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MITIGATING THE MACHINE: BALANCING INNOVATION WITH OVERSIGHT IN THE DIGITAL AGE

Andrew Street*

> "By far the greatest danger of Artificial Intelligence is that people conclude too early that they understand it." – Eliezer Yudlowsky[1]

INTRODUCTION

Imagine a politician delivering a speech they never gave, or students in a classroom engaging in a virtual Q&A session with a long-lost historical figure. Better yet, what if a celebrity could sign autographs in New York while simultaneously shooting a commercial in Tokyo? Is it possible to be in two places at once? It's a terrifying yet intriguing hypothetical, reflective of a paradox made possible by artificial intelligence ("AI") and machine learning ("ML"). The emergence of AI and ML algorithms has revolutionized technological advancement and societal production, enabling business and industry alike to enhance marketability and improve operational strategy.[2] It is a force capable of astonishing innovation and realistic manipulation—while AI has reshaped the boundaries of productivity by streamlining the creative process, ethical considerations persist regarding the misuse of this technology by those with malintent.[3]

*J.D. Candidate, 2026, Southern University Law Center. I would like to express my sincere gratitude to Professor Adrienne Shields for her guidance and support in writing this article. I would also like to thank Henry Hays for his invaluable insight on AI and its impact on business efficiency. Lastly, I want to thank my parents and family for their continued and unwavering support.

1. Devansh Lala, *Artificial Intelligence: Understanding the Hype*, MEDIUM (July 23, 2017), https://towardsdatascience.com/artificial-intelligence-understanding-the-hype-daee0df04695.

2. Elysse Bell, *How to Use AI in Business Planning*, INVESTOPEDIA (Mar. 22, 2024), https://www.investopedia.com/how-to-use-ai-in-business-planning-8610190.

3. Rick Spair, *Breaking Boundaries: How Generative AI is Reshaping the Media Landscape*, DX TODAY BLOG (Jan. 1, 2025),

For every beneficial use that AI has to offer comes with it the potential for it to be weaponized to undermine privacy, security, and even the very fabric of democracy.[4] A sobering realization in light of emerging technologies has been the inability of existing legal frameworks to maintain pace. The teetering nature of AI and ML technology presents a challenge in that there are mixed beliefs regarding the best way to address it.[5] If AI is to be considered a spectrum, then on one end are those who believe that any regulation is unwarranted because it is still emerging, while on the other end are those who believe immediate action is needed before it becomes too advanced to control.[6] This comment seeks to establish a middle ground by examining these concerns through the lens of intellectual property ("IP") and right-of-publicity doctrines. Part one of this comment provides an overview of different kinds of AI and ML, with a particular emphasis on deepfakes and the implications thereof. Part two focuses on the right of publicity in Louisiana and compares it with that of other jurisdictions. Part three evaluates how the right of publicity has inspired the recent introduction of federal legislation, and recommends steps that can and should be taken to balance protection with progress.

I. ARTIFICIAL INTELLIGENCE (AI) AND MACHINE LEARNING (ML)

Broadly speaking, AI "[r]efers to the ability of machines to perform tasks that typically require human intelligence. . . ."[7] Devices equipped with AI technology are capable of simulating human learning in such a manner so as to circumvent the need for human intervention.[8] Although all AI systems are designed to

https://www.rickspairdx.com/2025/01/breaking-boundaries-how-generative-ai.html.

4. *Id.*

5. Interview with Henry Hays, CEO, DisruptREADY, in Baton Rouge, La. (Oct. 7, 2024).

6. *Id.*

7. *Generative AI vs Machine Learning vs Deep Learning Differences*, REDBLINK TECH. (Mar. 16, 2023), https://redblink.com/generative-ai-vs-machine-learning-vs-deep-learning/#Generative_AI_Vs_Machine_Learning_Vs_Deep_Learning.

8. *What Is Artificial Intelligence (AI)?*, IBM (Aug. 9, 2024), https://www.ibm.com/topics/artificial-intelligence.

improve efficiency through self-learning, within the field of AI exists several categories and subcategories that each differ in application.[9] The main subcategory of AI, machine learning ("ML"), utilizes algorithmic models to promulgate machine self-learning "[w]ithout explicit programming."[10] This is accomplished by use of three separate techniques: supervised learning, unsupervised learning, and reinforcement learning.[11] Supervised learning involves the use of labeled datasets wherein the algorithm identifies labeling patterns and uses them to predict new outputs of unseen data.[12] Unsupervised learning differs in that the algorithm is exposed to unlabeled data pairs and is tasked with structuring its own output predictions.[13] Reinforcement learning is a technique often seen in self-driving cars wherein the algorithm is "[r]ewarded or punished based on its actions in an environment," encouraging the algorithm to gradually improve its decision making over time.[14]

Another branch of ML, deep learning ("DL"), utilizes artificial neural networks capable of processing large quantities of complex data, similar to that of the human brain.[15] This subcategory differs from traditional ML in that DL algorithms "[a]utomatically learn representations from data" without the need for any human intervention.[16] DL employs a form of reinforcement learning wherein the neural networks are "trained" to produce a desirable output.[17] Within this branch exists yet

9. *What is (AI) Artificial Intelligence?*, UNIV. OF ILL. CHIC., https://meng.uic.edu/news-stories/ai-artificial-intelligence-what-is-the-definition-of-ai-and-how-does-ai-work/ (last modified May 7, 2024).

10. *Id.*

11. *See Generative AI vs Machine Learning vs Deep Learning Differences*, *supra* note 7.

12. *What Is Artificial Intelligence (AI)?*, *supra* note 8.

13. *Generative AI vs Machine Learning vs Deep Learning Differences*, *supra* note 7.

14. *Id.*

15. *What Is Artificial Intelligence (AI)?*, *supra* note 8.

16. *Deep Learning*, NVIDIA, https://www.nvidia.com/en-us/glossary/deep-learning/. *See also id.*

17. Jessica Ice, *Defamatory Political Deepfakes and the First Amendment*, 70 CASE W. RES. L. REV. 417, 421 (2019) https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=4854&context=caselrev (Quoting Alan Zucconi, *An Introduction to Neural Networks and*

another subset of AI known as generative AI, which utilizes a combination of ML and DL to recognize trends presented by the input data and create a unique output.[18] It is within the latter two branches that deepfakes are created.

A. Deepfakes

Deepfakes are "any of various media…[t]hat has been digitally manipulated to replace one person's likeness convincingly with that of another, often used maliciously to show someone doing something that he or she did not do."[19] There are a variety of ways in which deepfakes can be created, one of which is by use of an autoencoder.[20] Autoencoders are capable of learning latent representations in data sets, which in turn can be used to promulgate face swapping.[21] An autoencoder is a self-supervised[22] neural network that "[c]ompress[es] (or encode[s]) input data…[to] then accurately reconstruct (or decode) [the] original input."[23] Through an iterative training process, the encoder network compresses the input (original imagery) through a "bottleneck" layer in the network's architecture, capturing the input's essential features.[24] The decoder then reconstructs the original input,[25] the goal being to minimize reconstruction error and mimic the input

Autoencoders, ALAN ZUCCONI BLOG (Mar. 14, 2018), https://www.alanzucconi.com/2018/03/14/an-introduction-to-autoencoders/).

18. *What Is Artificial Intelligence (AI)?*, *supra* note 8.

19. *Deepfake*, OXFORD ENGLISH DICTIONARY https://www.oed.com/dictionary/deepfake_n?tab=meaning_and_use#1345352340 (last visited Sep. 28, 2024).

20. *What is a Variational Autoencoder?*, IBM (June 12, 2024), https://www.ibm.com/think/topics/variational-autoencoder.

21. Alakananda Mitra, et al., *The World of Generative AI: Deepfakes and Large Language Models*, ARXIV 3 (Feb 8, 2024), https://arxiv.org/pdf/2402.04373v1.

22. "self-supervised" in this instance refers to the aforementioned "unsupervised learning" technique wherein the system is self-learning without the need for human input or supervision. *What is self-supervised learning?*, IBM (Dec. 5, 2023), https://www.ibm.com/topics/self-supervised-learning.

23. *What is a Variational Autoencoder?*, *supra* note 20.

24. *Id.* "Bottleneck" in this context "[i]s both the output layer of the encoder network and the input layer of the decoder network." *See What is an Autoencoder?*, IBM (Nov. 23, 2023), https://www.ibm.com/topics/autoencoder.

25. *Id.*

"[a]s closely as possible."[26] By training the networks separately, the process results in the decoder seamlessly imbedding a swapped facial structure onto the original imagery input.[27]

Another way deepfakes are created is through a DL technique in which existing images are superimposed onto the source material through generative adversarial networks ("GAN").[28] There are two neural networks within GANs—generators and discriminators.[29] The generator creates new images inspired by the input source material and the discriminator evaluates the authenticity of the output.[30] The networks learn by continuously working against one another—each time the discriminator detects a falsified image, the generator creates a more authentic output, and the process repeats until the discriminator believes the output is a part of the original dataset.[31] GANs serve as the most popular way in which deepfakes are created because the networks are capable of producing realistic images with a higher degree of accuracy than that of traditional autoencoders.[32]

No matter how they are created, much of the concern surrounding deepfakes stems from the fact that they can be so convincing that they appear authentic to the ordinary observer.[33] Indeed, this technology in the hands of those with malintent can have heinous consequences, such as an individual's likeness being used to create pornographic material or make it appear as if they

26. Mohammad Al-Marie, *Exploring Neural Network Architectures: Autoencoders, Encoder-Decoders, and Transformers*, MEDIUM (Apr. 3, 2023), https://medium.com/@mohd.meri/exploring-neural-network-architectures-autoencoders-encoder-decoders-and-transformers-c0d3d6bc31d8.

27. Ice, *supra* note 17, at 421-22.

28. Sarah H. Jodka, *Manipulating reality: the intersection of deepfakes and the law*, REUTERS (Feb. 1, 2024), https://www.reuters.com/legal/legalindustry/manipulating-reality-intersection-deepfakes-law-2024-02-01/#:~:text=The%20consent%20further%20requires%20companies,used%20to%20train%20generative%20AI.

29. *Id.*

30. Danielle C. Breen, *Silent No More: How Deepfakes Will Force Courts to Reconsider Video Admission Standards*, 21 J. High Tech. L. 122, 138-39 (2021).

31. *Id.* at 139-40.

32. Ice, *supra* note 17, at 422.

33. *Id.*

are committing a crime.[34] Moreover, the dispersion of such imagery on the internet is capable of inflicting irreversible reputational harm, as it is virtually impossible to remove deepfake content once it is disseminated online.[35] This creates consequences that transcend mere reputational damage,[36] and although negative connotations persist, this lack of regulation has only exacerbated the technology's use. Indeed, while our ability to detect deepfakes at their inception is ever-evolving and improves daily, the vastness of the internet renders an outright ban on deepfakes unfeasible.[37] Big Tech companies have begun leading initiatives to combat harmful deepfakes at the source, but once the content that slips through the cracks makes its way onto the internet, "[t]he genie is [already] out of the bottle."[38] There is also a prevailing sentiment that because the technology is still emerging and not yet fully understood, there is reason to believe that any regulation thereof presents serious First Amendment concerns, especially as it pertains to political advertisements and freedom of the press.[39] These concerns are largely predicated on fair use exceptions that are embedded throughout federal copyright law and state right-of-publicity doctrines.[40]

An additional justification warranting the hesitancy to enact regulation is that although deepfake content is often viewed in a malicious context, there are actually some beneficial uses of DL technology that frequently go unrecognized. For instance, DL and

34. *Id.*

35. *See* Donna Etemadi, *The Deepfake Dilemma*, 112 Ill. B.J. 38, 39 (2024).

36. *E.g.,* Heather Chen & Kathleen Magramo, *Finance worker pays out $25 million after video call with deepfake 'chief financial officer,'* CNN (Feb. 4, 2024, 2:31 AM), https://www.cnn.com/2024/02/04/asia/deepfake-cfo-scam-hong-kong-intl-hnk/index.html.

37. *Id.*

38. *Id.*

39. *See, e.g.,* Letter from Jeff Landry, Louisiana Governor (June 20, 2024), https://www.legis.la.gov/legis/ViewDocument.aspx?d=1382553 (citing First Amendment concerns as reasoning for veto of political deepfake bill in Louisiana).

