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"Patterns"

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Davis Journal of Legal Studies Editorial Staff

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Letter from the Editor-in- Chief

Dear Reader,

Our world has many patterns. Whether it be the passing of the seasons, the universe's mathematical sequences, or the ebb and flow of politics—patterns exist for so long as there is an eye keen enough to observe them. The law is no exception. One's ability to spot legal patterns can shape outcomes in small communities, countries, and the entire world.

Thus, it is with great enthusiasm that I present to you *Davis Journal of Legal Studies: Volume VI, Spring 2026*.

This year marks the first time the Journal has been organized around a theme. In this year's theme of "Patterns," authors answer questions and identify recurring issues, ranging from voting rights, free speech, environmental regulation, and artificial intelligence.

Since its establishment in 2020 at the University of California, Davis, the Davis Journal of Legal Studies (DJLS) has become more than just an undergraduate legal publication. The Journal contributes to public legal scholarship, developing a community of undergraduate legal researchers, and creating opportunities in publication for undergraduate students.

I thank the National Center for Free Speech and Engagement and the Center for Student Involvement for their support, to Professor Lisa Klotz for her guidance as our faculty sponsor, and to the Journal's editorial staff, without whom this volume would not exist.

Patterns are everywhere, it's up to us to find them.

Happy reading,

Editor-in-Chief
Davis Journal of Legal Studies, Volume VI: Spring 2026

Louisiana v. Callais: The Reconstruction of Representation Under the Voting Rights Act

By Sabrina Dhanoya

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Abstract

This paper examines whether the United States Supreme Court's forthcoming ruling in *Louisiana v. Callais* (2026) will preserve the vitality of Section 2 (§2) of the Voting Rights Act (VRA) — a cornerstone civil rights statute that operates as a prophylactic prohibition on racial discrimination in electoral practices nationwide. The heart of the dispute presented in *Louisiana v. Callais* began in 2020, when the Louisiana state legislature adopted a congressional redistricting map, which resulted in the National Association for the Advancement of Colored People's (NAACP) Legal Defense Fund challenging Louisiana's 2022 congressional map under Section 2 in *Robinson v. Ardoin* (2022). In *Robinson,* both the U.S. District Court for the Middle District of Louisiana and the Fifth Circuit Court of Appeals held that the map violated Section 2, as it fragmented Black communities across multiple districts, thereby diluting their voting power to elect candidates of their choice.[1] The U.S. District Court for the Middle District of Louisiana required the state legislature to redraw the map to a second congressional Black-majority district because Black voters made up approximately one-third of the state's population, but only made up one of the six congressional seats.[2] The creation of Louisiana's 2024 congressional map, titled S.B. 8 is precisely the court-ordered, race-conscious remedial map that led non-African American voters to challenge the state's map as an unconstitutional gerrymander in *Callais v. Landry* (2024).[3] These two pivotal cases were consolidated together in *Louisiana v. Callais* (2026),

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[1] Brief for Robinson Appellants at 1, *Louisiana v. Callais*, Nos. 24-109, 24-110 (U.S. Dec. 19, 2024).

[2] Michael Li, *Section 2 of the Voting Rights Act at the Supreme Court*, Brennan Ctr. for Just. (Oct. 15, 2025), https://www.brennancenter.org/our-work/research-reports/section-2-voting-rights-act-supreme-court.

[3] *Ibid.*

by the U.S. Supreme Court to determine whether states' consideration of race when drawing an additional Black-majority district — as required by Section 2 of the VRA — can be reconciled with the Equal Protection Clause of the Fourteenth Amendment, which prohibits race from being a *predominant factor* motivating a legislature's districting decisions.[4] Based on the parties' briefs and oral argument, this paper argues that the Court should uphold Louisiana's remedial districting plan as a constitutionally permissible remedy under Section 2 to preserve equal political participation for historically disenfranchised minority and low-income communities to ensure that the statute remains a constitutional safeguard against discriminatory disparities in democratic processes.

Introduction of Section 2 of the Voting Rights Act

The Voting Rights Act of 1965 was a landmark piece of Civil Rights legislation, targeting any voting law, practice, or procedure that results in the denial or abridgement of the right of any citizen of the United States to vote on account of race or color.[5] Since its inception, Section 2 of the VRA has required states to configure congressional districting maps that protect minority voting strength through the creation of majority-minority districts — an inherently race-conscious mandate.[6] The number of Black elected officials in the South alone rose from approximately 1,470 in 1962 to over 6,400 by 1980, alongside parallel growth in Latino and Asian American representation.[7] This expansion, driven by the Act, fundamentally reshaped the electorate by transforming access to political office in historically discriminatory jurisdictions.[8]

In *Robinson v. Ardoin* (2023), the Middle District of Louisiana and the Fifth Circuit ruled in favor of the National Association for the Advancement of Colored People's (NAACP) Legal Defense Fund and held that the Louisiana state legislature's 2020 congressional

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[4] *Shaw v. Reno*, 509 U.S. 630 (1993).
[5] Kareem Crayton, *The Voting Rights Act*, Explained, Brennan Ctr. for Just. (July 17, 2023), https://www.brennancenter.org/our-work/research-reports/voting-rights-act-explained.
[6] Andrea Bernini, Giovanni Facchini & Cecilia Testa, *Race, Representation, and Local Governments in the US South: The Effect of the Voting Rights Act*, 131 J. Pol. Econ. 994–1056 (2023).
[7] Andrea Bernini, Giovanni Facchini, Marco Tabellini & Cecilia Testa, Sixty Years of the Voting Rights Act: Progress and Pitfalls, 40 Oxford Rev. Econ. Pol'y 486–97 (2024).
[8] Khalilah Brown-Dean, Zoltan Hajnal, Christina Rivers & Ismail White, 50 Years of the Voting Rights Act: The State of Race in Politics, Joint Ctr. for Pol. & Econ. Stud. (2015), https://jointcenter.org/50-years-of-the-voting-rights-act.

redistricting plans violated Section 2 of the VRA.[9] The courts required the Louisiana state legislature to redraw its districts to incorporate a second Black-majority district and provide Black voters an equal opportunity to elect candidates of their choice.[10] After the Louisiana legislature complied with the Section 2 mandate enforced by the Fifth Circuit, non-Black voters contended that the state's creation of an additional district based on race was an unconstitutional gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment.[11] A three-judge panel for the Western District ruled in their favor and struck down Louisiana's remedial map for the 2024 congressional elections.[12]

The Supreme Court temporarily suspended the enforcement of that ruling and heard reargument in October 2025. The Court must determine: (i) whether the district court erred in finding that race was a predominant factor in Louisiana's enactment of the new map; (ii) whether the majority erred in finding that the state had a compelling reason — such as complying with the VRA — to use race as a factor; and (iii) whether federal courts have the authority to hear the case or if it is non-justiciable.[13] The cyclical redistricting litigation, from *Robinson* to the review of *Louisiana v. Callais* demonstrates how this case presents a pivotal opportunity for the Court to resolve the tension between race-conscious redistricting under Section 2 of the VRA and the Equal Protection Clause.

Background of Voter-Dilution Jurisprudence

In the landmark ruling of *Thornburg v. Gingles* (1986), Black voters challenged multimember districts in North Carolina, arguing that bloc voting repeatedly defeated Black-preferred candidates.[14] In *Gingles*, the Court established its foundational voter-dilution framework to identify and remedy electoral practices that produce a discriminatory *effect* by diluting the voting strength of minorities

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[9] *Robinson v. Landry: Challenging Louisiana's Discriminatory Redistricting Maps*, NAACP Legal Def. & Educ. Fund (2024), https://www.naacpldf.org/case-issue/robinson-v-landry-louisiana-discriminatory-redistricting/.
[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] Louisiana v. Callais*: Analyzing Whether a State Has Properly Used Race in Congressional Redistricting When Attempting to Remedy a Potential Voting Rights Act Violation*, Cong. Rsch. Serv., Const. of the U.S.: Analysis & Interpretation (Library of Congress), https://constitution.congress.gov/browse/essay/intro.9-4-4/ALDE_00000131/.
[14] *Thornburg v. Gingles*, 478 U.S. 30 (1986).

under Section 2 of the VRA, irrespective of intent.[15] Under *Gingles*, plaintiffs must show three preconditions to substantiate a Section 2 violation: (1) the minority group is "sufficiently large and geographically compact to form a single-member majority district"; (2) the group is politically cohesive — that is, whether the protected class commonly votes together; and (3) whether the "white majority votes sufficiently as a bloc to enable it… to defeat the minority's candidate of choice."[16] Once these threshold requirements are met, courts proceed to a "totality of the circumstances" inquiry to determine if a Section 2 violation occurred.[17] Under this analysis, plaintiffs must demonstrate how members of a protected class have a diminished opportunity to participate equally in the political process.[18] This enforcement framework authorizes federal courts to strike down electoral districting maps that cause voter dilution — defined as the disproportionate weakening of minority voting strength.[19]

Seven years after *Gingles* was decided, the Court held in *Shaw v. Reno* (1993) that the Fourteenth Amendment strictly prohibits the use of race to create congressional voting districts unless justified by a compelling state interest and narrowly tailored to that interest under strict scrutiny.[20] In *Shaw,* the Court struck down the map because it constituted racial gerrymandering that "can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."[21]

Thirty-one years following *Gingles*, the Court still had not fully defined what evidence a state must provide to justify race-based districting under Section 2 of the VRA until *Cooper v. Harris* (2017). In *Harris*, North Carolina redrew districts after an increase in Black voting-age population in each district, and the Court made clear that Section 2 of the VRA does not *automatically* permit race-based districting on caution alone, and that a state must have "good reasons" to believe such consideration of race is necessary to avoid a voter-dilution violation under the narrow tailoring requirement of strict scrutiny.[22] Yet, following the Court's ruling in *Harris*, a critical

[15] Li, *supra* n. 2.
[16] 52 U.S.C. § 10301.
[17] *Ibid.*
[18] *Ibid.*
[19] Li, *supra* n. 2.
[20] *Shaw*, 509 U.S. at 643.
[21] *Id.* at 642.
[22] *Cooper v. Harris*, 581 U.S. 285 (2017).

threshold question remained unresolved: whether Section 2 compliance alone could constitute a compelling interest required under strict scrutiny. For over thirty years, this uncertainty has persisted across decades of voting rights legislation, which *Louisiana v. Callais* requires the Court to answer and determine whether Section 2 compliance can justify a state's deliberate use of race in redrawing legislative voting districts.[23]

Constitutional Analysis

The broad implications of the Court's decision center on whether the landmark vote-dilution framework established in *Thornburg v. Gingles* will remain the governing standard for Section 2 violations under the VRA. During oral arguments, Counsel for the Robinson Appellants, Janai Nelson, the President of the NAACP Legal Defense Fund, argued on behalf of the Appellants that Louisiana's 2024 map, which incorporated a second majority-Black congressional district drawn to remedy a finding of racial vote dilution under Section 2 of the VRA is consistent with four decades of the Court's precedent, including its recent ruling in *Allen v. Milligan* (2023), which affirmed employing the remedy of race-conscious redistricting to rectify a Section 2 violation in the State of Alabama.[24] She further warned that striking down Section 2 of the VRA or overturning *Gingles*' vote-dilution framework would regress "the equal protection of citizenship on all fronts for African Americans in our diverse multi-racial democracy."[25] Conversely, the Counsel for the Appellees, Edward Greim, argued that the Court should affirm the district court's finding that SB8 constituted an unconstitutional gerrymander.[26]

Louisiana Solicitor General Benjamin Aguiñaga, arguing on behalf of the Appellant, the State of Louisiana, contended that the Court should overturn its past precedent in *Gingles* on the basis that Section 2's mandated remedy of race-based redistricting compels racial discrimination through electoral design.[27] Nelson directly contested this characterization, arguing that the remedy of race-based redistricting under Section 2 of the VRA is not a

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[23] *Louisiana v. Callais*, 608 U.S. ___ (2026), slip op. at 9.
[24] Supplemental Brief for Appellants at 2, *Louisiana v. Callais*, Nos. 24-109, 24-110 (U.S. Aug. 27, 2025).
[25] *Id.* at 4.
[26] Supplemental Brief for Appellees at 43, *Louisiana v. Callais*, Nos. 24-109, 24-110 (U.S. Sept. 17, 2025).
[27] Oral Argument at 49, *Louisiana v. Callais*, No. 24-109 (U.S. Oct. 15, 2025).

perpetuation of racial discrimination, but a necessary *correction* to dismantle it.[28]

The foundational debate before the Court in *Callais* centered on two issues: (1) whether compliance with Section 2 of the VRA constitutes a compelling interest justifying race-based redistricting; and (2) whether the *Gingles* preconditions must be restructured to disentangle race from partisan affiliation.[29] The Court should adopt the Appellants' position and hold that Louisiana's remedial districting plan under Section 2 of the VRA is constitutional under the Fourteenth and Fifteenth Amendments because it operated to remedy structural barriers to political participation that persist in the absence of overt discriminatory intent and are embedded in electoral design.

The Compelling Interest Threshold and the Restructured Gingles Framework

The threshold question of whether Section 2 compliance *alone* could constitute a compelling interest under strict scrutiny has remained an unanswered question stretched across thirty years of the Court's jurisprudence.[30] According to the *Callais* opinion, the Court has declined to decide this issue because it has consistently reached the same result by ruling against states on the narrow tailoring requirement alone.[31] Louisiana's Appellant brief reflected how entrenched this assumption had become in routine redistricting practices, stating that VRA compliance has been treated as an "unquestioned compelling interest that courts had long accepted without dispute."[32] The Appellees' brief took the opposite position, arguing that VRA compliance fails to constitute a compelling interest for two reasons: first, Section 2 is no longer applicable given current voter data showing that Black voters in Louisiana possess an equal opportunity to participate in the political process and elect representatives of their choice; and second, the State's *motivating* purpose was to appease the federal court — rather than comply with the VRA — which cannot justify the use of race-based redistricting.

Justice Jackson pushed back against the Appellees' framing of

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[28] Oral Argument at 38–49, *Louisiana v. Callais*, No. 24-109 (U.S. Oct. 15, 2025); Brief for Appellants at 28, *Louisiana v. Callais*, Nos. 24-109, 24-110 (U.S.).
[29] *Callais*, slip op. at 1.
[30] *Id.* at 9-10.
[31] *Id.*
[32] Brief for Appellants at 41, *Louisiana v. Callais*, Nos. 24-109, 24-110 (U.S.) (quoting *Abbott v. Perez*, 585 U.S. 579, 587 (2018)).

Section 2's enforcement and argued that the Constitution's guarantee of an *equally* open electoral process itself is the compelling interest, irrespective of whether a majority-Black district is the remedy required.[33] Justice Kagan pressed Aguiñaga's argument further, confronting how his position had been rejected in *Allen v. Milligan* three terms prior. In *Milligan*, the Court held that the Fifteenth Amendment does not limit Congress to legislating against purposeful discrimination alone and that the *Gingles* threshold inquiry remains the prevailing standard. Justice Kagan correctly highlighted that *Callais* was not a matter of first impression, but an invitation to relitigate the Court's settled precedent in *Milligan*.[34]

The majority in *Callais* resolved the compelling interest question by restructuring the *Gingles* framework and imposing new proof requirements at each step of *Gingles*.[35] Under the first precondition of *Gingles*, plaintiffs must now provide an illustrative map satisfying both racial compactness and *all* of the State's nonracial objectives, including the preservation of existing congressional seats held by sitting members of Congress to guarantee that remedying vote dilution does not come at the cost of redrawing districts that undermine sitting representatives' political power.[36] Under the second *Gingles* precondition, plaintiffs must distinguish that a disparity between Black and white voting patterns is driven specifically by race, rather than party affiliation. Finally, the Court reframed the third *Gingles* precondition by requiring that plaintiffs must bear the burden of proving that white voters consistently vote *against* minority-preferred candidates specifically based on race alone, and not merely because of their political party.

The restructuring of the second and third *Gingles* preconditions was driven by the necessity to remain consistent with *Rucho v. Common Cause* (2019), under which the Court held that states can legally draw congressional maps designed to maximize Republican or Democratic seats and are not subject to judicial review by federal courts. This ensures that Section 2 vote dilution claims cannot be raised to unsettle the constitutional protection for partisan gerrymandering that the Court settled in *Rucho*.[37] Yet, restructuring

[33] Oral Argument at 80–81, *Louisiana v. Callais*, No. 24-109 (U.S. Oct. 15, 2025).
[34] Oral Arg. at 65-66, *Callais*, Nos. 24-109.
[35] *Callais*, slip op. at 9–10.
[36] *Id.* at 33-34.
[37] *Id.* at 28.

the *Gingles* conditions for the purpose of doctrinal consistency, it fails to recognize the workability concerns of how states will distinguish political affiliation from race, where both identities are commonly intertwined. This was the precise concern raised by Justice Kagan's dissenting opinion, where she recognized that the new *Callais* requirements "laid the groundwork for the largest reduction in minority representation since the era following Reconstruction. Under the cover of 'updat[ing]' and 'realign[ing]' the greatest of statutes, the majority makes a nullity of Section 2 and threatens a half-century's worth of gains in voting equality."[38] Therefore, while the Court did not explicitly answer if Section 2 compliance constitutes a compelling interest, it redefined the scope of the statute so narrowly that the conditions necessary to establish a Section 2 violation preceding review under strict scrutiny will rarely be satisfied.[39]

The Revival of Bolden's Intent Standard Under Gingles

Under the second issue in *Callais*, the Court identified four post-*Gingles* developments that have shifted the landscape of voting rights litigation to justify modifying the *Gingles* framework: (1) increased minority registration and voter turnout; (2) the shift to a competitive two-party system in Southern states, where voters of different races now consistently align with opposing political parties making it increasingly difficult to distinguish whether racial discrimination or partisan competition was the root cause of voting differences; (3) upholding the Court's ruling in *Rucho* that partisan gerrymandering is not reviewable in federal court; and (4) the increased capacity of computer technology to generate illustrative maps eliminating plaintiffs' production obstacles.[40]

The majority's restructuring of the *Gingles* framework resolved the compelling interest inquiry at the expense of reintroducing the *intent-based* requirement in *Mobile v. Bolden* (1980) that the 1982 amendments were designed to eliminate. In *Bolden*, the Court held that Section 2 required proof of *purposeful* discrimination, and Congress repudiated *Bolden*'s intent-requirement by amending the text of Section 2 to replace the intent standard with an effects-based results test.[41] Counsel for the Appellees, Edward Greim asserted that under Section 2, plaintiffs should bear the burden of proving "*ongoing*

[38] *Callais*, slip op. at 33-34 (Kagan, J., dissenting).
[39] *Id*. at 40 (Kagan, J., dissenting).
[40] *Callais*, slip op. at 28–29 (citing *Allen v. Milligan*, 599 U.S. at 23, 33, 36).
[41] *Id*. at 13-16 (Kagan, J., dissenting).

or recent *intentional* discrimination."[42] During oral argument, Greim contended that the Appellees' argument rests on the premise that the enforcement of Section 2 is an overbroad remedy that involves "stereotyping voters and making assumptions about their politics and their views…based on their race" by exclusively examining effects.[43]

The majority restored *Bolden*'s intent framework in everything but name by requiring plaintiffs to prove voter dilution through present-day findings of *deliberate* discrimination. In doing so, it deemed evidence of how historical forms of racial disenfranchisement continue to produce disparate *effects* in electoral outcomes today to carry "much less weight" under the totality of the circumstances inquiry.[44] Justice Kagan's dissenting opinion warned that narrowing the totality of circumstances inquiry to intentional present-day findings of voting discrimination "is neither what Congress said nor meant when it added the phrase 'totality of circumstances,'" underscoring that the majority's revised interpretation of Section 2 implicates the fundamental principles of judicial restraint.[45]

The Judicial Watch and Allied Educational Foundation, a conservative public interest organization, filed an amicus brief in support of the Appellees, arguing that race-based division of citizens for purposes of compliance with Section 2 under the *Gingles* framework resembles a framework "targeting racial retribution rather than reconciliation."[46] This argument rests on the premise that the country's history of discrimination cannot justify perpetuating division *indefinitely* because the United States cannot be defined by its past.[47] While their argument promoting racial neutrality and strict color-blindness may appear persuasive, it cannot be reconciled with the reality that facially race-neutral justifications will be unchecked and persist without any consequence. A rigid enforcement of racial neutrality in this context would not eliminate systemic disparities in political representation—it would entrench them.

Conclusion

Accordingly, Counsel for the Robinson Appellants stressed that if

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[42] Supplemental Brief for Appellants, *supra* n. 23, at 2.
[43] *Id*. at 101-102.
[44] *Callais*, slip op. at 30–31 (opinion of the Court); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).
[45] *Callais*, slip op. at 32 (Kagan, J., dissenting).
[46] *See* Brief of Amici Curiae Judicial Watch, Inc. & Allied Educational Foundation in Support of Appellees, *Louisiana v. Callais*, Nos. 24-109, 24-110 (U.S. Sept. 24, 2025).
[47] *Id*. at 9.

Section 2 ceased to prevent the effects of vote dilution in districting, it would risk jeopardizing the opportunity of diversifying leadership representation across the South and many states like Louisiana, where every Black congressional member was elected from majority-minority districts under Section 2's conditions.[48] The implications of the Court's ruling in *Callais* fundamentally reconfigure the legal framework that allows minority communities nationwide to seek constitutional protection against vote dilution. The Court's revised interpretation of Section 2's narrow scope jeopardizes majority-minority districts across the South that have provided minority citizens meaningful political representation for the past half-century. Section 2 of the VRA was enacted to guarantee voters of color are not denied an equal opportunity to participate in the democratic electoral process. The restructuring of *Gingles* under *Callais* undermines that seminal guarantee by limiting Section 2 protections to contemporary evidence of intentional discrimination, which risks leaving minority voters without a *feasible* federal remedy that the 1982 amendments to Section 2 of the VRA were designed to secure.

[48] *Id*. at 33-34.

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Managing Mental Illness Through Imprisonment: Patterns of Mental Illness, Incarceration, and Recidivism in the United States

By Olivia Gomes

Olivia Gomes studies Psychology and Political Science at the University of California, Davis, where she will graduate in the Spring of 2027. Following graduation, Olivia plans to attend law school and receive her Juris Doctor (J.D.) degree, which she will then use to pursue a career as a medical malpractice and healthcare attorney. As an attorney, Olivia hopes to become a voice and advocate for individuals who have faced injustices while navigating the American physical and mental health care systems.

Abstract

This paper analyzes the growing criminalization of mental illness within the United States justice system, as well as examines how existing constitutional and statutory frameworks have contributed to the recurring cycles of incarceration and recidivism among individuals with mental health disorders across the nation. As community-based mental health resources have continued to decline, jails and prisons have increasingly become de facto mental health institutions, despite lacking the resources and groundwork to provide adequate care. This paper looks at the constitutional standards governing medical treatment in correctional facilities under the Eighth Amendment, particularly the "deliberate indifference" standard established in *Estelle v. Gamble* and *Farmer v. Brennan*, as well as the limitations these standards set on incarcerated individuals receiving sufficient mental health treatment. Additionally, this paper looks to analyze protections provided under the Americans with Disabilities Act and the Rehabilitation Act, while also highlighting the significant barriers that prevent individuals from effectively exercising these rights in correctional settings. By looking at recidivism, the continuity-of-care failures following release from institutions, and California's recent diversion and CARE Court reforms, this paper argues that the current legal framework establishes only minimal protections for incarcerated individuals with mental illness, and ultimately reinforces cycles of deterioration and reincarceration, rather than promoting reform. Finally, this paper proposes potential legal and policy reforms aimed at strengthening mental health protections, expanding diversion programs, and improving the continuity of care both during and following incarceration.

