without discriminating against that individual based on sex."[26] Under Title IX, no person "shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance."[27] While transgender claimants argue that discrimination on the basis of transgender status equates to discrimination on the basis of sex, states and school boards counter that Title IX's reference to sex should be understood in a binary, strictly biological fashion.[28] However, many factors complicate the latter assertion, including Title IX's silence on the meaning of "sex" and the notable exclusion of the word "biological," the finding that "dictionaries from that [Title IX's] era defined 'sex' in myriad ways and, therefore,…[do not] reflect a uniform and unambiguous meaning of 'sex' as biological sex or sex assigned at birth," and the "well-settled" applicability of Title VII employment discrimination jurisprudence, thereby including *Bostock*, to Title

substantial governmental objective."); See, for example, Clark, Etc. v. Arizona Interscholastic Association, 695 F.2d 1126, 1131 (9th Cir. 1982); Hecox v. Little, 479 F. Supp. 3d 930, 952 (D. Idaho 2020).

[25] Hecox v. Little, 479 F. Supp. 3d 930, 977-78 (D. Idaho 2020).

[26] Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020).

[27] 20 U.S.C. § 1681(a) (emphasis added).

[28] See, for example, A.M. v. Indianapolis Public Schools, 1:22-cv-01075-JMS-DLP, 14-16 (S.D. Ind. Jul. 26, 2022); Adams v. School Board of St. Johns County., 318 F. Supp. 3d 1293, 1321 (M.D. Fla. 2018); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1047 (7th Cir. 2017); Hecox v. Little, 479 F. Supp. 3d 930, 962 (D. Idaho 2020) (all involving disputes over the scope of Title IX).

IX.[29] While *Bostock* did "not purport to address bathrooms, locker rooms, or anything else of the kind," crucially, nor did the majority "foreclose the application of its holding to the Title IX context," particularly where biological sex remains a "remains a but-for cause" of transgender exclusion.[30] In addition, three years before *Bostock* in *Whitaker*, the Seventh Circuit applied the Court's landmark decision in *Price Waterhouse v. Hopkins* in conjunction with lower court cases determining that *Price Waterhouse* "encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms," the latter to which a transgender individual "[b]y definition…does not conform," in holding a restrictive bathroom bill in violation of Title IX.[31] Since Title IX claims also rest on showing "improper discrimination [that] caused…harm," lower courts have further recognized "emotional and dignitary harm" of exclusionary policies that, in accordance with *Bostock*'s definition of discrimination as "treating…[an] individual worse than others who are similarly situated," impermissibly discriminate

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[29] Adams v. School Board of St. Johns County, 318 F. Supp. 3d 1293, 1321 (M.D. Fla. 2018); Board of Education of the Highland Local School District v. U.S. Department of Education, 208 F. Supp. 3d 850, 866 (S.D. Ohio 2016); M.A.B. v. Board of Education of Talbot County, 286 F. Supp. 3d 704, 713 (D. Md. 2018); see Doe v. Boyertown Area School District, 893 F.3d 179, 196 n.103 (3d Cir. 2018); Whitaker v. Kenosha Unified School District No. 1 Board of Education, 858 F.3d 1034, 1047 (7th Cir. 2017); Grimm v. Gloucester County School Board, 302 F. Supp. 3d 730, 744 (E.D. Va. 2018); Jennings v. University, 482 F.3d 686, 695 (4th Cir. 2007); Olmstead v. L. C, 527 U.S. 581, 617 n.1 (1999); Smith v. Metropolitan School District Perry Township, 128 F.3d 1014, 1023 (7th Cir. 1997) (all applying Title VII principles to Title IX); see also "Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County," Office for Civil Rights, Department of Education, June 22, 2021, https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf ("Consistent with the Supreme Court's ruling and analysis in Bostock, the Department interprets Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination on the basis of sexual orientation and gender identity.").

[30] Bostock v. Clayton County, 140 S. Ct. 1731, 1753 (2020); A.M. v. Indianapolis Public Schools, 1:22-cv-01075-JMS-DLP, 19 (S.D. Ind. Jul. 26, 2022); Grimm v. Gloucester County School Board, 972 F.3d 586, 616-17 (4th Cir. 2020); see also B. P. J. v. West Virginia State Board of Education, 550 F. Supp. 3d 347, 356 (S.D.W. Va. 2021).

[31] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004); Whitaker v. Kenosha Unified School District No. 1 Board of Education, 858 F.3d 1034, 1048-49 (7th Cir. 2017).

against transgender individuals compared to "similarly situated" cisgender individuals whose gender identity they share.[32] In the aftermath of *Bostock*, categorical exclusions of transgender individuals in federally funded environments face difficult questions under Title IX.

While the overwhelming majority of cases are brought by transgender individuals against exclusionary acts, a minority have been filed by cisgender students challenging permissive policies under Title IX and equal protection grounds. Most notable in the sports arena are *Soule v. Connecticut Association of Schools* (four cisgender female athletes challenging the state's "transgender participation" policy) and a recent lawsuit filed by a group of cisgender female athletes seeking enjoinment of the NCAA's transgender eligibility rules (largely in response to Lia Thomas' participation in the 2022 NCAA Division I Women's Swimming and Diving Championships as a transgender woman).[33] With the *Soule* case not yet considered on merits (the Second Circuit Court of Appeals affirmed the district court's ruling that the challengers lacked standing, before the Second Circuit en banc vacated and remanded to the district court for further proceedings in December 2023) and the class action lawsuit against the NCAA only just filed, it remains to be seen how lower courts will approach such cases.[34]

III. Conclusion: A Divisive Issue, a Divided Public, a Unified Future

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[32] Grimm v. Gloucester County School Board, 972 F.3d 586, 616-18 (4th Cir. 2020); Bostock v. Clayton County, 140 S. Ct. 1731, 1740 (2020); see, for example, B. P. J. v. West Virginia State Board of Education, 550 F. Supp. 3d 347, 356-57 (S.D.W. Va. 2021); Adams v. School Board of St. Johns County, 968 F.3d 1286, 1310 (11th Cir. 2020); A.M. v. Indianapolis Public Schools, 1:22-cv-01075-JMS-DLP, 21 (S.D. Ind. Jul. 26, 2022); Hecox v. Little, 479 F. Supp. 3d 930, 987 (D. Idaho 2020) (all finding harms to transgender students as a result of exclusionary policies and thereby finding, even if preliminarily, Title IX violations).

[33] Soule ex rel. Stanescu v. Connecticut Association of Schools, Inc., No. 21-1365 (2d Cir. 2023); "Complaint for Damages, Declaratory, Equitable, and Class Relief and Demand for Jury Trial," United States District Court, Northern District of Georgia, Atlanta Division, submitted March 14, 2024, https://swimswam.com/wp-content/uploads/2024/03/Complaint-re-2022-Championships-FINAL.pdf.

[34] Soule v. Connecticut Association of Schools, 57 F.4th 43 (2d Cir. 2022); Soule ex rel. Stanescu v. Connecticut Association of Schools, Inc., No. 21-1365 (2d Cir. 2023).

Just as progress advancing and protecting the rights of cisgender women in the United States has been painfully slow, frustratingly circuitous, and all too reliant on lagging public opinion, it stands to reason that so too will efforts to elevate transgender people from a position of marginality and despair to one of equality and promise. While the arc of American history has been tragically uneven across demographic groups, the spirit of this country imbues even those most relegated to the peripheries with a sense of hope that the American dream can yet be theirs. This optimism is not blind but a reflection, as Justice Kennedy wrote in the Supreme Court's majority opinion in *Obergefell* (recognizing a constitutional right to same-sex marriage), that "dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[35] Guided by Justice Kennedy's sage advice and commanded by the applicable constitutional and statutory protections, the legal merits behind the inclusion of transgender women in historically cisgender women's sports are likely to favor transgender women and trans allies. Incorporating transgender Americans into a society conceived along gender binary lines raises unavoidable and important questions, questions that are contentious and worthy of debate. It is precisely their undeniable difficulty that compels Americans not to dismiss issues of transgender inclusion but to treat them with the degrees of thought and care they inherently warrant. Doing so does not necessitate carte blanche outcomes. Instead, it requires nuanced conversation, and it is, of course, nuance that is easily overcome by brazenness during periods of great socio-political divide. The dialogue surrounding transgender women in women's sports represents just one such conversation of the many comparatively recent debates

[35] Obergefell v. Hodges, 576 U.S. 644, 660 (2015).

concerning transgender individuals. Its relative novelty must be considered alongside the courses of similar movements, including that of women's equality generally with which it often intersects. Justice Kennedy, also in *Obergefell*, declared that "[t]he nature of injustice is that we may not always see it in our own times," which, in practice, seems as much a call to action as a justificatory reminder.[36] As days, weeks, months, and years go by, cries of injustice become louder and demands of rectification grow stronger. The question facing American society today cannot be *if* to answer those calls from transgender individuals but *when* and, as importantly, *how*. In 1963, a preacher confined in a jail cell in Birmingham penned the words, "justice delayed is justice denied," a proclamation that continues to echo across the country that pledges "liberty and justice for all."[37] In America's pursuit of these fundamental ideals, its transgender progeny command a seat at the table.

[36] Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

[37] Martin Luther King, Jr., "Letter from Birmingham Jail," August 1963, https://www.csuchico.edu/iege/_assets/documents/susi-letter-from-birmingham-jail.pdf.; Pledge of allegiance to the flag; manner of delivery, U.S. Code 4 (2011), § 4, https://www.govinfo.gov/app/details/USCODE-2011-title4/USCODE-2011-title4-chap1-sec4.

The Ambiguity of Textualism in Bostock

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Abstract

Bostock v. Clayton County (2020) was a landmark Supreme Court decision that sought to identify the extent to which the Civil Rights Act (1964) protects against sexual-orientation based discrimination. Both the majority opinion, written by Justice Gorsuch, and the dissent, from Justice Alito, utilized the textualist method to reach their conclusions. This paper examines Scalia's conception of textualism, and then investigates how Gorsuch and Alito used textualism to reach opposite conclusions. This paper comes to the conclusion that Alito's analysis adheres more closely to Scalia's textualism. However, this paper also demonstrated an inherent flaw in the textualist philosophy: linguistic ambiguity in legal statutes. This paper concludes that textualism cannot be the sole method of adjudication if courts are to effectively decide hard cases.

I. Introduction

In Bostock v. Clayton County, the Supreme Court ruled that employment discrimination based on sexual orientation or gender identity violated the Civil Rights Act of 1964. In the Court's opinion, Neil Gorsuch demonstrates how discrimination against gays falls under the purview of "sex discrimination," and therefore must be prohibited. Both Gorsuch and the dissenting Samuel Alito rely on the same interpretational method to reach their conclusions: Antonin Scalia's textualist approach. In "Common-Law Courts in a Civil-Law System," Scalia details this approach to judging. He states that the optimal way of understanding a law is to understand the "intent that a reasonable person would gather from the text of the law, placed alongside the remainder

of the corpus juris."[1] Simply, one must look only at the words and phrases contained in the law and place them in the context of their ordinary public meaning and prior statutes.

Scalia's textualism appears simple and straightforward; one must only consult the text of the law to understand its meaning. Of great interest, then, is how both Gorsuch and Alito could employ textualism and reach directly opposite results in Bostock. Although both justices claim the same philosophy of interpretation, Alito's opinion adheres more closely to the principles outlined in Scalia's text. However, their conflict reveals the limits of textualist interpretation, namely that a close reading of a law isolated from its author's intentions allows the reader to project their own biases and presumptions.

II. Scalia's Textualism

To Scalia, the proper way of knowing the meaning of a law is to understand its words both individually and together. However, Scalia warns against the trap of "literalism," or "strict-constructionism," which he calls a "degraded form of textualism."[2] Like textualism, literalism looks to the definition of words as its primary recourse. It diverges, however, by not placing those words in their proper context of what a reasonable individual would have thought them to mean when they were written. Scalia illustrates this with the example of a defendant who faced a longer sentence for "using" a firearm during a drug crime. The phrase "using a firearm" ordinarily means to use it as a

[1] Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws" in A Matter of Interpretation: Federal Courts and the Law - New Edition, ed. Amy Gutmann (Princeton University Press, 2018), 17.
[2] Ibid, 23.

weapon. However, this man merely bartered it for drugs. Scalia excoriated his fellow justices for ruling against the man, claiming that their too-literal reading of the text divorced itself from the ordinary public meaning of the words and phrases in it. As Scalia writes, a text should not be construed strictly or leniently, but "be construed reasonably, to contain all that it fairly means."[3]

Words must not be loosely construed because this opens the door for judges to invent new applications of a law. Scalia uses the example of the "due process" clause in the 14th Amendment to demonstrate judicial malpractice. In its text, the due process clause does not protect rights, but only guarantees "process," meaning that property, life, and liberty can be taken by the government, "but not without the process that our traditions require-notably, a validly enacted law and fair trial."[4] This clause, according to Scalia, has been stretched far beyond its textual meaning, as it has been used to protect certain forms of speech and religion, and to create new rights that do not exist explicitly in the Constitution (such as abortion).

Scalia's textualism can further be understood by what it does not take into account: "legislative intent." The use of legislative intent is often hazy; one must imagine what legislators meant when writing a law. At first glance, legislative intent may appear similar to the textualist doctrine of "ordinary public meaning" since they both rely on the context surrounding a law's enactment. They differ as such: legislative intent seeks to involve extratextual factors in adjudication (including floor debates or committee reports), while the ordinary public meaning doctrine is concentrated on the

[3] Ibid.
[4] Ibid, 24.

text itself. The best evidence of legislative intent, to textualists, is the words of the law itself; if legislators "intended" to make a law mean something not included in its text, then the proper remedy is new legislation, not judicial tinkering.