40. Sasha Rosenthal-Larrea, et. al, *AI Deepfakes: Unauthorized Depictions and Protection of Property Rights to Name, Image and Likeness*, ALM N.Y.L.J. (June 3, 2024), https://www.law.com/newyorklawjournal/2024/06/03/ai-deepfakes-unauthorized-depictions-and-protection-of-property-rights-to-name-image-and-likeness/.

the methods of predictive learning therein are capable of bettering surgical procedures and training mechanisms for rare illnesses.[41] Studies have shown that DL algorithms can be trained to locate cancerous tumors with a high degree of accuracy and avoid noncancerous changes.[42] Some models' methods of predictive learning are so advanced that they are capable of predicting whether or not cancerous regions have spread,[43] oftentimes much better than that of computed tomography alone.[44]

These benefits extend further beyond the scope of medicinal application. When viewed in an educational context, deepfake imagery can be utilized to develop AI tutors coded to provide support specific to individual students.[45] AI tutor applications can be "[l]everage[d]…to create immersive learning experiences," thereby providing an effective way in which students retain information.[46] Moreover, audio and video data can be utilized to create accurate depictions of prominent historical figures, enabling future generations to experience their stories through holographic representations.[47] The fact that the potential benefits of this technology are emerging alongside its harms gives rise to further questions about the constitutionality of any laws seeking to regulate it.[48]

When viewing the pros and cons of deepfake technology in conjunction with one another, it follows that the lack of governance

41. Nagothu, et al., *Deterring Deepfake Attacks with an Electrical Network Frequency Fingerprints Approach*, FUTURE INTERNET (Apr. 21, 2022). https://www.mdpi.com/1999-5903/14/5/125.

42. *See generally* Nadia Jaber, *Can Artificial Intelligence Help See Cancer in New, and Better, Ways?*, NAT. CANCER INST. (Mar. 22, 2022), https://www.cancer.gov/news-events/cancer-currents-blog/2022/artificial-intelligence-cancer-imaging.

43. *See id.* (Citing Stephanie Harmon, et al., *Multiresolution Application of Artificial Intelligence in Digital Pathology for Prediction of Positive Lymph Nodes From Primary Tumors in Bladder Cancer*, JCO CLIN. CANCER INOFRM. (Apr. 24, 2020), https://pmc.ncbi.nlm.nih.gov/articles/PMC7259877/.

44. *Id.*

45. Dan Patterson, *Deepfakes for good? How synthetic media is transforming business*, TECH INFORMED (Oct. 5, 2023), https://techinformed.com/deepfakes-for-good-how-synthetic-media-is-transforming-business/.

46. *Id.*

47. Nagothu et al., *supra* note 41.

48. Ice, *supra* note 17, at 428.

thereof is not without rhyme or reason. However, these factors alone should not serve as an insurmountable barrier to regulation. Indeed, the principles of fair use are essential not only to balance the rights of individual creators against the societal interest of free expression,[49] but also to incentivize technological advancement. Nevertheless, there are mechanisms at our disposal whereby we can maintain these principles while safeguarding against the harms this technology imposes. For instance, there are indeed laws currently in effect that criminalize the creation deepfake pornography[50] and target identity theft, and some have even suggested verifying the authenticity of deepfakes at the source via digital watermarking.[51]Admittedly, however, these mechanisms only go so far— while our ability to detect deepfake content is gradually improving, so is the ability of those with malintent to circumvent these efforts.[52]

B. Deepfakes and the First Amendment

Recent studies have shown that 63.8% of the world's population uses social media,[53] and that approximately one-in-five American adults regularly receive their news from social media influencers.[54] Albeit while online platforms have responded to increased user-bases by implementing safeguards to screen out the spread of manipulated content, such attempts are oftentimes futile due to the speed at which the content is disseminated on the internet.[55] Moreover, due to the lack of meaningful incentives for

49. Christian Marks, *"Southern Fights": A Battle to Expand Rights of Publicity in Louisiana Under the Allen Toussaint Legacy Act*, 70 LOY. L. REV. FOR. at 8 (Nov. 27, 2023), https://loynolawreview.org/theforum/2j4gsqpzdegx94helyh3tg3fvtzfqm25112023 .

50. *See, e.g.,* LA. STAT. ANN. § 14:73.14 (2024) (criminalizing the unlawful creation and dissemination of deepfake pornography).

51. *See, e.g.,* Etemadi, *supra* note 35 (Quoting IL H.B. 3285, Artificial Intelligence Consent Act (2023)).

52. Etemadi, *supra* note 35.

53. *Global Social Media Statistics*, KEPIOS, https://datareportal.com/social-media-users (last updated Oct. 2024).

54. Galen Stocking, et al., *America's News Influencers*, PEW RES. CENT. (Nov. 18, 2024), https://www.pewresearch.org/journalism/2024/11/18/americas-news-influencers/.

55. Melissa Heikkila, *Bans on deepfakes take us only so far—here's what we really need*, MIT TECH. REV. (Feb. 27, 2024),

social media companies to combat the problem, in combination with the priority these platforms give to virality, the spread of digitally-altered material continues to rise.[56]

In recognition of the fact that social media use and AI generated content is at an all-time high, several states have begun enacting targeted legislation to mitigate some of the harm that deepfakes are capable of inflicting.[57] Much of the regulation at the state level merely extends existing legal frameworks by adding AI generated content to conduct that is already illegal, such as prohibiting nonconsensual deepfake pornography.[58] Digitally-created sexual content deservedly receives the most regulatory attention because it makes up the majority of deepfakes on the internet.[59] However, the proliferation of deepfakes gives rise to additional concerns for our government and national security, particularly as it pertains to manipulated media that targets politicians and public officials.[60] The ability of artificial intelligence to influence our elections has been referred to as a "[serious] threat to the [stability of] our Republic,"[61] with foreign entities leveraging this technology on social media to build artificial personalities and court public opinion.[62] In the absence of federal legislation on the issue, the desire to preserve election integrity has prompted several states to draft legislation

https://www.technologyreview.com/2024/02/27/1089010/bans-on-deepfakes-take-us-only-so-far-heres-what-we-really-need/.

56. Kavyasri Nagumotu, *Deepfakes are Taking Over Social Media: Can the Law Keep Up?*, 62 IDEA 102, 118 (2022).

57. Michelle Graham, *Deepfakes: Federal and state regulation aims to curb a growing threat*, REUTERS (June 26, 2024), https://www.thomsonreuters.com/en-us/posts/government/deepfakes-federal-state-regulation/.

58. *See generally* Bill Kramer, *Most States Have Enacted Sexual Deepfake Laws*, MULTISTATE, https://www.multistate.ai/updates/vol-32 (last updated June 28, 2024).

59. *Increasing Threat of Deepfake Identities,* DHS.GOV 17 (2021), https://www.dhs.gov/sites/default/files/publications/increasing_threats_of_deepfake_identities_0.pdf.

60. Ice, *supra* note 17, at 418.

61. *Id.* at 429 (Quoting Senator Marco Rubio, Keystone Remarks at The Heritage Foundation's Homeland Security Event on Deep Fakes (July 19, 2018)).

62. DHS, *supra* note 59, at 16. *See also* Nagumotu, *supra* note 56, at 137 ("[i]ntelligence agencies confirmed Russian meddling on social media during the 2016 U.S. presidential election").

pertaining to political deepfakes.[63] Nevertheless, so persists a fine line between this desire and the potential for government overreach.

AI generated content necessarily implicates First Amendment scrutiny in that it is sometimes viewed as nothing more than a satirical expression protected thereunder.[64] The First Amendment of the United States Constitution prevents the government from infringing upon an individual's right to freedom of speech, religion, the press, and assembly.[65] Whether deepfakes bear artistic or informational purpose, and regardless of their veracity, free speech law confers upon all citizens the right to create and share such content online.[66] Well-settled in First Amendment jurisprudence is the principle that false statements concerning public officials that are made in the absence of "actual malice" are not actionable.[67] With falsities being the exact type of speech the First Amendment is designed to protect, this precedent has been modernized and held to be presumptively applicable as it pertains to digital replicas.[68] Nevertheless, the Constitution does not afford the same protections to all speech equally.[69] Because deepfakes oftentimes extend beyond the kind of expression to which the First Amendment applies,[70] the use of this technology to defame or commercialize another's identity without their consent can indeed give rise to an actionable offense.[71] As deepfakes continue to become more sophisticated, the burden rests

63. *See, e.g.,* Graham, *supra* note 57.

64. *See* UNITED STATES COPYRIGHT OFFICE, *Copyright and Artificial Intelligence, Part 1 Digital Replicas Report* 43 (July 31, 2024), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-1-Digital-Replicas-Report.pdf.

65. U.S. CONST. amend. I.

66. Marc Jonathan Blitz, *Deepfakes and Other Non-Testimonial Falsehoods: When Is Belief Manipulation (Not) First Amendment Speech?*, 23 Yale J. of L. & Tech. 160, 173 (2020).

67. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). *See also* Garrison v. State of La., 379 U.S. 64, 73 (1964) (reasoning that the principles of free expression in the Constitution "preclude attaching adverse consequences to any [false utterances]" in the absence of actual malice).

68. *See* Kohls v. Bonta, No. 2:24-CV-02527 JAM-CKD, 2024 WL 4374134, at *4 (E.D. Cal. Oct. 2, 2024).

69. UNITED STATES COPYRIGHT OFFICE, *supra* note 64.

70. Blitz, *supra* note 66, at 170.

71. UNITED STATES COPYRIGHT OFFICE, *supra* note 64.

on policymakers to balance the desire to deter bad actors against the First Amendment in order to ensure that the effort to safeguard against this technology's harms does not restrict the right to creativity or free expression.

The United States Copyright Office ("USCO") has echoed the sentiment that the advancement of generative AI warrants new federal legislation.[72] In July of 2024, the USCO issued part one of its forthcoming series of Reports analyzing the intersection of AI and existing copyright law.[73] Therein, the USCO highlights why existing federal legislation is too narrowly tailored to properly account for the harm that deepfakes are capable of creating.[74] For example, using preexisting copyrighted works to procure digital replicas may indeed violate the Copyright Act if the individual depicted bears the rights to the underlying input.[75] However, the Copyright Act does not in and of itself establish a proprietary interest in one's identity, meaning that the mere replication of one's likeness is not enough to constitute an infringement.[76] Moreover, because the Copyright Act only protects creative works authored by humans, traditional copyright law in the United States falls short of adequately protecting against identity exploitation.[77] To address this issue, the USCO recommends the adoption of federal protections similar to that of state right of publicity laws.[78] In doing so, Congress will not only be able to fill the gaps of protection left by traditional copyright law, but also

72. UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 7.

73. *Copyright and Artificial Intelligence*, COPYRIGHT.GOV (2024), https://www.copyright.gov/ai/ (Part 1 of the Report addresses deepfakes and digital replicas).

74. UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 24.

75. *Id.* at 17.

76. *Id.* (Citing Downing v. Abercrombie & Fitch, 265 F.3d 994, 1004 (9th Cir. 2001)).

77. Katherine Klosek, *A Federal Right of Publicity May Address AI-generated Deepfakes While Protecting Free Expression*, ASS'N OF RESEARCH LIBRARIES 2 (Jan. 16, 2024), https://www.arl.org/wp-content/uploads/2023/07/Federal-Right-of-Publicity.pdf (describing how an individual's likeness is not the kind of original works that the Copyright Act is designed to protect).

78. UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 57.

resolve the jurisdiction-dependent disparities found in state right of publicity laws.[79]

II. RIGHT OF PUBLICITY

The law has long recognized the right of an individual's interest in their own identity.[80] This principle stems from the realization that the nonconsensual use of someone's identity can have injurious effects on their commercial and individual interests.[81] The law confers two broad categories of identity rights—the "right of publicity," which refers to a protected commercial interest, and the "right of privacy," which refers to the protection of personal interests.[82] While each category is rooted in protecting an individual's interests, they differ in application.[83] Right to privacy is designed to safeguard an individual's personal interest in their identity, while right of publicity is similar to copyright law in that it confers an actual property right in one's identity.[84] In most cases, liability is imposed in cases whereby an individual's identity is utilized for a tortfeasor's "use or benefit."[85] The difficulty of this interpretation lies in the fact that it prohibits tortious conduct without identifying the damage it seeks to alleviate.[86] Whether or not a violation is one of privacy or publicity denotes a different measure of liability, and ultimately depends on the specific harm suffered by the individual.[87] As such, in the event that a violation of one's publicity rights occurs, the measure of redressability is jurisdictionally dependent—an individual in one

79. *See generally* Klosek, *supra* note 77.

80. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. a (AM. L. INST. 1995).

81. *See id.*

82. *Id.*

83. John R. Vile, *Right of Publicity*, FREE SPEECH CENTER AT MTSU, https://firstamendment.mtsu.edu/article/right-of-publicity/#:~:text=Whereas%20the%20right%20to%20privacy,has%20cultivated%20in%20becoming%20a (last updated July 2, 2024).

84. *Id.*

85. Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 89 (2020) (Citing RESTATEMENT (SECOND) OF TORTS § 652(C) (AM. L. INST. 1977)).

86. *Id.* at 90.

87. RESTATEMENT (THIRD) OF UNFAIR COMPETITION, *supra* note 122, § 46 cmt. b.

state may need to establish a commercial value in their identity, while in others the individual need only establish injuries to personal reputation.[88] In Louisiana, the Allen-Toussaint Legacy Act encompasses the former measure, however it was not until recently that this became the standard.