Introduction

In the United States, the rate at which individuals with serious mental health issues are being taken into custody of both jails and prisons during moments of crisis, rather than being taken to receive the necessary treatment for such vulnerable moments, has continued to grow exponentially. In recent decades, there has been a dramatic increase in the number of incarcerated individuals experiencing psychiatric disorders, with studies estimating that nearly half of inmates in jail and over a third of those in prison report symptoms consistent with a mental health condition. As community treatment options have declined and mental health crises are frequently addressed through law enforcement intervention, individuals suffering from untreated psychiatric conditions are disproportionately funneled into the criminal justice system rather than into places that allow them to receive proper medical care. As a result, correctional facilities now serve as some of the largest mental health providers in the country, despite being institutions designed primarily for punishment, rather than for treatment.

Incarcerated individuals with mental illnesses are often introduced to a system managed through the use of strict legal standards that often fall short of ensuring meaningful medical treatment for those in distress. Though many statutes are in place for those incarcerated to receive basic care, under the Eighth Amendment, correctional officials only violate constitutional protections when they demonstrate "deliberate indifference" to a serious medical need, such as untreated injuries, serious mental illness, or other life-threatening medical conditions; a standard established by the Supreme Court in *Estelle v. Gamble,*[1] and later clarified in *Farmer v. Brennan*.[2] While this doctrine prohibits extreme neglect, the deliberate indifference standard set in the amendment sets a relatively low baseline for care, ultimately allowing significant room for delayed treatment, understaffed psychiatric services, and institutional practices that prioritize discipline over rehabilitation. This issue has led to many incarcerated individuals suffering from mental illness receiving only minimal or crisis-based treatment while in custody, rather than consistent, significant care.

Federal disability law provides an additional framework intended to protect incarcerated individuals with mental illness.

[1] *Estelle v. Gamble*, 429 U.S. 97 (1976).
[2] *Farmer v. Brennan,* 511 U.S. 825 (1994).

Statutes such as the Americans with Disabilities Act (ADA) and the Rehabilitation Act prohibit discrimination against individuals with disabilities, and require public institutions, including correctional facilities, to provide reasonable accommodations for a variety of needs. In practice, though, the enforcement of disability rights in correctional settings remains inconsistent across the nation due to structural barriers and limited oversight. These issues often prevent individuals from effectively asserting their rights while incarcerated, which allows the issue of inadequate mental health care to persist within many correctional institutions.

This paper argues that the recurring cycle of mental illness, incarceration, and recidivism in the United States is reinforced by legal frameworks that establish minimal standards for mental health care in correctional settings, which are inconsistently enforced through disability law. Though nationwide constitutional and statutory protections recognize the rights of incarcerated individuals facing mental illness, the limited scope of these protections allows for systemic gaps in treatment to remain in place. This gap has led the American justice system to frequently function as a substitute for full-blown mental health care settings. The result? Predictable and repetitive cycle of deterioration and reincarceration for individuals facing mental health disparities.

This paper will examine the growing criminalization of mental illness in the United States, while also looking to analyze the constitutional standards governing medical care in custody and the disability law protections that exist within correctional settings. Lastly, this paper will consider recent reform efforts and propose possible legal and policy interventions that would improve mental health care within the criminal justice system.

I. The Criminalization of Mental Illness in the U.S. Justice System

One of the most significant factors contributing to the incarceration of individuals with serious mental illness is the criminalization of psychiatric conditions within the United States justice system. Many individuals experiencing mental health crises are arrested for minor offenses closely related to the symptoms of many untreated illnesses. According to the National Alliance on Mental Illness, “many people with mental illness who are incarcerated are held for committing non-violent, minor offenses related to the symptoms of

untreated illness (disorderly conduct, loitering, trespassing, disturbing the peace), or for offenses like shoplifting and petty theft."[3]

Several structural factors contribute to this recurrence. Policies such as zero-tolerance policing strategies, nuisance laws, and mandatory sentencing for drug-related offenses have extended the role of law enforcement in responding to mental health crises across the nation[4] (NAMI, n.d.). Additionally, the lack of a strong crisis-response infrastructure in many states means that police officers frequently serve as the primary responders to psychiatric emergencies, rather than formally trained mental healthcare providers.

Research also shows that interactions between individuals experiencing serious mental illness and law enforcement are more likely to escalate into violent encounters. For example, a Congressional Research Service report notes that "the death rate for people who had signs of mental illness during police interactions (20 deaths per million) is nearly seven times higher than it is for people without signs of a mental illness (3 deaths per million)."[5]

Another major contributor to the issue of individuals not receiving proper mental health care while incarcerated is the limited availability of diversion programs and community-based treatment options. Research examining individuals who suffer from mental illness and have been involved in the American justice system suggests that fewer than ten percent are able to access appropriate treatment services while in custody or in community settings.[6]

Jails and Prisons as De Facto Mental Health Institutions

The criminalization of mental illness has been further intensified by the collapse of the United States psychiatric hospital system. Since the 1950s, the number of psychiatric hospital beds has declined dramatically as part of the deinstitutionalization movement. This decline resulted in approximately a ninety-seven percent reduction in available psychiatric beds nationwide[7]. Although the

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[3] "Criminalization of People with Mental Illness," NAMI, October 23, 2025, https://www.nami.org/advocacy-at-nami/policy-positions/stopping-harmful-practices/criminalization-of-people-with-mental-illness/.
[4] *Ibid.*
[5] Johnathan Duff et al., "Issues in Law Enforcement Reform: Responding to Mental Health Crises," Congress.gov, 2025, https://www.congress.gov/crs-product/R47285.
[6] Faye S. Taxman, Matthew L. Perdoni, and Lana D. Harrison, "Drug Treatment Services for Adult Offenders: The State of the State," Journal of Substance Abuse. Treatment 32, no. 3 (April 2007): 239–54, https://doi.org/10.1016/j.jsat.2006.12.019.
[7] Samantha Raphelson, "How the Loss of U.S. Psychiatric Hospitals Led to a Mental Health Crisis," Npr.org, November 30, 2017, https://www.npr.org/2017/11/30/567477160/how-the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis.

deinstitutionalization movement was supported to replace institutional care with community-based treatment options, many of these programs were never properly funded or implemented.

As psychiatric hospital populations continued to decline, correctional institutions increasingly absorbed the individuals experiencing untreated mental illness. Today, people with psychiatric disorders represent a disproportionately large portion of the incarcerated population in the United States. According to Deconstructing Stigma, a global public awareness campaign centered on mental health advocacy, approximately 64% of individuals held in county jails, 54% of those in state prisons, and 45% of those in federal prisons report experiencing significant mental health conditions or symptoms of such that require treatment.[8] These figures demonstrate how correctional institutions have increasingly become substitutes for community-based mental health systems, rather than facilities designed solely for punishment and rehabilitation.

Despite prisons and jails becoming the new hosts for those with mental illness, many of these institutions are poorly equipped to provide adequate mental health care. Correctional facilities are frequently overcrowded, understaffed, and designed to maintain security across their facilities rather than provide individual therapeutic treatment for their inhabitants. When these issues are apparent and combined with one another, they can easily lead to many of a facility's inhabitants being overlooked and being forced to suffer in silence.

III. Constitutional Standards Regarding Mental Health Care

The Eighth Amendment and Medical Care in Prison

The constitutional framework governing medical care within correctional institutions can be found in the Eighth Amendment, which prohibits "cruel and unusual punishments." Since the amendment's enactment, courts across the nation have looked to interpret this provision in order to set requirements for correctional institutions, specifically in terms of how they are to provide necessary medical care for incarcerated individuals.

In *Estelle v. Gamble* (1976), the Supreme Court held that "deliberate indifference to serious medical needs of prisoners"

[8] "Locked Away, Left Behind: Mental Health + the Justice System," Deconstructingstigma.org, June 18, 2025, https://deconstructingstigma.org/guides/incarcerated-mh.

constitutes a violation of the Eighth Amendment.[9] This decision recognized that incarcerated individuals rely entirely on the correctional institutions they are being held in for access to medical care, and the failure of the institutions in providing such care may result in the facilities facing punishments on account of acting unconstitutionally.

The Supreme Court furthered the idea of the deliberate indifference principle in the Farmer v. Brennan (1994) case. In this case, the Court ruled that prison officials can be held liable for failing to provide adequate care for their incarcerated persons, but only in cases when they have knowledge of a potential risk for serious harm and purposely ignore that risk.[10]

This subjective knowledge requirement creates a high threshold for plaintiffs looking to shed light on their experiences with inadequate prison medical care. Since plaintiffs are given the burden of proving that police officials were aware of a possible danger relative to not providing care and still chose not to address it, system deficiencies such as understaffing or delayed treatment may not meet the legal threshold required for constitutional liability. Subsequently, this high threshold can often lead to only the "worst of the worst" cases of neglect being addressed and punished, while the consistent inequities that come along with the lack of systemic resources continue to fall through the cracks.

These justice system limitations are particularly evident in the context of mental health care. Many correctional systems in the United States are known to face severe shortages of psychiatric professionals, which often results in extended wait times for mental health evaluations and treatment. Since psychiatric treatment can more often than not be unavailable, this can lead to mental illness and potential crises being overlooked for many individuals facing incarceration, with only the most obvious crises having a chance at being addressed. Considering these implications, it is not surprising that in many American facilities, treatment is limited to crisis stabilization rather than long-term rehabilitative and therapeutic-grade care.

IV. Disability Law and Mental Illness Behind Bars

The Americans with Disabilities Act

Title II of the Americans with Disabilities Act prohibits discrimination against individuals with disabilities by public entities,

[9] *Estelle v. Gamble*, 429 U.S. 97 (1976).
[10] *Farmer v. Brennan*, 511 U.S. 825, 1994.

including correctional institutions.[11] The Supreme Court confirmed that this statute applies to prisons in *Pennsylvania Department of Corrections v. Yeskey,* 524 U.S. 206 (1998), when it ruled that state prisons are "public entities" and therefore the ADA protects facility inmates from disability-based discrimination on the basis of the programs and services that they provide.[12]

Under the Americans with Disabilities Act, American correctional institutions must provide reasonable accommodations for their inhabitants, ensuring that those with disabilities have equal access to prison programs, services, and activities during their time in such facilities.

The Rehabilitation Act

Section 504 of the American Rehabilitation Act similarly prohibits disability discrimination in programs receiving federal funding. Considering that most correctional institutions receive federal financial assistance, the Rehabilitation Act applies broadly to prison systems nationwide.

Under the Rehabilitation Act, "individuals with disabilities are defined as persons with a physical or mental impairment which substantially limits one or more major life activities."[13] In addition to those currently facing the hardships that come along with dealing with disabilities, Section 504 also states that people who have a history of having a physical or mental health impairment that significantly impacted their quality of life are protected under the Rehabilitation Act as well.[14] Considering that many mental health conditions, such as schizophrenia, bipolar disorder, major depression, and post-traumatic stress disorder (PTSD), are known to have life-altering symptoms and implications for those affected, individuals diagnosed with such illnesses may qualify as having a disability under this act.

Barriers to Enforcement of Such Protections

Despite these legal protections, enforcement of disability rights in correctional institutions remains extremely limited. On account of this issue, one report done by the Center for American Progress

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[11] "What Rights Do Prisoners Have under the American with Disabilities Act?," Rockymountainada.org, 2013, https://rockymountainada.org/resources/research/what-rights-do-prisoners-have-under-american-disabilities-act.
[12] *Pennsylvania Department of Corrections v. Yeskey,* 524 U.S. 206 (1998)
[13] U.S. Department of Health and Human Services, "Your Rights under Section 504 of the Rehabilitation Act: What Is Section 504?" (U.S. Department of Health and Human Services, June 2006), https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/factsheets/504.pdf.
[14] *Ibid.*

explains that "While behind bars, people with disabilities are often deprived of necessary medical care, as well as needed support, services, and accommodations. This is despite long-standing federal disability rights laws that mandate equal access to programs, services, and activities for all people with disabilities in custody."[15] This report further notes that solitary confinement is frequently used for individuals with disabilities, which can often result in severe psychological harm. According to the same analysis, "A growing array of research reveals that even short stays in solitary confinement can have severe and long-lasting consequences for people with disabilities, and particularly those with mental health conditions."[16] The findings of this report make it clear that many correctional facilities nationwide are not properly equipped on either the resource or procedural level to attend to the needs of those incarcerated and dealing with mental illness.

V. Release and Recidivism Relative to Mental Illness

A major gap in the legal framework surrounding mental health care occurs when individuals are released from incarceration. Although incarcerated individuals are constitutionally entitled to medical care while in custody, there is no comprehensive legal mandate in place that ensures a continuity of care following their release.

One contributing factor that significantly adds to this issue is the Medicaid Inmate Exclusion Policy, which prevents federal Medicaid funds from covering healthcare services for incarcerated individuals. As a result, many individuals lose their health insurance coverage during the time that they're incarcerated, on top of the possibility of experiencing delays in re-enrollment following their release.[17] Losing health insurance can be extremely detrimental for those with mental illness in the justice system, as it can lead to interruptions in medication and treatment. Considering that the processes of being booked into jail or released from prison are lengthy and confusing, it is not uncommon for individuals to face interruptions in their prescription medications as they are being worked through the system. This process significantly worsens when a lack of health insurance comes into play, as so many individuals facing mental illness are unable to receive the

[15] Rebecca Vallas, "Disabled behind Bars," Center for American Progress, July 18, 2016, https://www.americanprogress.org/article/disabled-behind-bars/.
[16] *Ibid.*
[17] Sarah E. Wakeman, Margaret E. McKinney, and Josiah D. Rich, "Filling the Gap: The Importance of Medicaid Continuity for Former Inmates," Journal of General Internal Medicine 24, no. 7 (April 18, 2009): 860–62, https://doi.org/10.1007/s11606-009-0977-x.

medication and treatment they need, even when they become established in the system of the jail or prison that they're being held in. This subsequently leads to significant gaps in time where individuals' mental health needs are not addressed, which can lead to fluctuations in their symptoms and well-being.

In addition to interruptions in individual care, the popular issue of a lack of discharge planning has served as a significant roadblock for incarcerated persons with mental health issues. Research looking at post-release outcomes highlights the severity of this transition period; particularly how critical it is for determining an individual's success following incarceration. Studies on the issue found that "re-entry into the community for former inmates is a vulnerable time, marked by difficulties adjusting, increased drug use, and a twelve-fold increased risk of death in the first 2 weeks after release."[18,19] These studies found that such issues can especially hold true for individuals with mental illness, as the overwhelming transition back into the community can lead to a rise in symptoms, which are often difficult to address outside of the system. This issue is known as the "revolving door" effect, and affects nearly half of American inmates dealing with mental health conditions. It has become common for recidivism rates to be higher for prisoners who are mentally ill compared to those who are not, based on many influencing factors that can occur, such as rapid relapse, as well as a general lack of medication, housing, and community care.[20]

Probation requirements can further exacerbate the challenges that come along with release for mentally ill prisoners. Standard supervision conditions often impose strict obligations that may be difficult for individuals with severe mental illness to fulfill, which can result in small technical violations of probation leading to such individuals facing reincarceration.[21]

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[18] Nicholas Freudenberg et al., "Coming Home from Jail: The Social and Health Consequences of Community Reentry for Women, Male Adolescents, and Their Families and Communities," *American Journal of Public Health* 95, no. 10 (October 2005): 1725–36, https://doi.org/10.2105/ajph.2004.056325.

[19] Ingrid A. Binswanger et al., "Release from Prison — a High Risk of Death for Former Inmates," *New England Journal of Medicine* 356, no. 2 (January 11, 2007): 157–65.

[20] Miriam Becker-Cohen and KiDeuk Kim, "The Revolving Door: Mental Illness, Incarceration, Inadequate Care, and Inadequate Evidence," Urban Institute, April 7, 2015, https://www.urban.org/urban-wire/revolving-door-mental-illness-incarceration-inadequate-care-and-inadequate-evidence.

[21] Emily Widra, "One Size Fits None: How 'Standard Conditions' of Probation Set People up to Fail," Prisonpolicy.org, August 2024, https://www.prisonpolicy.org/reports/probation_conditions.html.

VI. California as an Example for Reform

California is a great example of how state governments have attempted to address the intersection between mental illness and the criminal justice system, specifically through their diversion programs and court-supervised treatment initiatives. The reforms that the state has put into place have aimed to reduce incarceration among individuals experiencing severe mental illness by prioritizing treatment and community-based care over traditional punitive responses. Although such programs have expanded widely across the state in recent years and pose several potential benefits, they have also revealed the limitations of using legal institutions to address mental health crises in the United States.

Mental Health Diversion Programs

One of the most significant reforms in California so far has been the implementation of mental health diversion programs under California Penal Code §1001.36. Under 1001.36, individuals with certain criminal offenses can be diverted from the traditional criminal justice process into community-based mental health treatment programs instead.[22] Individuals diagnosed with certain mental health disorders found in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), such as schizophrenia, bipolar disorder, and major depressive disorder, can potentially be eligible to participate in these diversion programs if it can be proven that their mental condition played a role in committing the alleged offenses they are facing in court.[23]

Defendants who are deemed eligible to receive treatment plans typically receive therapy, medication management, and social services designed to stabilize their condition and address the underlying causes of criminal behavior. Penal Code 1001.36 states that the participant can remain in the program for up to two years, and that the program "can consist of either inpatient or outpatient treatment and if needed, can also include alcohol or drug treatment."[24] If the program is

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[22] "Mental Health Diversion," Lessem, Newstat & Tooson, LLP, March 23, 2026, https://lnlegal.com/mental-health/mental-health-diversion/.

[23] Michael MacIntyre, "Mental Health Diversion in California under PC § 1001.36 – Michael MacIntyre, M.D.," Macintyrepsychiatry.com, August 2022, https://macintyrepsychiatry.com/articles/2022-08-diversion.html.

[24] Emin Gharibian, "Mental Health Diversion: An Overview of the Legal Guidelines and Requirements," Verdugo Psychological Associates, October 9, 2021, https://verdugopsych.com/mental-health-diversion-an-overview-of-the-legal-guidelines-and-requirements/.

completed successfully, the criminal charges against the individual may be dismissed, and their arrest records could even possibly be sealed.

These programs have become more common in California in recent years, with surveys of county diversion programs showing that approximately 85% of responding counties reported having some form of active mental health diversion programs in place, with many of these programs allowing both misdemeanor and felony offenses to qualify for diversion.[25]

CARE Court

In addition to criminal diversion programs, California has also enacted the Community Assistance, Recovery, and Empowerment (CARE) Court program. CARE Court is a civil court initiative created to help connect individuals experiencing severe, untreated mental illness with treatment plans and supportive services before they become overly involved in the recidivism cycle.

The CARE Court framework allows family members, clinicians, first responders, and other approved individuals to petition a civil court to create a "CARE plan" for individuals diagnosed with schizophrenia spectrum disorders or other psychotic illnesses. The program mainly focuses on individuals whose untreated mental illness has led to repeated run-ins with emergency services, law enforcement, or homelessness over time.[26,27] Once a petition is approved, the court collaborates with medical providers and community organizations to create a treatment plan that may include psychiatric care, medication management, substance use treatment, and housing services in order to support the individual in need.

Unlike traditional court proceedings, CARE Court is designed to function as a supportive intervention rather than a method for punishment. Participants receive care through a team of service providers and can remain in the program for up to twenty-four months while their treatment plan is monitored by a civil court judge. The program also includes accountability mechanisms toward local

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[25] "Mental Health Diversion in California Survey Analysis Overview," California Department of Corrections and Rehabilitation, 2022, https://www.cdcr.ca.gov/ccjbh/wp-content/uploads/sites/172/2022/11/CA-MH-Diversion-Survey-Synthesis_ADA.pdf.
[26] "Governor Newsom's New Plan to Get Californians in Crisis off the Streets and into Housing, Treatment, and Care," California Governor, March 2022, https://www.gov.ca.gov/wp-content/uploads/2022/03/Fact-Sheet_-CARE-Court-1.pdf.
[27] "Governor Newsom Signs CARE Court into Law, Providing a New Path Forward for Californians Struggling with Serious Mental Illness," California Governor, September 14, 2022, https://www.gov.ca.gov/2022/09/14/governor-newsom-signs-care-court-into-law-providing-a-new-path-forward-for-californians-struggling-with-serious-mental-illness/.

governments to ensure they're providing necessary services, with these governments being able to face penalties if they fail to implement the required treatment resources in their areas.[28,29]

Strengths and Limitations of California's Approach

California's mental health diversion efforts have several strengths, such as encouraging earlier intervention by connecting individuals with treatment before their mental health conditions escalate into more serious criminal behavior, and emphasizing treatment and rehabilitation rather than incarceration, both of which may reduce long-term recidivism and improve public safety outcomes over time.

Despite these promising ideas, significant roadblocks to achieving these goals remain. One common barrier to diversion programs is the shortage of supportive housing options available for individuals experiencing severe mental illness. Surveys of county diversion programs indicate that the lack of housing resources is one of the largest obstacles to implementing and sustaining diversion programs across the state.[30] A lack of funding and shortages of mental health professionals also restrict the ability of local governments to fully implement these initiatives as well.

As a result, while California's reforms represent promising steps toward addressing the criminalization of mental illness, they also shed light on the broader structural challenges involved in shifting the American justice system away from strictly punitive measures and more toward a treatment-oriented model.

VII. Proposal of Legal and Policy Interventions

Addressing the cycle of mental illness, incarceration, and recidivism that has become so common across the United States will require both legal reform and expanded public policy initiatives. Although existing constitutional and statutory protections recognize certain rights for incarcerated individuals with mental illness, these frameworks often establish minimal standards for care, which leaves room for systemic gaps in various vital areas. By strengthening these protections and expanding treatment-based alternatives to incarceration, the United States can look to reduce the reliance on correctional institutions as primary providers of mental health services, while ensuring those already involved in the justice system are met with proper care for their mental health needs as well.

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[28] "Governor Newsom's New..." California Governor.
[29] "Governor Newsom Signs..." California Governor.
[30] California Department of Corrections and Rehabilitation.

Strengthening Constitutional Healthcare Standards

One option for reform is strengthening the constitutional standards relative to mental health care in correctional facilities. Under the current legal framework established by *Estelle v. Gamble* and *Farmer v. Brennan*, incarcerated individuals are burdened with proving that prison officials acted with deliberate indifference to serious medical needs in order to establish an Eighth Amendment violation. This standard requires clear proof that officials working in the facilities were aware of a potential significant risk for harm and deliberately disregarded that risk, which can often be very difficult to prove as a plaintiff.

While this legal standard helps prevent cases of extreme neglect, it often fails to address more common systemic disparities within American correctional health systems. Chronic understaffing, delays in treatment, and limited access to psychiatric services may not meet the high threshold required to establish deliberate indifference, even though these conditions significantly reduce the quality of care available to incarcerated individuals. If the interpretation of constitutional healthcare obligations were able to expand to include more comprehensive standards for timely and adequate mental health treatment, it could encourage correctional systems to adopt more proactive treatment models to care for their inhabitants.

Strengthening Enforcement of Disability Rights

A second area of reform involves improving the enforcement of disability rights laws within correctional institutions. Although policies such as the Americans with Disabilities Act and the Rehabilitation Act apply to individuals in prisons and jails, enforcement of these protections remains inconsistent and difficult. Structural barriers such as the Prison Litigation Reform Act make it hard for incarcerated individuals to pursue claims of their civil rights, while the culture within correctional facilities often prioritizes security concerns over disability accommodations as well.