Take, for example, the case Church of the Holy Trinity v. United States. The federal government prohibited the importation of foreign workers (with narrow exceptions), and the Church of the Holy Trinity ran afoul of this law by hiring an English pastor. While the Court admitted that pastors fell under the scope of the law, they ruled against the government anyway under the logic that Congress only intended the importation of manual laborers to be banned. Although the Court may have been right, and Congress may have incorrectly written the law, Scalia argued that it is not the duty of the Court to distinguish between "wise" and "foolish" laws and rewrite the latter. Legislative intent acts as a way for judges to introduce their own subjectivity into statutory interpretation, thus usurping the legislature and threatening democracy. As Scalia writes, "Men may intend what they will; but it is only the laws that they enact which bind us."[5]

When the text is clear, no further interpretation is needed. However, statutes are often ambiguous and require further investigation. Scalia offers several tools and legal assumptions for resolving ambiguities. Firstly, any ambiguity must be made "internally consistent, but also compatible with previously enacted laws."[6] Internal consistency is an obvious requirement, however compatibility with prior laws seems less so. Logically, however, if Congress meant to write a new law that reversed portions of prior ones, then

[5] Ibid, 17.
[6] Ibid, 16.

they would have made that clear. Ambiguity, then, should be resolved in favor of the status quo. Further, Scalia promotes the limited use of "canons" of construction, which are syntactical choices that hold implicit meaning. One canon is that "the expression of one is the exclusion of the other;" for example, a sign stating those under age 12 may enter without paying implies that 13-year-olds must pay. Canons are useful in interpreting a law. Scalia distinguishes canons from "presumptions," which include notions such as statutory ambiguities must be resolved in favor of a criminal defendant, or that remedial statutes should be interpreted broadly. These rules are idiosyncratic to each judge, and thus "increase the unpredictability, if not the arbitrariness, of judicial decisions."[7]

Textualism depends on the text of the law and the public meaning of its words when written. If needed, textualists can consult laws on comparable topics to resolve ambiguities in language. A good decision is not one that leads to the best outcome for society, but one that follows the text of the law. If the text of the law is unpalatable to the public, then they must follow the democratic process and elect lawmakers that will fulfill their wishes. If modern conceptions of the meaning of words have changed, it is not a judge's duty to adhere to it. A justice need not ban the death penalty for being "cruel and unusual punishment" under the 8th Amendment, because the writers of that text understood it not to be cruel. To Scalia and other judges, textualism is a way for laws to retain their meaning over time. A law that changes its meaning when the public changes its opinions is a danger to American democracy because it allows the majority to determine the content of a law according to their whims.

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[7] Ibid, 28.

III. Gorsuch's Opinion in Bostock

Gorsuch used textualism as a foundation for the majority opinion in Bostock, ruling that an employer cannot discriminate against an employee based on their sexual orientation or gender identity. The case revolved around Title VII of the Civil Rights Act of 1964, which states that employers cannot "discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[8] While sexual orientation is not explicitly stated in the list of protected traits, Gorsuch works to include it under the concept of sex discrimination. The meaning of the word "sex" in this context is agreed upon by both plaintiff and defendant as referring to biological sex, according to the ordinary public meaning of the word found in dictionaries at the time of the law's creation. Further, the definition of the word "discrimination" is also agreed upon as referring to differential treatment. The Court must also understand the meaning of "because of." Contemporary decisions equate it to "by reason of."

The bulk of Gorsuch's opinion relies on the concept of "but-for" reasoning, which holds two scenarios constant "but for" one change. If two employees are treated differently for the same act or trait and they only differ in regard to their sex, then employers are engaging in discrimination. The employer in Bostock would not fire a woman for being attracted to men. However, if hypothetically the woman's sex changed to male, retaining the attraction to men, then the employer would fire them. To Gorsuch and five other members of the Court, this is a clear case of sex-based discrimination. Since homosexuality is intrinsically tied to one's sex, any discrimination based on that factor is sex-based discrimination.

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[8] Bostock v. Clayton County, 590 U.S. 644 (2020).

One might claim that the employer is not firing based on whether someone is a man or a woman, but rather on their sexual orientation. They are not firing men for being gay, or women for being gay, but they are firing anyone for being gay, thus making the object of their disapproval homosexuality and not sex. They might claim that they are actually treating men and women equally because of this policy. Gorsuch refutes this argument by stating that the Civil Rights Act is meant to specifically protect "individuals" and not classes, which is demonstrated in its repeated textual use of the word. It does not matter if one is treating both men as a class and women as a class equally; what matters is that on an individual basis, employment decisions are made (at least partially) based on sex.

Gorsuch investigates one possible question that appears to defeat this argument: what if the employer has no knowledge of a prospective employee's sex before making a decision? If, on the job application, there exists a box that asks "Are you homosexual?" to be checked or not checked, then the employer is only making a distinction based on sexual orientation and not sex. Gorsuch retorts that this is merely an evasive maneuver, as the applicant can only make a decision on checking the box by considering their sex. He offers a similar hypothetical that replaces "homosexual" with "black" or "Catholic." An employer that makes decisions based on these traits still engages in discrimination despite not knowing the individual applicant.

To be a proper textualist, Gorsuch must still explain the reason that Congress left sexual orientation out of the list of protected classes in the Civil Rights Act. He writes in his opinion that "Congress's failure to speak directly to a specific case that falls within a

more general statutory [does not create] a tacit exception."[9] In adding sex to the list of protected characteristics, Congress has developed a broad rule. Therefore, it is sensible for the Court to apply the broad rule instead of carving out narrow exceptions. Another objection is that very few people in 1964 would have expected the act to apply to homosexuals. Gorsuch responds that the unexpected application of a law in "situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates [the] breadth of a legislative command."[10] Congress may not have intended to include gay people in the Civil Rights Act, but as Scalia writes, intention is irrelevant to a textualist.

V. Alito's Dissent

Alito, to say the least, vehemently disagrees with Gorsuch's interpretation of textualism. Like Gorsuch, Alito will be concerned with the "ordinary public meaning" of the language in the provision; unlike Gorsuch, he will not treat "sex" and "discrimination" as two separate words to be defined, but "sex discrimination" as a singular phrase to be put in the context of the 1960s. As Scalia made clear, words mean what they convey to reasonable people at the time they were written, and "sex discrimination" did not carry any connotations of sexual orientation or gender identity in 1964.

Alito writes that textualists do not read laws "as if they were messages picked up by a powerful radio telescope from a distant and utterly unknown civilization."[11]

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[9] Ibid.
[10] Ibid.
[11] Ibid.

Following Scalia, social context is integral to textualism. At the time of the law's inception, the DSM-1 classified homosexuality as a mental disorder; the federal government could revoke security clearances on account of homosexuality; the federal government could fire an employee for their sexual orientation (until 1975); 49 states and the District of Columbia had criminalized "sodomy;" homosexuals were excluded from the military and from immigrating. It would be curious, therefore, if the ordinary public meaning of sex discrimination included discrimination on account of sexual orientation, considering that discrimination against gays was widely practiced. Quoting Scalia, the Court's duty "is not to scavenge the world of English usage to discover whether there is any possible meaning" in which sex discrimination includes sexual orientation.[12] Likewise, sex discrimination could not possibly include gender identity in 1964 because the term "gender identity" had just been defined in an academic paper, and thus remained far out of the common parlance.

Alito takes issue with many of the hypotheticals used by Gorsuch. For example, in the example of a job applicant checking a box that asks about homosexuality, Alito reasons that it is irrelevant that the applicant must know their sex before making a decision. The crucial consideration is that the employer does not know the sex of the applicant. Therefore, there can exist no intent of the employer to discriminate based on sex. A blanket ban of homosexuals based on checking a box resembles the military's own policy at the time of the law's origin. Gorsuch uses the example of the illegality of a box asking if one were black or Catholic. However, checking the box explicitly identifies the applicant as being either black or Catholic, and refusing to hire them is an intentional

[12] Ibid.

decision based on their race and religion; checking the homosexuality box differs because it does not identify the sex of the applicant.

Alito argues that many legislators and judges must have been wrong or ignorant from 1964 to 2019 if Gorsuch's claims are true. Every session of Congress from 1975 to 2019 failed to pass bills that either amended Title VII to include orientation or that defined sex discrimination as including sexual orientation. Logically, these bills would be redundant if the ordinary public meaning of "sex discrimination" already included sexual orientation. Likewise, lower federal courts repeatedly found that sexual orientation and gender identity were not covered by the Civil Rights Act, including in 2017. While the exact text of the law may be somewhat ambiguous if Gorsuch's considerations have been taken into account, textualists must also consider the ordinary public meaning of the word and laws with comparable language. As detailed above, Alito sees Gorsuch as failing in both those regards.

VI. Textualism's Gaps

Although the Court's decision in Bostock reached the noble goal of protecting gay and transgender employees from discrimination, it is Alito's dissent that is more aligned with textualist principles (at least, Scalia's school of textualism). Gorsuch's interpretation is similar in method to the aforementioned "using a gun" example. There *is* discrimination happening towards gay employees and the sex of the employees *is* the issue if using but-for reasoning. However, referring to the employer's action as sex discrimination is not only alien to the ordinary public meaning of the text at the time of its conception, but would also puzzle most people today. Gorsuch's logic veers into the

literalism that Scalia described; it is quite algorithmic, and his opinion seems to play out more like a rhetorical word game than a textualist analysis. His ahistorical close reading of the text lacks the necessary nuance that Scalia prescribes.

Although Alito's use of textualism is more effective in Bostock, of critical importance, then, is how two of the highest judges in the land could disagree on a case while reasoning with the same, well-known method. Gorsuch's opinion may not have been in line with prior judges or legislators, but he did manage to convince five other members of the Supreme Court that sex discrimination applied to sexual orientation. How can "sex discrimination" mean something different than "sex" and "discrimination?" Textualism, while being a strong foundation for statutory, cannot be completely perfect because linguistic communication itself is not completely perfect. Every individual has their own ideas and associations connected with each word and phrase. These idiosyncrasies are unwieldy to articulate, and therefore we must rely on linguistic shortcuts to get our meaning across. Therefore, it is important that those in a community generally share a set of overlapping associations regarding a word. These overlapping associations will constitute the "ordinary public meaning," while other associations are left out. This dynamic explains Scalia's emphasis on the definition of a word and phrase according to a "reasonable" person.

One limit of textualism, therefore, is that one cannot be purely objective about imagining a "reasonable" person in 1964, or even in the present. As a creation of our minds, we will be forced to project certain unconscious biases onto this person as we create them. Resorting to this fabled "reasonable" person with their "ordinary" public

meaning allows us to cleave off certain unpopular characteristics and opinions. As a blank slate, we can imbue them with whatever beliefs we choose, and particularly the ones that come most naturally to us. For example, the majority of the nation in 1964 was white, was straight, was Christian, and, although not a majority, the nation was dominated by men. While none of these groups are monoliths, there are certain conservative tendencies of thought they share. Is it sensible, therefore, to exclude gay individuals in 1964 from our construction of a reasonable individual? As Gorsuch mentioned in his opinion, gay and transgender individuals did file Title VII complaints soon after the passage of the bill, indicating that they must have understood themselves to be protected by the text.

The text itself is often incomplete. It is not possible for legislators to include every detail of how a law should work, and therefore unforeseen issues can arise as seen in Bostock. Sometimes, word choices may be thoughtless, as the author, in the natural course of writing, chooses words that come to him the most naturally. However, under textualist thought, the intentions of this author must be categorically ignored. Silencing the author and their interpretation of the text means that the reader must place themselves in the authorial position. The reader then has room to impose their own meaning on the language of the statute. Is the reader really understanding the objective of the statute if they are ignoring the author's purpose? Scalia says the author is irrelevant as a matter of law. He may be right, since the nation is ruled by laws and not men. However, as a matter of actually knowing what the text means, he may be wrong.

The weaknesses explained above explain the divergent conclusions by Gorsuch and Alito. The nature of their difference can be boiled down to one question: how far must we take the idea of "ordinary public meaning" when analyzing a statute? Surely, at least some dependence on the people of the past is necessary. Although it was not a point of contention in Bostock, words can and do change meaning over decades, and using modern definitions can radically alter the meaning of the law. On the other hand, giving too much credence to the people of the past will lead to a reading of the text that is stagnant, immovable, and potentially out of place. For example, as Gorsuch writes, Title VII was later used as a reason to criminalize workplace sexual harassment, something that would have been entirely unexpected at the law's formation. Relying too much on the beliefs of those in the past can prevent the application of the law to new circumstances. Gorsuch attacks those that defer to past society: they would "seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime."[13] Clearly, some flexibility in interpretation is necessary.

VII. Conclusion

Despite being cited by both the majority opinion and the dissent in Bostock, it is only Alito that gets textualism right. However, the important part of their debate is not that one was right and one was wrong, but that the textualist method they used is incomplete both due to general linguistic imperfection and the fact that readers must construe the text without the assistance of the author's intent. Scalia's textualism revolves around a "fair meaning" of the text at hand, removed from the intentions of the

[13] Ibid.

legislature that wrote it. Definitions must be understood in the context of the society which wrote them. Under this logic, "sex discrimination" in the Civil Rights Act of 1964 does not protect employees from being fired for their sexual orientation or gender identity.

Undoubtedly, this is a sour conclusion to make; it is difficult to accept that a landmark civil rights law, when read correctly, leaves certain subpopulations vulnerable to discrimination. While textualism does not result in a "good" societal outcome under this analysis, we must recall that "good" is not the goal of the method. In the same way that textualism can restrain judges from "good" decisions, it can also restrain judges from making decisions with bad outcomes for society. Textualism, like every interpretational method, has its drawbacks. However, in a democratic system that aspires to make law only through the proper channels, textualism is a powerful tool in maintaining a strict separation of the legislative and judicial branches.

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LGBT Crackdown in Russia

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On November 30, 2023, the Supreme Court of the Russian Federation ruled that the "international LGBT movement" was to be classified as an "extremist organization" by the Russian government. The court was acting upon a lawsuit brought by the Russian Ministry of Justice, which accused LGBT activists in general of threatening the social and religious traditions of the country. The designation of the "LGBT movement" as an extremist organization gives Russian officials a renewed mandate and legal justification for the censorship of free expression surrounding LGBT issues, although the extent to which the crackdowns will be implemented remains to be seen.[1] Due to consolidation of the judicial system under the influence of the Kremlin over the past couple of decades, the decision should be seen largely as a political decision by the government and less of a principled judicial interpretation of Russian law. Since his inauguration as president in 2000, Russian President Vladimir Putin has overseen a significant right-wing shift in both popular opinion and government policy. This research article plans to address the law in both the historical and current political context of contemporary Russia.