A. Right of Publicity in Louisiana – the History

Prior to enacting the Allen-Toussaint Legacy Act, Louisiana did not recognize a property right in in one's identity.[89] Instead of adopting the common law principle that an individual's identity was proprietary, courts frequently viewed an identity right as one of privacy.[90] For example, in the case of *Tatum v. New Orleans Aviation Bd.*, Louisiana's Fourth Circuit Court of Appeal held that the right to privacy was a strictly personal right different from that of a "real right" over property.[91] Therein, the plaintiff filed suit on behalf of his late mother, alleging that the nonconsensual use of her imagery on an airport mural constituted an invasion of privacy.[92] The court rejected these arguments, holding that Louisiana law, whether "statutor[y] or jurisprudentia[l]" provided no basis upon which the plaintiff could assert a right belonging only to the decedent.[93] Six years later, deferring to the reasoning set forth in *Tatum*, the Louisiana First Circuit held that claims predicated on privacy intrusions are not heritable and extinguish upon the decedent's death.[94] The court noted further that to establish a commercial right of publicity in one's identity "[w]ould constitute an unwarranted intrusion into an area in which the legislature has not seen fit to act."[95] As these cases reflect, the refusal to jurisprudentially recognize a commercial value in an individual's identity was largely due to legislative inaction.

88. *Id.*

89. *See, e.g.,* Tatum v. New Orleans Aviation Bd., 2011-1431 (La. Ct. App. 4th Cir. 4/11/12), 102 So. 3d 144, 147, *writ denied*, 2012-1847 (La. 11/9/12), 100 So. 3d 838.

90. *Id.*

91. *Id.* at 147.

92. *Id.*

93. *Id.*

94. *See* Frigon v. Universal Pictures, Inc., 2017-0993 (La. Ct. App. 1 Cir. 6/21/18), 255 So. 3d 591, 599, *writ denied*, 2018-1868 (La. 1/18/19), 262 So. 3d 896.

95. *Id.* at 598.

However, while a commercial right in one's identity had yet to be codified in Louisiana, precedent did indeed confer personal privacy rights thereof.[96] Relief in privacy tort for the appropriation of one's likeness still exists in instances whereby the appropriation is so unreasonable such that it "[s]eriously interfere[s] with another's privacy interest"[97] for the tortfeasor's benefit.[98]

While the elements constituting violations of privacy and publicity are largely the same,[99] recovery for misappropriation of identity under traditional privacy mechanisms is inherently difficult.[100] Determining whether or not a misappropriation qualifies as an "unreasonable" invasion of privacy requires a balancing of the plaintiff's interests with the defendant's motives.[101] The balancing test is ultimately circumstantial—while the plaintiff need not prove malicious intent on behalf of the defendant, a slight invasion of one's privacy does not rise to the level so as to violate the plaintiff's interests if the invasion is "[a]uthorized or justified by the circumstances."[102] Even in the event that all elements of a privacy claim are satisfied, privacy law in Louisiana does not recognize post-mortem rights, precluding a decedent's beneficiaries from recovery thereunder.[103] These limitations to recovery under traditional privacy law ultimately served as the spark behind the existing right of publicity framework in Louisiana.

B. Allen-Toussaint Legacy Act

In Louisiana, citizens are now afforded a commercial right in their identity as codified by the Allen-Toussaint Legacy Act ("the Act").[104] Enacted in 2022, the Act confers a property right in one's identity, including that produced through digital replicas,

96. *E.g.,* Tatum, 102 So. 3d at 146 (Citing Jaubert v. Crowley Post-Signal, Inc., 375 So. 2d 1386, 1389 (La. 1979)).

97. *Id.*

98. *See* Slocum v. Sears Roebuck & Co., 542 So. 2d 777, 779 (La. Ct. App. 3d Cir. 1989). *See also* Post & Rothman, *supra* note 127.

99. Post & Rothman, *supra* note 85, at 93.

100. Marks, *supra* note 49, at 6.

101. Tatum, 102 So. 3d at 146

102. *Id.* at 146-47.

103. *Id.* at 147.

104. LA. STAT. ANN. § 51:470.3 (2022).

that may be licensed or transferred with the express consent of the individual or, if the individual is deceased, by the legatees thereof.[105] The express language of the statute defines "individual[s]" subject to the protections therein as natural persons "domiciled in Louisiana or a deceased natural person who was domiciled in Louisiana at the time of the individual's death."[106] Furthermore, the Act defines identity rights as identifiable traits particular to the individual, including their "name, voice, signature, photograph, image, likeness, or digital replica."[107] Similar to other states, the Act contains fair use exemptions wherein an individual's identity may be utilized in certain instances insofar as said use is consistent with federal Copyright law.[108] Audiovisual works are also encompassed in these exemptions; however, they do not extend to digital replicas of professional performers if the performer did not participate in the original work.[109] By prohibiting the nonconsensual replication of one's identity through digital means, the Act provides a layer of reputational protection against those reproductions that are "indistinguishable from the actual likeness or voice of a professional performer."[110]

While the Act's purpose of protecting an individual's likeness is well-founded, its restrictive scope is inherently limiting. For instance, in applying these protections only to that of Louisiana domiciliaries, individuals who spent most of their life in Louisiana but maintained a separate domicile when they died are not afforded the same protections thereunder.[111] Additionally, notwithstanding the fact that the prohibition of nonconsensual replicas provides crucial protections to one's identity in light of emerging technologies, the restrictive application to that of only professional performers is overly confining. Amending the Act

105. *Id.*

106. *Id.*

107. LA. STAT. ANN. § 51:470.2 (2022).

108. *See* LA. STAT. ANN. § 51:470.5(A) (2022) (stating that the Act "does not affect rights and privileges recognized under other state or federal laws, including those privileges afforded under the 'fair use' factors in the United States Copyright Act of 1976.").

109. UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 16.

110. LA. STAT. ANN. § 51:470.2 (2022).

111. Marks, *supra* note 49, at 7.

such that all individuals in Louisiana are afforded the same protections against nonconsensual digital replicas would not only promote business efficiency[112] and technological investment, it would also follow a multi-jurisdictional trend in further safeguarding against the harms of identity exploitation.

C. Right of Publicity in Other States

In recent years, several states have amended or enacted new right of publicity laws to modernize protections in accordance with emerging technologies.[113] For instance, the state of Tennessee expanded its right of publicity statute in July of 2024 as to extend beyond the previous restriction of commercial use and also include protections against unauthorized voice simulations.[114] Additionally, California's Governor Gavin Newsom recently signed a bill into law detailing watermark and labeling requirements for digitally-created advertisements.[115]

An Illinois bill that was signed into law in September of 2024 serves to amend Illinois's Right of Publicity Act.[116] To take effect in January of 2025, the law establishes a commercial right in one's identity and prohibits the unauthorized use thereof.[117] While the protections and application established by the Illinois statute are largely the same as the Act in Louisiana, a notable difference pertains to the scope of those affected. The Illinois statute makes no mention of a domiciliary requirement, instead conferring the right upon all natural or juridical persons (individuals) that reside in the state.[118] Furthermore, while both laws are restricted in scope to commercial use, Illinois's law does not limit the digital replica prohibitions solely to professional performers.[119] These

112. *Id.* at 21.

113. UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 15.

114. *Id.* (Citing the Ensuring Likeness, Voice and Image Security "ELVIS" Act of 2024, Tenn. Pub. Acts ch. 588). ELVIS provides fair use exceptions similar to that of the Act in Louisiana and federal Copyright law. The expansion thereof now encompasses unauthorized digital replicas that are made available to the public.

115. *See* Cal. Assemb. J., Reg. Sess., No. 2355 (2024).

116. IL H.B. 4875, Amends the Right of Publicity Act (2024).

117. *Id.*

118. *Id.*

119. *See generally id.*

differences, albeit while subtle, represent notable changes Louisiana should make to its right of publicity law. Repealing the domiciliary requirement and holding the protections of the Act applicable to all individuals in Louisiana would procure demonstrable benefits—it would effectively provide all residents with the peace of mind that the proprietary interest in their identity is protected from misuse.[120] Furthermore, the change would provide this same sense of protection for those that currently reside out-of-state, incentivizing those involved in athletics or entertainment to conduct business in Louisiana[121] and contribute to the state's economic growth.

III. FEDERAL REGULATION

Currently, the United States does not have comprehensive omnibus legislation directly applicable to artificial intelligence.[122] While existing frameworks at the federal level can be utilized to address some of the pertinent issues, each carries its own set of limitations.[123] For instance, digital reproductions of previously copyrighted works are capable of implicating the rights established under federal Copyright law.[124] However, Copyright law does not in and of itself protect against identity misappropriation,[125] and the affected individual may only recover thereunder if they happen to own the copyrights to the underlying input.[126] Similarly, traditional trademark law falls short of

120. *See generally* Marks, *supra* note 49, at 21.

121. *Id.*

122. *AI Watch: Global regulatory tracker – United States*, WHITE & CASE LLP (Dec. 18, 2024), https://www.whitecase.com/insight-our-thinking/ai-watch-global-regulatory-tracker-united-states#:~:text=As%20noted%20above%2C%20there%20is,or%20deployers%20of%20AI%20systems.

123. Nagumotu, *supra* note 56, at 137.

124. UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 17.

125. *Id.*

126. Sasha Rosenthal-Larrea, et. al, *AI Deepfakes: Unauthorized Depictions and Protection of Property Rights to Name, Image and Likeness*, ALM N.Y.L.J. (June 3, 2024), https://www.law.com/newyorklawjournal/2024/06/03/ai-deepfakes-unauthorized-depictions-and-protection-of-property-rights-to-name-image-and-likeness/

protecting individuals who do not use their identity for commercial gain.[127]

The inherent limitation of existing IP and right-of-publicity doctrines to combat this technology persists due to the narrow scope to which they apply, prompting the introduction of new legislation to help bridge some of these gaps. For instance, a bill proposed in early 2024 seeks to establish an IP right in one's likeness by prohibiting the unauthorized creation of digital replicas indistinguishable from that of a person's real identity.[128] Labeled the NO-AI FRAUD Act[129], the bill seeks to establish federal protections synonymous with that of state right of publicity laws, and includes numerous factors to accommodate First Amendment concerns.[130] While the bill represents an encouraging shift towards the issue of AI generated content being addressed on a national scale, its proposal is not without criticism.[131] Particularly, the exemptions contained therein are seen in opposition as limiting the application of First Amendment defenses.[132] Unlike the specifically enumerated fair use exceptions set forth within the Copyright Act,[133] the NO-AI FRAUD Act fails to specify the kind of activity subject to fair use balancing.[134] In the absence of clear exceptions, the proposal risks overextending its reach and inadvertently censoring free expression.[135] Moreover, the right of publicity generally only applies in situations where an individual's identity is being utilized for commercial gain, leaving the harms that arise from non-commercial use largely unaddressed. Despite the fact that the proposal has faced criticism, its introduction aligns with the prevailing sentiment that the right of publicity can serve as an immediate mechanism

127. *Id.*

128. UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 26.

129. H.R. 6943, 118th Cong. (2024).

130. UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 27.

131. Rosenthal-Larrea, et. al, *supra* note 178.

132. Katherine Klosek, *No Frauds, No Fakes…No Fair Use?*, ASS'N OF RESEARCH LIBRARIES (Mar. 1, 2024), https://www.arl.org/blog/nofraudsnofakes/ (last updated Apr. 19, 2024 12:43 PM).

133. *See generally* 17 U.S.C. § 107.

134. Rosenthal-Larrea, et. al, *supra* note 126.

135. Klosek, *supra* note 77.

to combat the harms of digitally-altered media.[136] In order to strike an effective balance between these competing interests, however, it is crucial that such legislation specifies the conduct it seeks to address. Albeit while the right of publicity carries its own limitations,[137] the inclusion of narrowly tailored prohibitions can help it survive constitutional scrutiny, safeguard constitutionally protected expression, and address gaps in existing regulatory frameworks.[138]

IV. CONCLUSION

The emergence of AI and ML represents one of the most disruptive technological events of our lifetime. The inevitable pace at which this technology is advancing necessitates proactive regulation to mitigate the harms it is capable of imposing while also ensuring the United States is not left behind in the AI arms race. As this article suggests, the best and most immediate course of action is to establish federal protections that align with traditional IP and right of publicity frameworks. Such an intentional regulatory approach would not only promote technological advancement and maintain the principles of fair use and free expression, but also provide much-needed safeguards that have become apparent in an evolving digital landscape.

136. *See generally* UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 57 (USCO recommending that the federal government establish a transferrable right "that protects all individuals during their lifetimes from the knowing distribution of unauthorized digital replicas.").

137. *E.g.,* Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 807 (Cal. 2001) (holding that the right of publicity can't be used as a means to censor "disagreeable portrayals.").