Increased federal oversight and enforcement by the Department of Justice could potentially help ensure compliance with disability rights laws in correctional settings. Additionally, expanding access to legal representation for incarcerated individuals could help them more effectively exercise their rights relative to the physical and mental health care they received, or did not receive, while incarcerated.

Expansion of Diversion Programs

Another idea that reform that is critical for improving mental health care in correctional settings involves expanding diversion

programs that connect individuals experiencing mental health crises with treatment instead of incarceration. Mental health courts and pre-arrest diversion programs show promising results in reducing recidivism among individuals with serious mental illness, suggesting that if such resources were to be expanded upon, the impact could be significant and on a much larger scale.

Crisis response programs that pair law enforcement officers with mental health professionals have also shown potential for reducing arrests during psychiatric emergencies. By ensuring that trained mental health responders who can assess individuals in crisis and connect them with appropriate treatment services are present when police are called, these programs are helping reduce the likelihood that individuals experiencing mental illness will enter the criminal justice system in the first place.

Ensuring Continuity of Mental Health Care After Release

Finally, the most significant method for reform on a national level is for policymakers to address the significant gaps in continuity of care that occur when individuals with mental illness are released from incarceration. The Medicaid Inmate Exclusion Policy often leads to the termination of Medicaid coverage during incarceration, which can create delays in re-enrollment following release. A disruption of Medicaid and other health insurance can prevent many individuals from accessing necessary medications and treatment services while incarcerated, as well as during the critical transition period following reentry into the community.

Ensuring that Medicaid coverage is reactivated prior to release could significantly improve access to healthcare services and reduce recidivism rates among individuals with serious mental illness. Additionally, correctional institutions should look to implement comprehensive discharge planning procedures that connect individuals with community mental health providers, housing resources, and social services before these incarcerated individuals leave custody in order to properly set them up for success before they are released back into the community.

Conclusion

Ultimately, the growing reliance on incarceration as a response to mental illness reflects broader systemic failures within the American healthcare and criminal justice systems. While constitutional and statutory protections formally recognize the rights of incarcerated individuals with mental illness, these safeguards often provide only minimal standards of care and fail to address the institutional

structure that has contributed to repeated incarceration. Without significant investment in community-based treatments, continuity of care, and diversion-focused reforms, correctional institutions will likely continue to function as substitutes for adequate mental health outlets. Addressing this issue requires not just legal reform, but a significant shift in how the United States understands mental illness, public safety, and rehabilitation. By moving away from punitive responses and moving toward treatment-centered approaches, the nation can look to better protect vulnerable individuals during times of mental health crisis, while also promoting long-term public health and community stability overall.

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The Pattern of Intentional Design in Political Control of Information: The PRESS Act

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Abstract

This paper attempts to argue that the recurring theme of targeting journalists and media through subpoenas and surveillance reflects an intentional pattern within the U.S. government that is designed to control the flow of governmental misconduct or controversial policies and simultaneously skew the public opinion on such matters. The PRESS (Protect Reporters from Exploitative State Spying) Act[1], introduced to the Senate by U.S. Senator Ron Wyden in 2023, challenges this structure by disrupting long-standing methods of blatantly unjust and hostile governmental influence over the press by limiting federal surveillance of journalists and establishing stronger protections for press confidentiality. Without structural protections for journalistic confidentiality, the government's investigative power can transform from a legitimate law-enforcement tool into a mechanism of political information control.

Introduction

A consistent, historical pattern of governmental pressure directed toward journalists exists within the United States, one that has spanned multiple presidential administrations. Through this, federal authorities have used subpoenas, surveillance of communications and investigative tools to identify confidential sources with justification that does not have the people's best interest in mind. Seizure of phone and email records, secret subpoenas and other investigative measures aimed at uncovering the identities of individuals who provide information to reporters are recurring practices across political parties, historical settings and administrations, furthering the idea that these are not isolated incidents but rather a continuing pattern of the government's involvement in investigative journalism. This pattern specifically

[1] Protect Reporters from Exploitative State Spying Act, S. 2074, 118th Cong. (2023).

reflects an intentional stance with serious political motivations as governments have incentives to control sensitive information that could be exposed as misconduct or challenge standing narratives they set. Such efforts will discourage investigative reporters from exercising their natural rights, therefore limiting the press's ability to inform the public. The proposed PRESS Act seeks to disrupt this pattern by restricting the federal ability to compel journalists to reveal such information and limiting the surveillance of their communication.

More Insight

Freedom of the press is a first amendment right that is commonly seen as a foundation for a democratic government. Media is historically the primary mechanism through which the public may access information regarding government conduct, policy decisions and any potential abuses of power in such regards. Investigative journalism that does so often relies on confidential sources (government insiders or whistleblowers) who can help to provide information that would otherwise remain undiscovered by the public. The journalists ability to protect the confidentiality of their sources is crucial in effective production of informative media and the functioning of the press overall. When such protections are weakened by forces such as unjust governmental restraints, the flow of information between the two is inhibited and therefore so is the public's access to information necessary for democratic accountability.

Despite the constitutional and civic interests of the press, the federal government has historically exercised investigative powers against journalists in ways that threaten their natural protections. Importantly, these actions are not confined to a singular political movement or administration, and are prevalent across time, political affiliation. Throughout the span of numerous presidential administrations, higher figures have subpoenaed reporters in an effort to get access to confidential sources and referenced national security threats in order to override traditional press protections. These actions are intentionally setting pressure upon not only the reporters themselves, but also the sources, as the possibility of the confidential communications being exposed increases when regarding governmental affairs.

Real life examples of this happen without the public even realizing. For example, in 2013 under the Obama administration, the Department of Justice [DOJ] secretly obtained phone records belonging to journalists and editors at the Associated Press as part of a leak investigation. The seizure encompassed a wide range of

communications across multiple individuals/offices and was completed without any previous warnings to the organization. Similarly, the DOJ under the administration of Donald Trump sought phone and email records of reporters belonging to some of the biggest outlets—CNN, The Washington Post and The New York Times—in efforts to locate sources that had previously been involved in revealing classified information. These incidents are prime examples that the governmental targeting of journalists has never been necessarily partisan, further highlighting an institutional pattern within the government that utilizes unjust authorities to obtain information regarding press members and their assignments.

Intentionality

The recurring targeting of journalists can be referenced as a structural relationship between the state's investigative authority and the limited protections in favor of journalists. The federal government possesses such broad legal tools, especially in comparison to those of the press, allowing investigators to obtain information regarding reporters' sources in certain circumstances. The powers of subpoena, access to telecommunication records and national security authorities are all ones granted to the federal government, all of which are utilized in legal loopholes to gain access to the information they deem crucial despite the first amendment rights that protect newsgathering and sources from interference. Because these authorities operate within existing legal frameworks, this surveillance occurs through means which are technically lawful, even when they contradict freedom of the media on paper.

In numerous cases, such as that of the Obama administration, the government works directly through third-party service companies such as email platforms or network companies to ensure that the journalists do not receive the courtesy of being notified ahead of time, and therefore are not able to contest the requests. The breadth and secrecy of this investigation generated significant concern among press organizations, arguing that obtaining such communication records could reason that other confidential sources could too be exposed through call logs and/or contact patterns. Even without knowing the exact content of the phone calls, these investigators could expose individuals who provided information for the greater wellbeing of the media and the government's constituents. However, as previously stated the investigation remained sound from a legal perspective as the procedures were permissible under the law.

Government officials typically have the same response for such

investigative actions: national security, public safety or leak prevention. Protecting such sensitive information and unlawful disclosure of it is typically one of the government's most legitimate interests, even prompting the Espionage Act of 1917. Serving as a safeguard for national security information, this act is often used in many contexts regarding investigations into the press beyond the original outlines of leak prevention. The repeated utilization of The Espionage Act has broader and even more intentional consequences for the press as the aggressive efforts to disclose the sources will eventually discourage the whistleblowers from coming forth. The knowledge of the surveillance will then halt or slow the production of stories that are crucial to the public, not so inadvertently restricting the flow of information regarding government wrongdoings.

A Disruption To This Pattern

The PRESS Act represents a significant legislative effort to address the institutional challenges faced by journalists under the current federal law. The proposed legislation aims to strengthen protections for reporters and their sources by limiting the federal government's ability to pressure journalists or other thor-party providers to disclose information that was specifically come across within the course of their journalistic work. This act also would be the first of its kind: a comprehensive federal press shield law in the United States. According to the bill's language in S.2047, the legislation would prohibit "the federal government from compelling journalists and providers of telecommunications services (e.g., phone and internet companies) to disclose certain protected information, except in limited circumstances such as to prevent terrorism or imminent violence."[1] By placing statutory limits, this significantly closes the legal gaps that have allowed for investigators to obtain protected information and ensures that requests to do so are subject to greater scrutiny and oversight.

As previously mentioned, the PRESS Act would be the first of its kind at a federal level, although not at a state one as other similar protections exist. Within the span of several decades, most states have adopted press shield laws that protect journalists from being forced to reveal confidential sources or unpublished reporting materials. These laws, however, vary in scope and strength. Some states such as Nevada, Oregon, Arizona and New York may provide strong statutory protections that allow journalists to outright refuel disclosing said information while others like Idaho are more limited protections that can easily be overridden by legal or national security concerns. The

varying degrees of protection at the state level has created uneven legal standards for journalists and government across the nation. Journalists that work within specific states with heavy laws will be able to enjoy strong protections and have higher chances of working with confidential sources whereas those in areas without will not be granted the same privilege. Furthermore, because federal authorities are not bound to state shield laws when conducting federal investigations, the media can still be compelled to disclose information under federal legal procedures even in states such as Nevada, Oregon, Arizona or New York. The gap between the state protections and federal authority has been a driving force in justification for this federal legislation.

Utilizing such context, the PRESS Act can be seen as an effort to combat these pressures and unfair circumstances forced up journalists in their everyday jobs and to establish a consistent national standard for protecting their publications. By enforcing statutory limits on federal efforts to reveal the sensitive information, this piece of legislation represents a response to the recurring, intentional pattern mentioned at the beginning of this piece. Rather than solely relying on constitutional principles that are loosely interpreted, there is finally the ability to enforce the First Amendment values. Supporters of the legislation argue that these protections are necessary to ensure that reporters can gather the information necessary for their careers without fear or hesitation. Following the strengthening of confidentiality protection, the aim is that whistleblowers and other sources provide information regarding misconduct without any risk of exposure nor surveillance. This act is not intended solely to protect the journalists and their sources but also to restore the broader democratic function of investigative reporting in itself.

Possible Limitations

Although the PRESS Act represents a significant step toward strengthening press protections, it does not completely eliminate the structural tensions between the governmental authority and the realm of investigative journalism. Several limitations remain that highlight how the Act may address the problem partially but does not fully remove the entirety of the pressure that the government places upon journalists.

One concerns the scope of the Act being applied as the PRESS Act primarily restricts investigative action taken on by federal agencies not state or local authorities, meaning journalists may be subjected to investigation through pressures of the other forms of

government. At first glance, it may appear that the Supremacy Clause of the U.S. constitution may resolve this issue though allowing federal law to override inconsistent state laws; however, the clause does not automatically turn federal protections into standards necessary for states to adopt into their systems. Instead, the federal government will govern within their realm of agencies, leaving the state to retain its authority to regulate within their own court system. Since the PRESS Act is primarily designed to limit federal practices rather than impose a nationwide standard for state governments, the Supremacy Clause does not necessarily fix the issue at hand.

Silencing Scholars: Speech Suppression on College Campuses

By Casey Kuang

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Abstract

This paper examines recurring infractions of First Amendment constitutional liberties on college campuses in response to perceived ideological threats or disagreeable rhetoric. It assesses the validity of government intervention in speech on campuses, as well as the persistent trend of administrative policy infringing upon the right to free speech. This paper does not seek to criticize or assess the validity of any particular ideology nor does it attempt to advocate for one. Rather, it seeks to underscore the significance of recurrent trespass on First Amendment rights when it is determined that a compelling government interest satisfies strict scrutiny. Through the analysis of historical and contemporary legal precedents and events, it seeks to suggest a more ameliorative advocacy of constitutional liberties in accordance with modern jurisprudence. While legislative revision can assist the protection and function of First Amendment privileges, greater adherence to established doctrines, particularly those of time, place and manner restrictions, as well as viewpoint neutrality could substantially decrease suppression.

Free Speech on College Campuses

College campuses primarily act to educate, but as Professor Sigal Ben Porath of the University of Pennsylvania claims, they also hold a unique position in regard to speech, acting as "both mirror of American democracy and the window into its future."[1] As a consequence of developing higher education, college campuses often foster environments for radical speech to thrive, in turn leading to suppression of said ideas. Instances of speech suppression are persistent in American history, though following the recognition and expansion of "academic freedom" in *Sweezy v. New Hampshire*,[2] their nuances have since been more thoroughly examined. *Sweezy* was

[1] Sigal R. Ben-Porath, *Free Speech on Campus* (2017).
[2] *Sweezy v. New Hampshire,* 354 U.S. 234 (1957).

opined at the height of the anticommunist sentiment in America, and questioned the constitutionality of state oversight in intellectual inquiry. In the Court's plurality opinion, Chief Justice Earl Warren wrote "the essentiality of freedom in the community of American universities is almost self-evident."[3] He continued, "invasion of petitioner's liberties in . . . areas of academic freedom and political freedom -- [are] areas in which government should be extremely reticent to tread."[4]

Through *Sweezy*, the concept of academic freedom was incorporated into American constitutional jurisprudence, though it wasn't until *Healy v. James*, that it would officially be brought to college students. In *Healy*, Justice Lewis Powell delivered the majority opinion, adapting the wording of *Tinker v. Des Moines Independent School District,* stating that "state colleges and universities are not enclaves immune from the … First Amendment. 'It can hardly be argued that either students or teachers shed their constitutional rights ... at the schoolhouse gate.'"[5] Justice Powell's reasoning in *Healy* was as the Court itself stated "no new constitutional ground."[6] Rather, the reasoning affirmed the legal protection of academic freedom the Court has long sought to protect. *Tinker* itself also contributed to the modern position on academic freedom, where it held that a student's expression may only be limited if it proved a "material and substantial interference,"[7] expanding the foundational principle of students' protection of academic freedom. However, *Healy* only applies to public universities as government actors. While private universities are not unilaterally unrestricted, they enjoy greater discretion with speech restriction, leading to different dynamics of speech suppression. The rulings in *Sweezy*, *Tinker, Healy*, and similar cases such as *Keyishian v. Board of Regents*,[8] make clear that with particular restrictions with respect to educational autonomy, campuses ought to be hearths of inquiry and discussion. Justice Oliver Wendell Holmes' dissent in *Abrams v. United States* provides a prescient quotation on speech and thus analogously, academic freedom in American jurisprudence: "[T]he ultimate good desired is better reached by free trade in ideas… the best

[3] *Id.* at 250.
[4] *Ibid.*
[5] *Healy v. James,* 408 U.S. 169 (1972).
[6] *Id.* at *181.*
[7] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
[8] 385 U.S. 589 (1967).

test of truth is the power of the thought to get itself accepted in the competition of the market."[9]

Despite this, the issue of campus speech suppression continues in the present day with the Foundation for Individual Rights and Expression (FIRE), finding that in a five year span, over a thousand attempts to punish students for speech and expression were made, with sixty-three percent resulting in an administrative punishment.[10] In *Tinker,* the Court stated that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,"[11] in response to fearful claims that the free exercise of speech could cause disturbances on campus. The Court further stated that "any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk … and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."[12] As such, the rising trend of penalizing students alludes to a pattern which presses against the value the First Amendment has reserved in the American legal system, and our Founders sought to protect.

Government Intervention

While free speech in society is imperative to democracy, it is seldom argued that the government should have no interest in regulating it, especially when it concerns national security or ideological threats. Such was the impetus behind the creation of "subversive activity" committees like the House Un-American Activities Committee (HUAC) during the Cold War, which sought to investigate alleged disloyalty and rebel activities among private citizens.[13] In order to prevent the spread of fascism and communism, which were perceived

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[9] *Abrams v. United States*, 250 U.S. 616 (1919).

[10] "Report: More than 600 College Students and Student Groups Punished or Investigated for Speech in Five Years." 2025. The Foundation for Individual Rights and Expression. May 15, 2025. https://www.thefire.org/news/report-more-600-college-students-and-student-groups-punished-or-investigated-speech-five-years.

[11] *Id.* at *508.*

[12] *Id.* at 508-509.

[13] House Un-American Activities Committee," Harry S. Truman Presidential Library & Museum, accessed December 31, 2025, https://www.trumanlibrary.gov/education/presidential-inquiries/house-un-american-activities-committee.

as national security threats, the HUAC hosted many investigations which were largely unpopular, due to its tendency to conduct witch hunts.[14] At this time much of contemporary First Amendment doctrinal framework had not yet been created, and as such the HUAC operated largely under the "clear and present danger"[15] framework in *Schenck v. United States,* which was expanded in 1951 in *Dennis v. United States* where action was balanced with "the gravity of the 'evil.'"[16] Consequently, the HUAC operated with broad power to restrict free speech and free association. The same decade, *Sweezy*, as well as *NAACP v. Alabama,* would be decided, providing new First Amendment doctrines that the HUAC should have applied. As earlier described, *Sweezy* expanded upon the idea of academic freedom, and *NAACP* would expand upon the freedom of association stating "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment."[17]

With the incorporation of the First Amendment, the freedom of association through the First Amendment, as well as the doctrine backing academic freedom, contemporary understandings of First Amendment rights in academia provide far more permissive exercise of privileges which remain in line with state interests (which the HUAC failed to do, given the instant jurisprudence). Famously, the HUAC interrogated former communist Granville Hicks in testimony, who gave testimony of a communist party cell at Harvard University. Aiming to silence communist sentiment, HUAC chairman Harold Velde would announce his pursuit of "the Reds" in higher education, placing unique pressure on Harvard professors. Citing the imminent danger of communism to national security, Velde was quoted as saying "there are too many professors who are slyly promoting the Communist doctrine. It's a lot better to wrongly accuse one person of being a Communist than to allow so many to get away with such Communistic activities."[18] This broad protection of national security was justified by Congress's investigatory powers, which had been affirmed in *McGrain v. Daugherty* where the Court held that "each house of Congress has

[14] "The Permanent Standing House Committee on Un-American Activities | US House of Representatives: History, Art & Archives." 2018. @USHouseHistory. 2018. https://history.house.gov/Historical-Highlights/1901-1950/The-permanent-standing-House-Committee-on-Un-American-Activities/.
[15] *Schenck v. United States,* 249 U.S. 47 (1919).
[16] *Dennis v. United States*, 341 U.S. 494 (1951).
[17] *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958).
[18] *The New Hampshire,* Vol. 42, No. 24 (Apr. 9, 1953).

power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution."[19] Through *McGrain, Shenck,* and *Dennis,* the gravity of danger posed by the spread of communism provided the framework for the HUAC to limit the First Amendment on campuses. While contemporary American jurisprudence has evolved beyond the aforementioned standards to operate under a standard of strict scrutiny, narrowly tailored action, and the necessity of a compelling government interest when regarding the First Amendment, the actions of the HUAC acted as the precursor for the present position. That is, in spite of its importance, the First Amendment's protections on academic freedom and expression may very well be limited with sufficient government interest.

Today, this logic is used again under the Trump administration, where the government again acts to limit the First Amendment on campuses, now asserting its interest in preventing discrimination. In order to combat the perceived threats of discriminatory practices and antisemitism, the Trump administration enacted the renewal and extension of Executive Order 13899 with Executive Order 14188, titled "Additional Measures To Combat Anti-Semitism." To combat antisemitism, the National Science Foundation's (NSF) 2025 GC-1 Grant requires colleges or other recipients of government payment to "not engage in a discriminatory prohibited boycott."[20] Discrimination as defined and used in the GC-1 Grant are actions which violate federal civil rights laws, which prevent discrimination "on the basis of race, color, sex, religion, and national origin,"[21] while a prohibited boycott as defined in section (1)(d) of the National Institute of Health's prior *Notice of Civil Rights Term and Condition of Award* means "refusing to deal, cutting commercial relations, or otherwise limiting commercial relations specifically with Israeli companies or with companies doing business in or with Israel or authorized by, licensed by, or organized under the laws of Israel to do business."[22]

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[19] *McGrain v. Daugherty,* 273 U.S. 135 (1927).
[20] "Effective for New NSF Grants, and Funding Amendments to Existing Grants, Made on or After." 2025. https://nsf-gov-resources.nsf.gov/files/gc1-may25.pdf?VersionId=RdriMqnd62.ey0QVsxuF0zglt8ltlwaS#page=38.
[21] *Id.*
[22] "NOT-OD-25-090: Notice of Civil Rights Term and Condition of Award." 2025. Nih.gov. 2025. https://grants.nih.gov/grants/guide/notice-files/NOT-OD-25-090.html.

The government's decision to enact such requirements on the grant stems from its intentions to combat discrimination in pursuant to Title VI of the Civil Rights Act of 1964, with Executive Order 14188 stating that "students, in particular, faced anti-Semitic harassment in schools and on university and college campuses."[23] Title VI of the Civil Rights Act states that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." As such, the government claims the interest in preventing discrimination is compelling such that it may prevent any kind of "discriminatory prohibited boycott," and uphold equality in the Congress's spending powers and the equal protections outlined in Article I, Section 8, Clause 1, and the Fourteenth Amendment respectively.

While the National Institute of Health's notice has since been rescinded, several campuses have chosen to comply with the requirements of the GC-1 Grant, with University of California President Michael Drake prohibiting student governments from financial boycotts of companies associated with any country, including Israel.[24] Here, the tension between government interest and exercise of free speech is evident. In spite of the government's interests in preventing discrimination through its grant requirements, precedent also exists against unconstitutional conditions. The instant conflict revolves around the mechanism of action that a boycott is—whether a boycott acts a material form of discrimination, or if it constitutes an exercise of free speech. If a campus organization's boycott functions as free speech and the grant acts as a condition which limits it, precedent points towards the unconstitutional conditions doctrine in cases like *Perry v. Sinderman.* In *Perry*, the Court held that the government may not "may not deny a benefit to a person on a basis that infringes his constitutionally protected interest, especially his interest in freedom of speech,"[25] thus preventing the government from placing conditions which gave up constitutional rights on government benefits.

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[23] Donald J. Trump, "Executive Order 14188—Additional Measures To Combat Anti-Semitism," Federal Register 90, no. 21 (February 3, 2025): 8847–8849, https://www.federalregister.gov/documents/2025/02/03/2025-02230/additional-measures-to-combat-anti-semitism.

[24] "University of California Reiterates Ban on Student Government Boycotts of Israel." 2025. AP News. July 3, 2025. https://apnews.com/article/university-of-california-boycott-israel-ea435fe4de05bc6acb20af8bfeea77b8.

[25] *Perry v. Sindermann*, 408 U.S. 593 (1972).

By contrast, if a boycott does not function as speech, rather as a purely material form of discrimination, then the government may justify regulation through Title VI federal law. If a boycott functions as an economic activity rather than an expressive activity, it may be regulated even if it has an incidental implication as an exercise of speech. In this instance, precedent points towards *United States v. O'Brien,* where the Court held that "a governmental regulation is sufficiently justified if it is within the constitutional power of the Government and furthers an important or substantial governmental interest unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to that interest."[26] As such, the legal framework the government operates by in this instance depends largely on the way a prohibited boycott is interpreted: as speech, or as economic activity.