The court's judgment and its all-important definition of the "international LGBT movement" was worded vaguely, almost certainly by design in order to provide Russian officials the widest possible jurisdiction to crack down on LGBT-related expression. Nonetheless, an analysis of a variety of recent news stories since the November decision gives us insight into how the law is already being implemented and where it could be going next.[2] For example, basing its story on reports from local Russian news websites Ostorozhno Novosti and Sota, *CNN* reported that gay venues around Moscow were

[1] Duma and Federation Council, "Federal Law No. 114 FZ on Counteraction of Extremist Activities (2002)" (Moscow: Russia, July 25, 2002).

[2] Tom Waugh, "Institutional Prejudice. What the Full Text of the Russian Supreme Court Judgement Labelling the LGBT Movement 'extremist' Tells Us," Novaya Gazeta Europe, January 21, 2024.

raided by Russian police just one-day after the court's decision was announced.[3] At least three notorious LGBT venues in Moscow were reportedly targeted, and were shut down under the pretext of an anti-drug operation. Although no arrests were made, visitors of the club were forced to leave and have their passports photographed by police. Another club in St. Petersburg, according to the report, was shut down as its managers were denied further leasing due to the "new law." Presumably, these gay club crackdowns are an indication that merely organizing a place for the LGBT community to convene is now considered an illegal extremist action.

In Early February 2024, it was reported that the first convictions under the new law were made against two individuals who were caught displaying the rainbow flag — which is the internationally recognized symbol of the LGBT community.[4] In the first case, a man was fined for "displaying the symbols of an extremist organization" when it was discovered that he had posted the rainbow flag online. The fine, originally much larger, was reduced to roughly ten euros in Russian rubles after the man admitted guilt and claimed he made the post out of "stupidity." Another woman was reportedly sentenced to five days in "administrative detention" for wearing frog-shaped earrings that displayed the rainbow flag. These convictions make clear that the Supreme Court decision has effectively outlawed displaying the rainbow flag both online and in public — as a symbol of "extremism." By March, the Kremlin's crackdown appeared to have escalated with gay bar managers and art directors being arrested — facing up to ten

[3] Darya Tarasova, Gul Tuysuz, and Jen Deaton, "Police Raid Gay Venues in Russia after Top Court Bans 'International LGBTQ Movement,'" CNN, December 4, 2023, https://edition.cnn.com/2023/12/04/europe/police-raid-gay-venues-russia-intl-hnk/index.html.

[4] "Russia Makes First Convictions for 'LGBT Extremism' Following Ban ," Reuters, February 1, 2024, https://www.reuters.com/world/europe/russia-makes-first-convictions-lgbt-extremism-following-ban-2024-02-01/.

years in prison for "organizing an extremist community."[5] More employee arrests have followed ever since.

In April, according to Russian Business News *Vedomosti*, a new institution in Russia called the Russian Book Union was created to begin recommending LGBT-related books that should be censored.[6] *A Home at the End of the World* by American writer Michael Cunningham, *Giovanni's Room* by American writer James Baldwin and *Heritage* by Russian writer Vladimir Sorokin have already been targeted and were removed from shelves on April 22.[7] This suggests that it is only a matter of time before more LGBT-related literature will be banned throughout the country, a significant crackdown on publishing and the dissemination of ideas and LGBT acceptance in Russia. Although still early on in the extremism rulings' existence, the visible trend is a quickly escalating definition of extremist actions in relation to the LGBT community. It is impossible to know at this time the extent to which the definition of extremist LGBT actions will be expanded to include, and the severity of the punishments associated with these newly criminal activities. A safe assumption however, taking into account the rapidly escalating nature of the crackdowns in recent months, is that the Russian government is just getting started with its LGBT suppression.

Russia's new court ruling is far from the first oppressive action taken against the

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[5] Denis Leven, "Russia Locks up Boss of Gay Bar for Breaching New Anti-LGBTQ+ Laws," POLITICO, March 21, 2024, https://www.politico.eu/article/russia-arrest-anti-lgbtq-laws/.

[6] Дмитрий, "В России Создан Экспертный Центр Для Проверки Книг На Соответствие Законам," Ведомости, April 22, 2024, https://www.vedomosti.ru/media/articles/2024/04/23/1033498-v-rossii-sozdan-ekspertnii-tsentr-dlya-proverki-knig.

[7] Sébastian SEIBT, "Russia's Book Police: Anti-Gay Law Opens New Chapter as Censors Target Literature," France 24, April 30, 2024, https://www.france24.com/en/europe/20240430-russia-s-book-police-anti-gay-law-opens-ugly-new-chapter.

Russian LGBT community. Having been illegal in Tsarist Russia, a ban on homosexuality was intentionally left out of the 1922 Soviet Criminal Code — effectively decriminalizing consensual same sex relations.[8] While many leftists correctly point out that the Soviet Union decriminalized homosexual relations decades before other Western countries, no doubt an important milestone and social justice achievement in global LGBT liberation, the Soviet Union's second leader Joseph Stalin decriminalized homosexuality in 1933 and implemented brutal crackdowns.[9] By 1934, the law applied to all Soviet Republics and caused, at minimum, tens of thousands to suffer.[10] Despite Stalin's successor Nikita Khrushchev's general de-Stalinization programs, he doubled down on crackdowns against homosexuals — issuing a secret decree in 1958 to strengthen the "struggle against sodomy" which led an estimated 1000 men to prison per year.[11] After the fall of the Soviet Union, in order to adhere to Council of Europe standards, Boris Yeltsin enacted a series of liberalizing laws in 1993. One of such laws was the decriminalization of male homosexuality.[12] This status quo has remained up until this point; however, Russian conservatism returned in full force as the liberalization and democratization of Russia had failed by the turn of the century. In a

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[8] Englestein L, "Soviet Policy toward Male Homosexuality: Its Origins and Historical Roots," Journal of homosexuality, 1995, https://pubmed.ncbi.nlm.nih.gov/8666753/.

[9] Pablo Herón Rodrigo López, "The Decriminalization of 'homosexuality' in the USSR: A Milestone in the History of Sexual Liberation," Left Voice, May 25, 2021, https://www.leftvoice.org/the-decriminalization-of-homosexuality-in-the-ussr-a-milestone-in-the-history-of-sexual-liberation/.

[10] Dan Healey, "A Russian History of Homophobia," The Moscow Times, March 29, 2012, https://www.themoscowtimes.com/2012/03/29/a-russian-history-of-homophobia-a13689.

[11] ibid

[12] "The Facts on LGBT Rights in Russia," The Facts on LGBT Rights in Russia - Council for Global Equality, 2017, http://www.globalequality.org/component/content/article/1-in-the-news/186-the-facts-on-lgbt-rights-in-russia.

2002 Duma debate, for example, the restoration of the Stalinist law as well as its expansion to include lesbians was openly discussed and considered.[13] While Putin, who had become president in 2000, ignored the calls for the decriminalization of private homosexual acts — and has continued to up until this point — the debate set the tone for the 21st century.

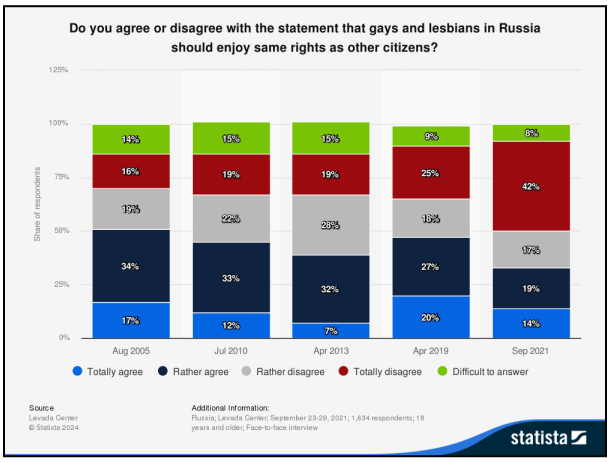
In 2012, the Moscow city government banned gay pride parades for the next "100 years," kicking off what would become more than a decade of escalating crackdowns on public LGBT expression. One year later, the "For the Purpose of Protecting Children from Information Advocating a Denial of Traditional Family Values Act" was signed into law by Putin. This occurred after similar bills submitted to the Duma in 2003, 2004 and 2006 had failed and were denounced by the Supreme Court as illegal since homosexuality had been decriminalized in 1993.[14] The law, commonly referred to as the Anti-Gay Propoganda Law, banned "propaganda of non-traditional sexual relations among minors" and "enforcing information about non-traditional sexual relations that evokes interest to such relations." In 2022, the law was extended to apply to spreading LGBT-friendly messages to adults as well as children.[15] These laws not only began forcing the Russian LGBT community to stay in the closet but have worked to prevent work done by LGBT activists and educational authorities throughout the country. November's classification of the LGBT movement as "extremist", although it remains to be seen (as previously discussed) the extent to which it will be used to prosecute the

[13] Dan Healey, Russian Homophobia from Stalin to Sochi (London, United Kingdom: Bloomsbury academic, 2018), 9.

[14] Justine De Kerf. "Anti-Gay Propaganda Laws: Time for the European Court of Human Rights to Overcome Her Fear of Commitment." DiGeSt. Journal of Diversity and Gender Studies 4, no. 1 (2017): 35–48. https://doi.org/10.11116/digest.4.1.2.

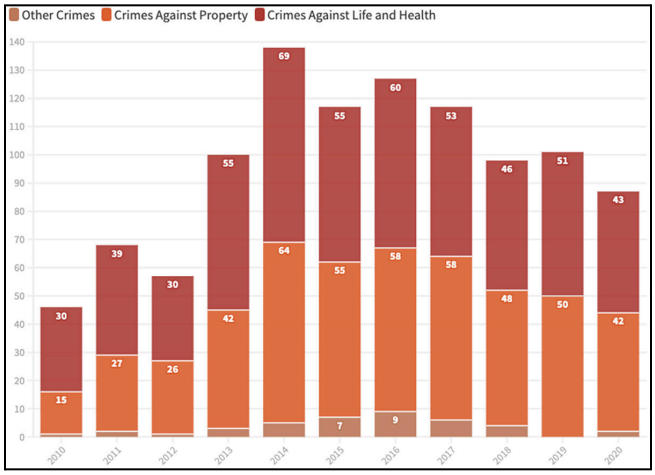
[15] "Russia: Expanded 'gay Propaganda' Ban Progresses toward Law," Human Rights Watch, November 28, 2022, https://www.hrw.org/news/2022/11/25/russia-expanded-gay-propaganda-ban-progresses-toward-law.

LGBT community, could potentially be seen as step three of the escalating anti-LGBT "Propaganda" legal regime.



These measures, to a large extent, have been accepted by large swaths of an increasingly conservative and homophobic Russian society. In a 2005 poll by the Russian nonprofit Levada Center, for example, when Russian adults were asked if they agree that homosexuals should "enjoy [the] same rights as other citizens," only 35 percent of Russians said they "rather disagree" or "totally disagree."[16]

When asked the same question in 2021 however, that number increased to 59 percent. Interestingly, the number of Russians who said they "rather disagree" decreased slightly from 19 percent to 17 percent, while the share of Russians who responded that they "totally disagree" shot up drastically from 16 percent to 42 percent. In 2021, only 14 percent of Russian adults said that they "totally agree" that "gays and lesbians in Russia should enjoy [the] same rights as other citizens" while another 19 percent said that they "rather agree."

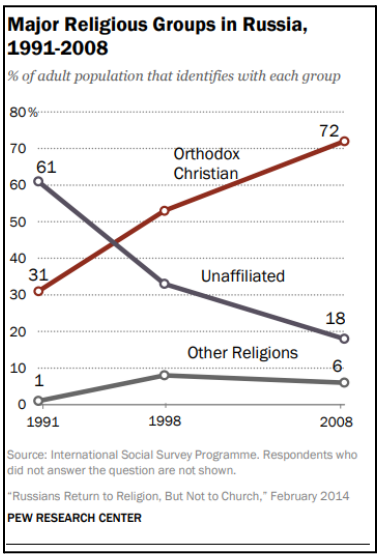


Another study which drew on data between 2010 and 2020 found that hate crimes against members of the LGBT community substantially increased in volume throughout the decade — particularly following the previously mentioned 2013 Anti-Gay

[16] Levada Center. "Do you agree or disagree with the statement that gays and lesbians in Russia should enjoy same rights as other citizens?." Chart. October 15, 2021. Statista. Accessed May 03, 2024. https://www-statista-com.proxy.library.nyu.edu/statistics/1128654/opinion-on-lgbt-equal-rights-in-russia/

Propaganda law.[17] From 2010 to 2015 specifically, the number of victims of LGBT hate crimes roughly tripled. In 2014, the largest number of victims was discovered.

While the increase in hate-crimes is likely a direct result of the 2013 law, it is difficult to conclude whether the general trends of rising homophobia in Russia are a result of governmental actions and propaganda, or if the increase in anti-LGBT legislation is a reaction by the government to trends in the population. Most likely, both factors are at play as Putin and much of the Russian population reinforce each other's resolve in two interrelated ideologies — Russian conservatism and opposition to the West.



President Putin's Russian conservative and anti-Western ideology mirrors that of large segments of Russian society, both in the intelligentsia and the general populace. This ideology is Russian adoption of Eastern Orthodox Christianity and the sacking of Constantinople by Western knights in the 13th century. For a variety of reasons, although Russians do not regularly attend church in high numbers, large swaths of Russian society have begun identifying as religious again since the fall of the Soviet Union.[18] Overwhelmingly, Russians align with Eastern Orthodoxy which was originally spread from Constantinople, the capital of the Byzantine Empire. Between 1991 and 2008, the amount of Russians that identified as Orthodox Christians more than doubled, from 31 percent to 72 percent.

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[17] Sergey Katsuba, "The Decade of Violence: A Comprehensive Analysis of Hate Crimes Against LGBTQ in Russia in the Era of the 'Gay Propaganda Law' (2010–2020)," Victims & Offenders 19, no. 3 (February 6, 2023): 395–418, https://doi.org/https://www.tandfonline.com/doi/full/10.1080/15564886.2023.2167142.