138. *See generally* UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 57.

TOO OLD FOR THE OVAL? THE ADEA'S IMPACT ON PRESIDENTIAL AGE LIMITS

Maya Jones*

> "It's just a denial of equal protection. It might be law, but it's not justice. It's completely unfair. Justice for all. That's all we want." – Janice Clark[1]

INTRODUCTION

They say age is just a number, but in our society, it's much more than that — it's a gatekeeper. At 16, you can drive with a license;[2] at 21, you can drink;[3] and, at 35, you can run for president.[4] Age sets boundaries, shaping what we can and cannot do. This conversation surrounding age and its correlation with capabilities has become more prevalent than ever as questions have been raised as to whether President Joe Biden is too old for the Oval Office. So, the question remains, "is age a fair measure of capability, or have we allowed numbers to overshadow the qualities that truly define leadership?"

On November 3rd, 2020, Election Day for Joe Biden and Donald Trump arrived, a day marked by the lingering anxieties of the COVID-19 pandemic and the ongoing echoes of Black Lives

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2. *Driving Age by State: A Complete Guide to Graduated Driver Licensing (GDL) Programs*, THOMPSON LAW INJURY LAWYERS, https://1800lionlaw.com/driving-age-by-state/.

3. *The 1984 National Minimum Drinking Age Act*, NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM: ALCOHOL POLICY INFORMATION SYSTEM, https://alcoholpolicy.niaaa.nih.gov/the-1984-national-minimum-drinking-age-act.

4. U.S. CONST. art. II, § 1, cl. 5.

Matter protests.[5] In the end, Joe Biden secured the 2020 election with 306 Electoral College votes and a margin of over seven million in the popular vote.[6]

In April 2023, former President Biden announced his bid for reelection.[7] However, the first Presidential debate on June 27th would prove to be a turning point.[8] Despite having enough delegates to win renomination, Biden appeared fatigued and stumbled over key points, sparking a wave of concern.[9] The following morning, major networks and newspapers began questioning his fitness for office, igniting a political firestorm.[10] Concerns over his health and chance for reelection dominated the mainstream media.[11] Consequently, President Biden ended his candidacy.[12] Vice President Kamala Harris swiftly stepped in as a younger candidate, determined to secure the Democratic Party's path to victory.[13] For Harris, this was a full-circle moment. After her faltered 2020 campaign, she now had the opportunity to rewrite her political legacy.[14] Her adept use of social media, particularly TikTok,[15] garnered significant attention, helping her connect with a broad audience and boosting her approval ratings.[16] With immense support from the public and higher approval

5. Editors of the Encyclopedia, *United States Presidential Election of 2020*, ENCYCLOPEDIA BRITANNICA, (Nov. 26, 2024), https://www.britannica.com/event/United-States-presidential-election-of-2020.

6. *Id*.

7. *Id*.

8. Zeke Miller et. al., *A Halting Biden Tries to Confront Trump at Debate but Sparks Democratic Anxiety about His Candidacy*, AP NEWS, (June. 28, 2024, 1:21 AM), https://apnews.com/article/bidentrumppresidentialdebate-0e7577e9a354a69f50675494fea54ca9.

9. Seung Min Kim, *Kamala Harris is Now Democratic Presidential Nominee, Will Face off Against Donald Trump this fall,* AP NEWS*, (August 5, 2024, 11:21 PM), https://apnews.com/article/harris-democratic-presidential-nomination-eb43b6b346cc644b2d195315cb2bfb20*.

10. *Id*.

11. *Id*.

12. *Id*.

13. Miller et. al., *supra* note 8.

14. *Id.*

15. Meg Kinnard & Curtis Yee, *Harris Steps into the Limelight. And the Coconut Trees and Memes have Followed*, AP NEWS (July 23, 2024, 4:27 PM), https://apnews.com/article/kamala-harris-brat-coconut-meme-bc8988aa24a836b09dabf53ba4028295

16. *Id*.

ratings than Biden, it appeared that Vice-President Harris was going to win the Oval Office.[17]

As Election Day 2024 unfolded, the nation watched with anticipation.[18] Trump secured 312 Electoral College votes, surpassing the 270 needed to reclaim the White House.[19] Kamala Harris secured 226 votes, leaving her campaign supporters reflective of what had unfolded. In the popular vote, Trump garnered fewer votes with 77.2 million votes to Harris' 75 million votes—a result that underscored the nation's deeply divided political landscape.[20]

The irony was unmistakable: Biden, who withdrew from the race due to concerns about his age at 82 years old, was succeeded by a 78-year-old Trump.[21] President Trump, who assumed office on January 6, 2025, has surpassed Biden as the oldest individual to hold the position in the Oval Office.[22] It is worth remembering that Trump will reach the age of 82 at the end of his presidency.[23] Yet, the debate over age in the Oval Office sparked a broader cultural reckoning: What truly defines a leader's ability to govern? Is it merely a matter of years, or does it hinge on qualities like vision, wisdom, and adaptability? To what extent does ageism – prejudice against individuals based on their age – influence the public opinion of the president? As the nation prepared for

17. Megan Brenan, *At 45%, Harris' Approval Rating Is Higher Than Biden's*, GALLUP: POLITICS, (Oct. 16, 2024), https://news.gallup.com/poll/652178/harris-approval-rating-higher-biden.aspx.

18. Caroline Linton, *The Electoral College Votes to Confirm Results for the 2024 Presidential Election. Here's what to know*, CBS NEWS: POLITICS, (Dec. 17, 2024, 5:22 AM), https://www.cbsnews.com/news/electoral-college-vote-results-2024/.

19. *Id.*

20. *Id.*

21. Mini Racker, *Why Biden's Age Has Become a Bigger Deal Than Trump's*, TIME: POLITICS, (Feb. 10, 2024, 8:00 AM), https://time.com/6693305/biden-age-memory-trump-campaign/.

22. Peter Baker, *As Debate Looms, Trump Is Now the One Facing Questions About Age and Capacity*, THE NEW YORK TIMES: NEWS ANALYSIS, (Nov. 6, 2024), https://www.nytimes.com/2024/09/09/us/politics/debate-trump-age-capacity.html.

23. Victoria Bisset et. al., *Trump is the Oldest Person to be Elected President: U.S. Presidents, by Age,* THE WASHINGTON POST: NATIONAL, (Nov. 8, 2024), https://www.washingtonpost.com/politics/2024/11/08/oldest-us-presidents-trump/.

Trump's return to the Oval Office, the age question remained more relevant than ever.[24] Are the spectators correct? Is Joe Biden too old for the Oval Office? — or has America yet to reconcile its evolving views on leadership, age, and power?

This comment explores the complex issue of ageism and the science of aging, challenging stereotypes about older leaders' capabilities. It questions whether age discrimination is a genuine issue or merely used as a political proxy. This comment concludes by advocating for an age limit on the Presidency, either through constitutional amendment or statutory age limit. If amended, the Constitution should set a maximum age of 75, determined by a comprehensive assessment of psychological, mental, and physical health.[25] Alternatively, if Congress imposes an age limit, it must be based on a nondiscriminatory, legitimate purpose under the Age Discrimination in Employment Act of 1967 ("ADEA").

I. FOUNDING FATHERS AND THEIR THOUGHTS ON AGE AND THE PRESIDENCY

As it turns out, the Founding Fathers such as Thomas Jefferson and George Washington were born into a world that respected age, but grew old in the world they had created—one in which younger men were assumed to reign supreme. After the American Revolution, Americans embraced a vision embracing youth as the guarantor of creativity and vitality. At the same time, they increasingly disparaged old age and the elderly. And yet, the founding generation waffled when it came to the age profile and expectations of their own political leadership. They were often younger than they had been before the Revolution, yet presidents were well into late middle age before taking office. What did the Founders think about aged political leadership? How might that shed light on our contemporary dilemmas?[26]

While it's challenging to pinpoint the exact thoughts of the Founding Fathers, some scholars offer valuable insights into the historical context at that time. Costas Panagopoulos, a political

24. Linton, *supra* note 19.

25. *Id*.

26. Rebecca Brannon, *The Founding Fathers on Aging Political Leadership*, OAK PARK TEMPLE, (Nov. 12, 2020 7:30 PM), https://www.oakparktemple.org/event/the-founding-fathers-on-aging-political-leadership.html.

science professor at Northeastern University and Harvard University graduate, stated that "[the minimum age requirement] was adopted when the life expectancy in America was about that (mid-30s), on average. Clearly, the Founders expected presidents would be older, and likely experienced as a result."[27] Did the Founding Fathers think anyone was too old for the Oval Office? Likely not. In their time, ageism — the prejudice against individuals based on age — wasn't a recognized concept, and experience and wisdom, often linked to age, were highly valued. The Founders likely set a minimum age of 35 for the presidency to ensure a baseline of maturity and experience but chose not to impose an upper limit, reflecting the societal norms of the 18th century. However, we now live in an era of longer lifespans and advancements in healthcare. While the Founding Fathers valued experience in leadership, today's discussions around age and the presidency have evolved. This modern dilemma forces us to strike a balance between respecting experience and addressing the contemporary challenges of ageism in politics.

II. AGEISM IN THE POLITICAL REALM

A. Ageism and the Science Behind Aging: Understanding the Impact

The term ageism was coined by Dr. Robert Butler, a well-respected physician and the first Director of the National Institute on Aging.[28] According to the World Health Organization, ageism is defined as "the stereotypes (how we think), prejudice (how we feel) and discrimination (how we act) towards others or oneself based on age."[29] Essentially, it is where certain individuals are mistreated or discriminated against because of their age.[30] This

27. Mary Cunningham & Taylor Johnston, *See the Full List of the Youngest Presidents in U.S. History*, CBS NEWS (Nov. 1, 2024, 7:00 AM), https://www.cbsnews.com/news/youngest-us-president/.

28. Patricia A. Fletcher, *What is Ageism*, NATIONAL INSTITUTES OF HEALTH (May 1, 2024), https://www.edi.nih.gov/blog/opinion/what-ageism.

29. *Ageing: Ageism*, WORLD HEALTH ORGANIZATION, (Mar. 18, 2021), https://www.who.int/news-room/questions-and-answers/item/ageing-ageism.

30. *Id.*

can show up in medical treatment, workplace, or mainstream media.[31]

A concern among many is that imposing an age limitation on Presidents would not only establish a maximum age, but it could also portray older individuals in a negative light, a point that will be explored later.[32] As with any form of discrimination, ageism is a result of prejudice and stereotypes against a category of people.[33] Joe Biden faced age-related discrimination when social media was flooded with memes and euphemisms, including the nickname 'sleepy Joe.'[34]

With the emergence of the term ageism, laws addressing age-based discrimination began to take shape, such as the Age Discrimination in Employment Act of 1967 and the establishment of the Equal Employment Opportunity Commission ("EEOC").[35] Over time, societal attitudes have shifted—from viewing age as merely a number, to disregarding it as a consideration, to now recognizing it as a potential basis for discrimination. This evolution prompts a critical question: How far should we go in addressing age as a factor in the presidential candidacy?

III. FEDERAL STATUTES PROTECTING AGE DISCRIMINATION

A. Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act of 1967 is a federal law that prohibits employment discrimination against individuals who are 40 years of age or older.[36] This law, which is enforced by the EEOC,[37] has undergone subsequent amendments

31. Kirsten Weir, *Ageism is one of the last Socially Acceptable Prejudices. Psychologists are Working to Change that*, AMERICAN PSYCHOLOGICAL ASSOCIATION: MONITOR ON PSYCHOLOGY, (Mar. 1, 2023), https://www.apa.org/monitor/2023/03/cover-new-concept-of-aging.

32. *Id*.

33. *Id.*

34. Andrew Stanton, *'Sleepy Joe' Becomes a Reality*, NEWSWEEK, (July 5, 2024), https://www.newsweek.com/sleepy-joe-becomes-reality-1921610.

35. *Age Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/age-discrimination.

36. *Id*.

37. *What Employers need to know about Age Discrimination at Work*, THOMSON REUTERS: ARTICLE (June 24, 2024),

over the years.[38] Initially, it covered workers aged 40 to 75, but subsequent changes raised and eventually "eliminated the upper age limit, ending mandatory retirement for nearly all workers."[39]

The Act itself recognizes the prevalence of setting arbitrary age limits and the potential disadvantages faced by older individuals. The purpose of the Act is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."[40]

B. Age Discrimination and The Oval Office

While the ADEA protects older workers from discrimination in traditional employment, no such safeguards—or limitations—exist for the presidency. This lack of regulation has sparked debates about the role of age in presidential performance. In 2023, the Pew Research Center made an interesting discovery: the median age for all U.S. Presidents is 55 years old.[41] Furthermore, statistics reveal that out of the 21 presidents who were reelected, the median age is 58 years.[42] As such, it is important to analyze the physical, cognitive, and mental aspects of aging on individuals, especially someone holding a high position of office. The complexities present a dual perspective: one view holds that advancing age correlates with a decline in cognitive abilities, while the other side argues that although cognitive decline may occur, it is often accompanied by a growth in wisdom and expertise.[43]

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https://legal.thomsonreuters.com/en/insights/articles/what-is-the-age-discrimination-in-employment-act.