Depending on this interpretation, government intervention may act to limit speech on campuses, partially mirroring the concerns that allowed the HUAC to do the same. Both the HUAC and the GC-1 Grant's required prevention of boycotts in order to receive funding, act as instances of government intervention on speech and implicitly act as a form of ideological compromise. Notably, however, there are important distinctions in severity between the two: the HUAC's investigations resulted in criminal penalties, while NSF grants act as incentives/conditions. While neither are de jure strict restrictions on speech, both act as de facto limitations or incentives to discourage specific rhetoric. This trespass on ideological expression on campuses begins to encroach on the concerns which Justice Warren reasoned were at risk in *Sweezy*, stating that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."[27] As Justice Warren warns, the limitation of speech and academic inquiry upon college campuses in *any* capacity can have severe consequences, which both the HUAC and the GC-1 grant began to approach. The HUAC through its stifling of communist advocacy and discussion, and the GC-1 grant through its potential limitation of expressive speech through boycotts, begins to challenge the reticence of freedom Justice Warren claimed the government should display.

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[26] *United States v. O'Brien,* 391 U.S. 367 (1968).
[27] *Id.* at 250.

Superseding the First Amendment

The tension between the First Amendment's constitutional rights and the government's interest in protecting national security or preventing the dissemination of harmful ideology lies at the crux of speech suppression on college campuses. In determining when the government's interest of protection supersedes students' First Amendment rights, a plurality of factors aggregate to influence this decision, which may include (but are not limited to): if the speech produces imminent lawless action, the disruption caused by the speech, and the speech's severity and pervasiveness. These standards further compound upon other considerations such as the government's own interest in limiting free exercise to consider the exceptions to the First Amendment liberties. While these standards veritably are not a comprehensive account of all standards of speech limitation, they provide a scaffolding of minimum standards that speech should be held to to prevent suppression.

1969's *Brandenburg v. Ohio* established the two pronged imminent lawless action test which allows government restriction of speech if the speech is: (1) directed at inciting or producing imminent lawless action, and (2) is likely to incite or produce such action.[28] In doing so, the *Brandenburg* test replaced its precursors of "bad tendency" and "clear and present danger"[29] established in English common law and *Schenck v. United States* respectively. *Brandenburg's* requirements of imminence, intent, and likelihood for restrictions on speech are prudent insofar as to say First Amendment jurisprudence was overbroad under these tests. In his concurring opinion in *Brandenburg*, Justice Douglas elucidated the concerns with jurisprudence prior to *Brandenburg*, namely the standards set forth in *Schenck* ("clear and present danger") *Dennis* (ad hoc balancing). There, Justice Douglas stated that:

> "when one reads the opinions closely and sees when and how the 'clear and present danger' test has been applied, great misgivings are aroused. First, the threats were often loud, but always puny, and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in Dennis as to make the trial of those teachers

[28] *Brandenburg v. Ohio,* 395 U.S. 444 (1969).
[29] Meghan Ryan. 2017. "Brandenburg Test." LII / Legal Information Institute. June 29, 2017. https://www.law.cornell.edu/wex/brandenburg_test.

> of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment."[30]

The new standard established following *Brandenburg*, provided a less broad standard to which the government might limit speech, a poignant consideration for the government's claim of interest in limiting campus speech.

Another criterion which may warrant the restraint of First Amendment liberties on campuses is the harm or disruption it may cause to the educational environment. The 1941 case of *Cox v. New Hampshire* established the standards of disruption that speech may have, and established the time, place, and manner doctrine of speech.[31] This standard allows the government to impose reasonable restrictions on the time, place and manner of speech, provided that "restrictions are justified without reference to the content of the regulated speech, … are narrowly tailored to serve a significant governmental interest, and … leave open ample alternative channels for communication of the information."[32] The tent protest in May of 2025 at Brooklyn College exemplifies this doctrine in that protestors were removed not on the grounds of their content, but because protestors illegally camped on university property, thereby infringing the time, place and manner restrictions of speech.

Another facet of social exigency which may limit speech, is if the speech intends to or acts as harassment. Title IX of the Education Amendments Act of 1972, intends to ensure equal learning opportunities, prevent harassment, and prevent discrimination in academics which was affirmed in 1999's *Davis v. Monroe*. In *Davis*, the Court argued that student on student harassment may rise to the actionable level of discrimination under the statute, given that the action is "severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities."[33] The salient notation of harassment being severe and pervasive to the extent that it detracts from others

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[30] *Brandenburg*, 395 U. S. 454 (Douglas, J., concurring).
[31] 312 U.S. 569 (1941).
[32] LII Staff. 2014. "First Amendment: Freedom of Speech." LII / Legal Information Institute. July 17, 2014. https://www.law.cornell.edu/supreme_court_of_the_united_states_2013%E2%80%932014_term_in_review/first_amendment_freedom_of_speech.
[33] *Davis v. Monroe County Board of Education* 526 U.S. 629 (1999).

equal opportunities is upheld in regards to campus speech. Further, while *Davis* defines the standard of discrimination under Title IX, courts have imported the Title IX standards of discrimination to Title VI discrimination cases. In *Bryant v. Independent School District,* the 10th Circuit Court of Appeals stated that "because Congress based Title IX on Title VI courts can apply *Davis* directly to a determination of Title VI intentional racial discrimination."[34] While the extension of *Davis* to Title VI is circuit precedent and not yet Supreme Court precedent, other circuits have also followed this extension, as the Title IX standard was modeled after Title VI. As such, speech may be limited according to Title IX standards of discrimination, relating to Title VI, and may not be limited if it fails to meet Title IX standards. This framework became tangible in 2011, when the University of California Berkeley was sued by Jewish alumna Jessica Felber under Title VI allegations of unlawful harassment following an event held on campus called "Apartheid Week." Despite her accusations of allowing antisemetic sentiment to grow on campus, her claims were dismissed in *Felber v. Yudof*, where the Court determined that she "failed to demonstrate they 'suffered severe and pervasive harassment,' [and] failed to show they were 'denied access to the University's educational services in any meaningful sense.'"[35] Thus, precedent for how campus protests and related speech can be conducted is set: considering the severity, pervasiveness, and impact on equality of opportunity.

Administrative Policy

An important distinction to draw when discussing the infringement of First Amendment rights in colleges is when they are caused by the government as opposed to the administration's own policy. It's often possible that a university's policies may indirectly discourage or even prevent speech, in a phenomenon known as "chilling" of free speech. The concern of speech chilling was introduced in *Wieman v. Updegraff*, where Justice Felix Frankfurter wrote that a state imposed loyalty oath "has an unmistakable tendency to chill that free play of the spirit."[36] The concept of "chilling" widely brought forth the idea of people being afraid to express themselves in fear of prosecution even if their speech is protected. While the threat of chilling speech is real, it's rarely litigated as a result of its implicit and

[34] *Bryant v. Independent School District No. I-38,* 334 F.3d 928 (10th Cir. 2003).
[35] *Yaman Salahi, Nasrina Bargzie,* Talking Israel and Palestine on Campus: How the U.S. Department of Education Can uphold the Civil Rights Act and the First Amendment, 12 Hastings Race & Poverty L.J 164 (2015).
[36] *Wiemann v. Updegraff* 344 U.S.183 (1952).

capacitory nature, allowing administrations to act in ways which may chill free speech, and go unchallenged.

The scarce litigation of chilling speech cases is explained by cases like *Laird v. Tatum,* which held that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."[37] As such, *Laird* established the requirement of a "specific objective harm, or threat of a specific future harm"[38] for cases about chilling speech to be justiciable. Because the chilling of speech is a largely implied fear, it thus becomes difficult to litigate while meeting the standard in *Laird*, consequently allowing college administrations to enact policy which may chill speech with little resistance. The phenomenon of chilling speech has been brought to life across the nation, prominently described in a letter from the ACLU of Illinois to the University of Illinois, Urbana-Champaign. In the letter ACLU details the impact of the "intimidating and time-consuming disciplinary process"[39] that members of the Students for Environmental Concerns had to undergo following multiple violations of university policy. As the ACLU states, "the chilling impact of SECS's disciplinary ordeal was substantial. Students … are afraid to proceed with the First Amendment activity they have planned for the rest of the school year … because they fear further inadvertent violation of University restrictions."[40] While not yet officially challenged, policies like those of the University Illinois Urbana-Champaign, are present all across the nation and can inadvertently chill speech as a result of overly broad or arbitrary policy.

Beyond the incidental restrictions of free speech, universities will also often directly restrict speech with their policies. At West Virginia University, despite time, place, and manner restrictions on speech being required to be narrowly tailored or have a compelling state interest, policies like "free speech zones" were enforced until pressure from organizations like FIRE led to reform.[41] Similar policies which infringe on free speech are wide spread, but are rarely legally challenged due to the plethora of complications: their recency, the cost of litigation, administrative discretion in policy making, etc.

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[37] *Laird v. Tatum,* 408 U.S. 1 (1972).
[38] *Ibid.*
[39] ACLU of Illinois, "Public Letter to University of Illinois."
[40] *Id.* at 4.
[41] Harvey A. Silverglate, David French, and Greg Lukianoff, *FIRE's Guide to Free Speech on Campus*, 2nd ed. (Philadelphia: Foundation for Individual Rights in Education, 2012).

At the University of California, Davis, this issue is markedly prevalent, with FIRE ranking the university at 252nd out of 257 schools in the 2026 College Free Speech Rankings.[42] The democratic adoption of a constitutional amendment passed by the Law Student Association (LSA) at the UC Davis Campus, which endorsed the Boycott, Divestment, and Sanctions (BDS) movement, led to Dean Jessica Berg and Chancellor Gary May stripping the student government of its official status and suspend its authority.[43] The relevant policy invoked here is the University of California's Policies Applying to Campus Activities, Organizations and Students (PACAOS), where administrators stated the LSA's endorsement of the BDS was a violation of PACAOS §61.13,[44] which requires viewpoint neutrality. PACAOS §61.13 states that student governments must "provide financial and other tangible support for student activities and organizations on a viewpoint-neutral basis, consistent with the provisions of Section 86.00 of these Policies." While the statute aims to prevent viewpoint discrimination among student governments by requiring them to distribute support with a neutral viewpoint, the statute also inadvertently stifles it because of its breadth, and its demand for neutrality.

The issue at hand is that viewpoint neutrality as described in PACAOS §86.30, does "not include approval or disapproval of the viewpoint of the Registered Campus Organization or any of its related programs or activities."[45] Universities may impose viewpoint-neutral conditions on student government funding, and should prevent the allocation of public funds in an exclusionary manner, but policy should be clarified so as to distinguish between expressive endorsement and prohibited discriminatory conduct. As established in *Rosenberger v. Rector and Visitors of the University of Virginia* and *Board of Regents v. Southworth,* the government is prohibited from restricting or favoring

[42] Foundation for Individual Rights and Expression (FIRE), "2026 Rankings Spotlight – University of California, Davis," accessed March 2026, https://www.fire.org/research-learn/2026-rankings-spotlight-university-california-davis.

[43] David Greenwald. 2025a. "UC Davis Students Denounce Administration's Actions, Call for Reinstatement of Suspended Student Government (Updated with UCD Response) - Davis Vanguard." Davis Vanguard. April 7, 2025. https://davisvanguard.org/2025/04/uc-davis-students-denounce-administrations-actions-call-for-reinstatement-of-suspended-student-government/.

[44] University of California, *Policies Applying to Campus Activities, Organizations, and Students* §6. Revised 2004, https://policy.ucop.edu/doc/2710526/PACAOS-60.

[45] University of California, *Policies Applying to Campus Activities, Organizations, and Students* §6. Revised 2007, https://policy.ucop.edu/doc/2710528/PACAOS-80.

speech based on its content or message, with the Court holding in *Board of Regents* that "[t]he proper measure, and the principal standard of protection … is the requirement of viewpoint neutrality in the allocation of funding support." As the Court has made precedent, the viewpoint neutrality in funding must be maintained so as to prevent discrimination, wherein lies the tension. This is to say that the conflict at hand is if the UC Davis LSA's amendment may have functioned as expressive political speech, not an exclusionary distribution of funding and thus may be subject to different doctrinal framework. While PACAOS §61.13 is constitutionally valid and upholds equal protections, thus the government and universities have legitimate interests in preventing discrimination, it's contestable that its application has exceeded its legitimate scope. Consequently, it's possible that the actions of the LSA should be held to a different standard of protection as a function of speech, rather than be persecuted as those of discrimination.

Concerns over the encroaching administrative limits on freedom of speech are especially concerning as they explore new avenues to control speech on campuses, without historical precedent, and rare legal challenges. It's crucial to understand the overarching importance of administrative injunctions on speech, as the constitutional right to speech may be under pressure.

Conclusion

Constitutional intrusions on students' First Amendment rights have been a pattern since the Cold War. While this is an inexorable byproduct of the tension between individual liberties and the government's interest in promoting the general welfare, it should not discourage students from exercising their rights with adherence to the law. Speech may have certain limits based on its nature, location, and intent (among others), but it is indispensable to democracy. The constant encroachments on the liberties of students threaten the principles of democracy America was founded on, and require students to push back. Protest speech should still be utilized to defend our constitutional liberties, by adhering to established doctrine and pushing for reform through either the clarification or addition of policy.

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The Bipartisan Illusion: How Patterns In Supreme Court Jurisprudence and Statutory Mandates Entrench Elite Convergence

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Abstract

The United States' two-party system is persistently depicted as an ideological divide, yet patterns in elite-level convergence—defined here as cross-party cooperation among elected officials, party leaders, and influential donors—sustain policy continuity and institutional stability between Democrats and Republicans. This article examines how three key mechanisms interact to entrench this conference: Supreme Court campaign-finance jurisprudence (from *Buckley v. Valeo* to *McCutcheon v. FEC)*, the constitutional absence of a federal single-subject rule, and statutory single-member district mandates. Together, these factors sustain policy continuity behind a facade of heightened affective polarization among voters. By analyzing legislative productivity amid public division, this article elucidates how these legal foundations incentivize moderation, logrolling, and cross-aisle cooperation. Implications for constitutional interpretation and potential reforms are explored, with emphasis on the resulting accountability deficit in American governance.

Introduction

In March 2024, Congress passed the Consolidated Appropriations Act, a massive omnibus bill funding government operations through fiscal year 2024. It bundled defense spending, disaster aid, agricultural subsidies, and other priorities into a single package that passed with bipartisan support, despite intense public rhetoric over border security and inflation.[1] This routine legislative feat achieved through backroom deals and vote-trading exemplifies a central paradox in American politics: voters perceive Democrats and

[1] Consolidated Appropriations Act, 2024, Pub. L. No. 118-42, 138 Stat. 25 (2024).

Republicans as locked in ideological conflict, while elites from both parties converge to maintain policy stability and avoid gridlock.[2]

This article contends that Supreme Court campaign-finance jurisprudence (from *Buckley v. Valeo* to *McCutcheon v. FEC*), the constitutional absence of a federal single-subject rule, and statutory single-member district mandates interact to entrench bipartisan elite governance. These frameworks sustain policy continuity behind heightened affective polarization in ways that undermine voter accountability in the two-party system.

Additionally, affective polarization—defined as the emotional hostility partisans feel towards the opposing party—has intensified to an unprecedented degree, with surveys indicating that members of both political parties view the opposing party as a threat to the nation's well-being.[3] However, empirical evidence shows a contrasting image as Congress maintains legislative productivity through cross-party coalitions, with bipartisan bills comprising a significant portion of enacted laws even in polarized eras.[4] This elite-level harmony is systematically induced by a legal structure that rewards moderation—an ideological stance that rejects extreme, rigid views from either the far-left or far-right, aiming for a centrist, pragmatic middle ground. This creates an illusion of opposition as policy continuity continues through moderation despite what either political actor defines themself as. Nevertheless, this obscures the shared commitments of political actors to institutional preservation.

While political scientists have documented the persistence of bipartisanship despite polarization,[5] legal scholarship has underexplored the specific doctrinal and statutory mechanisms that actively produce this convergence. By emphasizing the combined operation of these three foundations—finance doctrine channeling

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[2] James M. Curry and Frances E. Lee, "Congress as Problem Solver: Building Consensus Despite Polarization," by Institution for Social and Policy Studies, ISPS Working Paper, November 5, 2024, https://isps.yale.edu/sites/default/files/publication/2025/02/curry_lee_working_paper_12.5.24.web_.pdf.

[3] Shanto Iyengar et al., "The Origins and Consequences of Affective Polarization in the United States," *Annual Review of Political Science*, 2019, 129–46.https://pcl.sites.stanford/edu/sites/g/files/sbiybj22066/files/media/file/iyengar-ar-origins.pdf.

[4] *Curry and Lee, "Congress as Problem Solver: Building Consensus Despite Polarization," November 5, 2024.*

[5] Jennifer N. Victor, "Do Network Connections Between Republican and Democratic Members of Congress Encourage Bipartisan Cooperation?," *American Politics Research* 53, no. 5 (March 12, 2025): 440–55, https://doi.org/10.1177/1532673x251324140.

donor influence toward moderation, constitutional silence enabling bundled logrolling, and district mandates compelling cross-aisle relationships. These aspects reveal how law frameworks entrench an accountability deficit: by overestimating policy differences between parties, voters lose the ability to hold elites accountable for shared outcomes.

Part I describes the divergence between voter affective polarization and elite convergence, grounding the analysis in empirical data of Supreme Court cases and bills. Part II provides a rigorous doctrinal examination of the three foundations, emphasizing their incentives for moderation and cooperation. Part III demonstrates these mechanisms in action, showing how they mask policy continuity. Part IV assesses normative implications, including the erosion of accountability and the limits of judicial remedies. And lastly, the conclusion reflects on the illusion's resilience and its implications for democratic legitimacy.

The Divergence of Affective Polarization Among Voters vs. Elite Convergence

The public perception of partisan warfare and the reality of elite cooperation is widening. Politically, among voters, affective polarization has reached unprecedented levels in the United States, with partisans reporting deep emotional hostility towards the opposing party.[6] In contrast, elite convergence—defined as cross-party collaboration yielding policy stability—remains robust. Despite metrics of ideological polarization in roll-call, such as DW-NOMINATE scores demonstrating a widening gap since the 1990s.[7] Yet Congress continues to enact major legislation through a bipartisan mechanism.[8]

Recent examples illustrate the dynamic of Congress's bipartisanship. The Infrastructure Investment and Jobs Act (2021)[9] and the CHIPS and Science Act (2022)[10] each passed with significant Republican support under Democratic control. These landmark achievements mirror bipartisan legislative efforts under divided

[6]Curry and Lee, *Congress as Problem Solver: Building Consensus Despite Polarization.* (2024)
[7] Nolan McCarty Jr., Keith T. Poole, and Howard Rosenthal, *Polarized America: The Dance of Ideology and Unequal Riches*, *Chapter 2: The Polarization of the Politicians*, (2004) https://legacy.voteview.com/pdf/MPRchapter2_rev3.pdf.
[8] Curry and Lee, "Congress as Problem Solvers." (2024)
[9] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021)
[10] CHIPS and Science Act, Pub. L. No. 117-167, 136 Stat. 1366 (2022)

government, such as the CARES Act (2020).[11] Ongoing omnibus appropriations bills, including those passed between 2023–2025, similarly have diverse and often competing priorities despite partisan rhetoric—suggesting that the appearance of irreconcilable conflicts masks functional legislative cooperation.

This elite harmony coexists with mass polarization because the legal pillars, further examined in Part II, insulate decision-making from public scrutiny. Voters see endless conflict, while elites maintain the status quo through arrangements that symmetrically undermine democratic accountability, as electoral outcomes fail to reflect the policy changes that partisan rhetoric promises.

The Doctrinal and Statutory Foundations of Convergence

The illusion of opposition is sustained by three interlocking legal pillars that incentivize elite moderation, protect vote-trading, and compel cross-party relations. Campaign-finance doctrine amplifies donor pressure for centrism; the constitutional absence of a federal single-subject rule enables bundled logrolling; and statutory single-member districts create structural incentives for cross-aisle cooperation. Together, those entrench elite convergence, offering a fresh, previously unexamined explanation for how structural legal design manufactures political stability at the expense of genuine ideological opposition.

Campaign-Finance Jurisprudence (Buckley through McCutcheon)

The Supreme Court campaign finance doctrine has evolved to prioritize robust protection of political speech, and in so doing, has created incentives that channel elite donor influence toward candidates who promote predictability, moderation, and bipartisan stability.

In *Buckley v. Valeo*, the per curiam opinion laid the doctrinal foundation by drawing a sharp distinction between contributions and independent expenditures.[12] The Court upheld limits on contributions as "closely drawn" measures narrowly tailored to prevent actual or apparent quid pro quo corruption, while striking down caps on independent expenditures and overall spending as impermissible burdens on core First Amendment rights. Critically, the per curiam opinion explicitly rejected the propositions that the government could restrict political speech to equalize the realized voices of speakers, declaring that such an explanation is "wholly foreign to the First

[11] Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).
[12] *Buckley v. Valeo,* 424 U.S. 1, 25-28 (1976).

Amendment."[13] This ruling effectively freed unlimited independent spending, empowering wealthy donors, corporations, and other elites to support candidates across party lines who offer reliable access, policy predictability, and institutional continuity over ideological risk.[14]

Subsequent rulings amplified this dynamic by further dismantling barriers to large-scale independent spending. In *Citizens United v. FEC*, the court struck down restrictions on independent expenditures by corporations and unions, holding that spending uncoordinated with candidates does not give rise to corruption or its appearance.[15] Justice Kennedy's majority opinion thereby unleashed super PACs as a method for large-scale political influence.[16] These entities, drawing particularly from business elites who prioritize regular predictability, disproportionately favor incumbents with moderate, cross-partisan profiles over ideological outliers. As scholarship on campaign finance and political polarization confirms, donor networks reward convergence, with moderates attracting broader funding than ideological extremists on either flank.[17]

McCutcheon v. FEC 572 U.S. 185 (2014) extended this logic by invalidating aggregate contribution limits, allowing individuals to donate to unlimited candidates and committees simultaneously.[18] Chief Justice Roberts' plurality opinion dismissed concerns of systematic corruption, arguing that existing base limits sufficiently guard against quid pro quo risks, and that broader reactions would unduly burden First Amendment activity.[19] This enables donors to hedge their political investments bets across parties—particularly on having shared priorities like deregulation—pressuring politicians to moderate their positions and pursue cross-aisle cooperation to remain attractive to broad-based funders.[20]

Moreover, the Bipartisan Campaign Reform Act (BCRA) of 2002 complements this post-*McCutcheon* era.[21] BCRA banned "soft money"—unregulated, unlimited contributions to national parties and

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[13] *Ibid.*
[14] *Ibid.*
[15] *Citizens United v. FEC*, 558 U.S. 310, 357 (2010).
[16] *Ibid.*
[17] Raymond La Raja and Brian Schaffner, *Campaign Finance and Political Polarization*, *University of Michigan Press eBooks*, 2015, https://doi.org/10.3998/ump.13855466.0001.001
[18] *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014)
[19] *Ibid.*
[20] *Ibid.*
[21] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

committees operating with federal contribution rules.[22] While BCRA predates *McCutcheon* by over a decade, its channeling effect is amplified in the post-*McCutcheon* environment: by eliminating soft money pathways, BCRA ensured that large-scale giving flows through regulated hard-money channels, which disproportionately benefits moderate incumbents capable of building broad donor networks.[23] The net result is a financing environment where donors can maximize support for established, cross-partisan figures without soft-money workarounds, reinforcing financial incentives for bipartisan moderation that *McCutcheon* subsequently deepened.