[18] Joseph Liu, "Russians Return to Religion, but Not to Church," Pew Research Center, February 10, 2014, https://www.pewresearch.org/religion/2014/02/10/russians-return-to-religion-but-not-to-church/#:~:text=Across%20all%20three%20waves%20of,1998%20and%207%25%20in%202008.

Orthodox Christianity in Russia however, is important politically and nationalistically as well as religiously.[19] In essence, since the fall of the Byzantine Empire in 1453 to the Turks, many Russian nationalists like Putin believe that Russia was effectively handed the torch to carry on Orthodox tradition as the only major independent country still supposedly dictated by its doctrine. Some conservative Russian nationalists even argue that Russia is the "Third Rome," after the first Roman Empire and Byzantium.[20] Thus, a large part of Russian nationalism is based on the "defense" of Orthodoxy against outside threats. Based on historical interpretations, such as the sacking by Western knights of Constantinople during the Fourth Crusade, the West — along with its ideals, customs, supposed greed and individualism — is typically viewed by Russian nationalists and conservatives as the greatest threat to Eastern Orthodoxy and by extension Russian traditions.[21] The West, in this worldview, is thus seen as an exporter of immorality (LGBT issues in this case) and selfish individualism. Some of Russia's most famous historical figures and national heroes, such as the mid-nineteenth century writer Fyodor Dostoyevsky, have reinforced this worldview via their works and continue to have an effect on the Russian mindset. The French and German invasions of Russia, as well as their perceived loss to the United States during the Cold War, have certainly done little to improve Russia's view of Western "ideologies." These historically rooted dynamics are critical to understanding Russian opposition to the expansion of LGBT rights — which is seen as the next influx

[19] Sarah Riccardi-Swartz, "Christian Nationalisms and Building New Social Realities," Berkeley Center for Religion, Peace and World Affairs, March 30, 2022, https://berkleycenter.georgetown.edu/responses/christian-nationalisms-and-building-new-social-realities.

[20] Niels Drost and Beatrice de Graaf, "Putin and the Third Rome ," Journal of Applied History 4 (2022): 28–45.

[21] Tikhon Shevkunov, The Fall of an Empire—the Lesson of Byzantium (PravoslavieRu), accessed 2024, https://www.youtube.com/watch?v=f1CWG-2GLU4.

of Western immorality. Otherwise, it would be difficult to comprehend how the Russian government's weaponization of this context could be so effective on its population — despite the absurdity of the argument that the Russian LGBT community only exists because of Western infiltration and not the nature of human beings.

To explore why Russia has, via its Supreme Court, decided to expand its now over a decade-long prosecution of the LGBT community in recent months, it is important to address the elephant in the room — the Ukraine War. Putin has referred to his actions in Ukraine as a holy war on the West's "satanism" and "reverse religion."[22] Russian state media has reinforced this perspective of the war, suggesting, for example, that a queer community center in Mariupol was being controlled by U.S President Joe Biden and the United States Congress.[23] In essence, it appears that the Russian government's framing of the war in Ukraine as a fight against Western liberalism is intended to appeal to its domestic audience which has been, as previously been discussed, predispositioned to oppose Western ideology. It is important to consider the reality that ordinary Russians are generally supportive of the war in Ukraine, accepting the explanation that Russia is in a "civilizational struggle" against the West which goes beyond ambitions in Ukraine.[24] Expanded prosecution of the

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[22] 22 Matt Stieb, "Putin Decries U.S. 'satanism' in Bizarre Speech Annexing Parts of Ukraine," Intelligencer, September 30, 2022, https://nymag.com/intelligencer/2022/09/putin-decries-u-s-satanism-annexes-parts-of-ukraine.html.

[23] "На росТВ Сообщили о Выявлении в Мариуполе Подконтрольного США 'Центра Геев и Лесбиянок,'" ФОКУС, May 4, 2024, https://focus.ua/voennye-novosti/513517-na-rostv-soobshchili-o-vyyavlenii-v-mariupole-podkontrolnogo-ssha-centra-geev-i-lesbiyanok.

[24] Nate Ostiller, "Poll: Majority of Russians See War in Ukraine as 'Civilizational Struggle with West,'" The Kyiv Independent, January 10, 2024, https://kyivindependent.com/poll-majority-of-russian-see-war-in-ukraine-as-civilizational-struggle-with-west/.

LGBT community at this time is almost certainly a part of the war propaganda — as it would only make sense in this context that if Russia is opposing "western liberalism" in the Western-backed Ukraine then it must also oppose it domestically. Analysts have suggested that a likely consideration of the Kremlin upon these crackdowns is the development of an internal enemy and a scapegoat.[25]

Ultimately, the November 2023 Supreme Court decision was only the latest addition to a series of recent anti-LGBT laws and free expression crackdowns in Russia The Russian government, led by conservative and nationalistic President Vladamir Putin, has successfully framed the Russian LGBT community as a Western creation — leading large segments of the historically anti-Western Russian population to accept the new crackdowns as a defense of Russian traditional Orthodox values. This explains the importance of the word "international" that is placed by the Supreme Court decision in front of the "LGBT movement," further pushing the unsubstantiated and inane suggestion that Russians could only identify as LGBT after indoctrination by malicious Western propaganda. Because the Supreme Court's decision has only been active for several months, it is unclear the extent to which the crackdowns will continue and how far the repression will go. If the current trajectory continues, however, the LGBT community in Russia is likely to see further marginalization in the foreseeable future — particularly as the Ukraine War rages on.

[25] Pjotr Sauer, "Russia Outlaws 'international Lgbt Public Movement' as Extremist," The Guardian, November 30, 2023, https://www.theguardian.com/world/2023/nov/30/russia-supreme-court-outlaws-lgbt-movement.

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Generally Speaking:

Originalism's Conservative Past and Progressive Future

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Abstract

In this paper, I examine how originalism has shifted from its content-neutral, objective roots into a tool for political manipulation, hijacked by a larger conservative political movement. Originally conceived by Robert Bork and Antonin Scalia, among others, to limit judicial bias, originalism has done the opposite. Now, originalism allows conservative-leaning justices to selectively interpret historical generalities in order to justify their desired conservative outcomes. The rulings in cases like *Dobbs* and *Bruen* clearly show how originalists manipulate historical context to achieve these results. While some argue for a return to liberal legal traditions, I believe progressives should instead develop their own version of originalism. This "progressive originalism," a concept advanced by Jack Balkin, Reva Siegel, and others on the cutting edge of legal theory, would interpret constitutional provisions at a higher level of generality, keeping decisions rooted in history while adapting to the evolving needs of society. I argue that liberal justices should adopt this method to counter the conservative majority's inconsistent and self-serving use of originalism. By doing so, they can better protect fundamental rights such as abortion and equal protection, which are being constantly battered through the misuse of originalism. Given today's judicial landscape, I maintain that progressives must engage with originalism rather than abandon it, using its principles to secure just legal outcomes for modern society.

I. Introduction

The Reagan Administration is manipulating the appeal to original intent in order to give a gloss of respectability and a *patina of neutrality* to a particular social vision that is unconcerned with racial justice and the plight of the oppressed, that is quick to disapprove the tragic choice of women who find themselves unable to continue a pregnancy, and that yearns to prop up the waning authority of the state with the symbols of the church.

—Laurence H. Tribe, *Baltimore Sun, September 17, 1985*

A lot of our Constitution … the guarantee of equal protection and due process of law … the framers knew they were writing for the ages … so they wrote in *broad* terms, what you might even call *vague* terms .. if you look at that, they could not *possibly* have thought that 250 years later, people would be asking *exactly* what they meant when they said equal protection … they used those *generalities* for a reason—they knew the country would change."

—Justice Elena Kagan, *Northwestern Pritzker School of Law Address, September 15, 2022*

Originalism has solidified its position as the conservative legal movement's panacea against progressive social values seeping into constitutional law. The interpretive theory has won over academics, attorneys, politicians, and voters alike after President Donald Trump's hand-picked Supreme Court justices relied on it to gift the Republican Party victories on many of its social policy priorities, from gun rights to abortion bans. However, at its birth, originalism was supposedly an impartial, non-partisan way to interpret the Constitution. Early supporters of originalism, including Professor Raoul Berger, Judge Robert Bork and Justice Antonin Scalia—who formulated a prototypical originalism in his blockbuster book titled *Originalism: The Lesser Evil*—thought the interpretive method might constrain judges' political bias from slipping into their jurisprudence.[1] Scalia describes this intended effect by stating that originalism protects Court decisions from the greatest danger of constitutional

[1] Reva Siegel, "The 'Levels of Generality' Game, or 'History and Tradition' as the Right's Living Constitution," SSRN Scholarly Paper (Rochester, NY, April 26, 2024), 12, https://papers.ssrn.com/abstract=4808688.

interpretation—judges' personal predilections—by "establish[ing] a historical criterion that is conceptually quite separate from the preferences of the judge himself."[2]

In this paper, I will describe how originalism, left to the devices of modern conservative justices, has repeatedly failed to realize these noble intentions. Instead, these self-avowed originalist justices have taken advantage of the vagueness of originalism—specifically by cherry-picking levels of generality through which to view the past—to arbitrarily create versions of history purpose-made to achieve results they normatively desire, leaving the theory incoherent and unworkable.[3] Thus, originalism today has succeeded not in its theoretical goals but instead as a conservative "political ideology that has motivated political engagement and action."[4] While some liberal legal commentators may suggest that we must stay true to traditionally liberal living constitutionalist theories to combat originalism,[5] I disagree. Given the Roberts Court's conservative Supreme Court supermajority and their commitment to originalism, the interpretative theory will reign supreme for the foreseeable future. Therefore, I argue that the progressive legal movement is well-placed to challenge the purportedly originalist justices with a more legally sound originalism of their own. A principled progressive originalism—first developed by Jack Balkin—that interprets American history at a higher level of generality can result in Court decisions that follow the evolving needs of modern-day Americans while also staying anchored to a stable history and tradition framework.

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[2] Antonin Scalia, "Originalism: The Lesser Evil Essay," *University of Cincinnati Law Review* 57, no. 3 (1989 1988): 863–64.
[3] Trevor Burrus, "Can Originalism Work? Foreword," *Cato Supreme Court Review* 2021–2022 (2022 2021): 7.
[4] Dawn Johnsen, "The Progressive Political Power of Balkin's Original Meaning," *Constitutional Commentary* 24, no. 2 (2007): 7.
[5] Siegel, "The 'Levels of Generality' Game, or 'History and Tradition' as the Right's Living Constitution."

I. **Originalism's Objective Beginnings**

To begin, it is imperative to trace the history of originalism, from Scalia's initial formulation to its current use as an unprincipled tool of conservative legal politicking. Ironically, Scalia foreshadowed the core weakness that originalism would succumb to in his authoritative book about the theory. He writes: "The inevitable tendency of judges to think that the law is what they would like it to be will, I have no doubt, cause most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current, modern values."[6] Although Scalia believed that the logic path would go the opposite way and justices would inappropriately transform the moral tenets of 1789 into tenets palatable for current-day society, his recognition of originalism's fundamental subjectivity is prescient in a post-*Dobbs,* post-*Bruen* legal landscape. To demonstrate the subjectivity Scalia worries about in *Originalism*, we can look to *Dobbs v. Jackson Women's Health Organization* (2022)'s handling of *Washington v. Glucksberg* (1997). In *Dobbs,* Alito waxes poetic about the *Glucksberg* test in his majority opinion overturning *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), quoting Glucksberg to state that "any [fundamental] right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[7] However, Alito conveniently refuses to address one unfavorable truth: *Glucksberg* recognized the right to an abortion as a "fundamental right" found in the history and traditions of the American people. Justice Rehnquist explicitly writes the following in *Glucksberg*: "In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes

[6] Scalia, "Originalism," 864.
[7] Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2242 (Supreme Court 2021).

rights to … to marital privacy, Griswold v. Connecticut, 381 U. S. 479 (1965); to use contraception, ibid.; Eisenstadt v. Baird, 405 U. S. 438 (1972) … and to abortion, (Casey, *supra.)"* In *Glucksberg,* Rehnquist also affirms these rights as "so rooted in the traditions and conscience of our people as to be ranked as fundamental" several times.[8] Out of this blatant disagreement on core historical truths between two conservative justices, Rehnquist in *Glucksberg* and Alito in *Dobbs*—one fact does not change, although American history seemingly does: there is no objectivity in modern-day originalism. No matter how much Scalia believed in the ability of originalism to anchor justices to objective history, he knew that originalism could actually *create* the judicial subjectivity he purportedly despised. Soon after his time on the Court, this undesirable outcome came true.