38. *Id*.

39. David Neumark, *The Past and Future of the Age Discrimination in Employment Act*, THE BULLETIN ON AGING & HEALTH (2011).

40. Age Discrimination in Employment Act of 1967, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION https://www.eeoc.gov/statutes/age-discrimination-employment-act-1967.

41. Katherine Schaeffer, *Most U.S. Presidents have been in their 50s at Inauguration*, PEW RESEARCH CENTER: SHORT READS (Oct. 10, 2023), https://www.pewresearch.org/short-reads/2023/10/10/most-us-presidents-have-been-in-their-50s-at-inauguration/

42. *Id*.

43. Gary J. Schmitt & Bradley Schurman, *Matter of Debate: Should There Be an Age Limit for Presidents*? AMERICAN ENTERPRISE INSTITUTE (Mar. 10,

IV. SCIENTIFIC EVIDENCE

A. Aging on the Brain

In early childhood, the brain rapidly forms neural connections, creating over a million new ones per second.[44] By age six, the brain reaches about 90% of its adult size.[45] However, starting in the 30s and 40s, the brain begins to shrink, and this shrinkage accelerates by age 60.[46]

An article by the National Library of Medicine reports that aging can affect brain size, vasculature, and cognition.[47] The volume of the brain begins to decline by the age of 70.[48] A cross-sectional study compiled "neuroimaging data from a total of 619 healthy aging individuals aged 18 to 88 years from the Cambridge Centre for Ageing and Neuroscience repository, excluding participants with poor image quality, excessive head motion or rotation, missing or incomplete data."[49] The results found that "in older individuals, we observed reduced integration and segregation within the frontal-occipital regions and the cerebellum along the brain's medial axis."[50] Additionally, "functional brain networks displayed decreased integration and increased segregation in the prefrontal, centrotemporal, and occipital regions, and the cerebellum."[51] "An age-related decline in structure–function coupling was observed within sensory-motor, cognitive, and subcortical networks…. Overall, the network

2024), https://www.aei.org/articles/matter-of-debate-should-there-be-an-age-limit-for-presidents/.

44. *Changes that Occur to the Aging Brain: What Happens when we get* Older, COLUMBIA MAILMAN SCHOOL OF PUBLIC HEALTH (June 10, 2021), https://www.publichealth.columbia.edu/news/changes-occur-aging-brain-what-happens-when-we-get-older.

45. *Id*.

46. *Id*.

47. R. Peters, *Ageing and the brain*, 82 POSTGRADUATE MEDICAL JOURNAL 964 (2006).

48. *Id*.

49. Maedeh Khalilian et. al., *Age-Related Differences in Structural and Resting-State Functional Brain Network Organization Across the Adult Lifespan: A Cross-Sectional Study*, 5 AGEING BRAIN 100105 (2024).

50. *Id*.

51. *Id*.

vulnerability decreased significantly in subjects older than 70 in both networks."[52]

"Although some studies show that one-third of older adults struggle with declarative memory — that is, memories of facts or events that the brain has stored and can retrieve — other studies indicate that one-fifth of 70-year-olds perform cognitive tests just as well as people aged twenty (20)."[53]

Interestingly enough, there are exceptional 80-year-olds that have memories as great as 20- year-olds: they are known as Superagers.[54] Research shows that the brains of Superagers shrink more slowly than those of others their age, which helps them resist typical memory loss associated with aging.[55] This challenges the idea that cognitive decline is an unavoidable part of getting older.[56]

While scientific evidence has proven relative cognitive decline in older individuals, proponents against ageism often recognitive the harmful effects that these narratives create.[57] Dr. Tracey Gendron at Virginia Commonwealth University believes that society concentrates on the negative effects of aging instead of realizing that "older age can benefit decision-making, critical thinking, resilience and coping skills. The knowledge and experience we gain as we age help us make more thoughtful and balanced decisions and weigh options and opinions."[58] She explains that research shows older adults use both sides of the brain when performing tasks.[59] While fluid intelligence, which helps process new information, tends to decline with age, older

52. *Id*.

53. Seunggu Han, *What Happens to the Brain as we Age?* MEDICAL NEWS TODAY (May 26, 2023), https://www.medicalnewstoday.com/articles/319185.

54. *Id*.

55. *Id*.

56. *Id*.

57. *Should Age Matter in Politics? VCU Professor Discusses Ageism in the 2024 Presidential Election and Society*, VIRGINIA COMMONWEALTH UNIVERSITY https://chp.vcu.edu/about/featured-news/articles/should-age-matter-in-politics-vcu-professor-discusses-ageism-in-the-2024-presidential-election-and-society.html.

58. *Id*.

59. *Id*.

adults can still perform just as well as younger individuals on tasks when given more time.[60]

"On a positive note, there's growing evidence that the brain's continued ability to change and evolve enables us to manage new challenges and respond better to life experiences. This adaptability, called neuroplasticity, can be thought of as a structural remodeling of the brain."[61]

Cognitive decline can have serious implications for individuals in high-stakes, intellectual professions, including the presidency. "Attorneys with cognitive deficits might not be able to analyze their cases' strengths and weaknesses, formulate appropriate arguments, or understand opposing counsels' arguments. These problems, in turn, may lead to ethical misconduct, disciplinary measures, and legal malpractice claims."[62] Similarly, federal judges with lifetime appointments may face challenges in their decision-making if cognitive abilities decline.[63] In particular, federal judges with senior status (at least 65 years old) may continue work reduce caseloads while on a salary.[64]

In other fields, age-related cognitive concerns have prompted structured interventions.[65] For instance, the Federal Aviation Administration mandates psychological testing for pilots.[66] The Yale New Haven Hospital faced legal action for requiring neuropsychological evaluations for employees aged 70 and older.[67] Studies also show that up to 28% of physicians aged 70 and above may experience mild cognitive impairment or

60. *Id*.

61. Dr. Jennifer Baker-Porazinski, *How your Brain Changes with Age*, CANYON RANCH (Apr. 6, 2022), https://www.canyonranch.com/well-stated/post/how-your-brain-changes-with-age/.

62. Sharona Hoffman, *Cognitive Decline and the Workplace*, 57 WAKE FOREST L. REV., 115, 131-136, (2022).

63. *Id* at 133.

64. *Id*.

65. Hoffman, *supra* note 62, at 121.

66. FAA Exams, *Neurocognitive Specialty Group*, https://www.neurocognitivespecialtygroup.com/faa-exams/#:~:text=The%20FAA%20requires%20these%20evaluations,safety%20and%20decision%2Dmaking%20ability.

67. Baker-Porazinski, *supra* note 62.

dementia, which can affect their ability to provide safe and effective care.[68]

While scientific research provides valuable insights into how aging affects cognitive and physical abilities, the real challenge lies in translating these findings into policy. If lawmakers were to act on these concerns, they would need to consider whether amending the Constitution or passing new legislation is the appropriate path forward. But what would such a change look like in practice?

V. PATHS TO REFORM: AMENDING THE CONSTITUTION OR LEGISLATIVE ACTION

A. Amending the Constitution

In order to amend the United States Constitution, Article V outlines that the amendment must be proposed either by a two-thirds majority of both the House and Senate or by a constitutional convention called by two-thirds of the state legislatures.[69] Once proposed, the amendment must then be ratified by three-fourths of the state legislatures or by conventions in three-fourths of the states.[70] In this case, establishing an upper-age limit for the presidency under Article II would require this rigorous process. The author proposes a maximum age limit of 65, as the median age of reelection for U.S. Presidents is 58 years old,[71] – meaning by the end of a second term, they would be around 62 years old. Additionally, the author advocates for mandatory psychological, mental, and physical evaluations for all U.S. presidents to ensure assessments are fair, objective, and relevant to the demands of the office.

B. Passing a Federal Statute

The Age Discrimination in Employment Act of 1967 prohibits age discrimination in employment, protecting individuals who are 40 years of age or older from discrimination

68. Baker-Porazinski, *supra* note 62.
69. U.S. CONST. art. V.
70. *Id.*
71. Schaeffer, *supra* note 42.

based on their age.[72] This would not only protect the rights of the President, but also uphold the values of fairness and equality in our democratic system.

C. Does the Age Discrimination in Employment Act of 1867 apply to the Presidential Office?

The President of the United States is not subject to the Age Discrimination in Employment Act of 1967.[73] The Act states that "the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof."[74] In this case, the President is elected to public office by qualified voters, thereby excluding him from the protections against age discrimination afforded under the ADEA.[75]

However, the author argues that the ADEA should be applicable to Presidents because it qualifies as a job in various ways. The Act broadly defines a job to include "all state employees except those excluded by one of the exceptions in 29 USCS 630(f)."[76] This expansive definition allows the Presidency to fall within its scope. Like many other hard-working Americans, The President has clearly defined duties and responsibilities that are outlined in the Constitution: acts as Commander-in-Chief, appoints inferior and superior officers, and executes treaties.[77] Congress sets the President's salary, and under the Former Presidents Act, the President receives a lifetime of benefits including pension, medical care, and health insurance.[78] Additionally, the President's performance is highly evaluated by other branches through the checks and balances system, the public, and the media.[79] Such characteristics closely align with the attributes of other jobs, reinforcing that the Presidency fits within the definition of a job under the ADEA.

72. Peters, *supra* note 48.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991).
77. U.S. CONST. art. II, § 2
78. 3 U.S.C. § 102 (1958).
79. *Branches of the U.S. Government*, USAGOV (Sept. 8, 2024), https://www.usa.gov/branches-of-government.

D. What test/analysis should the courts employ to determine whether a law is a violation or permissible under the Age Discrimination in Employment Act of 1967?

Now that we've determined that the Presidency could fit within the definition of a job under the ADEA, the following is the analysis that the courts must use to determine if the age discrimination has occurred. "To establish age discrimination, a plaintiff must prove by the preponderance of the evidence that age was the but-for cause of the employment decision."[80] If the plaintiff does not allege direct evidence of age discrimination, then courts will analyze the claim under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*.[81] To establish a prima facie case, a plaintiff must show she (1) was at least 40 years old, (2) suffered an adverse employment action, (3) was meeting [her] employer's legitimate expectations at the time of the adverse employment action, and (4) was replaced by someone substantially younger." If the plaintiff successfully establishes a prima facie case, the "the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the employer proffers such a reason, the burden shifts back to the plaintiff to show that the proffered "reason was mere pretext for discrimination" and that "age was the 'but-for' cause of the challenged adverse employment action.[82]

The court defined an adverse employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[83] Here, a significant change in the President's employment status may be resignation or impeachment due to a poor performance or inculpabilities. If Congress imposed an age limit of 80, this would qualify as an adverse employment action, as President Trump would reach 80 during his current term.

Moreover, the adverse action "must have occurred under circumstances that raise a reasonable inference of unlawful

80. *Starkey v. Amber Enters.*, 987 F.3d 758, 763 (8th Cir. 2021).
81. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
82. *Id.*
83. *Laster v. City of Kalamazoo*, 746 F.3d 714, 727 (6th Cir. 2014).

discrimination."[84] In other words, the adverse action must not be merely a minor inconvenience of job responsibilities.[85] In this case, if Congress were to impose an age limitation on the Oval Office, the law must be for a legitimate, nondiscriminatory reason that will overcome the adverse employment action.

Courts have upheld the employer's action as a legitimate, nondiscriminatory reason where the employee had poor work performance, such as lack of initiative and numerous mistakes as outlined in *Ray v. Tandem Computers; Kelly v. Signet Star Re, LLC*.[86] Similarly, in *Kelly v. Signet Star Re, LLC*, Kelly, a 55-year-old Vice President and underwriter, was terminated for making numerous mistakes and failing to meet performance standards.[87] The Court cited Kelly's inadequate performance as a valid, nondiscriminatory reason for termination.[88] The Court stated in *Kelly* that "poor job performance is no doubt a legitimate, nondiscriminatory reason for termination."[89] Therefore, it's likely that Congress could justify poor job performance as a legitimate, nondiscriminatory purpose for an adverse action.

The ADEA has also considered mandatory age retirement for certain positions, such as firefighters, and law enforcement officers to be a legitimate, nondiscriminatory reason for the adverse action due to the high-stress nature of the job or safety-sensitive positions.[90] Certain jobs require safety and efficiency to ensure high performance, especially where physical capabilities are a necessity.[91]

In the case of *W. Air Lines v. Criswell*, the Court stated that "in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all

84. *Gaines v. Balt. Police Dep't*, 657 F. Supp. 3d 708, 723 (D. Md. 2023).