In sum, the evolution of Supreme Court campaign-finance jurisprudence—from *Buckley*'s foundational distinction between contributions and expenditures[24], through *Citizens United's* liberation of corporate and union independent spending[25], to *McCutcheon's* removal of aggregate contribution caps[26]—has created a donor environment that systematically favors candidates offering access, predictability, and institutional stability. By empowering wealthy elites to support moderates across party lines and hedge their investments in both major parties, this doctrine provides powerful financial incentives for bipartisan moderation and elite convergence. BCRA's ban on soft money, while intended to curb corruption, has reinforced this dynamic by channeling resources into regulated pathways that disproportionately reward establishment figures capable of cross-aisle cooperation.[27] Ultimately, these legal developments entrench the very bipartisan elite governance that masks policy continuity behind the facade of partisan opposition.

A. Constitutional Absence of a Federal Single-Subject Rule

The U.S. The Constitution's silence on requiring federal legislation to address a single subject—unlike forty-three state constitutions that impose such a constraint—permits logrolling that facilitates bipartisan majorities by bundling provisions.[28] This absence, rooted in Article I's broad delegation of legislative power, enables

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[22] *Ibid.*
[23] *Ibid.*
[24] Buckley v. Valeo, 424 U.S. 1, 25-28 (1976).
[25] *Citizens United v. FEC*, 558 U.S. 310, 357 (2010).
[26] *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014)
[27] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.
[28] Richard Briffault, "The Single-Subject Rule: A State Constitutional Dilemma," Scholarship Archive, n.d., https://scholarship.law.columbia.edu/faculty_scholarship/3052/.

Congress to combine unrelated items without judicial interference,[29] creating methods for vote-trading and cross-party compromises that would be far more difficult under a single-subject constraint.

The Supreme Court reinforced this in *Clinton v. City of New York* by invalidating the Line Item Veto Act under the Present Clause.[30] Justice Stevens's majority opinion held that the Act allowed the President to "cancel" enacted provisions after passage, violating bicameralism and presentment requirements of Article I.[31] Therefore, this ruling is important in what it preserves: by foreclosing authority to excise individual provisions from unbolded legislation post-enactment, the Court entrenched Congress's powers to assemble and protect omnibus packages from target revisions.[32] Thus, any mechanism permitting selective removal of provisions—the precise function the Line Item Veto Act sought to enable will require a constitutional amendment. Therefore, this structural protection of omnibus legislation's integrity is what makes bundled logrolling a durable and legally insulated convergence tool.

Omnibus practices under the Appropriations Clause (Article I, § 9)[33] institutionalize this dynamic as well. Where "must pass" bills such as consolidated appropriations acts bundle diverse priorities and often ideologically disparate priorities, compelling bipartisan trades to avoid shutdowns.[34] This practice sustains elite convergence by aligning donor-backed policy items within the same legislative package and necessitating inter-party negotiations in divided chambers.

Nevertheless, this absence of a federal single-subject rule thus operates as a powerful institutional pillar of bipartisan elite convergence; it lowers the threshold for enacting complex legislation through reciprocal concessions and masks the extent of cross-party cooperation from voters who perceive only the rhetorical conflict surrounding a bill's passage.

B. Statutory Single-Member District Mandates

The Uniform Congressional District Act (1967), codified at 2 U.S.C. § 2c, mandates single-member districts for House elections. This entrenches a winner-take-all rule that reinforces two-party dominance

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[29] U.S. Const. art . I, § 1.
[30] *Clinton v. City of New York*, 524 U.S. 417 (1998).
[31] *Ibid.*
[32] *Ibid.*
[33] U.S. Const. art. I, § 9, cl. 7.
[34] *Ibid.*

and creates structural incentives for cross-aisle ties.[35] This statutory requirement produces a similar dual-edged institutional effect; it amplifies primary-driven extremism in safe seats, where candidates face minimal general-election competition and cater primarily to base votes, while simultaneously compelling elite-level convergence and moderation in the general legislative process. A process where governing requires cross-party coalitions that no single faction can sustain alone.

In narrowly divided chambers—where a recurrent feature of contemporary American politics—this dynamic is particularly acute. When majority control hinges on a handful of competitive seats, members representing those districts face powerful electoral incentives to cultivate reputations for cross-aisle pragmatism. At the elite level, this translates into the interpersonal working relationship and informal negotiation networks that produce bipartisan legislative outcomes, even as floor rhetoric signals ideological intransigence.

This pillar interacts synergistically with the others. Campaign-finance doctrine supplies resources to moderates who can navigate these cross-aisle relationships, while the absence of a single-subject rule provides the legislative vehicles—omnibus bills—through which those relationships produce results. Together, these three pillars create a structural environment in which elite convergence thrives even as mass affective polarization intensifies.

Mechanisms in Action—Where Convergence Masks Continuity

In practice, these three foundations generate elite convergence that veils substantive policy continuity from an increasingly polarized electorate. Each mechanism operates through distinct channels, but their effects are mutually reinforcing

Campaign-finance doctrine aligns donors with moderation. In the aftermath of post-*Citizens United*, super PAC spending increasingly favors incumbents who facilitate cross-party deals. This is a pattern that continued in the 2024 federal elections, where super PACs and affiliated dark-money groups poured record sums—exceeding $1.9 billion—into races that reinforced party-leadership and incumbent priorities over ideological extremes.[36] Therefore, donors—those particularly representing business and financial interests—prioritize

[35] 2 U.S.C. § 2c (1967).

[36] Anna Massoglia, "Dark Money Hit a Record High of $1.9 Billion in 2024 Federal Races," Brennan Center for Justice, May 7, 2025, https://www.brennancenter.org/our-work/research-reports/dark-money-hit-record-high-19-billion-2024-federal-races.

candidates whose positions signal regulatory predictability and institutional reliability, regardless of partisan affiliation.

The constitutional absence of a single-subject rule enables logrolling through omnibus vehicles, masking trades. The 2024 Consolidated Appropriation Act illustrates this mechanism directly: Democratic infrastructure funding with Republican border security riders was bundled into a single package that passed despite public outcry from both partisan bases.[37] Such bundling diffuses accountability, as voters attribute legislative failures to the other side without seeing reciprocal concessions that made passage possible. As congressional logrolling confirms that vote-trading across unrelated policy domains is a foundational mechanism of coalition building, one structurally enabled by the absence of any subject-matter constraint on federal legislation.[38]

Single-member districts amplify this by requiring interpersonal networks. In the 117th Congress, for example, bipartisan working groups on the CHIPS and Science Act forged compromises on semiconductor subsidies that reflected policy administrations, despite rhetorical differences between the parties on industrial policy. [39] The result is masked continuity extending across major policy domains—from enduring free-trade frameworks (from NAFTA to the USMCA) to defense budget allocations—that persists beneath the surface of apparent partisan conflicts

Nevertheless, affective polarization exacerbates the illusion. Voters increasingly fixated on emotional cues, overestimated substantive policy differences between parties, reducing their scrutiny of elite legislative behavior.[40] This dynamic sustains the status quo; elites remain insulated from electoral repercussions for conserving policies that their own rhetoric condemns.

Implications and the Accountability Deficit

The entrenchment of elite convergence through these three doctrinal pillars imposes significant normative costs, chief among them an accountability deficit. By masking continuity behind affective

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[37] Consolidated Appropriations Act, 2024, supra note 1

[38] Gilat Levy and Ronny Razin, "Does Polarisation of Opinions Lead to Polarisation of Platforms? The Case of Correlation Neglect," *Quarterly Journal of Political Science* 10, no. 3 (September 17, 2015): 321–55, https://doi.org/10.1561/100.00015010.

[39] Curry and Lee, "Congress as Problem Solver: Building Consensus Despite Polarization."

[40] Levy and Razin, "Does Polarisation of Opinions Lead to Polarisation of Platforms? The Case of Correlation Neglect." 10, no. 3 (September 17, 2015): 321–55, https://doi.org/10.1561/100.00015010.

polarization, the system dilutes voter agency; partisans punish opponents for symbolic stances while outcomes remain stable, eroding democratic responsiveness.[41]

Judicial intervention faces significant doctrinal obstacles. The *Buckley* line's speech-centric framework—treating expenditure limits as presumptively unconditional burdens on First Amendment activity—resists equality-based reforms, and constitutional silence on single-subject rules defers to Congress.[42] Yet, courts operating within this framework are unlikely to uphold campaign-finance restrictions promised on equalizing donors' influence, even when that influence distorts legislative priorities. Similarly, the constitutional silence on a single-subject rule defers entirely to Congress, foreclosing judicial enforcement of any subject-matter coherence requirement on federal legislation absent a constitutional amendment.

Yet the framework is not entirely static. Courts could, within existing doctrine, adopt a narrower construction of the quid pro quo corruption standard to sustain contribution limits that reach closer to the donor-candidate relationship than current doctrine permits. Alternatively, states could experience multi-member districts under the Elections Clause, introducing proprietary events that would partially distort the winner-take-all dynamics entrenched by statutory single-member distinct mandates.

So, reform pathways exist, though each faces substantial constraints. Statutory public financing of federal elections could reduce candidates' dependence on the donor networks that currently reward moderation and cessation, decoupling electoral success from the convergence incentives that campaign-finance doctrine has created. A federal single-subject rule, achievable only through constitutional amendment, would constrain the logrolling that enables omnibus-based convergence.[43] And, reforming the statutory single-member distinct mandate—whether through ranked-choice voting or multi-member alternatives—could mitigate the winner-take-all extremism that similarly drives primary polarization and compels elite convergence in the legislative process. Each of these reforms would require navigating

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[41] Shanto Iyengar et al., "The Origins and Consequences of Affective Polarization in the United States," Annual Review of Political Science, 2019, 129–46, https://pcl.sites.stanford.edu/sites/g/files/sbiybj22066/files/media/file/iyengar-ar-origins.pdf.

[42] *Buckley v. Valeo*, 424 U.S. 1, 25-28 (1976).

[43] Michael D. Gilbert, "Single Subject Rules and the Legislative Process," *University of Pittsburgh Law Review* 67, no. 4 (April 26, 2006), https://doi.org/10.5195/lawreview.2006.55.

substantial doctrinal and political constraints, and none constitutes a complete solution. Together, however, they offer pathways toward greater transparency, aligning the formal structure of legislative competition with the accountability expectations of democratic governance.

Ultimately, recognizing these mechanisms is itself a precondition for meaningful reform. A more sophisticated democratic discourse—one that acknowledges the genuine structural tensions between elite stability and voter accountability is necessary to evaluate the illusion that the current framework sustains.

Conclusion

Nevertheless, the American two-party system is a result of deeply embedded legal frameworks that emphasize elite convergence beneath the idea of partisan opposition. Supreme Court campaign-finance jurisprudence, the constitutional absence of a federal single-subject rule, and single-member district mandates form a self-reinforcing system that rewards moderation, facilitates logrolling, and channels political power toward actors who sustain institutional continuity.

This structural dynamic carries profound democratic consequences. By masking policy continuity behind affective polarization, the system distorts voter perception, diffuses accountability, and weakens the electorate's ability to meaningfully evaluate or discipline those in power. Elections become contests over symbolic differences rather than substantive policy alternatives, while elite actors remain insulated from the full force of democratic scrutiny. In this way, the illusion of bipartisanship is constituted—it is a necessary feature of a system that depends simultaneously on the appearance of conflict and the reality of cooperation.

By illuminating these frameworks, this article calls for renewed scrutiny of how law shapes political incentives, urging reforms that align elite actor actions with public expectations. The challenge is to realign the legal structures of American governance so that political outcomes more transparently reflect voter preferences. Only then can the gap between perceived division and actual governance be narrowed, and the promise of democratic responsiveness be more fully realized.

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Executive Order 14159: "Protecting the American People" At What Cost?

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Abstract

As part of his revamped approach to immigration enforcement, Donald Trump introduced Executive Order 14159 in a package of orders, setting the tone for his return to the presidency. The contentious order, titled "Protecting the American People from Invasion," includes several provisions such as increased funding for ICE detainment facilities, an adjustment to expedited removal, and setting "sanctuary cities" as a main target for immigration officers, among other changes. Rather than protecting the American people, however, the order appears more focused on relaying massive human rights abuses, raising red flags about the ethics behind the Trump administration's true goals with immigration policy. As such, this paper thoroughly analyzes Donald Trump's executive order and the implications it has had for both sides of the political spectrum: largely pushing the liberal-aligned to oppose the policy while the conservative-aligned support it. Without a doubt, this order has had chaotic consequences that largely overshadow its intended goals; instead of protecting the American people, the United States of America is weaker, more internationally vulnerable, and less United than ever.

Introduction

Donald Trump secured the 2024 election on the backdrop of Biden's presidency, a four-year period characterized by increasing dissatisfaction with the Biden administration's handling of immigration surges. Without a clear and effectively enforced border policy, Americans grew increasingly concerned with the Democratic president's handling of the situation, leaving both Republican and Democrat voters frustrated. Republicans especially pushed a platform of reduced immigration, worried by the influx of narcotraffic and potentially dangerous criminals entering through the US borders. With sentiment adopted by the Republican party, Donald Trump was elected president with an "America First" vision for the nation.

With his re-election, Trump has established a strong platform of policies surrounding immigration, especially policies that target the undocumented within US borders. Executive Order 14159 Protecting the American People from Invasion, is an order issued alongside several others during the first week of Trump's second term in office. The order, directly quoted from the Federal Register, aims to "faithfully execute the immigration laws against all inadmissible and removable aliens, particularly those aliens who threaten the safety or security of the American people."[1] In particular, the executive order outlines several standards for a renewed immigration policy, including revamping of the 1940 Alien Registration Act, increases in fast-track deportations through expedited removal, mass funding and hirings for the US Immigration and Customs Enforcement (ICE), targeting of "sanctuary cities" with reduced funding, and changes to asylum applications. This paper takes the executive order through a thorough analysis, covering both key aspects of the policies, criticizing the order for human rights abuses and damaging America's international reputation, while also examining related public opinion, electoral politics, interest groups, and media coverage.

Summary and Overview of Executive Order 14159

Implications of the Executive Order

Revamping of the Alien Registration Act

Proposed in 1940, the Alien Registration Act requires "illegal aliens" in the US to register themselves as such within 30 days, including having fingerprints taken and completing a questionnaire. The Trump administration argues that this act has become null and unenforceable in recent decades, resulting in millions of unregistered immigrants currently residing in the US. Moreover, the administration claims many of such unregistered aliens are involved in "hostile activities, including espionage, economic espionage, and preparations for terror-related activities" while also "[abusing the generosity of the American people."[2] As such, the newly instated executive order *reinforces the original intent of the act,* empowering Immigration and Customs Enforcement (or ICE) to prioritize such unregistered aliens in their immigration enforcement.

[1] The White House. "Protecting the American People Against Invasion." The White House, 20 Jan. 2025, https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-american-people-against-invasion/. Accessed 23 Nov. 2025.
[2] *Ibid.*

Expedited Removal

Expedited removal, in the United States, is defined as the process by which immigration officers can forcefully remove non-citizens from the country without a court hearing. Established in 1996 under the Illegal Immigration Reform and Immigrant Responsibility Act, the move could historically be used conforming to certain standards: non-citizens must have entered through a port of entry and have not been consistently present in the US for at least two years. Of those, only those "who either lack the proper entry documents or who seek or have sought entry through fraud or misrepresentation" are eligible for expedited removal.[3] The act was initially installed to remove the need for an immigration hearing if reasonable presumptions could be made of a person's non-citizen status. However, with Executive Order 14159, if a person cannot "affirmatively demonstrate" that they have been consistently within US borders for two years on the spot, they could be deported immediately.

Sanctuary Districts

Federal and local governments have not always been in alignment on immigration policies. While the federal government may take a more aggressive stance on targeting undocumented immigrants, local governments may opt for a defensive stance that protects immigrants from a potentially unjustified persecution. From this clash arise sanctuary cities, or specific cities within the US whose local policies may interfere with federal immigration enforcement. Some sanctuary cities, such as San Francisco, may refuse to cooperate with ICE officers by limiting communication of valuable information, or by refusing to direct funds to aid ICE officials.[4] As such, sanctuary cities are seen as safe havens for undocumented immigrants and typically contain large percentages of the undocumented demographic. In Executive Order 14159, Trump directs the Attorney General of the United States and the Department of Homeland Security to limit access to federal funds for sanctuary cities, essentially punishing such cities for defying the current administration's orders.[5]

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[3] American Immigration Council. "Expedited Removal Explainer." American Immigration Council, https://www.americanimmigrationcouncil.org/fact-sheet/expedited-removal/. Accessed 23 Nov. 2025.

[4] SF.gov. "Learn More About San Francisco's Sanctuary City Ordinance." SF.gov, https://www.sf.gov/information--sanctuary-city-ordinance. Accessed 23 Nov. 2025.

[5] The White House. "Protecting the American People Against Invasion." The White House, 20 Jan. 2025, https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-american-people-against-invasion/. Accessed 23 Nov. 2025.

Expansion of ICE Facilities and Employment

As previously mentioned, Immigration and Customs Enforcement (ICE) is the main federal means of immigration enforcement. A lesser discussed topic during the Biden administration, ICE officers surged to headlines following Trump's ascension to presidency, newly empowered by his various executive orders. Section 21 of "Protecting the American People from Invasion" expands the number of ICE officers employed by the administration, working in tandem with Section 11 that qualifies state and local officers to take on the roles of ICE officials. As of 2025, ICE has become the most funded federal law enforcement agency, with Donald Trump's "signature law" including about $75 billion for ICE over four years.[6] With such a massive deportation plan on his roster, Trump is in need of a massive arsenal of immigration enforcers to carry out his vision. Alongside an expanded immigration workforce, the Executive Order calls for funding to be directed towards construction of detention facilities, "[allocating] all legally available resources or [establishing] contracts to construct, operate, control, or use facilities to detain removable aliens".[7]

Policy Analysis

Analysis of Public Opinion

The US is often characterized as a "melting pot": a nation of all backgrounds, ethnicities, religions, and cultures. Immigrants from various parts of the globe have brought their own distinct ideas over generations, combining and intermeshing to produce a contemporary United States. Despite this, reactions of the American public were divisive regarding Trump's collection of immigration-related executive orders**.** In a period of increasing political polarization, Americans have become even more divided, often becoming more caught up in their argumentation rather than focusing on real issues at hand. Heavy political pushback against the order, and broadly against the immigration policies of the administration, has revealed that the new policy does not reflect the average American's vision for immigration enforcement. Executive Order 14159 is not what Americans wanted.

When taking a close look at specific issues within immigration, Pew Research Center proposes that "60% of Americans disapprove of

[6] Sherman, Amy. "Does Trump's New Law Make ICE the Largest Federal Law Enforcement Agency?" PolitiFact, 11 July 2025, https://www.politifact.com/factchecks/2025/jul/11/jon-favreau/ICE-FBI-bill-Donald-Trump-largest/. Accessed 23 Nov. 2025.
[7] The White House. "Protecting the American People Against Invasion." The White House, 20 Jan. 2025, https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-american-people-against-invasion/. Accessed 23 Nov. 2025.

the suspension of most asylum applications (39% approve)," while fifty percent of Americans agree with more federal employees working on deportation efforts– both measures promoted by Executive Order 14159. The Trump administration's suspension of CBP One's appointment scheduling function faces a majority unpopularity, as the change simply complicates the asylum-seeking process even further. Removing an online scheduling system simply forces more asylum seekers to make appointments in person, generating concerns of overcrowding and increased complications. In already jampacked facilities, this move unnecessarily exacerbates an already stressful process for both asylum seekers and processing staff alike.

On the other hand, expanding funding for ICE hiring and facilities seems to be popular with about half of Americans, citing a very evenly divided outlook on the necessity of ICE and its effectiveness in implementing immigration policies. As of now, the numbers are not entirely in the administration's favor, but opposition is not strong enough to fully repel the administration's decisions, specifically Donald Trump's executive orders. In general, Americans are providing mixed evaluations of immigration policy, leaning more critically on some aspects of current immigration enforcement and approving of others. Generally, the more drastic measures, such as "suspending most applications for asylum" and "deporting some immigrants in the U.S. illegally to a prison in El Salvador" face the greatest opposition at sixty and sixty-one percent disapproval rates, respectively. Americans tend to be more against more blatant human rights abuses, as well as in favor of an immigration enforcement system that works efficiently, but within certain parameters that ensure the decency and dignity of people are still being maintained.[8] Actions such as approving expedited removal raises concerns about due process and a right to trial, which all residents (regardless of migratory status) have rights to, as per the 5th Amendment.[9] Executive Order 14159 strays much too far from maintaining dignity, quite blatantly violating human rights that are presumably respected within modern democracies.

Likewise, the number of demonstrations concerning immigration policy has skyrocketed in 2025, with "over 700 immigration-related

[8] Baxter, J., et al. "Trump Administration Immigration Actions Get Mixed, Negative Reviews in 2025." Pew Research Center, 17 June 2025, https://www.pewresearch.org/politics/2025/06/17/americans-have-mixed-to-negative-views-of-trump-administration-immigration-actions/. Accessed 12 Dec. 2025.

[9] 100. U.S. Constitution, amend. 5, sec. 1.

demonstrations… recorded across all 50 states and the District of Columbia" between January and March alone. Around ninety-seven percent of these protests are in favor of immigrant rights and against the administration's decisions, while the remaining three percent support increased immigration restrictions.[10] Mobilization of the local and the national community has flared up in the face of what critics argue is an unjust immigration policy, with anti-ICE protests, such as the "No Kings" protests, garnering mass support. Though the "No Kings" protests were generally against the increasingly authoritarian nature of Donald Trump's policies, a major issue of contention was his harsh immigration policy. Estimates show that over 7 million people participated in the second "No Kings" protest: "one of the largest single-day nationwide demonstrations in U.S. history."[11]

A mass mobilization such as this places massive pressure on the Trump administration to end an unjust and unconstitutional set of policies. If the stance of the administration ceases to relax, people will understandably continue to protest and challenge the legality of continued immigration crackdowns. The longer and more frequent the protests become, the more exasperated people become, increasing their willingness to resort to more violent measures to achieve their political goals. However, a shift in voter behavior at the next election is much more likely– voters predictably will swing away from Republican candidates and harsh immigration policy platforms, instead opting for parties and candidates who hold other platform priorities, such as the economy or cost of living.

International Implications

In tackling immigration policy, Executive Order 14159 is inherently concerned with foreign policy, as it indirectly constrains the number of immigrants who are incentivized to cross the US border. In labeling the mass influx of immigrants an "invasion," the Trump administration is signalling that people from outside the country are a threat to national security, moving the problem from a domestic stance to an international-level security pedestal.

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[10] Bridging Divides Initiative. "Issue Brief: Mapping the Rise in Immigration-Related Demonstrations in Early 2025." Bridging Divides Initiative, https://bridgingdivides.princeton.edu/issue-brief-mapping-rise-immigration-related-demonstrations-early-2025. Accessed 12 Dec. 2025.

[11] Rahman, Khaleda. "'No Kings' Map Estimates Highest, Lowest Turnout by State." Newsweek, 20 Oct. 2025, https://www.newsweek.com/no-kings-map-estimates-highest-lowest-turnout-state-10905425. Accessed 12 Dec. 2025.