II. Gone Awry: Subjectivity Strikes Originalism

Despite this inherent weakness within Scalia's theory of originalism, the conservative majority on the Supreme Court post-Trump has adopted the interpretative method as their north star. However, Yale Law School Professor Reva Siegel warns that these justices are not focused on adhering to a theoretical model. Instead, they are exploiting originalism to inject their "value-laden, normative, claims" into the jurisprudence of the Roberts' Court, while appealing "to the community's memory of the past [to] help guide [their] path into the future and legitimate the[ir] exercise of legal authority."[9] This political ploy is most evident in the landmark affirmative action case *Students for Fair Admissions v. Harvard* (2023), in which Siegel describes a situation in which the "majority tells one story, appealing to America's decision to reject racial

[8] Washington v. Glucksberg, 521 US 702, 720, 721, 726 (Supreme Court 1997).
[9] Siegel, "The 'Levels of Generality' Game, or 'History and Tradition' as the Right's Living Constitution," 4.

segregation in Brown to justify its decision to invalidate race-conscious admission, [while] the dissent counters, emphasizing different facts about the past, justify its claim that race-conscious admissions are just and constitutional."[10] Through further examination, she asserts that the Roberts Court's "appeals to history and tradition to change the law" in *SFFA* do *not* rest on originalism—nor any other identifiable method scholars can agree on.[11]

Instead, she diagnoses the conservative justices on the Roberts Court with the ailment of falling into originalism's "gravitational force," a term coined by a Federalist Society panel of originalist legal scholars in a talk titled *How Originalist is the Supreme Court?*[12] They note that justices feel compelled to overrule *stare decisis* in cases like *Dobbs* because they deeply *value* originalism as a principle—while simultaneously ignoring its precepts. This half-baked originalism loses its value-neutral, content-independent status and instead becomes a "goal-oriented political practice, a way of achieving movement-valued ends." Building upon the Federalist Society's words, Siegel aptly puts the issue like this: "Scholars on the left and on the right are more confident in characterizing *Dobbs* or *Bruen* as the work of Justices who identify as originalists as a matter of creed or network — than in agreeing that there is a method that explains the decisions."[13] The problem is complex and multifaceted, but it is now clear. Conservative justices' unconstrained, reckless originalism is running amok within our Supreme Court, having fallen far from Scalia's envisioned theory. To make it worse,

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[10] Siegel, 4.
[11] Siegel, 5.
[12] *Showcase Panel IV: How Originalist Is the Supreme Court? [NLC 2023]*, 2023, https://www.youtube.com/watch?v=e7bw1QjWWEM.
[13] Siegel, "The 'Levels of Generality' Game, or 'History and Tradition' as the Right's Living Constitution," 10.

originalism has not been a silver bullet for the Supreme Court's longstanding constitutional interpretation struggles. Instead, it is a real bullet that has caused the Court's public to bleed out precipitously. Gallup polling makes this unfortunate trend clear: From 2017 to mid-2021, the court's approval rating was 49% or higher, but its rating plunged to 40% in September 2021" after it allowed a restrictive Texas abortion law to stand in *Whole Woman's Health v. Jackson* (2021), a precursor case to *Dobbs*.[14] 40% is a far cry from the Court's approval point at its highest, in September 2000: 62%.[15]

III. A Possible New Path Forward: Progressive Originalism

It is clear that the emergence of a new vision for originalism is ripe. To begin to explore a liberal form of originalism, there is one key aspect of originalist theory, fundamental to my conclusion *infra*, that liberals can innovate on to separate themselves from the self-serving, theoretically "bunk" originalism professed by the Roberts Court's conservative justices.[16] I posit that a theoretical battle between a conservative and progressive vision of originalism must center around unsettled debate around which *level of generality* originalists should treat American history with. Conservatives see history through varying levels of generality between cases, especially those they despise—look no further than the switch in generality between *Obergefell* and Dobbs. While Justice Kennedy saw marriage as an institution with a high generality

[14] Jeffrey Jones, "Supreme Court Approval Holds at Record Low," Gallup.com, August 2, 2023, https://news.gallup.com/poll/509234/supreme-court-approval-holds-record-low.aspx.
[15] Jones.
[16] "Opinion | Originalism Is Bunk. Liberal Lawyers Shouldn't Fall for It.," Washington Post, December 1, 2022, https://www.washingtonpost.com/opinions/2022/12/01/originalism-liberal-lawyers-supreme-court-trap/.

in *Obergefell* by noting its evolution through time,[17] the *Dobbs* majority refused to do the same, choosing to lower themselves to a level of generality so specific that they ended up counting how many states banned abortion in 1868.[18] However, conservatives do not only violate other precedential cases' levels of historical generality. They also violate their own levels of generality within one single opinion. Within their *Bruen* opinion, the Roberts Court fell into the logical inconsistency of stating that "weapons covered by the right to self-defense are described at a high level of generality—while laws regulating guns are limited to those that resemble past practice, described at a low level of generality."[19]

How best can liberals channel this level-of-originalism weakness to best replace this pernicious—and increasingly incoherent—form of originalism? On this point, I agree with former United States Acting Assistant Attorney General Dawn Johnsen: "Progressive interpretive theory arguably cannot succeed—and should not succeed either jurisprudentially or politically—unless it in some measure acknowledges the primacy of the text and the relevance of original meaning."[20] To develop a progressive originalism that recognizes how basic rights should remain even as social mores evolve, I channel Yale Law Professor Jack Balkin in his aforementioned rejection of the false dichotomy that exists between originalism and living constitutionalism. Balkin reminds

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[17] Kennedy, Obergefell v. Hodges, 200 U.S. 321, 2595 (Supreme Court of the United States 2015).
[18] Dobbs v. Jackson Women's Health Organization, 142 S. Ct. at 2236. Even more worryingly, Siegel warns us about the logical end to this style of reasoning: "If the Court had counted state laws in 1868 to determine whether same-sex couples have the right to marry, they would have no such right. If the Court had counted state laws in 1868 to determine whether interracial couples have the right to marry, they would have no such right." Siegel, "The 'Levels of Generality' Game, or 'History and Tradition' as the Right's Living Constitution," 16.
[19] Siegel, "The 'Levels of Generality' Game, or 'History and Tradition' as the Right's Living Constitution," 16.
[20] Johnsen, "The Progressive Political Power of Balkin's Original Meaning," 6.

us that fidelity to the text does not have to mean fidelity to the original expected application.[21] Fidelity to the text can still be obtained within a living originalist method that acts as a consistent "basic law whose reach and application evolve over time, a basic law that leaves to each generation the task of how to make sense of the Constitution's words and principles."[22] To do so, liberal justices must consistently interpret American history at a level high enough—similar to Kennedy's method in *Obergefell*—to allow the Constitution to remain steadfast in its historical roots while flexing to match evolving social mores.

IV. Goldilocks, Jack Balkin, and the Right Level of Generality

Putting Balkin in direct conversation with Siegel, it is clear that a return to the original textual meaning and implications of constitutional provisions is undoubtedly necessary to override our current *original expected application* regime, where justices seeking to justify a decision in "cases like *Trump v. Anderson, Students for Fair Admissions, Dobbs*, and *Bruen* can decide, first, whether to look to the deep past, second, on which historical periods to focus, and, crucially, and third, what evidence represents a tradition."[23] I note here that liberal justices currently on the Court, notably Justice Elena Kagan—who holds this paper's epigraph—and Justice Ketanji Brown Jackson, have repeatedly espoused their belief in the unvarnished tenets of originalism.[24] Armed with a plethora of legal and popular support, I endorse Balkin's

[21] Jack M. Balkin, "Abortion and Original Meaning," *Constitutional Commentary* 24, no. 2 (2007): 293.
[22] Balkin, 293.
[23] Siegel, "The 'Levels of Generality' Game, or 'History and Tradition' as the Right's Living Constitution," 14.
[24] See generally Debra Weiss, "Justice Jackson Uses Originalism to Undercut 'Conservative Juristocracy,'" ABA Journal, accessed March 27, 2024, https://www.abajournal.com/news/article/justice-brown-jackson-uses-originalism-to-undercut-conservative-juristocracy; "Justice Kagan Speaks at Northwestern Law School | C-SPAN.Org," accessed May 12, 2024, https://www.c-span.org/video/?522765-1/justice-kagan-speaks-northwestern-law-school.

theory of *living originalism,* a reworked version of originalism that focuses specifically on *text and principle.* He defines this method as "look[ing] to original meaning and underlying principle and decid[ing] how best to apply them in current circumstances."

Balkin's *text and principle* method deeply contrasts with Scalia's original formulation of originalism, which centers an analysis of the *original expected application* of constitutional provisions. In other words, Scalia aims to examine the "moral perceptions of the time," with 'the time' being 1791. Balkin frames his critique of Scalia's originalist variant around the fact that "the Eighth Amendment's prohibitions on 'cruel and unusual punishments' bans punishments that are cruel and unusual as judged by *contemporary* application of these concepts (and underlying principles), not by how people living in 1791 would have applied those concepts and principles."[25] Continuing Balkin's line of critique, I argue that we must not let *original expected application* overpower the weight of the original meaning of the Constitution's text and the *timeless* principles it creates. It would be preposterous to state that the Eighth Amendment prohibition of cruel and unusual punishment *only* applies to punishments that were cruel and usual to Americans in 1789. However, Scalia *did* argue this, holding that adhering exclusively to what was cruel in 1791 is the only way to "protect against the moral perceptions of a future, more brutal, generation."[26] The logic is scarce here. Extolling a twisted sort of utilitarianism, Scalia wants America to strictly adhere to the moral precepts (e.g. permissibility of the death penalty) of a more brutal past generation

[25] Balkin, "Abortion and Original Meaning," 295.
[26] Antonin Scalia et al., "Response," in *A Matter of Interpretation*, ed. Gordon S. Wood et al., NED-New edition, Federal Courts and the Law - New Edition (Princeton University Press, 1997), 146, https://doi.org/10.2307/j.ctvbj7jxv.10.

so that we may avoid a hypothetical more brutal future generation from having their way.

Despite forging his living constitutionalism out of a scathing critique of Scalia, Balkin points out that he agrees with Scalia on a separate but powerful point: a *Dobbs*-style argument about modern usual punishments not being explicitly written as a prohibited act in the text of the Eighth Amendment, given the rarity of the punishment at the time, should *not* succeed in originalism, given Scalia's belief in reading the *principle* of the constitutional provision.[27] Specifically on abortion, Balkin's commitment to seeing American history with a high level of generality allows him to find protection for abortion within the 14th Amendment, as originally written. He writes that "when the state uses women's capacity to become pregnant as a lever to subordinate women, assign them a second class status in society, or deny them full and equal enjoyment of their rights of citizenship, it violates the equal citizenship principle.[28] This equal citizenship principle is formulated from the interlinking of the Due Process, Equal Protection, and Privileges and Immunities Clauses of the 14th Amendment.[29] The latter is rare in modern constitutional jurisprudence but would be eligible to be used nonetheless within Balkin's ideal model of textual interpretation.

Within his treatment of Scalia's originalist perspective of *original expected application* regarding the Eighth Amendment lies the power of Balkin's *text* and *principle* interpretation. His theory builds bridges with the conservative legal movement, while simultaneously countering their constitutional inconsistencies with a

[27] Balkin, "Abortion and Original Meaning," 296.
[28] Balkin, 323.
[29] Balkin, 325.

high degree of logical efficacy. In that way, *text* and *principle* interpretation is an often-bitter medicine delivered straight to conservative originalists' mouths, effectively healing their purported originalism of its otherwise demonstrated unworkability. To end this exploration of a high-generality originalism characterized by *text and principle* analysis, I look to Justice Stevens' dissent in *McDonald v. City of Chicago* (2010). In this opinion, Stevens writes: "A rigid historical methodology is unfaithful to the Constitution's command … as it is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language."[30]

V. Conclusion

Liberal justices, legal scholars, and political changemakers must understand that the foreseeable future of the Court will *not* feature a glorious return to the living constitutionalism developed by Justices Warren and Kennedy. Instead, in our undoubtedly originalist constitutional future, progressives can still launch valid arguments protecting the rights our society has come to see as fundamental and necessary, with the right to abortion being most salient in our post-*Dobbs* world. To rescue and claw back rights like these, I implore the progressive legal movement to follow the path of Jack Balkin, developing a progressive originalism that first meets conservative justices where they are—and then proceeds to logically overpower their faulty interpretative theory. Only by beating the conservative Justices at 'their own game'— with legitimate originalist arguments through liberal Justices styled in the tradition of Elena Kagan and Ketanji Brown Jackson—will we be able to combat a deeply

[30] McDonald v. City of Chicago, Ill., 561 US 742 (Supreme Court 2010) (Stevens, J., dissenting).

conservative shapeshifting form of originalism. Liberal originalism can be a form of jurisprudence responsible and principled enough to maintain ground in our history while also reflecting the needs and values of a majority of Americans—not minoritarian conservative political agendas. At a high enough level of generality, liberal originalism can be *living*.

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Mental Health and Criminal Responsibility:

Should Mental Health Issues Mitigate Punishment or Exempt Accountability?

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Abstract

This paper examines the intricate relationship between mental health conditions and criminal responsibility, posing the question of whether mental health issues should mitigate punishment or exempt accountability in criminal proceedings. By focusing on the United States, the United Kingdom, and Pakistan, this study explores how these countries represent a spectrum of legal standards, ranging from progressive accommodations to the absence of structured frameworks. Through an analysis of legal frameworks, case studies, and psychological evaluations, this paper underscores ethical dilemmas and systemic loopholes within contemporary criminal justice systems. Particular attention is given to Pakistan, where a lack of codified standards highlights the urgent need for reform. Ultimately, the paper argues for a nuanced understanding of mental health in the legal context, advocating for reforms that enhance fairness while safeguarding against potential abuses.

I. Introduction: Results of the Intersection of Mental Health and Court Systems

As mental health awareness increases globally, the intersection of mental health and criminal justice has emerged as a contentious area of legal and ethical debate. The legal system faces the challenge of integrating psychological insights, such as the impact of mental disorders on decision-making, criminal intent, and the capacity for self-control, into its proceedings. The central question remains: Should individuals suffering from mental health conditions receive mitigated punishment or be held fully

accountable for their actions? This paper delves into this complex issue, examining legal precedents, the potential for abuse, and cultural perspectives that shape opinions on accountability.

II. Legal Frameworks and the Role of Mental Health in Criminal Responsibility

The legal definition of criminal responsibility varies significantly across jurisdictions, influenced by cultural, social, and legal factors such as societal views on mental illness, the availability of mental health resources, and historical legal traditions. In some countries, cultural stigma around mental health may limit the recognition of psychological conditions in legal defenses, while in others, progressive attitudes and robust mental health frameworks encourage more nuanced legal precedents. These factors shape the way mental health is integrated into criminal responsibility and influence how defendants with mental disorders are treated in different legal systems.

United States Framework

In the United States, the Model Penal Code allows for an "insanity defense," where defendants may be deemed incapable of understanding the wrongfulness of their actions due to severe mental illness. This defense is based on the premise that individuals who cannot discern right from wrong should not face the same punitive measures as those who can. However, the standards for establishing insanity, such as the M'Naghten Rule, often lead to inconsistent applications and potential loopholes. The M'Naghten Rule stipulates that a defendant may be excused from criminal responsibility if, at the time of the offense, they were suffering from a severe mental

disorder that prevented them from understanding the nature of their actions or distinguishing between right and wrong.[1] Despite its intention, this rule has faced criticism for being overly stringent and outdated, often failing to account for the complexities of mental illness.