85. *Id*.

86. *Ray v. Tandem Computs*., 63 F.3d 429 (5th Cir. 1995); *Kelly v. Signet Star Re, LLC*, 971 F. Supp. 2d 237 (D. Conn. 2013).

87. *Kelly v. Signet Star Re, LLC*, 971 F. Supp. 2d 237, 247 (D. Conn. 2013).

88. *Id*. at 248.

89. *Id*.

90. 1 FED. EQUAL EMP. OPPORTUNITY PRAC. GUIDE § 17.02 (2024).

91. Ezekiel J. Emanuel, *The Fairest Way to Keep Cognitively Declining People from Being Elected*, THE ATLANTIC: HEALTH https://www.theatlantic.com/health/archive/2024/09/age-limits-president/679726/.

employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently."[92]

Furthermore, age stereotypes or the plaintiff's age cannot justify a challenged decision or policy, and employers may not use this reasoning to justify adverse actions.[93]

The Supreme Court has defined legitimate expectations at the time of employment as the employer's perception of whether the employee was performing their job duties satisfactorily at the time the adverse action was taken.[94] The employee's own perception is irrelevant.[95] However, a plaintiff may offer evidence to rebut the employer's perception.[96] A plaintiff need not show that "he was a perfect or model employee. Rather, a plaintiff must show that she was qualified for the job and that she was meeting her employer's legitimate expectations."[97] "An employer's expectations of its employees are "legitimate" when they are honestly held; whether the employee agrees with those expectations is not the test."[98]

In the case of *Jones v. Calvert Group, Ltd.*, Plaintiff Linda Jones was a former African American employee of Defendant Calvert Group who was bringing a claim of age, sex, and race discrimination based under Title VII and the ADEA.[99] Plaintiff received negative performance reviews from 2003-2006.[100] The Court ruled that she failed to produce evidence that she met or

92. *W. Air Lines v. Criswell*, 472 U.S. 400, 415 (1985).

93. 8 BUSINESS ORGANIZATIONS WITH TAX PLANNING § 103E.06 (2024).

94. *Jones v. Eli Lilly & Co.*, Civil Action No. ADC-20-3564, 2023 U.S. Dist. LEXIS 62362, at *14-15 (D. Md. Apr. 7, 2023)

95. *Id.*

96. *Id.*

97. *Palmer v. Liberty Univ., Inc.*, Nos. 21-2390, 21-2434, 2023 U.S. App. LEXIS 16635, at *25 (4th Cir. June 30, 2023).

98. *Brown v. City of Columbia*, No. 3:10-2860-JFA-PJG, 2012 U.S. Dist. LEXIS 125864, at *9 (D.S.C. July 18, 2012).

99. *Jones v. Calvert Grp., Ltd.*, No. DKC 06-2892, 2010 U.S. Dist. LEXIS 127715, at *1-2 (D. Md. Dec. 3, 2010).

100. *Id.*

exceeded her employer's expectations.[101] To the contrary, the Defendant has produced numerous evidence to show plaintiff's underperformance.[102] The Plaintiff's performance before her promotion is irrelevant to determining whether she was adequately performing her job at the time of termination.[103] The Maryland District Court also ruled that there was a legitimate, nondiscriminatory purpose for the adverse employment action (termination) because of the plaintiff's poor work performance.[104]

In a similar fashion, the legitimate expectations for the Presidential Office are outlined in the Constitution, including leadership, executing laws, and fulfilling other duties.[105] These expectations are honestly held as they were established by the Founding Fathers through a formal process.[106] Here, the President need not be perfect, but he must demonstrate that he meets these legitimate expectations. In this case, if Congress were to impose an age limitation statute, it would bear the burden of proving the President's failure to perform his constitutional duties satisfactorily.

Just as employees must demonstrate that they meet their employer's legitimate expectations, the President must fulfill the constitutional duties outlined for the office. If challenged, the burden lies with the opposing party—in employment cases, the employer, and in constitutional matters, Congress—to prove failure to meet these expectations.

E. Analysis of Presidential Age Limitations under the Age Discrimination in Employment Act of 1967

A legitimate, nondiscriminatory purpose for Congress to impose the law may be to protect the integrity of the Oval Office by ensuring that the President can safely and efficiently perform his duties. If we impose an age limitation on the Presidential Office, then it is not a violation of the ADEA as long as Congress establishes a legitimate, nondiscriminatory purpose for the law that is not based on age or stereotypes.

101. *Jones v. Calvert Grp., Ltd.*, *supra* note 100, at 18.
102. *Id.*
103. *Id.*
104. *Jones v. Calvert Grp., Ltd.*, *supra* note 100, at 20.
105. *U.S. CONST.* art. II, supra note 78, § 2.
106. Brannon, *supra* note 27.

F. What laws would this effect?

The issue of age and leadership extends beyond just the Presidency — it has implications for positions such as Senators, Representatives, and federal judges, including those in Louisiana. This debate also touches on whether Supreme Court Justices should have term limits.

Recently, there has been growing debate over implementing term limits for Supreme Court Justices.[107] President Joe Biden has proposed reforms to the Supreme Court, including term limits, citing concerns about "an extreme court... weaponized by those seeking to carry out an extreme agenda for decades to come."[108] Recent decisions by the current Supreme Court have drawn significant attention, including the overturning of Roe v. Wade.[109] The ACLU criticized these decisions, stating, "this is a court ready to create brand new constitutional protections for former President Trump, while turning away the claims of the powerless."[110]

In response, Representative Jo Khanna introduced the *Supreme Court Term Limits and Regular Appointments Act of 2021*, which establishes 18-year-terms for Justices, and the President would be required to appoint a new Justice every two years.[111]

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[107] Chris Walker, *Two-Thirds of Americans Say Supreme Court Justices Should Have Term Limits*, TRUTH OUT: POLITICS & ELECTIONS, (Aug. 8, 2024), https://truthout.org/articles/two-thirds-of-americans-say-supreme-court-justices-should-have-term-limits/?gad_source=1&gclid=CjwKCAiAg8S7BhATEiwAO2-R6nh970WfqZHLB35grJ_q_blHne6Q3Y7gX_FpQQRdIAXgSKqdwEejsxoCUTIQAvD_BwE.

[108] Jeff Mason & Andrea Shalal, *Biden Proposes Term Limits, Code of Conduct to Rein in 'Extreme' Supreme Court*, THOMSON REUTERS, (July 29, 2024 5:51 PM), https://www.reuters.com/world/us/biden-propose-supreme-court-term-limits-binding-code-conduct-2024-07-29/.

[109] Devon Ombres, *The Major SCOTUS Cases: Threats to the Rule of Law Posed by the Supreme Court's 2023 Term*, AMERICAN PROGRESS, (June 18, 2024), https://www.americanprogress.org/article/the-major-scotus-cases-threats-to-the-rule-of-law-posed-by-the-supreme-courts-2023-term/.

[110] David Cole, *Supreme Court Term Ends with Win for Trump, First Amendment Rights*, AMERICAN CIVIL LIBERTIES UNION: NEWS & COMMENTARY, (July 10, 2024), https://www.aclu.org/news/civil-liberties/supreme-court-term-ends-with-win-for-trump-first-amendment-rights.

[111] H.R. 5140, 117th Cong. (2021).

This debate is not limited to the federal level. In Louisiana, judges like Janice Clark and Harry Cantrell have challenged the state's mandatory retirement age of 70, arguing that it is unconstitutional.[112] Both were unsuccessful in court, and Darleen Jacobs, representing Judge Cantrell, argued that "age is just a number" and that many lawyers over 70 continue to practice.[113] The Court ruled that it found no merit in Clark's argument and that the mandatory retirement age could only be changed by state Constitution.[114] In 2022, a proposal to raise the retirement age failed. Lawmakers like Representatives Larry Frieman and Abita Springs have pointed out that competent judges are being "aged out," making it difficult to find candidates willing to run for judgeships.[115] Despite several failed attempts to amend the law, including a bill by former Governor John Bel Edwards,[116] the Louisiana Supreme Court has defended the mandatory retirement age, citing the logistical burden of special elections and temporary judicial appointments whenever a judge reaches 70.[117]

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[112] *New Orleans Judge Harry Cantrell, 72, Challenges Judicial Age Cap in Lawsuit,* WDSU NEW ORLEANS, (May 1, 2020 9:39 AM), https://www.wdsu.com/article/new-orleans-judge-harry-cantrell-72-challenges-judicial-age-cap-in-lawsuit/32339231.

[113] Andrea Gallo & Matt Sledge, *Well-Known Judges Janice Clark, Harry Cantrell can't run again, new Supreme Court Ruling Says*, THE ADVOCATE, (July 22, 2020), https://www.theadvocate.com/baton_rouge/news/courts/well-known-judges-janice-clark-harry-cantrell-cant-run-again-new-supreme-court-ruling-says/article_0c631866-cbd7-11ea-95f4-57f9e8868f78.html.

[114] Joe Gyan Jr., *Told She's Too Old to Run Again, Baton Rouge Judge Janice Clark Says it's 'Voter Suppression'*, THE ADVOCATE, (July 29, 2020), https://www.theadvocate.com/baton_rouge/news/politics/elections/told-shes-too-old-to-run-again-baton-rouge-judge-janice-clark-says-its-voter/article_bdac9f14-d1a6-11ea-b163-2f3dc16616fe.html.

[115] Greg Larose, *Attempt to Raise Retirement Age for Judges in Louisiana Fails*, LOUISIANA ILLUMINATOR, (May 31, 2022 3:48 PM), https://lailluminator.com/briefs/retirement-louisiana-judges/.

[116] *Louisiana Mandatory Judicial Retirement Age, Amendment 5,* BALLOTPEDIA, (2024), https://ballotpedia.org/Louisiana_Mandatory_Judicial_Retirement_Age,_Amendment_5_(2014).

[117] Michael Carroll, *Louisiana High Court Ends Debate Over Mandatory Judicial Retirement Age*, LOUISIANA RECORD, (Aug. 3, 2020), https://louisianarecord.com/stories/544507277-louisiana-high-court-ends-debate-over-mandatory-judicial-retirement-age#:~:text=%E2%80%9CHowever%2C%20despite%20these%20inequities%2C,age%20issue%20in%20the%20future.

While debates around age and leadership continue, scientific research offers a nuanced perspective on the cognitive abilities of older adults, which is that older individuals can still perform as well as younger individuals when more time is given.[118] Though it's well-established that cognitive decline can occur with age, many retain the ability to contribute meaningfully to leadership roles. Research suggests that, rather than assuming older individuals are incapable, we should consider their continued adaptability and capacity to bring valuable perspectives to positions of power.[119] However, concerns remain about the potential risks of electing individuals with cognitive impairments, such as dementia, to high office, raising important questions about the balance between respect for aging and the need for competent leadership.[120]

VI. CONCLUSION

In conclusion, the question of whether to impose an age limit on the presidency is not merely about drawing a line in the sand between what is considered "too old" to lead. Instead, it invites us to critically examine the evolving relationship between age, experience, and the demands of leadership in a rapidly changing world. A proposed age limit of 75 is not just a response to ageism, but a reflection of the need to balance the invaluable insights gained through experience with the capacity to meet the dynamic demands of the office. As society continues to diversify and the pace of change accelerates, it may be time to reconsider our understanding of age and its role in shaping the future of leadership. By addressing this issue thoughtfully, we can ensure that our institutions remain both effective and inclusive for generations to come.

[118] *Supra* note 143.
[119] *Id.*
[120] *Id.*

"I DON'T GOOGLE, I TIKTOK": SOCIAL MEDIA AND ITS SOCIAL SEARCHES AS THE TRUE COMPETITOR OF GOOGLE

Miyah Westbrook*

INTRODUCTION

Imagine this. You are beginning to plan a much-needed vacation with your loved ones to an area that you are quite unfamiliar with, and it is your responsibility to create the itinerary for the trip. There is the unspoken requirement that the itinerary must include the highly recommended restaurants to try, the must-do excursions and activities for the group to enjoy, and the best lodging money can buy. Where would you begin your search? In the height of social media's expansion beyond connecting with other users, social media platforms have become the starting point for many people's daily search and inquiries. Whether the search be planning a trip or to something with less pressure, such as recipes and self-care tips, social media has created the expectation with its users that the very answer that they are searching for will be found.