Newly elected President of Mexico, Claudia Sheinbaum has been tasked with facing a second Donald Trump term with a clear immigration enforcement goal. Amidst a flurry of executive orders passed in the first week of Trump's term, including Executive Order 14159, Sheinbaum reaffirmed that she would act within the Mexican Constitution and "support [Mexican] nationals in the United States, calling them 'heroes and heroines of the nation.'" Part of Trump's renewed policy includes denying several thousand migrant asylum applications, alongside refusing to house Mexican nationals who are awaiting decisions on their asylum applications. Trump pulled this move during his first term, a move with which the president of Mexico at the time, López Obrador, willingly complied. Obrador agreed to house migrants awaiting asylum decisions in border towns, often for months at a time. In Trump's second term, President Sheinbaum appears equally willing to collaborate with Trump, citing that it is important from Mexico's side to act in a humanitarian way and support their nationals as much as possible.[12]

A moment of contention, however, arises with the removal of the CBP One app's appointment scheduling function, as directed by the executive order. Previously, migrants who wished to seek asylum in the United States could electronically schedule their appointments through the app, facilitating the flow of asylum applicants. Executive Order 14159 essentially abolishes this function, a directive opposed by Sheinbaum. The president insisted that the function should be kept, as it eases the tense buildup of asylum seekers at the northern Mexican border. However, the function has been made void since January of 2025, and all previous appointments made through the app have been cancelled. This action not only undermines dignity; it destroys an effective, more streamlined way for refugees to request asylum. Some 30,000 appointments, held by migrants awaiting access to ports of entry, were cancelled once Executive Order 14159 went into effect.[13] Some applicants had been waiting for more than a year for their appointment, and in one simple sweep, all that hope was effectively lost. Many asylum seekers have decided to return home, others have restarted the process– and for many, their options have now dwindled to zero.

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[12] Rodríguez, Emiliano. "After Trump's Orders, Mexico's Leader Says She'll 'Always Defend' Her Country." The New York Times, 21 Jan. 2025, https://www.nytimes.com/2025/01/21/us/politics/trump-mexico-sheinbaum.html. Accessed 23 Nov. 2025.

[13] "CBP One: An Overview." 2025. American Immigration Council. https://www.americanimmigrationcouncil.org/fact-sheet/cbp-one-overview/.

The implications of the executive order expand beyond the Mexican border, however, holding potential to impact the entire international community. In alignment with strict immigration policy standards, the order likewise permits the Secretary of State, along with the Secretary of Homeland Security, to impose sanctions on any country that refuses to take back their nationals as a result of deportation from the US.[14] The United States effectively takes off responsibility for deportees through this measure, involving other countries and threatening economic repercussions. The sweeping sanctions that characterize the economic policies of Trump's second term have already shocked international trade, and increased sanctions would only further complicate matters. In general, the Trump administration's strict immigration policy paints the US in quite an undesirable light. Not only is the administration brutally cracking down on migrants, but it actively threatens long-established foreign ties. The message being sent is no longer about diplomacy or negotiation: it is "comply with us, or face the consequences."

Policy experts at the UN level have expressed criticism of the current administration's actions, citing human rights violations in the areas of worker mistreatment, student and journalistic rights, and especially the forced deportation of migrants. The UN discusses the US in the broader context of Trump undermining "human rights and fundamental freedoms at both domestic and international levels," as well as "[harming] the UN Charter-based international order." The UN maintains its commitment to upholding democratic ideals and supporting human rights, especially through goals 10 and 16 of the UN's 17 Sustainable Development Goals. As the United States holds significant influence within the UN framework, to see the human rights abuses currently unfolding is a great cause for alarm in the international community. By placing pressure on the United States to reinstate its commitment to justice and human rights, the Human Rights Office of the High Commissioner calls for "all people who believe in the value of the rule of international law, justice, human rights, peace and security and sustainable development to come together to vehemently defend these core values and the institutions that safeguard them."[15]

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[14] The White House. "Protecting the American People Against Invasion." The White House, 20 Jan. 2025, https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-american-people-against-invasion/. Accessed 23 Nov. 2025.

[15] United Nations Human Rights Office of the High Commissioner. "The New US Administration Must Recommit to Human Rights at Home and Abroad: UN Experts." United Nations, 2025, https://www.ohchr.org/en/press-releases/2025/02/new-us-

Interest Groups + Lobbyists

Domestically, interest groups likewise play a role in influencing the outcomes of the executive order and challenging its legality. A Chicago-based, non-profit advocacy group that champions fighting against deportation, Organized Communities Against Deportation (OCAD), has proposed legal challenges to Executive Order 14159, particularly through "Organized Communities Against Deportations et al v. Benjamine Huffman (Acting Secretary of Homeland Security) et al (N.D. Ill.)." The main mission of the advocacy group, as cited from their website, is "building a resistance movement against deportations and the criminalization of immigrants and people of color in Chicago and surrounding areas."[16] ICE deportation raids have hit Chicago especially hard, with Donald Trump fulfilling his promise of targeting the sanctuary city and seeking out "worst of the worst criminal illegal aliens in Illinois."[17] In response, OCAD submitted a legal complaint, citing violations of the 1st and 14th Amendment, alongside arguing for trauma imposed on children and families by immigration raids and the harmful effects on the local economy. OCAD is not the only organization fighting against the executive order, however; the cities of San Francisco, Chelsea, the state of New York, and Illinois (among others) have all proposed legal challenges specifically against punishing sanctuary cities and states under "Protecting the American People from Invasion."[18]

Another advocacy group, Make the Road New York, took Kristi Noem to court over the validity of expedited removal in the ongoing case *Make the Road New York et al v. Kristi Noem (Acting Secretary of Homeland Security) et al (D.D.C.)* (2025).[19] Make the Road New York is a non-profit organization providing legal services to vulnerable immigration populations in New York, with the overarching goal of

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administration-must-recommit-human-rights-home-and-abroad-un-experts. Accessed 23 Nov. 2025.

[16] Organized Communities Against Deportation. "We Are a Movement Against Deportations and the Criminalization of Our People." OCAD, 2025, https://www.organizedcommunities.org/about. Accessed 11 Dec. 2025.

[17] Wong, Aloysius, and Ariel Tozman. "Trump Sent Federal Troops to 'Save' Chicago. The 'Midway Blitz' Raids Forced the Windy City to Defend Itself." CBC, 30 Nov. 2025, https://www.cbc.ca/news/world/chicago-sanctuary-city-war-zone-9.6996046. Accessed 12 Dec. 2025.

[18] Just Security. "Litigation Tracker: Legal Challenges to Trump Administration Actions." Just Security, https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/. Accessed 12 Dec. 2025.

[19] Make the Road New York et al v. Kristi Noem (Acting Secretary of Homeland Security) et al (D.D.C.) No. 1:25-cv-00190 (2025).

"[building] the power of immigrant and working class communities to achieve dignity and justice."[20] The program has had a long history of defending immigrant rights, and functions on a four-pillar model: using "legal and survival services," "transformative education," "community organizing," and "policy innovation" in fostering change. Specifically utilizing legal services, the organization initially challenged Kristi Noem in January of 2025, citing the expansion of expedited removal as illegal and a violation of both constitutional and human rights. As the administration's immigration policy developed, the organization submitted an amended complaint in March with further allegations and legal challenges. Overall, Make the Road New York challenged the administration's attack on a thirty-year precedent, violations of individuals' legal rights (including due process), as well as citing multiple instances of false detainment from enhanced expedited removal.

Multiple legal challenges have been presented against Donald Trump's executive order, arguing that the administration's approach to doubling down on immigration is unconstitutional on several bases. With organizations calling out violations of the 1st, 5th, and 14th Amendments, alongside declaring human rights abuses and damage to the economy, more domestic and international attention is drawn to Trump's policy that proves that aggressive immigration policy is doing more harm than good. Therefore, if the Trump administration fails to deliver the promises that attempt to justify its renewed policies ("America First," reduction of crime, improved economy, less burden on American taxpayers), members of the current administration face increasing unpopularity with the public and a reduced chance at winning the next election. The administration must prove that this policy is creating more net positive than negative for Americans as a whole.

However, lobbying isn't restricted to pushing against the immigration agenda. Several private corporations involved in the creation and management of immigration detention centers have lobbied for this particular executive order to be pushed, namely GEO Group and CoreCivic. These corporations obviously benefit from expanded funding for ICE facilities that the executive order entails, while an increased amount of detainees would bring in more revenue. Geo Group specifically has had a history of lobbying for expanded immigration enforcement, as well as a history of fighting states that try

[20] Action Network. "Make the Road New York." Make the Road New York, 2025, https://actionnetwork.org/groups/make-the-road-ny. Accessed 11 Dec. 2025.

to place limits on private prisons. In 2022, GEO Group won a legal challenge against the state of California, in which a 2019 California ban on private immigration detention centers was ruled unjust. Siding with GEO Group, the court argued that the ban "gave the state too much control over how the federal government handles immigrant detainees."[21] Using this win as fuel for the fire, the corporation has since pushed for as much deregulation and funding as possible. CoreCivic, which is another corporation running several private immigration detention centers in the US, tells a similar story. The corporation benefits directly from Executive Order 14159, citing that in November of 2025, "its revenue was up 18% compared to the same period in 2024, when Trump wasn't in power." The group additionally spent "$120,000 lobbying on Trump's 'Big Beautiful Bill'," [22] which included increasing spending for ICE facilities. In general, these large contributions to the Trump administration's aggressive immigration agenda have encouraged and incentivized policies such as Executive Order 14159 to be passed.

Media Coverage

The reality of the media today is incredibly polarized and sensationalized. Media companies have largely prioritized profit over actual reporting, realizing that media coverage invoking feelings such as fear, anger, or excitement produces much more engagement than simply facts. Social media creates a platform that pushes the loudest voices to be heard the most often, and so users are often so flooded with extremist views that they lose sight of an average American's views on immigration– specifically, media may "highlight inflammatory speech that draws in viewers creates a false narrative that the American public is anti-immigration."[23] As such, the conversations online about immigration policies have been nothing short of polarizing and charged with emotion.

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[21] Wiessner, Daniel. "GEO Group Wins Legal Challenge to California Ban on Private Immigrant Prisons." Reuters, 26 Sept. 2022, https://www.reuters.com/legal/geo-group-wins-legal-challenge-california-private-immigrant-prisons-2022-09-26/. Accessed 23 Nov. 2025.

[22] Friedman, Adam, et al. "Private Prison Operator CoreCivic Saw 55% Increase in Immigration Detainee Contracts." Tennessee Lookout, 6 Nov. 2025, https://tennesseelookout.com/2025/11/06/private-prison-operator-corecivic-saw-55-increase-in-immigration-detainee-contracts/. Accessed 23 Nov. 2025.

[23] Maurer, Jordan. "Fear, Love, and News: How US News Coverage of Immigration Negatively Impacts the Mental Health and Well-Being of Immigrant Families." Georgetown Medical Review, vol. 7, no. 1, 2023, https://gmr.scholasticahq.com/article/84314-fear-love-and-news-how-us-news-coverage-of-immigration-negatively-impacts-the-mental-health-and-well-being-of-immigrant-families.

On one hand, conservative media tends to idealize renewed immigration policy, praising Trump for his direct addressing of the "immigration problem" and dehumanizing undocumented immigrants with phrases such as "invasion," "illegals," and "aliens." According to a poll conducted by New York Times earlier this year, "just 30 percent of Republicans said immigrants strengthened the country," where the other seventy percent believed immigrants to pose threats and weaken the nation as a whole. Supporters of Trump's policies, especially his executive order, take the stance of border protections and cite the increases in foreign criminal activity in the United States. Advertisements, functioning as political messaging, were released by the White House to represent ICE agents as heroic patriots– defending the nation from dangerous criminals and protecting the American identity. For example, a Facebook video posted by the Department of Homeland Security depicts ICE agents detaining mass amounts of undocumented immigrants under the Pokémon theme song.[24] The famous catchphrase "Gotta Catch 'Em All" and clips from the anime play in between clips of ICE officers, creating a surreal video to be posted by a Department of Homeland Security social media campaign.

On Reddit, a social media platform especially popular with younger Americans, users create "subreddits" where they can ask questions and hold discussions on a variety of topics. Under the subreddit r/AskTrumpSupporters, one user asked why Trump supporters are "so concerned with immigration." In answering the question, a Trump supporter claimed that "illegal immigration significantly increases crime, depresses wages for Americans, inflates housing prices."[25] In general, conservative voters tend to be concerned with how illegal immigrants may be taking away from American livelihoods, taking advantage of the privilege of being within the United States. Conservative media specifically has largely covered the executive order in the same context, thus praising the order for purportedly defending American society, economy, and well-being.

On the other side of the polarized spectrum, Democrats are much more likely to reject the current administration's immigration policy; eighty percent of Democrats believe immigration strengthens the

[24] Homeland Security. "Gotta Catch 'Em All." Facebook, 22 Sept. 2025, https://www.facebook.com/homelandsecurity/videos/gotta-catch-em-all/1127194375517172/. Accessed 12 Dec. 2025.

[25] u/flyinghorseguy. Why are Trump supporters so concerned with immigration? Reddit, Feb. 2025, https://www.reddit.com/r/AskTrumpSupporters/comments/1i88lt4/why_are_trump_supporters_so_concerned_with/

country.[26] Liberal Democrat-aligned voters tend to focus more on the dehumanizing aspects of the administration's approach to immigration policy, opting to share videos of ICE agents breaking into cars, separating families, and generally using violence and intimidation. Media discussions are largely centered around broadly criticizing the Trump administration's advancement of immigration policies, calling them unjust and unnecessarily violent. For one, the usage of the word "invasion" in the title, in broad reference to illegal immigration, has sparked controversy. Prompting the attention of civil rights groups and immigration advocates, these groups believe the language in the executive order "amplifies white supremacist rhetoric" which are "harmful narratives that incite violence and discrimination."[27]Aside from that, liberal media also discusses what to do if ICE is at your door, sharing tips on protections from ICE, as well as criticizing the administration on its approach to immigration reform that they argue is more harmful than helpful. Often citing violations of the 5th and 19th Amendment, Democrats are much more likely to oppose the administration's approach, with up to seventy-one percent strongly disapproving according to New York Times.[28]

Conclusion

Donald Trump's Executive Order 14159 arises as a figurehead of Trump's stringent immigration enforcement policy. The executive order itself lays out increased funding for ICE programs, commanding ICE to target sanctuary districts, revamping of the Alien Registration Act, as well as expansion of expedited removal. The order, despite intentions to protect the American people, had instead undermined human rights, threatened well-established foreign relations, and complicated once-standard pathways to citizenship through asylum. Discussed by domestic actors such as lobbyists and social media networks, as well as international organizations, the executive order is a contentious move in a contentious time of immigration strategy. Executive Order 14159 will surely have made a mark in the history of American policy.

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[26] Zhang, Christine. "What Polls Say About Americans' Views on Immigrants and Immigration." The New York Times, 19 Nov. 2025, https://www.nytimes.com/2025/11/19/polls/how-americans-feel-immigration.html. Accessed 12 Dec. 2025.

[27] Southern Poverty Law Center. "Executive Actions That Undermine Our Freedoms." 2025. https://www.splcenter.org/resources/guides/executive-actions-undermine-freedoms/.

[28] Zhang, Christine. "What Polls Say About Americans' Views on Immigrants and Immigration." The New York Times, 19 Nov. 2025, https://www.nytimes.com/2025/11/19/polls/how-americans-feel-immigration.html. Accessed 12 Dec. 2025.

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Trump's War on Terror: A Defense Against Terrorism, or a Crusade Against Immigrants and Political Dissidents?

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Abstract

Priority number one under the current Trump administration is to "Make America Safe Again"[1] by combatting terrorist organizations and apprehending "criminal aliens." That being said, President Donald Trump's sweeping immigration policies and aggressive campaign against domestic terrorism exceed the executive branch's scope of power. To understand how and why the current state of the U.S. came to be, it is important to explore the country's complex history with terrorism and national security. To do so, the bulk of this paper dissects the designation and punishment procedure for Foreign Terrorist Organizations (FTOs), and how President Trump exploited this flawed framework to enact the Alien Enemies Act of 1798 and persecute Kilmar Abrego Garcia. The latter end of this paper delves into the Trump administration's reckless propaganda against so-called domestic terrorist organizations such as Antifa, demonstrating a dangerous disregard for American civil liberties.

Introduction

The gold standard for counterterrorism tools is the Foreign Terrorist Organization (FTO) designation process, which amended the Immigration and Nationality Act (INA)[2] in 1996. Throughout its first and second terms, the Trump administration designated an unprecedented number of FTOs. In September 2025, the Trump administration went on to designate domestic terrorism as a national priority area in a National Security Presidential Memorandum

[1] "President Trump's America First Priorities," The White House, Jan. 20, 2025, https://www.whitehouse.gov/briefings-statements/2025/01/president-trumps-america-first-priorities/.

[2] 8 U.S. Code § 219 - The Foreign Terrorist Organization (FTO) List, The Library of Congress, March 19, 2026, https://www.congress.gov/crs-product/IF10613.

(NSPM-7).[3] In today's uniquely polarized political climate, one must consider whether President Trump's crackdown on domestic terrorist organizations will apprehend true dangers to society or merely punish opposing opinions. Ultimately, the Trump administration is manufacturing a second War on Terror to bypass immigration law and justify unconstitutional domestic terrorism initiatives.

The Antiterrorism and Effective Death Penalty Act of 1996

While the post-9/11 War on Terror was a dramatic turning point in the U.S. anti-terrorism agenda, the Clinton administration (1993–2001) led the initial crusade against foreign and domestic terrorism. Following the 1993 bombing of the World Trade Center[4] by Pakistani terrorist Ramzi Yousef, President Bill Clinton proposed the Omnibus Counterterrorism Act of 1995[5]—which primarily focused on transnational terrorism. Though Clinton's first proposal did not pass, just one month later the infamous Oklahoma City bombing[6] led to a major shift in congressional opinions. Furthermore, Timothy McVeigh's bombing of the Alfred P. Murrah Federal Building was the most lethal terrorist attack on U.S. soil prior to 9/11, killing 168 and injuring over 600. Because McVeigh was a U.S. citizen, the federal government faced immense pressure[7] to create safeguards against domestic terrorism. That being said, domestic terrorism legislation has historically challenged lawmakers—because prosecuting legitimate homegrown threats runs the risk of punishing First Amendment protected acts of expression. The delicacy of this conflict is evident in the fact that no federal charge for domestic terrorism exists.

With this in mind, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[8] The AEDPA subtly addresses domestic terrorism by providing compensation to victims, following through with capital punishments by limiting the scope of habeas corpus reforms, and enforcing safety procedures for potentially

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[3] President Donald Trump, "Countering Domestic Terrorism and Organized Political Violence," The White House, Sep. 25, 2025, https://www.whitehouse.gov/presidential-actions/2025/09/countering-domestic-terrorism-and-organized-political-violence/.

[4] "World Trade Center Bombing 1993," Federal Bureau of Investigation, 2025, https://www.fbi.gov/history/famous-cases/world-trade-center-bombing-1993.

[5] S. 390, 104th Cong. - Omnibus Counterterrorism Act of 1995.

[6] "Oklahoma City Bombing," Federal Bureau of Investigation, 2016, https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing.

[7] President Bill Clinton, "President Statement on Antiterrorism Bill Signing," The National Archives, April 24, 1996, https://clintonwhitehouse6.archives.gov/1996/04/1996-04-24-president-statement-on-antiterrorism-bill-signing.html.

[8] 28 U.S.C. § 2244, 2254, 2255 - Antiterrorism and Effective Death Penalty Act of 1996.

dangerous biological agents.[9] But more importantly, the AEDPA directly combats foreign terrorism by adding a new provision to the INA stipulating the designation and punishment procedures for FTOs.[10]

FTO Designation Process

In eight years, the Obama administration (2009–2017) designated thirteen FTOs, and in four years, the Biden administration (2020-2025) designated four FTOs. This is in stark contrast with the Trump administration, which has designated thirty-seven FTOs in a little over five years. Though President Trump's aberration from past administrations may seem improbable, analyzing the FTO designation process unearths several openings for exploitation.

FTOs are formally designated by the Secretary of State, and the designation process typically involves deliberations with the Attorney General and the Secretary of Treasury. According to the AEDPA, a group is considered an FTO if they satisfy the following three criteria:

First, *they must be a foreign organization* in which their primary base of operations, recruitment efforts, and member nationality all reside outside of the U.S. Though this criterion may seem self-evident, it emphasizes the crucial distinction between foreign and domestic terrorism.

Second, *a group must engage in terrorist activity or retain the capability or intent to commit acts of terrorism*. There are two definitions of terrorism that apply to this criterion. The first definition[11] simply lists a series of crimes such as hijacking, assassination, blackmail, biowarfare, and arson that constitute terrorist activity. But this definition is outdated, because it neglects to mention the political motive that underlies terrorism—and distinguishes terrorism from ordinary crime. For example, "a group of individuals hijacking an airline in search of political asylum are not the same as terrorists hijacking an airline to publicize a political cause."[12] In light of this argument, the second definition interprets terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[13] Though the second definition is more widely-accepted and contemporary, both

[9] *Ibid.*
[10] *Ibid.*
[11] 8 U.S.C. § 1182(a)(3)(B) - defining "terrorist activity."
[12] Brian M. Jenkins, "The Study of Terrorism: Definitional Problems," Rand. Corp. 1980, https://www.rand.org/content/dam/rand/pubs/papers/2006/P6563.pdf.
[13] 22 U.S.C. § 2656f(d)(2) - defining "terrorism."

definitions can satisfy this criterion equally. As a result, several individuals may unjustly qualify as terrorists due to definitional inconsistencies. This non-specific criterion demonstrates the international community's ongoing struggle to universally define terrorism.

Another weakness in the second criterion is its consideration of "capability or intent to engage in acts of terrorism." Because gauging capability or intent involves a degree of subjectivity, this criterion is vulnerable to implicit biases and racial profiling. Subjectivity in counterterrorism law is especially dangerous, considering the U.S. government's history of using race, ethnicity, national origin, and religion to designate terrorists. For example, the Bush administration (2001–2009) implemented the National Security Entry-Exit Registration System (NSEERS)[14] following 9/11. This system required non-immigrant men from 25 different countries (24 of which were Muslim-majority states) to endure lengthy, often humiliating interrogations from immigration officers. Though the NSEERS program is widely condemned as an overt expression of anti-Muslim animus and racial profiling, the Supreme Court's ruling in Noem v. Perdomo (2025)[15] recalls the same prejudices from the not-so-distant past. In yet another shadow docket ruling, the Court upheld the constitutionality of Immigration and Customs Enforcement (ICE) agents factoring race, language, occupation, and location into their investigative stops—ultimately targeting Hispanics and Latinos. Both the NSEERS program and so-called "Kavanaugh stops" demonstrate that racial profiling is alive and ever-present in the U.S. government, which is precisely why gauging capability or intent to engage in acts of terrorism should not be left to vague subjectivity.

Third, *a group must threaten national security.* This criterion is typically the easiest to satisfy, as the evidentiary bar to demonstrate a valid security risk is relatively low.[16] For instance, the Secretary of State could rely on an organization's previous attacks to satisfy this criterion—whether they be complete or incomplete. In addition, any

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[14] "National Security Entry-Exit Registration System (NSEERS)," American Civil Liberties Union, https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/national-security-entry-exit-registration.

[15] "Kristi Noem v. Pedro Vasquez Perdomo," The Supreme Court of the United States, Sept. 8, 2025, https://www.supremecourt.gov/opinions/24pdf/25a169_5h25.pdf.