1) *United Kingdom's Approach*

On the other hand, the United Kingdom employs the "diminished responsibility" defense, which acknowledges mental health issues as a factor in sentencing but does not absolve individuals of accountability entirely. This approach aims to provide a balanced response, considering the defendant's mental state while still recognizing the need for justice for victims.[2] For instance, under the Homicide Act 1957, defendants can plead diminished responsibility if they have an abnormality of mental functioning that arose from a recognized medical condition, significantly impairing their ability to understand their conduct or to form a rational judgment.[3]

2) *Pakistan's Legal Context*

Some jurisdictions in Pakistan lack a structured approach to mental health in criminal cases, resulting in a reliance on traditional interpretations of accountability, which may overlook the psychological dimensions of behavior. The Pakistan Penal Code does not provide provisions for insanity or diminished responsibility, making it difficult for defendants to claim mental illness as a mitigating factor. The absence of mental health professionals in the legal process further complicates matters, as the judiciary

[1] Model Penal Code § 4.01 (1985).
[2] Homicide Act 1957, UK.
[3] Pakistan Penal Code, 1860, § 84

often relies on lay interpretations of mental illness.[4]

III. Ethical Considerations and Case Studies

The ethical implications of using mental health as a mitigating factor are profound. On one hand, acknowledging mental health conditions as a legitimate influence on behavior promotes compassion and understanding. On the other hand, it raises concerns about fairness and the potential for manipulation within the legal system.

1) Case Studies in the U.S.

High-profile cases in the United States illustrate these complexities. For example, John Hinckley Jr., who attempted to assassinate President Reagan in 1981, was found not guilty because of insanity.[55] This verdict sparked widespread public outrage and led to significant reforms in how insanity defenses were handled across various states. Critics argued that Hinckley's acquittal exemplified a failure of the justice system to hold individuals accountable for heinous acts. Conversely, the case of Andrea Yates, a mother who drowned her five children in a state of severe postpartum depression, raised questions about the justice system's capacity to understand the depths of mental illness. Yates was initially convicted, but following a retrial in 2006, her conviction was overturned due to new expert testimony and evidence suggesting that the jury in her original trial had been misled. Key factors in her acquittal included the presentation of new psychological insights into the severity of her mental illness, which were not fully

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[4] Khan, A. (2020). Mental Health in the Criminal Justice System of Pakistan. Journal of Forensic Sciences, 65(4), 1234-1241

[5] Dwyer, J. (2019). The Insanity Defense: A Comparative Analysis of Global Practices. International Journal of Law and Psychiatry, 64, 204-212.

explored in the first trial. Additionally, some critics argue that potential biases in her first trial, such as the prosecution's focus on her actions rather than the medical understanding of her condition, influenced the original conviction but later acquitted on retrial after it was established that her mental illness severely impaired her judgment.[66]

2) United Kingdom Studies

The complexities of mental health defenses are not limited to the U.S. In the United Kingdom, the case of the "Black Cab Rapist," John Worboys, brought significant attention to the intersection of mental health and criminal behavior. Worboys, who was sentenced to life imprisonment for drugging and assaulting multiple women, argued that his mental health issues contributed to his actions. The debate surrounding his case highlighted the challenges of integrating psychological evaluations into legal judgments, as experts disagreed on the extent to which his mental health should mitigate his culpability.[7]

3) Pakistan's Legal Cases

In Pakistan, the case of a mentally ill individual sentenced to death for a crime committed during a psychotic episode emphasizes the urgent need for reform in recognizing mental health within legal frameworks. Often, defendants with mental health issues face harsher scrutiny and inadequate support, leading to potential miscarriages of justice. The cultural stigma surrounding mental illness further complicates these cases, resulting in a legal environment where the psychological

[6] Smith, J. (2016). Mental Health in the Criminal Justice System: Policy and Practice. Journal of Criminal Law and Criminology, 106(4), 1237-1270.
[7] Roberts, G., & De La Rosa, M. (2016). The Role of Mental Health in Criminal Justice: An Overview of the Issues. International Journal of Law and Psychiatry, 49, 1-10.

dimensions of behavior are often disregarded.[8]

IV. The Risk of Abuse and Loopholes

The potential for abuse in claiming mental health conditions as a defense poses significant risks to the integrity of the legal system. Individuals may exploit mental health claims to evade accountability, leading to public distrust and skepticism regarding the legitimacy of such defenses.

1) *Data on Misuse*

Data from the U.S. suggest a troubling trend: an increase in defendants citing mental health issues as part of their defense strategies, often leading to inconsistent outcomes. According to a 2016 study published in the Journal of the American Academy of Psychiatry and the Law, approximately 20% of defendants who claimed an insanity defense were successful, raising concerns about the effectiveness of mental health evaluations in accurately assessing a defendant's state of mind.[9] Furthermore, discrepancies in mental health evaluations and the varying degrees of expertise among professionals conducting assessments exacerbate this issue. Many legal practitioners lack a nuanced understanding of mental health, leading to a reliance on outdated stereotypes and stigmatizing narratives.

2) *Cultural Loopholes*

In Pakistan, the lack of standardized mental health evaluations creates an environment ripe for exploitation. The absence of mental health professionals in the

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[8] U.S. Department of Justice. (2016). The Insanity Defense: An Overview of State Laws. Washington, DC: Bureau of Justice Statistics.

[9] Tamer, H. (2018). The Intersection of Mental Health and Criminal Responsibility: A Global Perspective. The Journal of Law, Medicine & Ethics, 46(2), 240-250.

courtroom often leads to judges relying on their interpretations or those of untrained individuals, resulting in significant disparities in how mental illness is treated. A 2019 report by the Pakistan Institute of Medical Sciences noted that only 0.4% of the country's budget is allocated to mental health services, highlighting the systemic neglect of mental health issues and the potential for injustice in the legal system.[10]

V. The Role of Cultural Perspectives

Cultural attitudes toward mental health significantly influence how societies address the intersection of mental illness and criminal behavior. In collectivist cultures like Pakistan, mental health issues are frequently stigmatized, leading to underreporting and inadequate treatment. This cultural backdrop complicates the legal landscape, as defendants may not receive the support needed to substantiate claims of mental illness effectively. Similarly, in many parts of Asia, the Middle East, and even in some European countries, mental health stigma persists, often hindering individuals from seeking help or being accurately assessed in the criminal justice system. This shared challenge impacts the fairness of legal proceedings in these regions.

1) Personal Reflection

Growing up in Pakistan, I have observed how societal norms and stigmas surrounding mental health affect perceptions of accountability. The lack of understanding and acceptance of mental health issues can lead to severe consequences for individuals in the criminal justice system, further marginalizing those who already struggle with mental health challenges. Cultural narratives often portray mental illness

[10] Pakistan Institute of Medical Sciences. (2019). Mental Health Policy in Pakistan: Current Status and Future Directions

as a personal failing, resulting in a legal environment where defendants are more likely to be judged harshly rather than receiving compassionate consideration.

2) Comparative Cultural Analysis

Comparatively, in Western contexts, there is a growing emphasis on rehabilitation over punishment, particularly for individuals with mental health conditions. Programs in countries like Norway and Sweden prioritize mental health treatment as part of the rehabilitation process for offenders, reflecting a societal commitment to addressing the root causes of criminal behavior.[11] This contrasts sharply with the punitive measures often seen in Pakistan, where mental health is not adequately considered, and individuals are frequently incarcerated without access to necessary support or treatment.

VI. Recommendations for Reform

Addressing the complexities of mental health and criminal responsibility requires comprehensive reform across legal systems.

1) Standardizing Mental Health Evaluations

Establishing clear guidelines and standards for mental health evaluations in legal proceedings can help mitigate discrepancies and improve the reliability of assessments. Implementing training programs for mental health professionals involved in legal cases would enhance their understanding of the legal context and improve the quality of evaluations.[12]

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[11] Appelbaum, P. S. (2006). Assessing Competence to Consent to Treatment. New England Journal of Medicine, 354(18), 1897-1902.
[12] Dwyer, J. (2017). The Burden of Mental Illness on the Criminal Justice System. Law and Human Behavior, 41(2), 197-205.

2) *Enhanced Training for Legal Professionals*

Providing legal practitioners with training on mental health issues can foster a deeper understanding of how to approach cases involving mental illness. This training should include education on recognizing the signs of mental illness, understanding its impact on behavior, and developing empathetic responses.[13]

3) *Criminal Justice Reform*

Increasing awareness and understanding of mental health within the criminal justice system can lead to more compassionate responses for individuals facing mental health challenges.[14] Legal reforms that incorporate mental health training for law enforcement, judges, and attorneys can help ensure fairer treatment for defendants with mental health conditions. Additionally, programs that prioritize mental health assessments during sentencing and rehabilitation can support a more just and effective system for individuals with mental illness.

4) *Legislative and Medical Collaboration*

Countries like Pakistan should consider enacting legislation that explicitly recognizes mental health conditions as mitigating factors in criminal cases. Such reforms would require collaboration between mental health professionals, legal experts, and policymakers to establish comprehensive guidelines that prioritize justice while acknowledging the complexities of mental illness.

VII. Conclusion

The relationship between mental health and criminal responsibility is

[13] Dwyer, J. (2017). The Burden of Mental Illness on the Criminal Justice System. Law and Human Behavior, 41(2), 197-205.
[14] World Health Organization. (2018). Mental Health: A Global Perspective. Geneva: WHO Press.

multifaceted, presenting ethical, legal, and cultural challenges. While acknowledging mental health conditions as mitigating factors in criminal proceedings is crucial for fostering a compassionate legal system, it must be approached with careful consideration of the potential for abuse and manipulation. The complexities of this issue underscore the need for a balanced approach that prioritizes both justice for victims and understanding of the psychological factors influencing behavior.

The analysis has shown that different legal frameworks across the globe approach the intersection of mental health and criminal responsibility in varied ways, reflecting societal attitudes and cultural beliefs. While countries like the United States and the United Kingdom offer some mechanisms for addressing mental health in criminal cases, significant loopholes and inconsistencies persist. In contrast, Pakistan's legal system requires urgent reform to ensure that mental health considerations are integrated into its framework, allowing for a more just and equitable approach to criminal responsibility.

Ultimately, the path forward lies in a commitment to reform that embraces comprehensive mental health evaluations, enhanced training for legal professionals, public awareness campaigns, and legislative changes. By fostering an environment that prioritizes understanding and support for individuals with mental health conditions, societies can work towards a criminal justice system that is both just and humane. As we navigate the complexities of mental health and criminal responsibility, we must strive for a balance between accountability and compassion, ensuring that the legal system reflects the realities of human behavior while upholding the principles of justice.

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3. Pakistan Penal Code, 1860.

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5. Dwyer, J. (2019). The Insanity Defense: A Comparative Analysis of Global Practices. *International Journal of Law and Psychiatry*, 64, 204-212.

6. Smith, J. (2016). Mental Health in the Criminal Justice System: Policy and Practice. *Journal of Criminal Law and Criminology*, 106(4), 1237-1270.

7. Roberts, G., & De La Rosa, M. (2016). The Role of Mental Health in Criminal Justice: An Overview of the Issues. *International Journal of Law and Psychiatry*, 49, 1-10. 8. Tamer, H. (2018). The Intersection of Mental Health and Criminal Responsibility: A Global Perspective. *The Journal of Law, Medicine & Ethics*, 46(2), 240-250. 9. U.S. Department of Justice. (2016). The Insanity Defense: An Overview of State Laws. Washington, DC: Bureau of Justice Statistics.

10. Pakistan Institute of Medical Sciences. (2019). *Mental Health Policy in Pakistan: Current Status and Future Directions*.

11. Olsson, G. (2018). Rehabilitation and Mental Health in the Criminal Justice System: A Comparative Study. *European Journal of Criminology*, 15(1), 18-34.

12. Appelbaum, P. S. (2006). Assessing Competence to Consent to Treatment. *New England Journal of Medicine*, 354(18), 1897-1902.

13. Dwyer, J. (2017). The Burden of Mental Illness on the Criminal Justice System. *Law and Human Behavior*, 41(2), 197-205.

14. World Health Organization. (2018). Mental Health: A Global Perspective. Geneva: WHO Press.

Uncovering the Ethical Challenges and Implications of AI to the US Judiciary and Legal Profession

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Abstract

Integrating Generative Artificial Intelligence (GenAI) into the legal profession presents various opportunities and ethical challenges. This law review examines the risks posed by GenAI, like confabulations and a lack of information integrity; and factors like the "black box" problem and deep fakes, which compromise legal accuracy and integrity. While prior research highlights AI's potential to improve efficiency and support legal reasoning, it also reveals vulnerabilities, including reliance on biased data and the perpetuation of systemic discrimination. I analyze these issues in a variety of ways. One is through the lens of the ABA Model Rules of Professional Conduct, focusing on the principles of competence, diligence, and integrity. Case studies, including *Mata vs. Avianca* and *Snell vs. United Specialty Insurance Co.*, alongside recent issues with AI tools like Cybercheck, show the dangers of unverified outputs and biased decision-making. Drawing on French sociologist Alexis de Tocqueville's thought, this paper addresses the deeper ethical concern of AI reinforcing majoritarian biases, which threaten constitutional democracy and minority rights. Through insights from researchers and experts, I advocate for guardrails, transparency, and alignment with core legal and constitutional values to mitigate these risks. This paper fills a gap in scholarship aimed at understanding the ethical implications of GenAI in law, offering insights into the issues and presenting strategies to preserve fairness and prevent the erosion of justice in an increasingly technological future. I emphasize the importance of moral oversight in making sure AI serves as a tool for justice and does not further systemic bias and the erosion of legal values.