Despite this growing phenomenon, social media has been denied of its rightful place in the search engine realm. Due to the unorthodox methods of searching on these platforms, many have disregarded their ability to compete with the generic and basic modes of searching. However, with the shift in modern technology and how today's society has maximized on the capabilities of the platforms, one would be led to believe that leaving social media out of the conversation would not yield accurate results as to the usage of search engines by only looking to websites that many are not aware of or with an existence unknown to the common person. This article will address the argument surrounding the exclusion of social media in the search engine conversation and how that exclusion has left major companies faced with an inevitable

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problem of establishing true competitors rather than default "competitors." More specifically, this article will address how the Department of Justice's manufactured "competitors" have left Google with the short end of the stick in terms of being faced with the monopoly title in the search engine and search text advertising market. [1]

I. HISTORICAL DEVELOPMENT

The idea of limiting the possibility of companies monopolizing a market stems from an Ohio Senator and market expert, John Sherman, who introduced the Act into Congress in 1890, which was coined as the Sherman Act.[2] The act makes the conspiracy, attempt, or act of monopolizing illegal, extending to trade and commerce within "any Territory,… in the District of Columbia,… between any State or States,… or with foreign nations."[3] The Sherman Act has been described to perform as the "country's economic constitution, an expression of national faith in free competitive enterprise."[4]

Moving past the sole issue of railroad discrimination that sparked the need of such an Act, Congress had been faced with the constant conversation and complaints referencing the effect of tariffs that correlated with the prevalent trust problem during this time.[5] Consumers were being subjected to the unjustified workings of trusts that led consumers to assert claims of the trusts dividing

1. United States v. Google LLC, No. 1:20-cv-03010-APM (D.D.C. filed Oct. 20, 2020).

2. Will Kenton, *Sherman Antitrust Act: Definition, History, and What It Does,* INVESTOPEDIA (last visited Jan. 4, 2025), https://www.investopedia.com/terms/s/sherman-antiturst-act.asp#toc-historical-context-of-the-sherman-antitrust-act.

3. 15 U.S.C. § 1-3 (1890).

4. Denton Independent School District, *Antitrusts*, https://www.dentonisd.org/cms/lib/TX21000245/Centricity/Domain/535/Antitrusts.pdf (last visited Jan. 4, 2025).

5. William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 247 (1956) (discussing how the different parties recognized and approached the arising trust issue); *see generally* American Experience, *Interstate Commerce Act*, PBS (last visited Jan. 4, 2025), https://www.pbs.org/wgbh/americanexperience/features/streamliners-commerce/.

classes within the country that was already concerned with poverty.[6]

It was established that common law recognized the illegality of monopolies, but did not have the power to be able to destroy the trusts, let alone diminish their power. The language of the common law, containing the word "monopoly", only applied to "the exclusive right to deal in and sell certain articles, guaranteed by positive law" at the time of the creating the common law.[7] This language could not, however, be applied to trusts, as trusts were not granted power by the government.[8] The common law standard also did not allow for standing to be possible for anyone other than the parties themselves, which further proved the common law's inability to disengage the trusts' monopoly power.[9]

Although the common laws were not strong enough to destroy the trusts and their monopoly power, the laws did serve as an indicator of the presumption of illegality towards monopolies and was further shown when the courts refused to uphold agreements that implemented restraints of trade in several cases.[10] However, economists and several lawyers urged for stronger legislation to be imposed to truly rectify the issue at hand.[11] In the early winter of 1888, Congress officially began to entertain the idea of imposing legislation regarding the trusts when Senator Sherman presented his drafted antitrust bill.[12] The Sherman Act, with a fifty-two member vote, was then signed by President Henry Harrison and was passed on July 2nd, 1890.[13]

For the purposes of this case note, it is also important to understand the restrictions imposed by the Clayton Act of 1914.[14] The Clayton Act possesses more specific language that targets the business practices of a suspected monopoly that continued to "engag[e] in operations that discouraged competition and fair

6. *Id.* at 225.
7. *Id*. at 241.
8. *Id*.
9. *Id*. at 243.
10. *Id.* at 244-45.
11. *Id.* at 245.
12. *Id.* at 250.
13. *Id.* at 255.
14. 15 U.S.C. § 12-27.

pricing."[15] More explicitly, the Act focused on companies' distribution practices, such as tying agreements, price fixing, and exclusive dealing.[16]

Homing in on exclusive dealing, or "agreements [with] the intended effect… to preclude the buyer from dealing in merchandise that competes with the seller's product," will be most important in this case note as the Clayton Act does allow for some exclusive dealing up to a certain extent. The courts have looked to the "percentage of the market foreclosed in the determinant of antitrust liability" and the "effect of exclusive dealing in creating, enhancing, or preserving the [accused's] market power," allowing for a violation to be found even when the foreclosure percentage is closer to none.[17] The balance of these two factors have been effectuated, slightly leaning more on the evaluation of one's market power over the years, to determine the applicability of the Clayton Act.[18]

II. INSTANT CASE

In the instant case, *U.S. v. Google, Inc.*, both the regulations under the Sherman and Clayton Act have been brought into question by the Department of Justice regarding Google's business practices and its effect on Google's relevant market.[19] After several attempts to bring suit against Google, which were consolidated into one suit, "[t]he Justice Department, along with the Attorneys General of California, Colorado, Connecticut, New Jersey, New York, Rhode Island, Tennessee, and Virginia, filed a civil antitrust suit against Google for monopolizing multiple digital advertising technology products in violation of Sections 1 and 2 of the Sherman

15. Troy Segal, *Clayton Antitrust Act of 1914: History, Amendments, Significance*, INVESTOPEDIA, https://www.investopedia.com/terms/c/clayton-antitrust-act.asp#toc-provisions-of-the-clayton-antitrust-act (last visited Jan. 4, 2025).

16. John Edwards Law Group LLC, *Breaking Down Section Three of The Clayton Act,* https://www.johnedwardslaw.com/newsletters/business-law-newsletters/antitrust-trade-law-clayton-act/ (last visited Jan. 4, 2025); Judd L. Bacon S. Ed., *Federal Antitrust Law – Exclusive Dealing – Standards of Illegality Under Section 3 of the Clayton Act,* 59 MICH. L. REV. 1236 (1961).

17. *Jonathan M. Jacobson, Exclusive Dealing, "Foreclosure," and Consumer Harm, 70 Antitrust L.J. 311 (2002).*

18. *Id.* at 312.

19. *Google LLC*, No. 1:20-cv-03010-APM.

Act."[20] Along with the assertion of monopolizing digital advertising, Google has also been accused to monopolizing general search services, claiming Google to have done so for the past fifteen years.[21] The suit particularizes Google's practices as intentional and deliberate in how it dominates within its market while keeping competition at bay.[22]

A. General Search Engine

Although Google possesses a multitude of functionalities, Google remains labeled as a general search engine (GSE), or a "software that produces links to websites and other relevant information in response to a user query."[23] Other sites that are also labeled within the same category of GSEs are sites such as Bing, Yahoo, DuckDuckGo, and Ecosia, with Bing being the only other GSE that "generates its own search results" while the remaining "syndicate their search results from Bing."[24] When comparing the consumer usage of Google to the other GSEs, "80% of all general search queries, whether entered on a desktop computer or mobile device, flowed through Google" and this number increased to 89.2% from 2009 to 2020, comparing Google's performance primarily and only to these sites, which is key to remember.[25]

"Search providers have multiple channels to make accessible, or distribute, their GSE to users on mobile and desktop devices."[26] Each of these channels are effective in their own way but the "most effective channel of GSE distribution is… placement as the preloaded, out-of-the-box default GSE," which varies among devices.[27] Experts credit the majority of Google's searches to the

20. U.S. Department of Justice, *Justice Department Sues Google for Monopolizing Digital Advertising Technologies*, (Jan. 24, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies (last visited Jan. 4, 2025).

21. *Id.*

22. *Id.*

23. *Google LLC*, No. 1:20-cv-03010-APM, 8 (the memorandum opinion of the Court).

24. *Id.* at 13.

25. *Id.* at 24.

26. *Id.*

27. *Id.*

default settings, where Google is seen to be used out of habit by the users, where the users are likely to remain with the default engine "[i]f that search engine… generates adequate experiences" and shows that the users are "unlikely to deviate from [that default engine.]"[28]

B. Digital Advertising

Along with the noncommercial results given when a user searches within GSEs for information that the sites do not monetize, there are also the searches made with commercial intent where "such a query seeks information on a product or service. GSEs often serve advertisements on a search engine results page in response to a commercial query."[29] "Search ads are an effective form of advertising since queries are a strong signal of user interest and intent [of making a purchase] and the ads appear immediately after the query is entered."[30] With this being the case, advertisers are drawn to paying for search advertising as a way to ensure conversion from the search to sales, viewing "paid search… [as a] powerful way to get in front of the consumer who is… actively looking to make a purchase or looking to sign up or enroll [in a service the advertisers are promoting or offering]."[31] Advertisers alike have testified that Google is relatively "essential to digital ads campaigns because search ads are uniquely able to capture high-intent consumers" and these advertisers generally "have a fixed budget that largely mirrors the relative market shares of Google and Bing" (specifically when looking to purchase search ads).[32]

C. Arguments and Court's Holding

With all of the above considered, these chains of events have led the Plaintiffs to file their complaint, finding issues with how Google has "conquered" both the general search engine and digital advertising realms.[33] Leaning into the already-curated GSE

28. *Id.* at 26-27.
29. *Id.* at 17-18.
30. *Id.* at 58.
31. *Id.*
32. *Id.* at 78-79.
33. *Id.* at 136, 165.

market, Plaintiffs heavily relied on the fact that the market share that Google holds heavily outweighs the rest of the GSEs in a manner that would make Google a monopoly and that Google has accomplished this status with intentionality.[34] Plaintiffs support this argument in a number of ways through their complaints.

Plaintiffs acknowledge the above-mentioned options that the users have to change default engines, but alleged that such a task would be burdensome to the user and that Google relies on that fact to be able to retain these users, claiming that Google is aware that many users will not go out of their way to change something that is already proving itself to be useful to the consumer.[35] Plaintiffs also highlighted the fact that even within the ability to change their default settings, social media does not appear as an option for such a change.[36]

Plaintiffs further push their argued monopoly stance by asserting that Google maintains the monopoly title in the digital advertising market, with the Plaintiff States again looking only to compare Google's performance to the predisposed GSE market but with U.S. Plaintiff recognizing any digital platform with the ability to occupy the search ad market with Google.[37] Notwithstanding the differing markets, Plaintiffs both hold that Google "(1) neutralize[s] or eliminate[s] ad tech competitors, actual or potential… and (2) wields its dominance across digital advertising markets to force more publishers and advertisers to use its products while disrupting their ability to use competing products effectively."[38] The allegations claim that Google "dissuade[s] potential competitors from joining the market, and left Google's few remaining competitors marginalized and unfairly disadvantaged."[39]

Google negated these allegations of maintaining a monopoly stance in either market and denies that it promoted anticompetitive tactics in order to prevent a free market.[40] Google

34. *Id.* at 136.

35. *Id.* at 27-32.

36. *Id.* at 25.

37. *Id.* at 165.

38. U.S. v. Google, LLC., No. 1:23-cv-00108 (D.D.C. filed Jan. 24, 2023) (Plaintiffs' complaint and request for jury trial).

39. *Id.* at 3.

40. *Google LLC.*, No. 1:20-cv-03010-APM, 135.

argued mainly that there is not a market for GSE alone, instead that Google is a part of a broader market of query responses which has thriving competition.[41] Google proposed that the actual market included "(1) [specialized vertical providers or] SVPs like Amazon, Booking.com, and Yelp, (2) social media companies like Meta… and Tiktok, and (3) prominent stand-alone websites, like Wikipedia."[42] Google hinged on the fact that the user is presented with the choice between itself and the proposed market participants to complete the user's query, which each of the proposed market participants are able to handle and respond to by providing the user with the information he/she sought.[43]

Acknowledging the argument of monopolizing the advertising market, Google disagreed yet again.[44] Google held the same market as the U.S. Plaintiffs and, with that being the case, argued that the broad market of competition makes it impossible for Google to be a monopoly.[45] Google debunked Plaintiffs' argument by claiming that there are other ad types that can also "identify and respond to user intent as effectively as search ads", which would render Plaintiffs' argument that search ads are unique in that fashion as void.[46] Google relied on the fact that advertisers spend their campaign budgets among differing forms of ads, depending on which will provide the highest ROI, and this fact alone overturns the argument that the technological differences outweigh the market reality.[47]

The Court in this case opted to uphold Plaintiffs' argument that Google acquired and maintained monopoly power within the search text advertising market and the general search market.[48] The Court rejected Google's argument that general search is not within itself a market and, with this rejection, did not look further into the proposed search query market.[49] The Court refused to look into this market based on the fact that the Court did not find social

41. *Id.* at 136.
42. *Id.* at 136-137.
43. *Id.* at 137.
44. *Id.* at 165.
45. *Id.*
46. *Id.* at 167.
47. *Id.*
48. *Id.* at 152, 167.
49. *Id.* at 140.

media and other SVPs to be proper substitutes for the services that Google provides, claiming that the user would not be able to mistake or confuse GSEs with these suggested competitors.[50]

The Court relied heavily on Plaintiffs argument that the social media sites and SVPs are not proper competitors due to deciding that "[u]nlike those other products, GSEs are a gateway to the World Wide Web" and that "[t]he web itself is often (but not always) the source of the answer to the query.[51] The Court asserted that due to the SVPs and social media sites being limited to only the available data within the platform, that these sites are "walled gardens" and do not contain the same reach that Google does.[52]

Considering the Court's analysis and holding in this case, I disagree with the conclusion that the Court reached. While I understand why the Court would have reached this conclusion with the selected market, I believe that in selecting that specific market, the Court is incorrectly assessing the world today. In this proposed market, the competition is not only thriving, but in some instances, exceeding Google's performance.[53] Specifically in the realm of social media, which the both the Court and Plaintiffs claims to only be relevant to the newer generations but is widely untrue, people have greatly shifted from allowing Google to be the sole program to provide the answers sought.[54] My analysis will assess both this shift in "social search" and how the flourishing trend is the actual competitors to Google, not the dying and lackadaisical presented competitors that are known as GSEs.