[16] Seth Loertscher, Daniel Milton, Bryan Price & Cynthia Loertscher, "The Terrorist Lists: An Examination of the U.S. Government's Counterterrorism Designations Efforts," Combating Terrorism Ctr. at West Point, Sept. 2020, 29 https://www.jstor.org/stable/resrep26666.5?seq=5.

activity that broadly threatens economic stability, foreign relations, U.S. officials, or military defense is also deemed a plausible national security threat.[17] The ease with which national security risks are established demonstrates the deep-rooted norm that times of emergency warrant swift decision making. That being said, history has proven that emergency exemptions to procedural safeguards can easily spiral into destruction if left unchecked. Most notably, in Korematsu v. United States (1944)[18], the Supreme Court upheld the World War II Japanese internment based on falsified evidence and overt racism. According to Justice Hugo Black, those of Japanese ancestry "constituted a menace to the national defense and safety which demanded that prompt and adequate measures be taken to guard against it."[19] The Korematsu ruling demonstrates that federal institutions have historically responded to alleged national security risks without proper scrutiny, resulting in irrevocable damage. For this reason, it is concerning that proving an FTO threatens national security requires relatively little evidentiary inspection.

FTOs: Explicit and Implicit Ramifications

Once a group is designated as an FTO, they are added to the Federal Register under the official FTO list.[20] From there, the consequences that follow are typically split into two distinct categories: explicit and implicit.

Starting with explicit consequences, one of the most contested legal ramifications is the criminalization of "knowingly providing material support or resources"[21] to an FTO. For one, to prosecute an individual for "knowingly" providing aid, the "government need not prove that the defendant knew his conduct was unlawful."[22] In other words, an individual cannot plead ignorance of the law—making this provision especially influential in the courtroom. In addition, "material support" is defined as "any property, tangible or intangible, or service," with the only exception being medicine or religious material. This unusually broad definition has led to immense controversy, especially

[17] *Ibid.*
[18] "Korematsu v. United States," Oyez, Apr. 2, 2026, www.oyez.org/cases/1940-1955/323us214.
[19] *Ibid.*
[20] Liana W. Rosen & Shelby B. Senger, "The Foreign Terrorist Organization (FTO) List," The Library of Congress, Sept. 11, 2025. https://www.congress.gov/crs-product/IF10613.
[21] "Terrorist Material Support: An Overview of 18 U.S.C. §§ 2339A & 2339B 29," The Library of Congress, Aug. 15, 2023, https://www.congress.gov/crs-product/R41333.
[22] 18 U.S.C. § 2339B - Providing material support or resources to designated foreign terrorist organizations.

regarding the criminalization of good-intentioned support. For example, in Holder v. Humanitarian Law Project (2010)[23], the Supreme Court upheld the broad interpretation of material support—ultimately thwarting humanitarian aid organizations from providing disaster relief to conflict zones controlled by terrorist organizations. In addition, the Trump administration's move to designate cartels as FTOs in Executive Order (EO) 14157[24] exacerbated public concerns regarding the harshness of the material support clause. Because most cartel members blend into everyday populations paying rent, having families, and maintaining jobs, several ethical and legal questions are raised when it comes to landlords providing lodging, family members embracing loved ones, and employers issuing wages to now-FTO members.

The second explicit consequence establishes the inadmissibility, and subsequent deportability, of all non-citizen FTO members. This consequence is especially relevant to the current Trump administration, which deported three plane loads of alleged FTO members in March 2025.[25] This mass deportation was the result of EO 14157, which declared a state of national emergency under the International Emergency Economic Powers Act (IEEPA)[26] regarding the threat of cartels. Using his emergency powers, President Trump created a process by which foreign criminal organizations could be added to the FTO list—simultaneously designating eight Hispanic cartels and gangs as FTOs in February 2025.

The final explicit consequence requires all U.S. financial institutions to report any FTO-related assets to the Office of Foreign Assets Control (OFAC).[27] Much like the material support statute, the definition of "assets" is purposefully broad. For reference, the OFAC defines assets as "any other property, real, personal, or mixed, tangible

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[23] "Holder v. Humanitarian Law Project," Oyez, *Apr. 2, 2026,* www.oyez.org/cases/2009/08-1498.

[24] Executive Order No. 14157, "Designating Cartels and Other Organizations as Foreign Terrorist Organizations and Specially Designated Global Terrorists," 90 Federal Register 8439, Jan. 29, 2025.

[25] Katherine Faulders, Armando Garcia, Emily Chang & Peter Charalambous, "Judge Blocks Trump From Deporting Noncitizens Under Alien Enemies Act, Orders Flights Turned Around," ABC News, Mar. 15, 2025, https://abcnews.com/Politics/trump-expected-invoke-wartime-alien-enemies-act-carry/story?id=119769090.

[26] 50 U.S.C. § 1701 - International Emergency Economic Powers Act (IEEPA).

[27] "OFAC Alert: International Cartels Designated as Foreign Terrorist Organizations and Specially Designated Global Terrorists," Office of Foreign Assets Control, Mar. 2025, https://ofac.treasury.gov/media/934096/download?inline.

or intangible, or interest or interests therein, present, future or contingent."[28]

In terms of implicit ramifications, demarcating a group as terrorists often casts a negative light on entire minorities. For example, anti-Muslim hate crimes increased by 1,600% following the attacks on 9/11.[29] This demonstrates the public's tendency to generalize isolated terrorist organizations as entire racial, ethnic, or religious communities. In addition, the word "terrorism" is powerful in and of itself—which is why we distinguish FTOs from Transnational Crime Organizations (TCOs).[30] Furthermore, terrorism is more influential long-term, because it not only involves crime, but it also involves psychological fear and public outcry. For this reason, the speed with which the Trump administration is releasing FTO designations is concerning, especially because it seems to be targeting specific marginalized groups. Not only does President Trump's pattern of FTO designations blur the lines between terrorism and crime, thereby creating an unnecessarily tense social climate, but it also creates a dangerous psychological link between communities of color and terrorism.

The Alien Enemies Act

As if his declaration of a state of emergency was not drastic enough, President Trump went on to invoke the 277-year-old Alien Enemies Act (AEA)[31] against the Venezuelan Tren de Aragua (TdR) street gang. This act, which was only employed three times prior to 2025, permits the president to deport any nationals of a country with which the U.S. has declared war or whose "invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States." Because the AEA is a wartime power, the fact that Congress has enumerated authority to declare war is an important check on the president's power. With this in mind, one could argue that President Trump formulated an FTO designation process for cartels and street gangs in order to stage a plausible "invasion or predatory incursion." In other words, if Congress will not declare war, President

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[28] *Ibid.*

[29] "Combating Post-9/11 Discriminatory Backlash," U.S. Department of Justice, Aug. 6, 2015, https://www.justice.gov/crt/combating-post-911-discriminatory-backlash-6.

[30] Tricia Bacon & Daniel Byman, "The Potential Policy Impacts of Classifying Cartels as FTOs," American University School of Public Affairs, June 20, 2025, https://www.american.edu/spa/news/classifying-cartels-as-ftos-06202025.cfm.

[31] President Donald Trump, "Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua," 90 Fed. Reg. 13033, Mar. 20, 2025.

Trump will simply manufacture one in order to carry out his aggressive immigration policies.

From March to April 2025, over 280 men were deported[32] to El Centro de Confinamiento del Terrorismo (CECOT)[33] in El Salvador—a maximum-security mega-prison known for its severe human rights abuse allegations.[34] In addition, many of these men were deported without their Fifth Amendment right to due process.

In A.A.R.P v. Trump (2025)[35], the Supreme Court granted a temporary injunction to several accused Venezuelan men who faced deportation charges. The Court emphasized that all citizens, even alleged "alien enemies," are subject to the ample notice and procedural fairness of due process. However, the Trump administration continues to demonstrate a clear disregard for due process in the ongoing Kilmar Abrego Garcia case.

Kilmar Abrego Garcia

The speed with which the Trump administration is deporting alleged FTO members is overwhelming, so much so that they mistakenly deported Kilmar Abrego Garcia, a Maryland resident, in March 2025. Salvadorian native Abrego Garcia was deported to CECOT for three months, where he endured grueling abuse under President Trump's expressed knowledge.[36]

For context, Abrego Garcia was detained by Maryland police officers in 2019 due to suspicion that he may be affiliated with El Mara Salvatrucha (MS-13), an El Salvadorian street gang. Although he received no charges, Abrego Garcia was transferred to an ICE detention center after revealing he had illegally immigrated to the U.S. in 2012. While his request for asylum was denied, he was granted a withholding of removal (WOR) due to reasonable fear of facing gang violence in El Salvador. It is important to note that a WOR does not offer a pathway to permanent citizenship like asylum, but it does prohibit the deportation of individuals to countries where they may face persecution.

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[32] "Tracking the CECOT Disappearances," National Immigration Law Center, Aug. 19, 2025, https://www.nilc.org/resources/tracking-the-cecot-disappearances/.
[33] The Associated Press, "What to Know About CECOT, El Salvador's Mega-Prison for Gang Members," NPR, Mar. 17, 2025, https://www.npr.org/2025/03/17/g-s1-54206/el-salvador-mega-prison-cecot.
[34] *Id.*
[35] "A.A.R.P. v. Trump 605 U.S. ___," Justia, 2025, https://supreme.justia.com/cases/federal/us/605/24a1007/.
[36] The Associated Press, "Abrego Garcia: Tortured in El Salvador's Prison," NPR, July 3, 2025, https://www.npr.org/2025/07/03/g-s1-75775/abrego-garcia-el-salvador-prison-beaten-torture.

In 2025, MS-13 was one of the eight designated FTOs amidst Trump's declaration of a state of emergency. Despite Abrego Garcia's WOR to El Salvador and his lack of proven MS-13 affiliation, he was still deported to CECOT. While the Trump administration initially acknowledged their "administrative error,"[37] they pivoted to the argument that Abrego Garcia deserved to be deported because he was indeed an MS-13 terrorist. According to the U.S. Department of Homeland Security website, "Kilmar Abrego Garcia is a violent criminal illegal alien and MS-13 gang member. He belongs behind bars and off U.S. soil."[38] This statement is troubling because even if Abrego Garcia was convicted of MS-13 membership, his deportation would still require due process.

The call for legal proceedings was first made by District of Maryland Judge Paula Xinis, who stated that "in a court of law, when someone is accused of membership in such a violent and predatory organization, it comes in the form of an indictment or criminal proceeding, so we can assess facts."[39] Just three days after Judge Xinis ordered the U.S. government to "facilitate and effectuate" the immediate return of Abrego Garcia, the federal government petitioned for a writ of certiorari against the order—to which the Supreme Court unanimously ruled in favor of Abrego Garcia's return.[40] According to Justice Sonia Sotomayor, Abrego Garcia was constitutionally guaranteed the right to due process under the INA, which requires a warrant before a non-citizen is arrested and detained.[41] She went on to outline the Trump administration's violation of the Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment (1984), which prohibits the deportation of any individual to a country where they are likely to face persecution.[42] Finally, Justice Sotomayor directly quoted the ICE directive, which states that it is the federal government's duty to "facilitate [an] alien's return to the United

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[37] Joel Rose, "Trump Administration Says Maryland Man Sent to El Salvador Prison in Error," NPR, Apr. 1, 2025, https://www.npr.org/2025/04/01/nx-s1-5347427/maryland-el-salvador-error.

[38] "Kilmar Abrego Garcia: MS-13 Gang Member with History of Violence," U.S. Department of Homeland Security, Apr. 16, 2025, https://www.dhs.gov/news/2025/04/16/kilmar-abrego-garcia-ms-13-gang-member-history-violence.

[39] Joel Rose & Sergio Martinez-Beltran, "Judge orders the Trump administration to return man who was mistakenly deported," NPR, Apr. 4, 2025, https://www.npr.org/2025/04/04/nx-s1-5352448/judge-orders-the-trump-administration-to-return-man-who-was-mistakenly-deported-el-salvador.

[40] "*Noem v. Abrego Garcia* 604 U.S. ___," The Supreme Court of the United States, 2025, https://www.supremecourt.gov/opinions/24pdf/24a949_lkhn.pdf.

[41] *Ibid.*

[42] *Ibid.*

States if . . . the alien's presence is necessary for continued administrative removal proceedings."[43] Despite each of these violations, Abrego Garcia remained in CECOT for 57 additional days—spending around 83 days in the mega-prison altogether. On top of that, Abrego Garcia was only returned to the U.S. under the condition he faced federal human smuggling charges upon arrival.[44]

Today, the Trump administration continues to call Abrego Garcia an MS-13 gang member, illegal criminal, human trafficker, and even child predator[45] despite zero courts upholding these assertions. In fact, Abrego Garcia was released from criminal custody by District of Tennessee Judge Waverly Crenshaw after facing human smuggling charges in June 2025, who reasoned there was insufficient evidence to prove he was a threat to society.

Ultimately, the Trump administration is operating under the logic of guilty until proven innocent, which directly negates the Fifth Amendment's promise of due process. At the same time, President Trump is weaponizing FTO allegations to support his "immigrants = dangerous" narrative.

Domestic Terrorism

From the Ku Klux Klan to the Wall Street bombing of 1920, domestic terrorism is certainly nothing new to the U.S. More recently, the 2021 U.S. Capitol riot, 2024 assassination attempts on President Trump, 2025 assassination of Charlie Kirk, and 2026 killings of Renee Good and Alex Pretti have brought the domestic terrorism debate to the forefront of modern politics. As discussed previously, effectively countering homegrown terrorism has historically frustrated the federal government because of the possible civil liberty violations. While no standalone federal charge for domestic terrorism exists, the federal government defines domestic terrorism as "ideologically driven crimes committed by individuals in the United States that are intended to intimidate or coerce a civilian population or influence the policy or conduct of a government."[46]

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[43] *Ibid.*

[44] Ximena Bustillo, "Kilmar Abrego Garcia, wrongfully deported to El Salvador, is back in the U.S. to face smuggling charges," NPR, June 6, 2025, https://www.npr.org/2025/06/06/nx-s1-5425509/kilmar-abrego-garcia-el-salvador-deport-cecot-maryland-ice.

[45] "THE REAL STORY: Kilmar Abrego Garcia is an MS-13 Gang member with a History of Violence," The Department of Homeland Security, Apr. 16, 2025, https://www.dhs.gov/news/2025/04/16/kilmar-abrego-garcia-ms-13-gang-member-history-violence.

[46] "Understanding and Conceptualizing Domestic Terrorism: Issues for Congress," The Library of Congress, Dec. 29, 2023, https://www.congress.gov/crs-product/R47885.

In light of the recent increase in political violence, President Trump released an NSPM-7 titled "Countering Domestic Terrorism and Organized Political Violence." This proclamation designates domestic terrorism as a national priority area, which redirects government funds, officials, and agencies towards the Trump administration's domestic terrorism initiatives. More specifically, NSPM-7 instructs the National Joint Terrorism Task Force (JTTF) to aggressively investigate domestic violent extremists (DVEs) and the Attorney General to formally designate domestic terrorist organizations.

However, implementing a federal criminal statute for domestic terrorist organizations is largely unnecessary, given the fact that 32 states already have domestic terrorism charges of their own. In addition, domestic terrorists rarely go unpunished—as U.S. Code already lists 57 "federal crimes of terrorism" such as assassination, arson, and aircraft hijacking.[47] In fact, material support that is conducive to any of the 57 listed crimes is criminalized with prison sentences of up to 15 years.[48]

That being said, formally implementing a criminal statute against DVEs could enhance the federal government's ability to prevent and respond to future attacks. For instance, the Department of Defense (DOD) faced immense backlash after deploying the National Guard during the 2020 Black Lives Matter (BLM) protests. As a result, DOD officials hesitated to deploy the National Guard for over three hours during the January 6 insurrection—hoping to avoid poor "optics." [49] By contrast, if domestic terrorism were a distinct federal criminal statute, perhaps law enforcement and government officials could investigate, apprehend, and punish DVEs more decisively without fear of overstepping their legal authority.

Nevertheless, if a criminal statute was in fact implemented, it is unlikely the federal government *would* target all acts of domestic terrorism equally—as government institutions such as the Federal Bureau of Investigation (FBI) have historically targeted left-wing movements and minority activists while minimizing right-wing violence.[50] For example, following the rise of the BLM movement in

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[47] 18 USC § 2332b(g)(5) - Federal Crimes of Terrorism

[48] "Terrorist Material Support: An Overview of 18 U.S.C. §§ 2339A & 2339B 29," The Library of Congress, Aug. 15, 2023, https://www.congress.gov/crs-product/R41333.

[49] Mark Mazzetti, Helene Cooper, Jennifer Steinhauer, Zolan Kanno-Youngs, Luke Broadwater, "Inside a Deadly Siege: How a String of Failures Led to a Dark Day at the Capitol," The New York Times, June 8, 2021, https://www.nytimes.com/2021/01/10/us/politics/capitol-siege-security.html.

[50] Michael German & Sara Robinson, "Wrong Priorities on Fighting Terrorism," Brennan Center for Justice, https://www.brennancenter.org/sites/default/files/

2014, the FBI released a report three years later on the imminent threat of Black extremists.[51] More specifically, the FBI invented a new domestic terrorism category called the "Black Identity Extremism movement" based on six unrelated, sporadic incidents in which Black individuals harmed police officers from 2014–2017.[52] In addition, according to the FBI's 2018–2020 fiscal year counterterrorism guide,[53] Black extremists were deemed "priority" threats while white supremacists were deemed "medium" threats despite violence from right wing militants and white supremacists taking place during the same period on a larger scale (e.g., the 2018 Pittsburgh synagogue and 2019 El Paso Walmart mass shootings). Therefore, the delicacy with which the federal government handled the 2021 Capitol riot is less indicative of optics-based thoughtfulness and more indicative of implicit biases continuing to permeate the U.S. federal government.

In addition, the Trump administration's longtime crusade against Antifa (short for anti-fascist) further demonstrates why the federal government cannot be trusted to impartially prosecute domestic terrorist organizations—regardless of the potential counterterrorism benefits. For context, the Trump administration released a memorandum titled "Designating Antifa as a Domestic Terrorist Organization" in September 2025.[54] In this administrative order, the president boldly pledged to "investigate, disrupt, and dismantle any and all illegal operations" of Antifa—which President Trump described as an organization "[whose] campaign involves coordinated efforts to obstruct enforcement of Federal laws through armed standoffs with law enforcement [and] organized riots."[55] This statement is particularly telling, because the same description could apply to militant groups such as the Proud Boys and Oath Keepers, who orchestrated the 2021 U.S. Capitol riot. But of course, President Trump refers to the January 6 rioters as "people who love our country," "patriots," and the event itself as a "day of love"[56]—going as far as pardoning over 1,500

2019-08/Report_Wrong_Priorities_Terrorism.pdf.

[51] Mike German, "The FBI Targets a New Generation of Black Activists," Brennan Center for Justice, June 26, 2020, https://www.brennancenter.org/our-work/analysis-opinion/fbi-targets-new-generation-black-activists.

[52] *Ibid.*

[53] *Ibid.*

[54] "Designating Antifa as a Domestic Terrorist Organization," 90 Federal Register 46317, Sep. 22, 2025.

[55] *Ibid.*

[56] Tom Dreisbach, "Donald Trump calls Jan. 6 a 'day of love.' Here are the facts," NPR, Oct. 29, 2024, https://www.npr.org/2024/10/29/nx-s1-5159868/2024-election-trump-harris-capitol-riot.

individuals in 2025.[57] It should also be noted that President Trump attempted to designate Antifa as a domestic terrorist organization in 2019, but ultimately failed in part because Antifa is a decentralized movement and not a concentrated organization.[58] By cherry-picking what is and is not considered domestic terrorism, the Trump administration demonstrates precisely why a domestic terrorist organization designation should never exist.

Finally, anti-ICE protests continue to be mentioned in the same breath as domestic terrorism under the current Trump administration. For example, just hours after the fatal shooting of 37-year-old Alex Pretti by an ICE agent, former Secretary of Homeland Security Kristi Noem stated that Pretti "committed an act of domestic terrorism" by "approaching law enforcement officers with a nine millimeter semi-automatic handgun."[59] However, numerous bystander videos reveal that Pretti was holding a phone, and not a gun, moments before the altercation took place.[60] In addition, Pretti had a permit to publicly carry his handgun as per Minnesota law—resulting in outrage amongst traditionally Trump-aligned organizations such as the National Rifle Association (NRA).[61] Similarly, Vice President JD Vance called 37-year-old Renee Good a "domestic terrorist" just one day after an ICE agent shot her.[62] In both instances, Pretti and Good were imprudently deemed domestic terrorists before the conclusion of any formal investigation. In many ways, the Trump administration's domestic terrorism narrative against anti-ICE protesters is yet another calculated attempt to fearmonger political dissidents into quiet submission. On top of that, hurling unsubstantiated domestic terrorism allegations diverts time, energy, and resources away from true acts of terrorism.

Conclusion

This paper illuminates several shortcomings in the U.S. counterterrorism framework, specifically listing the vulnerabilities in

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[57] "Full List of Jan. 6 Pardons," January 6 News, updated Jan. 20, 2025, https://www.jan-6.com/trump-will-pardon-jan-6-rioters.
[58] "A resolution calling for the designation of Antifa as a domestic terrorist organization," S. Res. 279, 116th Congress, July 18, 2019.
[59] Nancy Cordes, "In Alex Pretti's killing, a sharp contrast between what Trump officials say and what video shows," CBS News, Jan. 25, 2026, https://www.cbsnews.com/news/alex-pretti-shooting-contrast-official-accounts-videos/.
[60] *Ibid.*
[61] *Ibid.*
[62] "Press Briefing by Press Secretary Karoline Leavitt and the Vice President," YouTube, published by The White House, Jan. 8. 2026, https://www.whitehouse.gov/videos/press-briefing-by-press-secretary-karoline-leavitt-and-the-vice-president-jan-8-2026/.

the FTO designation process and the controversiality of the subsequent explicit and implicit ramifications. In many ways, these weaknesses are what enabled the Trump administration to carry out the oppressive domestic terrorism and immigration policies that everyday citizens are experiencing today. In a country where one's First Amendment rights to expression, Fourth Amendment protection against unreasonable searches and seizures, Fifth Amendment right to due process, and Fourteenth Amendment right to the rule of law seem to be under attack, it is easy to fall victim to cycles of learned helplessness. However, there are several ways in which everyday Americans can address these injustices:

1. Lobby and petition members of Congress to amend the definition of "terrorism" in the FTO designation process, allowing for a more contemporary interpretation and removing definitional inconsistencies.
2. Lobby and petition members of Congress to raise the evidentiary bar of "national security threats" in the FTO designation process, leaving less room for prejudice or irrationality in counterterrorism law.
3. Pressure the Supreme Court to check the Trump administration's power by filing amicus curiae briefs in high-stakes cases.
4. To limit the power of President Trump's NSPM-7, urge local representatives to limit their participation in JTTFs and prohibit data-sharing with federal agencies through city council meetings and direct outreach.
5. Engage in respectful political discourse and find common ground (e.g. political violence in any form is wrong).
6. Know your rights and educate others—especially immigrants, whose civil liberties are under attack now more than ever.

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Sovereignty as a Pattern of Resistance: Art, Ecology, and Law in Native America

By Isabelle Rabas

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Abstract

Sovereignty in Native American studies serves as a political system exposing tensions between the US federal law and Indian law, highlighting Indigenous resistance to colonial structures. This essay argues that sovereignty is a pattern of resistance expressed through art, ecology, and law. Drawing on Supreme Court cases, Native American narratives, and class lectures, the essay shows how federal law has repeatedly undermined land ownership and governance. It also reveals how Native American leaders have reclaimed the narrative to assert sovereignty. Overall, it demonstrates that sovereignty is a living legal system that is continuously restored, giving Indigenous people jurisdiction over land and law. It summarizes the legal actions taken in the past and what is currently being done to continue fighting for sovereignty. This essay reveals that sovereignty is a struggle not only for self-governance but also for Native American land stewardship, cultural restoration, and community.