Ethical Challenges and Implications of AI to the US Judiciary

The integration of Generative Artificial Intelligence (GenAI) into the legal field offers both remarkable opportunities and significant ethical challenges. While GenAI can enhance efficiency by automating routine tasks and allowing lawyers to focus on complex legal reasoning, it also poses serious ethical risks. Understanding the ethical worries raised by the use of AI in law, including confabulations and breaches of information integrity, is crucial as they highlight the importance of addressing practical challenges to upholding the ethical rules outlined in the ABA Model Rules. The use of AI in law enforcement and legal practice, exemplified by tools like Cybercheck, raises significant ethical concerns due to issues like lack of transparency and the occurrence of AI "hallucinations," where false information is confidently presented as fact–hallucinations are a type of confabulation. Cases like *Mata vs. Avianca* (2023) and recent research, including a Stanford study on AI legal research tools, highlight the risks of relying on AI-generated outputs without human oversight, demonstrating the potential for confabulated content to compromise legal accuracy and integrity. Furthermore, the blackbox problem and the rise of deepfakes highlight the significant challenges AI poses to legal practice, particularly in terms of transparency, trust, and the manipulation of evidence. Lawyers must navigate these risks, ensuring they can detect deepfakes and mitigate AI bias, while relying on existing legal principles to uphold ethical standards and accuracy in legal proceedings.

A deeper ethical implication of using AI in law ultimately reveals the implicit threat that the technology poses to the prevention of what Alexis de Tocqueville identified as one of the greatest dangers to constitutional democracy: the tyranny of the majority. The

use of AI systems can violate core values by perpetuating existing biases, marginalizing minority perspectives, and compromising the fairness of legal processes overall. Legal professionals must establish guardrails, identify authoritative sources, and ensure a balanced representation of diverse perspectives in AI training data to mitigate AI's risks, including biases and confabulations. By acknowledging and understanding the problems and implications raised by AI usage in law, legal professionals can equip themselves to harness AI's potential without undermining core constitutional values as they advance into an increasingly technological future.

One general challenge GenAI poses to the legal field is confabulations, where AI systems produce outputs to satisfy a user's request, even if that means producing an incorrect answer.[1] Confabulations interfere with an attorney's ability to uphold the standards and rules of the profession. On April 29, 2024, the National Institute of Standards and Technology (NIST) released the AI RMF Generative AI Profile, addressing risks tied to Generative AI based on their AI Risk Management Framework. Within the document, a confabulation is specifically described as "a phenomenon in which GAI systems generate and confidently present erroneous or false content to meet the programmed objective of fulfilling a user's prompt."[2]

The confabulation issue is present in several vulnerabilities inherent in machine learning and deep learning systems.[3] Vulnerabilities in machine learning refer to weaknesses that can be exploited or result in failures, such as dependence on training data and algorithmic errors.[4] A model trained on biased, inadequate, or inaccurate data

[1] "Artificial Intelligence Risk Management Framework: Generative Artificial Intelligence Profile," *NIST,* 2024, https://doi.org/10.6028/NIST.AI.600-1: 5.
[2] "Artificial Intelligence Risk Management," NIST, 5.
[3] S. Matthew Liao, "A Short Introduction to the Ethics of Artificial Intelligence." *Ethics of Artificial Intelligence,* ed. S. Matthew Liao, (Oxford University Press 2020), Kindle: 3.
[4] Liao, "Short Introduction," 3.

will produce a confabulation, or flawed output, regardless of the algorithm's sophistication.[5] Models fraught with confabulations fail to generalize well, limiting their usefulness in real-world applications. Generalization is a model's ability to perform with new, unseen data after training on a given dataset. The ultimate goal of most GenAI models is to apply what they have learned to make accurate predictions on new data. Inaccurate AI outputs can lead to erroneous legal documents or research, potentially causing severe repercussions for clients and the legal system. Therefore, understanding and mitigating these vulnerabilities is essential to maintain the integrity of legal practice in the age of AI.[6]

Confabulations highlight the importance of understanding and addressing the limitations of AI tools to maintain the high standards of competence, diligence, and candor required by the ABA Model Rules of Professional Conduct to preserve the integrity of the judiciary and the legal profession. The American Bar Association (ABA) Model Rules of Professional Conduct are the cornerstone for ethical legal practice in the United States. Rule 1.1, Competence, in the ABA Model Rules, emphasizes that lawyers must provide competent representation. It reads, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[7] Additionally, Comment 8 of Rule 1.1 applies to technology like GenAI, explaining, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant

[5] Liao, "Short Introduction," 6.
[6] Liao, "Short Introduction," 9.
[7] "Model Rules of Professional Conduct," *American Bar Association (ABA)*, last modified 2024, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject."[8] Rule 1.1 and Comment 8 are relevant because lawyers increasingly rely on AI for functions like legal research and document review. Attorneys must learn to use AI competently while questioning its use and acknowledging risks. Confabulations, like fabricated legal citations or misinterpretations of law, jeopardize their duty to provide competent and accurate representation.

Moreover, Rule 1.3, Diligence, is particularly relevant in the context of the rise of GenAI models. The rule states, "A lawyer shall act with reasonable diligence and promptness in representing a client."[9] GenAI can process vast amounts of legal texts and precedents much faster than humans, which can greatly enhance efficiency and lessen the potential for lawyers to miss vital information. However, the speed and capabilities of AI also come with confabulations, and when lawyers increasingly rely on AI outputs without proper verification, they risk overlooking errors, leading to subpar representation of their clients. Diligence requires that lawyers review and apply AI-generated content to ensure it meets the high standards of accuracy and relevance.

Given these ethical requirements by the ABA, the use of AI tools by legal professionals raises significant worries about compliance with the mission of the judiciary. One such tool is Cybercheck, an AI software used by law enforcement agencies and prosecutors to assist in their investigations.[10] When these legal groups request help

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[8] "Model Rules of Professional Conduct," *American Bar Association (ABA)*, last modified 2024, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

[9] "Model Rules of Professional Conduct," *American Bar Association (ABA)*, last modified 2024, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

[10] Tim Stelloh, "An AI tool used in thousands of criminal cases is facing legal challenges," *NBC News,* 3 May 2024:

from Cybercheck, the model conducts searches across both the surface web and web areas not indexed by these engines, often referred to as the deep web. The findings from these searches are then compiled into a comprehensive report and provided to the requesting law enforcement agencies. They are used to convict and charge individuals with serious crimes.[11] The use of Cybercheck raises ethical and legal concerns, particularly regarding the accuracy and reliability of its findings. Defense lawyers have questioned Cybercheck's methodology, noting that it is opaque and has not been independently vetted. Despite its creator, Adam Mosher, claiming that Cybercheck has over 90% accuracy and can perform extensive research quickly, the lack of independent verification poses serious issues.[12] Recent rulings highlight these concerns. In a New York case, a judge barred using Cybercheck evidence after prosecutors failed to demonstrate its reliability or acceptance in the legal community. Similarly, a judge blocked a Cybercheck analysis in Ohio when Mosher refused to disclose the software's methodology. These instances exhibit the potential for Cybercheck to create confabulations—producing flawed or unverified outputs that can significantly distort legal proceedings.[13] Presenting unverified AI findings as evidence undermines the legal system's integrity, potentially leading to wrongful convictions and eroding public trust.

Many instances of confabulations arising from AI use in legal practice take the form of what's commonly referred to as hallucinations. A model "'hallucinates'" when, in response to a user's query, it generates facts that, well, just are not true—or at least not

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nbcnews.com/news/crime-courts/ai-tool-used-thousands-criminal-cases-facing-legal-challenges-rcna149607.

[11] Stelloh, "AI tool used in thousands of criminal cases."
[12] Stelloh, "AI tool used in thousands of criminal cases."
[13] Stelloh, "AI tool used in thousands of criminal cases."

quite true."[14] They are a way that confabulations materialize in practice, producing flawed outputs that can mislead users. The danger arises when users trust the confidently presented false information, along with its accompanying logic or citations, leading them to act on or disseminate it. Hallucinations are particularly concerning when answering specific questions that require precise and accurate responses. In a concurring opinion for the case *Snell vs. United Specialty Insurance Co. (2024)*, a judge on the 11th Circuit expressed that proponents of "ordinary meaning" as the primary rule for interpreting legal texts should consider how GenAI models can aid in interpretive analysis, opening new possibilities for legal interpretation. Courts and scholars often describe ordinary meaning as the understanding a "reasonable reader" would have of the statutory language in question, and the belief is that GenAI could be helpful in construing legal documents and texts, with minimal risk of hallucinations.[15] Attorneys are increasingly using AI in broader contexts, far beyond narrow factual inquiries like word definitions mentioned in the opinion, and this widespread application increases the risk of hallucinations. Without guardrails, GenAI can draw from unreliable or fictional sources, presenting distorted information as fact. As it becomes more integrated into legal processes, the likelihood of hallucinations grows, leading to serious errors, misjudgments, and potentially undermining the integrity of legal proceedings.

The case *Mata vs. Avianca* is an example of how improper GenAI usage creates outputs ripe with hallucinations. In February 2022, Roberto Mata filed a lawsuit claiming a serving cart injured him during an Avianca international flight.[16] Mata's

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[14] *Snell v. United Specialty Insurance Co.,* Case no. 22-12581, (11th Cir. May 28, 2024) (concurring opinion): 45.
[15] *Snell v. United Specialty Insurance Co.,* Case no. 22-12581, (11th Cir. May 28, 2024) (concurring opinion): 25.
[16] *Mata v. Avianca, Inc.*, 22-cv-1461 (PKC) (S.D.N.Y. Jun. 22, 2023)

lawyers, Peter LoDuca and Steven A. Schwartz from Levidow, Levidow & Oberman P.C., submitted AI-generated filings that led to unprecedented complications involving GenAI. Avianca's attorneys noted that many of the cases cited in the opposition could not be found. LoDuca and Schwartz did not immediately withdraw their submission or address these issues. The judge requested LoDuca to file an affidavit with copies of the cited cases, and LoDuca delayed the submission, falsely claiming he was on vacation. He later provided an affidavit containing cases fabricated by ChatGPT. Several flaws in the fake cases were identified, including nonsensical legal analysis, factual errors, and internal inconsistencies. The court found both attorneys acted in "subjective bad faith," violating Federal Rule of Civil Procedure 11. They both received sanctions for failing to verify the cited cases, falsely swearing to the affidavit's truth, misleading the court about his vacation, ignoring red flags about the fake cases, and making false statements about his use of ChatGPT. The attorneys were ordered to inform Mata about the sanctions, send relevant materials to the misidentified judges, and pay a $5,000 penalty, highlighting the serious risks fake judicial opinions pose to the integrity of federal judicial proceedings.[17] Attorneys using AI technology must verify the outputs using the legal reasoning skills they have been equipped with, as failing to do so interferes with their ability to adhere to the ethical rules governing their conduct.

A recent study, titled "Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools," by Stanford RegLab and HAI researchers further illustrates the risk of confabulations by evaluating the performance of three AI research tools used specifically for legal research: Westlaw AI-Assisted Research and Ask Practical Law AI

[17] *Mata v. Avianca, Inc.*, 22-cv-1461 (PKC) (S.D.N.Y. Jun. 22, 2023).

by Thomson Reuters, and Lexis+ AI by LexisNexis.[18] While the study found that these specialized tools reduce errors compared to general-purpose AI models like GPT-4 and often provide sound and detailed legal research, they still produce incorrect information at alarming rates.[19] Lexis+ AI and Ask Practical Law AI made errors over 17% of the time, and Westlaw's AI-Assisted Research had a 34% error rate.[20] The study used a pre-registered dataset of over 200 open-ended legal queries, testing the systems on general research-based questions, jurisdiction or time-specific questions, false premise questions, and factual recall questions.[21] The findings reflect the wide range of legal research needs and highlight the ongoing challenge of ensuring and tracking accuracy and reliability in AI-generated legal information. The persistence of such errors emphasizes the need for vigilance and verification processes when integrating AI tools into legal practice.[22]

Confabulations are not the only form of risk GenAI poses to legal professionals. Information integrity is another key risk NIST highlights in their AI RMF document. Information integrity is described as "the spectrum of information and associated patterns of its creation, exchange, and consumption in society, where high-integrity information can be trusted; distinguishes fact from fiction, opinion, and inference; acknowledges uncertainties; and is transparent about its level of vetting."[23] When dealing with tangible use risks of the technology, the lack of information integrity manifests itself as the blackbox problem and deepfakes. The internal operations of AI

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[18] Varun Magesh et al. "AI on Trial: Legal Models Hallucinate in 1 out of 6 (or More) Benchmarking Queries," *Stanford Human-Centered Artificial Intelligence*, (23 May 2024): https://hai.stanford.edu/news/ai-trial-legal-models-hallucinate-1-out-6-or-more-benchmarking-queries
[19] Magesh, "AI on Trial."
[20] Magesh, "AI on Trial."
[21] Magesh, "AI on Trial."
[22] Magesh, "AI on Trial."
[23] "Artificial Intelligence Risk Management," NIST, 7.

models devoid of interpretability or explainability lead to the "blackbox" dilemma. This dilemma is when the processes that lead to a model's output are opaque or incomprehensible to humans. GenAI typically involves thousands of connections interacting in complex ways, making it difficult to understand how certain predictions are made. This lack of transparency raises significant issues of trust in fields like law, where the accuracy and reliability of information are paramount.[24] Cybercheck is a glaring example of a blackbox, as users are in the dark about the underlying processes that generate its outputs. Opacity of this magnitude makes it impossible to trust the technology and poses challenges for accountability, as it becomes difficult for users to identify and rectify errors or biases in the system.