III. ANALYSIS

A. Consideration of Alternative Market

Before approaching the possibility of including social media to be a competitor of Google, the relevant market must be identified to ensure that the two can operate within the same market.[55] When making a relevant market inquiry, there is a two-

50. *Id.*
51. *Id.*
52. *Id.* at 141.
53. *Id.* at 136.
54. *Id.* at 50.
55. *Id.* at 137; Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129,129-130 (the Court in the case recognizes this

step test that must be completed to determine if the alleged alternative product occupies the same market of the original product or service.[56] First, one must identify the relevant product market or identify the group of products or services that the accused party's product or service competes with.[57] After the relevant product market is identified, the relevant geographic market between the alleged substitute and the accused party's product or service must be determined.[58]

Factors are weighed against each other to assist with properly identifying the relevant product market.[59] These factors, better known as the "hypothetical monopolist test", consist of determining the extent in which the accused party's products are interchangeable with the alleged alternative products and assessing the "degree of cross-elasticity of demand" between the products.[60]

The interchangeability of products depends on the use and functions of the compared products for the consumer.[61] If the products can be easily exchanged by the consumer without creating much of a disturbance to the user's purposes for using the product, then the products are said to be able to be interchangeable.[62] Cross-elasticity is assessed by evaluating if the demand of the substitute will increase in response to the alleged monopoly's price increasing.[63] This shift in market demonstrates whether consumers are aware of possible alternatives and provides evidence of how the consumer reacts to such a shift, if the knowledge of alternatives is present.[64] If both interchangeability and an appropriate degree of cross-elasticity can be distinguished between compared products or services, there will likely be an

market evaluation as "practical indicia"); *See* Brown Shoe Company v. United States, 370 U.S. 294 (1962) (the relevant case used within the Court's analysis which focuses more on the monopoly status of the Sherman Act).

56. Baker, *supra* note 55 at 130.
57. *Id.*
58. *Id.*
59. *Id.* at 132.
60. *Id.* at 133.
61. *Id.* at 132.
62. *Id.*
63. *Id.*.
64. *Id.* at 142.

established market where the compared products operate as competitors.[65]

The relevant geographic market refers to where the alleged monopolist markets its product and how its competitors can market and compete in this area.[66] When defining the relevant geographic area, one should turn to the same basis as that for the relevant product market and determine "the geographic area to which consumers can practically turn for alternative sources of the product…"[67] The relevant geographic market for the internet is a less expansive method of analysis, as the internet is not confined to a specific place or location.[68]

B. The Rise of Social Search and Advertisement

As technology has improved and advanced over the recent decades, the use of social media has increased significantly, becoming a part of most people's daily lives.[69] As people have developed a relationship with these social sites, the sites have aimed their gears at providing information to their users by the means of performing similarly to search engines.[70] This form of information gathering has been coined with the name "social searches". In the DOJ's argument, it denied the ability for social media applications to be in the same market as Google because of the DOJ's belief of social media's inability to accept inquiries to produce search result.[71] This stance is disagreeable, as the stance disregards and undermines the present-day capabilities of search within social media.

Social media not only provides a search engine-like experience, but it also takes searching a step further by improving the searching process in a way that attracted the loyalty of their

65. *Id.* at 144.

66. Jared Kagan, *Brick, Mortar, and Google: Defining the Relevant Antitrust Market for Internet-Based Companies*, 55 N.Y.L. SCH. L. REV. 271 (2011).

67. *Id.* at 279.

68. *Id.* at 282.

69. Rosey Bowring, *Using Social Media As A Search Engine*, BROWSER MEDIA AGENCY, https://browsermedia.agency/blog/using-social-media-as-a-search-engine/ (last visited Jan. 4, 2025).

70. *Id.*

71. *See supra* note 52.

users.[72] Consumers have found social media to have surpassed in the realm of search stating, "traditional search engines require more work from users to find specific answers to their search queries… traditional search engines deliver irrelevant and unsatisfying results, forcing the user to scroll through unnecessary amounts of information."[73] Users have grown a preference to social search, describing social searches to be more convenient with their daily social media usage, favorable as to the quick result and engaging content, and valuable in the way personalized results are presented.[74]

Along with how social media presents as a search engine, the advertisement realm of social media is an undeniable force. Social media applications have not only altered their ability to search, "they also develop[ed] advertising solutions specifically designed for their search features."[75] Users have said to have favored social media advertisements and their search thereof due to the relatability of the products being advertised by fellow users of the applications. Users today can watch reviews of products and services that were done by people who the users feel as if they can trust, making the users more inclined to purchase the product or experience the service.[76]

With consumers shifting towards social media, businesses have been left with no choice but to follow suit. However, businesses have not gotten the shorter end of the stick in this outcome, as many businesses have grown to prefer social media searching and advertising.[77] Social media searching and advertising has allowed for business to "target their [search results and] ads based on various criteria, including demographics, interest, and behaviors", effectively allowing for

72. Lucy Thomas, *the Rise of Social Media as a Search Engine*, EYEKILLER, https://eyekiller.com/blog/the-rise-of-social-media-as-a-search-engine (last visited Jan. 4, 2025).

73. *Id.*

74. *Id.*

75. *Joseph Yaacoub, Scroll, Search, Discover: The Rise of Social Media as a Search Tool, LinkedIn, https://www.linkedin.com/pulse/scroll-search-discover-rise-social-media-tool-joseph-yaacoub-7gycf/ (last visited Jan. 4, 2025).*

76. *Id.*

77. *The Impact of Social Media on Advertising*, https://www.adcreative.ai/post/the-impact-of-social-media-on-advertising (last visited Jan. 4, 2025).

businesses to reach the right audience and increase the effectiveness of their campaign.[78]

C. Argument

With both parties agreeing that the relevant geographic market being the United States, an analysis is not required for that portion of the test.[79] Turning back to the relevant product market factors, it is not about whether the user will mistake the social media sites for the GSEs, as the Court asserted, but whether the users will make the conscious decision to replace one with the other due to the products characteristics, previous user changes, surveys, and expert opinion.[80] In viewing these factors, it is obvious that the social media sites and Google are now interchangeable.

The Court's main objection was that the social media sites do not produce external links in the same manner that Google does, making the two products characteristically different.[81] This opinion leads me to believe that the Court is uninformed on how the social searching within the sites actually works. TikTok, for example, has not only enable "Search Highlights" at the top of the search results pages that provides direct links to external sites relevant to the noncommercial query, TikTok has also enabled tabs within the search results that allows for the user to have direct access to the physical location of commercial queries, including the websites for the businesses, an accessible map for directions, relevant reviews, hours of operation, etc., which disproves that the information is only limited to user-produced content.[82] The Court also emphasized GSEs being able to produce information, giving the specific example of sports score feeds, and implied that social media could not do the same.[83] When in reality, Twitter has enabled under its search bar an accessible tab that

78. *Id.*

79. *Google LLC.*, No. 1:20-cv-03010-APM, 135.

80. *Google LLC., No. 1:20-cv-03010-APM,*, 135; Baker, *supra* note 55 at 139.

81. *Google LLC., No. 1:20-cv-03010-APM, 140.*

82. TikTok, *Search results for "restaurants in Baton Rouge"*, https://www.tiktok.com/search/user?lang=en&q=restaurants%20in%20baton%20rouge&t=1736136590377 (last visited Jan. 4, 2025).

83. *Google, LLC.*, 1:20-CV-03101, 140.

will not only take the user directly to the active games with their scores but also includes direct links to betting sites for those games for the users that indulge in such.[84]

Focusing on the search text ads, it would be questionable to think that social media does not also provide advertisements to its user using the push ad method. [85] . In a world where many creators make their living based on collaborations and sponsorships from brands, the user can easily search for a product and receive an overload of these videos and posts that directly relate to what is being sought based on the interest expressed in the search, as well as be directed to such products for purchase. For example, if one was to be in search of a Dyson Airwrap Blowdryer, searching that exact title on TikTok would not only take the user to the videos providing reviews from fellow users but would also take the user to both the TikTok shop and Dyson's personal shop where the user could purchase the product directly from the company.[86]

Also, in assessing the cross-elasticity between traditional search engines and social media, it is a test of when the traditional search engine prices increase of whether the increase will drive

84. X (formally known as Twitter), *For you trending news sports tab*, https://x.com/i/events/1790914960513470464?timeline=all (last visited Jan. 5, 2025).

85. *Google LLC*, No. 1:20-cv-03010-APM, 73 (the memorandum opinion of the Court).

86. TikTok, *Search results for "Dyson airwrap"*, https://www.tiktok.com/view/product/1729601628031390718?checksum=35a1cf9efb1f955d536556460f40669da15c4a999ddfa1520d8c768698116df5&og_info=%7B%22title%22%3A%22Dyson+Airwrap™+Multi-styler+Complete+Long+Diffuse+for+Curly+and+Coily+hair+%28Strawberry+bronze%5C%2FBlush+pink%29%22%2C%22image%22%3A%22https%3A%5C%2F%5C%2Fp16-oec-ttp.tiktokcdn-us.com%5C%2Ftos-useast5-i-omjb5zjo8w-tx%5C%2Ffe4393308c404a6a8a585825783f5567~tplv-omjb5zjo8w-resize-webp%3A260%3A260.webp%3Ffrom%3D1826719393%22%7D&sec_user_id=MS4wLjABAAAAxFsk1879B0Ng78j4O1CGNuJa3yQ2W63ZBqq3jlnYJM-eKJcrvaFB8tJmKP2qP97S&share_app_id=1233&share_link_id=C2D42663-DCDF-4386-9E49-FCB2C316CE4B&social_share_type=15&timestamp=1736137348&trackParams=%7B%22source_page_type%22%3A%22product_share%22%2C%22traffic_source%22%3A7%2C%22enter_from_info%22%3A%22product_share_outside%22%2C%22enable_shop_tab_popup%22%3A1%2C%22traffic_source_list%22%3A%5B7%5D%7D&tt_from=copy&u_code=D%3A776JL0I0DJ%3AM&ug_btm=b1478%2Cb6661&unique_id=miyahrhanyse&user_id=677859096982021837 3&utm_campaign=client_share&utm_medium=ios&utm_source=copy (last visited Jan. 4, 2025).

the advertisers to another source or if the advertisers will be left to pay what is presented. On average, the cost-per-click for Google Ads costs about $3.12 cost per thousand while YouTube, Facebook (which allows the advertisers to share the ads on Instagram and Messenger), and Twitter all cost an average of under $1.00 per thousand.[87] This gap between sites would reflect the increase in advertisers preferring social media for their advertising because the advertisers would be able to utilize their campaign funds in an advantageous way while reaching a bigger audience. Leaving this analysis out of the equation and only referring to the price changes that Google made between 2016 to 2020 was, whether the Court saw it this way or not, in fact fatal.[88]

Therefore, under the proposed query response market, it would be hard to find that Google would be able to maintain the monopoly status in the general search and search text ads market. If Google diminishes, it can be assumed that the other sites will not grow in response yet will only cause more users to turn to the true competition and will allow for these social media sites to grow and expand without much disturbance. I maintain the stance that both the DOJ and the ruling court erred in arguing and deciding that Google should be and is in a market that is separate from social media. Failing to include social media in the same market not only leaves Google in an impossible position, but it also leaves stones unturned that would be necessary to reach a true and accurate outcome. As the world continues to change, the legal realm would be at a disadvantage if it continued to ignore the world around it for the comfortability of only looking to what it knows because the alternatives are not ones that seemingly fit. Those within the legal system possess a duty to remain informed on how a shift in society will also cause a shift in how one is to practice law, and I feel as if both the Court and DOJ have failed to maintain that duty.

87. *Is Online Advertising Expensive? Online Advertising Costs in 2025*, TOPDRAW, https://www.topdraw.com/insights/is-online-advertising-expensive/ (last visited Jan. 4, 2025).

88. *Google, LLC.*, 1:20-CV-03101, 189.

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