GenAI is trained using a massive dataset, including publicly available text from the internet, thus it finds patterns in words and sentences following certain predictable sequences and "learns to generate more objects that look like the data it was trained on."[25] By observing these recurring patterns, the model learns to break the text into segments that have statistical predictability, allowing the AI to generate what might come next based on its learned patterns.[26] This process is not usually clear to the user, and it is very difficult to track all these patterns, resulting in the blackbox problem. The problem has serious potential to perpetuate and amplify discrimination, especially in areas where the tech profiles, evaluates, and examines humans. When the internal decision-making processes of AI are not transparent, it becomes difficult to understand how outputs are generated.[27] For example, discrimination can manifest in several ways

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[24] Liao, "Short Introduction," 7.
[25] Adam Zewe, "Explained: Generative AI." *MIT News*, November 9, 2023: https://news.mit.edu/2023/explained-generative-ai-1109.
[26] Zewe, "Explained: Generative AI."
[27] Liao, "Short Introduction," 7.

through AI tools used in hiring practices, like resume scanners.[28] Resume scanners are trained to look for specific criteria, which can result in the exclusion of candidates who do not fit the predefined mold. Video-interviewing AI technologies provide further concern by evaluating candidates' responses based on factors like attitude, engagement, and word choice.[29] Such systems can inadvertently discriminate against candidates with disabilities or those from different cultural backgrounds. Employers are liable for discrimination resulting from the use of these tools, regardless of their awareness of the AI's decision-making processes.[30]

In the legal field, AI tools used in profiling or criminal investigations can introduce biases, leading to unfair treatment and undermining the principles of justice in the Model Rules. Without necessarily meaning to, humans are provenly prone to consider protected characteristics like gender, race, pregnancy status, religion, sexuality, and disability when conducting legal investigations.[31] This implies that algorithms trained on historical data, which may contain these factors, are prone to replicating these biases in their decisions, thereby worsening discrimination and unfairness.[32] If an AI tool identifies a factor like a disability that differs from what was considered acceptable in its training data, it might potentially lead to unjust outcomes based on arbitrary traits. The potential for these tools to perpetuate systemic biases means that individuals from marginalized groups are at a higher risk of being wrongfully charged or convicted.

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[28] Dina Blikshteyn, "AI Executive Order and Employment," December 12, 2023, *The Legal Landscape, AI Chats*, Episode 32, produced by Haynes and Boone, LLP, podcast, MP3 audio, 3:14, https://www.buzzsprout.com/1760953/14134574.
[29] Blikshteyn, "AI Executive Order," 3:40.
[30] Blikshteyn, "AI Executive Order," 9:55.
[31] Mirco Bagaric, et al. "The Solution to the Pervasive Bias and Discrimination in the Criminal Justice System: Transparent and Fair Artificial Intelligence" *Georgetown American Criminal Law Review*, vol. 59, no. 1, (2022): 133.
[32] Bagaric, "Solution to the Pervasive Bias," 133.

Compounding these risks, deepfakes present another alarming challenge to the integrity of legal information and evidence. Deepfakes are AI-generated images, videos, and audio that are "nearly indistinguishable" from real content and pose challenges under Rule 3.3 in the ABA Model Rules: the duty to be honest and forthright.[33] These sophisticated AI-generated images and videos can convincingly mimic real individuals, exploiting our natural tendency to trust visual evidence. While this trust is reasonable in ordinary contexts, the increasing prevalence of deepfakes challenges this assumption, as they can deceive and manipulate. This highlights the significant risk that deepfakes pose to legal proceedings where the authenticity of evidence is central.[34] Bad actors can use deepfakes maliciously to develop false evidence and mislead the tribunal.

While some companies are developing programs to detect deepfakes, there is an ongoing arms race with actors creating more convincing deepfakes to evade detection.[35] As the tools to create deepfakes become more accessible and reliable, their presence in legal investigations, dispute resolution, and litigation is increasing. Both genuine deepfakes and claims that evidence has been manipulated are becoming more frequent, complicating the legal landscape.[36] To combat the rise of deepfakes, attorneys must learn to identify and address potentially manipulated evidence. Rule 1.1 of the ABA Model Rules requires attorneys to possess the "legal knowledge, skill, thoroughness, and preparation" necessary for effective representation.[37] Given the potential influence of deepfaked evidence, attorneys need to equip themselves with the appropriate tools to

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[33] Anne D. Cartwright et al."Deepfakes: Preparing to confront AI-generated 'evidence' in investigations and litigation," *The Texas Bar Journal*, (24 May 2024): 389.
[34] Liao, "Short Introduction," 14.
[35] Liao, "Short Introduction," 14.
[36] Cartwright, "Deepfakes," 389.
[37] Cartwright, "Deepfakes," 389.

address these challenges and formulate strategies to counteract deepfakes in their practice.[38]

Currently, no specific laws and rules regarding AI have been added to the legal system: only "existing rules and principles offer guidance."[39] Lawyers dealing with AI deception argue that existing court rules on admissibility—covering aspects like relevance, authentication, hearsay, and undue prejudice—should guide litigation and the evaluation of suspected deepfakes in investigations and resolutions.[40] By proactively developing skills and strategies for detecting deepfakes, attorneys can help maintain the thoroughness and credibility of their investigations and litigation efforts, thereby upholding the rules of legal practice amid these technological advancements.[41] Comprehending the ethical landscape of AI usage in the legal field involves understanding how AI can potentially compromise civil and constitutional rights. *Democracy in America* by Tocqueville contains a compelling description of tyranny of the majority that is evident in today's modern legal GenAI applications.[42] Reliance on AI without proper oversight can perpetuate existing biases and foster majoritarian dominance, leading to the oppression of minority views. Establishing trustworthy sources and securing a balanced representation of all perspectives in utilizing GenAI in law is inescapable to maintain the fairness of legal outcomes and avoid perpetuating existing biases and inaccuracies.

Snell vs. United Specialty Insurance Co. goes beyond confabulations by offering even greater insight to the deeper ethical implications of AI usage. The opinion on

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[38] Cartwright, "Deepfakes," 389.
[39] Cartwright, "Deepfakes," 390.
[40] Cartwright, "Deepfakes," 390.
[41] Cartwright, "Deepfakes," 390.
[42] Tocqueville, "Democracy in America," vol. 2, chapter 7.

utilizing AI to determine the "ordinary meaning" of legal terms by harnessing the model's power of aggregating the most prevalent ideas or what most sources say is problematic. The identification of the capability of GenAI for "probabilistically mapping… how ordinary people use words and phrases in context" involves predicting the most likely usage of words based on prevalent patterns.[43] The scenario implies using GenAI to survey what most people say, what most sources indicate, and what the most common idea is. However, this approach raises significant concerns because the judiciary should act as a check on majoritarian views, not simply reflect them. If legal officials rely on AI for legal analysis, they risk surrendering their judgments to the majority perspective and turning legal interpretation into a process similar to taking a vote–with unverified voters. The legal system must preserve the possibility for the majority to be wrong so that the system can challenge prevailing views and form evaluations on richer criteria than the probabilistic outcomes of popular opinion that AI combs its databases to retrieve.

Instead, the 11th Circuit opinion praises the vast amount of data that GenAI works with to generate its outputs, explaining that "because they cast their nets so widely, LLMs can provide useful statistical predictions about how, in the main, ordinary people ordinarily use words and phrases in ordinary life."[44] Members of the federal judiciary claim that using models to interpret the ordinary meaning of words can improve the transparency and reliability of the interpretive process compared to current practices. The idea is that while dictionaries are commonly relied upon, the methods

[43] *Snell v. United Specialty Insurance Co.,* Case no. 22-12581, (11th Cir. May 28, 2024) (concurring opinion): 39.
[44] *Snell v. United Specialty Insurance Co.,* Case no. 22-12581, (11th Cir. May 28, 2024) (concurring opinion): 36.

and criteria used by their compilers are not always clear or transparent.[45] However, lexicographers, those who compile reputable dictionaries, meticulously track how words are used and where they are misused over time. Their work involves tracing the evolution of words and phrases, maintaining standards, and explaining how these might be changing. This careful linguistic anthropology creates definitions in dictionaries based on consistent and well-documented usage. In contrast, AI models amalgamate vast amounts of data without the same level of scrutiny or historical context. This lack of careful linguistic tracking means GenAI is not equipped to provide reliability and depth of understanding comparable to human lexicographers. Therefore, relying on AI to interpret ordinary meaning without proper guardrails or understanding the underlying processes risks harming the accuracy and integrity of legal interpretations. While it might be efficient to ask ChatGPT what the definition of a word is and allow it to survey all the data available without taking the time to survey various reputable dictionaries, this efficiency impedes accuracy.

This potential for an unchecked majority voice is an implication of the blackbox problem. Outputs are only generated based on the data the model is given, so when the given data aggregates information on what most people believe or what most sources are saying, then the model necessarily draws from majority voices. Consequently, the majority's perspective will dominate the AI outputs rather than providing an objective or balanced analysis. In the study "Modeling and Reasoning with Preferences and Ethical Priorities in AI Systems" by Andrea Loreggia, Nicholas Mattei, Francesca Rossi, and K. Brent Venable, the authors discuss the importance of formal structures for modeling preferences and ethical priorities in AI systems. They emphasize that using

[45] *Snell v. United Specialty Insurance Co.,* Case no. 22-12581, (11th Cir. May 28, 2024) (concurring opinion): 40.

explicit preference models improves the transparency–blackbox to whitebox model–and explainability of AI outputs.[46] However, they also argue that when making collective decisions, subjective preferences alone are insufficient, and ethical priorities and social norms of society must be considered.[47] In cases where the user's preferences conflict with core values, the AI should have software safeguards so it behaves in accordance with these values more than the subjective preference of a user.[48] For instance, when using GenAI in a hiring context (like resume scanners), the preferences of committee members should not solely dictate the decision. Instead, these preferences must be weighed against core constitutional values and legal obligations (i.e. gender and minority diversity as an example).[49]

As a solution to aligning outputs with human morality, the authors advocate for the use of distance metrics to measure the alignment of actions with ethical priorities.[50] In this context, distance metrics are a quantitative tool to assess how well an AI system's decisions match the core values of society. These metrics gauge the discrepancy between the AI's current output and the ideal ethical outcome. By employing these metrics, the AI can prioritize producing outputs that better reflect ethical ideals, aligning its responses more closely with societal norms and values.[51] While the study highlights the importance of modeling preferences and core values in AI, it is important to warn against using majority preference as a basis for ethical truths.

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[46] Andrea Loreggia et al. "Modeling and Reasoning with Preferences and Ethical Priorities in AI Systems," Ethics of Artificial Intelligence, ed S. Matthew Liao, (Oxford University Press 2020), Kindle: 128.
[47] Loreggia, "Modeling and Reasoning," 129.
[48] Loreggia, "Modeling and Reasoning," 145.
[49] Loreggia, "Modeling and Reasoning," 129.
[50] Loreggia, "Modeling and Reasoning," 145.
[51] Loreggia, "Modeling and Reasoning," 145.

A clear example of the dangers of letting majority opinion overshadow minority voices is evident in the American Abolitionist movement. Although there was no advanced technology or GenAI at the time, the ethical conflict over slavery and the rights of all individuals, regardless of race, shows that majority opinion is not always right, and suppressing minority voices is not a solution. The White majority in the South often did not support the abolition of slavery or equal rights for Black citizens. In 1865, the 13th Amendment officially ended slavery, but the status of freed Black people in the South remained precarious during Reconstruction. The 14th Amendment granted them citizenship and equal protection under the law, and the 15th Amendment provided voting rights. Still, despite these legal protections, Black Americans were frequently disregarded or violated by the white majority.[52] Using such majority opinions as a basis for ethical models in AI can perpetuate injustices and reinforce unethical norms, preventing the safeguarding of minority rights. Attorneys working on ethical AI development must mitigate this risk by prioritizing fairness, equity, and the protection of vulnerable populations to prevent the perpetuation of systemic discrimination.

A significant GenAI challenge is determining what constitutes an authoritative source and determining who is trusted as the curators of the model data sets. Legal decisions rely heavily on the accuracy and credibility of information, so if GenAI pulls from sources that are not expert or trustworthy, it could lead to flawed research and create flawed legal arguments, potentially leading to unjust outcomes. Legal departments have posed ways to put guardrails on the use of AI technology to mitigate the risk of disseminating unreliable information. As discussed in a panel event on January 31st, 2024 with LexisNexis and the Wall Street Journal called “What Every

[52] Amanda Onion et al. “Slavery in America,” History.com, 25 April 2024: https://www.history.com/topics/black-history/slavery.

Managing Partner & C-Suite Leader Needs to Know About Legal AI," one strategy is to start by choosing the right model for their specific legal application and experimenting with different options to find the best fit.[53] After selecting a model, they implement guardrails including restricting confabulation-prone topics, optimizing data sets for balance, and limiting access to third-party apps or users who may introduce biases or errors.[54] By working backward from their use cases to develop a well-defined data set and establishing clear guidelines on source reliability, attorneys can generate information by GenAI that is more accurate and credible, and not just pulling from a flawed majoritarian opinion.[55] The guardrails are designed to mitigate the blackbox problem by giving the attorney more control and insight into how the AI is generating outputs, which allows them to better understand and properly influence the outputs and uphold core values of the legal system by maintaining control over AI processes.

In conclusion, the potential of AI to enhance efficiency and support complex legal reasoning is evident, yet the ethical challenges it introduces, particularly confabulations and information integrity issues, demand careful consideration. Understanding these challenges is pivotal for upholding the rules articulated in the ABA Model Rules of Professional Conduct. These rules, which emphasize competence, diligence, and integrity, serve as the foundation for ethical legal practice. These challenges strike at the heart of constitutional democracy and threaten to exacerbate the tyranny of the majority—a danger that Tocqueville warned about. As AI continues to influence legal processes, lawyers must prioritize ethical considerations in its development and

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[53] "What Every Managing Partner & C-Suite Leader Needs to Know About Legal AI: Generative AI and the General Counsel Perspective," LexisNexis, January 31, 2024: https://www.lexisnexis.com/en-us/products/lexis-plus-ai/thought-leadership.page?utm_campaign=m-2024+ll+ai&utm_medium=web&utm_source=blog&utm_term=ll.

[54] "Every Managing Partner," LexisNexis.

[55] "Every Managing Partner," LexisNexis.

application. Core constitutional values that safeguard justice and liberty for all, rather than just the majority, must guide the approach to AI in law. Implementing stringent safeguards and emphasizing the importance of morality over mere data aggregation are essential steps to ensure that AI acts as a force for justice instead of a tool for perpetuating systemic biases and injustices.

The necessity for rigorous review and the setting of defined guardrails in AI utilization is urgent. Upholding the rules and core constitutional values that define the legal profession and legal system is crucial, so the technology is employed responsibly and maintains the integrity, fairness, and impartiality of legal outcomes. Through responsible and ethical use, AI can be harnessed to preserve democratic morality and ensure that the legal system remains fair, unbiased, and just: for all citizens.

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