Introduction

Sovereignty is a political challenge to the authority of the United States; it is a layered concept with legal, territorial, and cultural dimensions, exposing the tension between Native Americans and the US government since federal law largely limits tribal sovereignty. Serving as a means of cultural reclamation and a creative outlet, it holds a long history representing the relationship between Native Americans and their homeland through political relations. Sovereignty can be studied through many lenses, including visual, environmental, and political lenses, displaying its deeply rooted significance to Native American life in the past and our current political landscape. Throughout history, sovereignty has served as a pattern of Indigenous political movement and resistance, enabling Native Americans to defend their land and challenge legal structures established by colonialism. Sovereignty in Native American studies must be

recognized as more than a legal status, but as a socio-political challenge to colonialism. It asserts Indigenous governance that reclaims authority, shaping Native American culture through law, land, and collective responsibility.

Defining Sovereignty: A Socio-Political Framework

The United States has repeatedly undermined treaties and committed systemic violations, directly affecting how Indigenous artists use their work to confront the legal systems and assert sovereignty. Art represents sovereignty because it is a form of expression through which Native Americans are resisting colonialism, using symbols and narratives to tell their story. For example, the documentary "Native Art Now!" profiles different Native American artists who share how their art represents their lived experiences, asserting sovereignty over how their cultures are represented as a tool for resistance.[1] This relates to the idea of decolonizing aesthetics, which critiques the Western assumption that Native art is limited to "traditional" forms and has not modernized. That assumption is challenged by modern art, such as online simulations that represent native life through animations. Art can also be a fugitive act that reimagines art by escaping the confines of colonial control rather than seeking inclusion. Jarrett Martineau and Eric Ritskes explore the term fugitive aesthetic: "Indigenous art evokes a fugitive aesthetic that, in its decolonial ruptural forms, refuses the struggle for better or more inclusion and recognition (Coulthard, 2007) and, instead, chooses refusal and flight as modes of freedom."[2] This emphasizes that art is integral to politics and sovereignty; it is a form of political resistance and cultural revival. It is an act of sovereignty because it refuses to adhere to colonial assumptions and reclaims the narrative so that Native Americans can rewrite the portrayal, asserting that Natives are still here. By grounding political meaning through their art, Indigenous artists outline an alternate legal framework that challenges the individualism and extractive assumptions of U.S. law.

Artistic Sovereignty

Another expression of sovereignty is practiced through environmental protection since sovereign tribes are given the authority to steward land by protecting the plants, water, and animals through relational care. This reciprocity relationship is key to the spiritual

[1] Veronica Passalacqua. Kate Morris. "Native Art Now!" PBS. (2017).
[2] Jarrett Martineau. Eric Ritskes. "Fugitive Indigeneity: Reclaiming the Terrain of Decolonial Struggle through Indigenous Art" (2014).

framework of ecological restoration, centered around responsibility and education. Leanne Betasamosake Simpson explores land as a pedagogy: "A resurgence of Indigenous political cultures, governances and nation-building requires generations of Indigenous peoples to grow up intimately and strongly connected to our homeland…"[3] This reveals how land relationships uphold political freedom and act to reclaim land from colonial narratives, developing political autonomy. Furthermore, bio-cultural sovereignty entails the right of Native Americans to maintain cultural and ecological relationships with their ancestral lands. For example, Cutcha Risling Baldy writes about the Supreme Court Case *Lyng v. Northwest Indian Cemetery Protective Association* (1988)[4], "the U.S. Forest Service had proposed the building of a road that would run through the Six Rivers National Forest in northern California from Gasquet to Orleans. 'The road's primary purpose was to benefit the logging industry.'"[5] This case goes beyond just a road; it displays how U.S. law defines land as an economic resource, opposed to the living relative Native Americans hold it to be. Through this logic, it reveals why environmental protection is central to sovereignty because it opposes colonial economic priorities. Despite the protest of local tribes, the Court ruled that the US government could lawfully build a road over religious lands, finding that the Free Exercise Clause does not apply. This highlights tension between the US government and Indigenous sovereignty; it undermines tribal sovereignty by limiting tribes from upholding their responsibility to the land. Ultimately, the struggle over environmental sovereignty reflects struggles over jurisdiction, highlighting that sovereignty requires the power to protect the land providing for Indigenous life.

Ecological Sovereignty

Political sovereignty establishes the inherent rights of tribes to govern themselves by determining their own set of laws/regulations. There has been an ongoing resistance to colonial systems to restore sovereignty through legislation, acts, court cases, et cetera. Colonialism was justified through documents such as the Doctrine of Discovery and court cases such as *Johnson V. M'Intosh* (1823)[6] determined that Native American tribes can only sell their land to the federal

[3] Leanne Betasamosake Simpson. "Land as pedagogy: Nishnaabeg intelligence and rebellious transformation" (2014).
[4] *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).
[5] Cutcha Risling Baldy. "Why we gather: traditional gathering in native Northwest California and the future of bio-cultural sovereignty" Springer Open. (2013).
[6] *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

government. Government actions such as these proved that Natives were not sovereign and were very much under the rule of the federal government despite the promises or treaties made to tribes. Treaties are especially important to gaining sovereignty because they serve as the law of the land under the US Constitution, and breaking them highlights legal instability for tribes. Native American Studies professor Brittani Orona discussed the Termination Era, lasting from 1952 to 1960, which was intended to dismantle the reservation system and put Native Americans under state control. This occurred through taking Native land for its timber and natural resources. For example, a Pomo woman, Tillie Hardwick, was led to believe that selling her rancheria to the government was a requirement, not an option.[7] In response to such injustices, the Self-Determination Era began which included many Native Americans moving to urban areas to get jobs, health services, education, et cetera. However, the road to progress was challenging and often violent because of aggressive colonial techniques and assimilation. Ned Blackhawk explores how colonial violence shaped Native American life in the Great Basin, "American political formation in the Great Basin occurred through violence in the homelands of Native peoples, many of whom had forged generations of relations with colonial societies… Following a rapid succession of events, newcomers swarmed throughout the region, seizing the most fertile lands and resources for their own."[8] This narrative reveals that sovereignty was a struggle of conflict, violence, and hardship that was not won easily and has still not been fully guaranteed for most tribes. Colonization damaged the political and land relationships that Native Americans held with the land, however, political perseverance has allowed repossession of some of this land through initiatives such as the Indian Reorganization Act which gave natives sovereignty, *Winters v. United States*, which made reservation land self-sufficient through water rights, et cetera. This ruling established that tribes possess inherent water rights shifting power back towards Indigenous peoples. It illustrates how tribal sovereignty requires legal recognition as an expression of political autonomy.

[7] Orona, Brittani. "Indigenous Sovereignty in the United States." Lecture. October 14, 2025.
[8] Blackhawk, Ned. "Violence over the Land: Indians and Empires in the Early American West," Harvard University Press (2006).

Political Sovereignty

Sovereignty is not only a dispute of the past but a current legal battle as tribes continue to defend their land and political power. For example, *McGirt v. Oklahoma* (2020) demonstrates the endurance of treaties and the instability of sovereignty. In a five-to-four majority, the Supreme Court found that treaties made in the 1830s, guaranteeing land as tribal, remain intact therefore crimes committed in Indian country cannot be prosecuted under the state of Oklahoma.[9] This reveals inconsistencies amongst the federal government who long ignored treaties giving tribes sovereignty over their land. Sovereignty is "recognized" or "unrecognized" depending on the US government's partiality and not upon the laws. Repeatedly, the US courts and agencies undermine Indigenous sovereignty, building a system of uncertainty that works to benefit the federal government at the expense of Native American communities. Along with land reclamation, the Land Back movement has served as a legal mechanism for restoring jurisdiction. Greywolf describes a recent success in the movement in the National Bison Range; in 2022 Congress transferred 18,800 acres to full tribal management.[10] Given that land ownership is imperative to governance, regaining territory shifts the balance of power as well. It challenges the Doctrine of Discovery which justified colonization by claiming back Native land. This movement aids in restoring cultural and political autonomy furthering that land ownership is not settled in the US, it remains a progressive struggle. These modern cases demonstrate that the US law inconsistently recognizes or restricts sovereignty through land ownership.

Conclusion: Sovereignty as a Living Legal Framework

As thus demonstrated, the definition of sovereignty contrasts between a Western and an Indigenous view. Through a colonialist lens, sovereignty means government authority "granting" Native people the right to self-govern while keeping the ultimate power to control tribes. In contrast, Native Americans view sovereignty as the inherent right of Native people to self-govern, protect the land, and maintain cultural/ecological relationships rather than display domination or ownership over the land. In conclusion, sovereignty is not limited to government authority, it expresses creative reclamation, land relationships, and a challenge to colonialism that reflects the pursuit of

[9] *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).
[10] Greywold, Dana. "The Land Back Movement." Native Americans Today. July 8, 2025.

self-determination. These understandings show that sovereignty is a living legal framework that demands the restoration of authority over land, governance, and laws to affirm self-determining political communities with enduring legal rights. This is an ongoing legal battle that leaves sovereignty as a negotiation rather than a guaranteed right, affirming sovereignty as a pattern of resistance.

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Environmental Litigation

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Abstract

This paper works to examine the legal history and future of environmental litigation. It begins with exploring the environmental movement beginning in the 1960s and moves into discussing modern environmental litigation. The paper concludes with a speculation on the future of environmental litigation in the United States.

History

Beginning in the 1960s, the environmental movement in the US has grown and developed over the past few decades. What began with Rachel Carson's 1962 book *Silent Spring*[1] has grown into a complex battle. Carson's *Silent Spring* offers an exposé on the harmful side effects of pesticides and agricultural chemicals on animals and humans.

How does a growing population and developing nation as large and environmentally diverse as the United States balance the demands of consumerism with protecting the environment? Many nationwide movements have shaped modern litigation, and social movements and social environments have a direct correlation to the outcome of environmental litigation. The grassroots environmental justice movement in the early 1980s stemmed from the civil rights movement and began in a small community protest in Warren County, North Carolina, which is linked to Rachel Carson publishing her *Silent Spring* environmental exposé. What began with community outrage over harmful chemicals in their water supply snowballed into a national environmental movement. The grassroots environmental justice movement pointed out the disproportionate burden of pollution that many poor or minority communities experience due to environmental racism; the disproportionate exposure of hazardous materials and pollutants in communities of color and those of lower classes versus areas populated by wealthy white communities. In the last few decades, the focus has shifted from holding local authorities

[1] Rachel L. Carson, *Silent Spring* (1962).

accountable to nationwide scale companies for their effects on the environment. Despite the effectiveness of regulating large environmental influences (such as carbon emissions, drinking water contamination, plastic waste, etc.), the future of climate protection is unstable due to the Trump administration's legislative priorities. Climate litigation is the last barrier to protect the United States from environmental derailment. As of early 2026, there are fewer than three-and-a-half years until the world reaches the Paris agreement's defined critical limit, which aims to keep the global temperature limited to 1.5 degrees Celsius increase over the next few decades. This countdown marks when pollution will cause irreparable damage to the environment.

Modern Climate Litigation Trends

As mentioned previously, climate litigation often reflects rapidly disseminating information accelerated through social movements. The 21st Century saw a major increase in the number of climate litigation cases. This increase was also aided by the evolution of climate litigation. According to "Climate and Carbon Litigation Trends" by the Harvard Law School Forum on Corporate Governance, climate litigation is becoming more involved with multiple legal areas such as consumer protection, securities law, advertising regulation, and state enforcement actions. The increase in litigation centered around climate-related issues is a direct result of the environmental social movements of the 1960s. In addition to climate litigation cases, there have been "developments in climate-related investigations [which] highlight a growing focus on the integrity of voluntary carbon markets and the influence of environmental, social, and governance (ESG) initiatives."[2] A new phenomenon of "greenwashing lawsuits" is also on the rise.

Greenwashing lawsuits are lawsuits that challenge large companies' claims of being completely carbon neutral, net-zero, or environmentally friendly. This has been seen through cases of shareholders suing companies over misleading climate disclosures. One such example arose in *Kostendt v. Oatly Group AB* (2021)[3] where shareholders sued the company due to overstating the sustainable qualities of their products, which they claimed inflated stock prices. *Kostendt v. Oatly Group* ended in almost a $10 million settlement,

[2] David B. Lynn & Matt S. Salzwedel, *Climate and Carbon Litigation Trends*, Harvard Law School Forum on Corporate Governance (July 7, 2025).
[3] *Kostendt v. Oatly Group. AB*, No. 1:21-cv-07904 (S.D.N.Y. filed Sept. 22, 2021).

which was largely driven by the environmental misrepresentation to the shareholders. Cases such as these show the increased importance being placed on environmental transparency and regulation.

Due to the social pressure related to environmental litigation, many government groups have begun to heavily enforce and analyze climate regulations. Several cases mentioned within "Climate and Carbon Litigation Trends," some examples being *Texas v. Blackrock* (2024)[4] and *People v. JBS USA Food Co.* (2024)[5], represent a government crackdown on misrepresenting climate impacts to consumers. Despite these increased enforcement efforts, other groups in the government are actively working against environmentally friendly policies.

Case Study: Federal Authority and Environmental Policy

President Trump issued an Executive Order 14156, Declaring a National Energy Emergency on January 20, 2025[6]. This order invoked authority through the National Emergencies Act (1976), which allows for expedited clearance on permit or clearance approval for energy-related procedures[7]. This order was made despite the fact that the US is in an energy production incline and has more energy production than in the past. This order allows federal agencies to ignore safeguarding laws meant to protect the environment and opens the door for harmful climate practices.

The Western District of Washington responded by leading a lawsuit in *Washington v. Trump* (2025), which included support from 15 US states. In the introduction to the case, the plaintiffs state the order is not only unconstitutional but will result in "damages to waters, wetlands, critical habitat, historic and cultural resources, endangered species, and the people and wildlife that rely on these precious resources."[8] The Trump administration likely announced a non-existent energy emergency to bypass laws which safeguard the environment so they could increase fossil-fuel mining/drilling projects. This is an example of climate law being abused and a breach of both environmental and executive mistreatment. Large corporations and government entities cannot take advantage of their influence without being held accountable for their harm to the environment and

[4] *Texas et al. v. BlackRock, Inc. et al.*, No. 6:24-cv-00437 (E.D. Tex. 2024).
[5] *People v. JBS USA Food Co. et al.*, No. 450682/2024 (N.Y. Sup. Ct. 2024).
[6] Exec. Order No. 14,156, 90 Fed. Reg. 8433 (Jan. 29, 2025).
[7] National Emergencies Act, Pub. L. No. 94-412that, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–1651).
[8] *Washington v. Trump*, No. 2:25-cv-00869 (W.D. Wash. filed 2025).

communities. *Washington v. Trump* is a glimpse into the future of climate litigation. With the increase in public understanding of environmental issues, there will be more accountability and environmental protection being enforced. Although they have yet to announce the prevailing party as of March 2026, the lawsuit itself sets a precedent for future cases. It challenges the government's authority in overriding climate law, places importance on enforcing environmental protections, and shows the care that climate-related issues are being handled in court. The Court is turning into a tool being utilized by the public and organizations to challenge policies that worsen climate and environmental issues.

Case Study: Environmental Organizations Challenging Government Policies

With the influence of environmental social movements and modern activism, organizations made solely to safeguard the environment were formed. One of these organizations is the non-profit Green Climate Fund. The Green Climate Fund was established in 2010 and is the world's largest dedicated fund made to help developing countries reduce greenhouse gas emissions and enhance climate resilience.[9] One goal of the organization is to aid countries in attaining their nationally determined contributions under the Paris Agreement. This is important to note because the Trump administration removed the US from the agreement in both 2020 and 2026. The GCF works towards implementing environmentally friendly procedures and speaks out against detrimental environmental practices. GCF actively fights against those damaging the environment, resulting in them filing a lawsuit against USDA Secretary Brooke Rollins' April 2025 memorandum 1078-006[10]. *Green Climate v Rollins* argued that Rollins' emergency designation, which would allow the logging industry to destroy 112 million acres of national forest for research, would violate the Administrative Procedure Act. The emergency designation, similarly to *Washington v. Trump*, was made to support a policy agenda of the Trump administration. In the case of *Green Climate v Rollins*, Trump issued Executive Order 14225–Immediate Expansion of American Timber Production[11]. The GCF directly called out the abuse of the Emergency Situation Determination system by the

[9] Green Climate Fund, 2010.
[10] United States Department of Agriculture Office of the Secretary Washington, D.C. (2025, April 3). Increasing Timber Production and Designating an Emergency Situation on National Forest System Lands.
[11] Exec. Order No. 14225, 90 Fed Reg. 11365 (March 1, 2025).

Administration in their lawsuit. They claimed that the administration did this in order to bypass environmental protection laws and to accelerate timber harvesting, causing major loss of habitat, increased carbon emissions, and soil degradation. The GCF asks that the memorandum be deemed unlawful, and the initiation of wide-scale, unnecessary logging is prohibited. The act also completely undermines recent efforts to reduce carbon emissions and to regulate deforestation. This case is still developing, yet it is very likely to end in favor of the GCF as it is a direct violation of the Administrative Procedures Act and of many federal environmental legal protections. It is not only a legal violation but also a revolting display of indifference on behalf of the Trump administration. One of the earliest acts of environmental activism in the US, initiated by President Theodore Roosevelt in the early 1900s, was the establishment of national forests, and aiming to log and destroy these historical and environmental landmarks is a clear display of environmental carelessness and greed. No matter the outcome of the lawsuit, this case sets another example of smaller organizations holding large groups accountable for negative impacts on the environment. Climate litigation is growing and becoming an instrument for society to call out environmental degradation and to enforce protective procedures.

Presidential Administration Policy Shifts on Environmental Litigation

The administration in office is a major force when it comes to environmental policy decisions. Prior to President Trump's second term, President Biden enacted several environmental protections during his time in office. Most notably, Biden used the Outer Continental Shelf Lands Act (OCSLA) to initiate one of the largest environmental protection acts in US history. In January 2025 Biden signed executive memoranda that withdrew 625 million acres of federal waters from being leased for future oil and gas mining. This banned oil and gas leasing on the entirety of the Atlantic and Pacific Coast, protecting areas ranging from Alaska to the Eastern Gulf of Mexico. This was lawfully done through section 12 of OCSLA[12], which authorizes the president to withdraw from disposition and unleased lands from the outer continental shelf. Weeks later, the first day Trump was sworn into his second term as president, he childishly declared he would reverse this act by Biden. Reversing Biden's withdrawal is unconstitutional and impossible unless congressional or judicial

[12] Section 12(a) of OCSLA (43 U.S.C. § 1341(a)).

approval is granted. Environmental procedures change dramatically depending on the administration in office, yet there are legal precedents and statutes that prohibit frequent reversals of policy. Differences in the administrative priorities of both Biden and Trump likely had a major influence on the contested state of climate litigation in the US. Many of the most recent climate litigation cases are a result of the Trump administration's violent approach to environmental policies. The shift from prioritizing climate mitigation and renewable energy during the Biden administration versus the focus on resource independence and fossil fuel production in the Trump administration has made environmental litigation a battlefield. Though it is likely that the Trump administration's efforts will fall short due to their acts often violating environmental protection laws, their attempts to harm the environment will reverse progress made through social activism in the US.

Future of Environmental Litigation

Cases such as *Washington v. Trump* serve as an example of environmental litigation's future. States can influence environmental regulation by using environmental litigation. Just as the Trump administration and big companies used environmental activism as a cover to get resources or more business, true environmental activists can use the courts to protect the climate and nature. The current social environment is unforgiving when it comes to environmental degradation. Many companies were boycotted by consumers due to greenwashing their environmental impacts, and the uncompromising treatment of manufacturers is expanding to bigger organizations. Both *Washington v. Trump* and *Green Climate v. Rollins* occurred due to a build-up of environmental activism that began in the 1960s. The increase in social environmental movements and scientific data related to the environment formed environmental litigation into an opportunity for progress. The disregard for environmental care that the government and companies have had in the past is finally being called out. Climate litigation has developed enough to encompass all impacts that large groups have on the environment, and it has become strong enough to properly protect the environment. This trend is likely to increase with more environmental protections being made and enforced, and an increase in climate litigation. Damaging environmental practices permitted through ignorance and carelessness are being eliminated through the deployment of environmental

litigation. With additional environmental activism in the future being highly likely, the future of environmental law looks bright.

Conclusion

What began with Carson's *Silent Spring* became a fight against environmental racism and evolved into fighting for protection across all environmental categories. From animal habitats to communities across the US, climate litigation is now playing a major role in shaping environmental practices and policies. This evolution was influenced by the social movements of the late 1900's and continues to evolve as large groups are being held accountable for their environmental impacts. The debate over proper climate regulatory practices has moved from the social world to the courtroom in the 21st century.

Climate litigation is a primary tool in environmental advocacy and progress. According to a study titled "Climate Change Litigation: Insights into the evolving global landscape," conducted by Goldnaraghi, Setzer, et al. (2021),[13] there were three waves of climate litigation across the world. The first wave, occurring prior to 2007, was characterized by claims being raised against national governments to raise environmental protection standards. The second wave, occurring from 2007-2015, was a major increase in the number of cases, especially in European countries. The third wave, from 2015 and beyond, began with the Paris agreement in 2015, triggering a series of landmark precedent climate litigation cases. As mentioned previously, the Paris agreement has been abandoned by the current Trump administration.

This paper hopes for the United States to realign with the Paris agreement and the same progressive environmental trend. Despite the US's environmental protection policies being threatened as of 2026, these challenges simply pose a bump in the road—a temporary cessation of progress. The US will likely align at some point with more climate safety practices and move more towards environmental protection. This future can be obtained through the usage of modern climate litigation, as it is now legally diverse enough to cover all forms of environmental protection. Environmental law is now one of the most influential categories of the legal system, as it will have major effects on climate governance and change the way consumers, companies, and organizations operate. The environmental health of the US depends on the current environmental battle occurring in courtrooms. Unless the

[13] The Geneva Association. 2021. Climate Change Litigation – Insights into the evolving global landscape.

future of the US includes green policies and allows for environmental protections, irreparable damage will be done to the global climate.

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Up in the Air: Overconsumption and Climate Regulations on Fast Fashion and AI

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Abstract

The rapid expansion of artificial intelligence and the fast fashion industry has generated unprecedented environmental externalities, particularly regarding excess water consumption, energy use, and material waste. These sectors operate under a shared production model prioritizing speed, scalability, and profit maximization over sustainability. This article argues that both industries, the artificial intelligence and the fast fashion industries, exemplify a much broader pattern of technologically driven overconsumption, where environmental costs are systematically externalized. Through analysis of these industries, this article highlights the regulatory gaps that permit such environmental harms to persist, evaluating potential legal and policy interventions that aim to mitigate their impact.

AI and Fast Fashion as Models of Unsustainable Consumption

AI and the fast fashion industry are known for their enormous waste and water consumption. Fast fashion itself is defined as creating rapid production cycles, with notorious hidden resource costs.[1] AI development relies heavily on data center infrastructure that drains

[1] Rashmila Maiti, "The Environmental Impact of Fast Fashion, Explained," Earth.Org, January 20, 2025, https://earth.org/fast-fashions-detrimental-effect-on-the-environment/.

energy and clean water at staggering rates, similar to how the fast fashion industry thrives on constant production, resulting in excessive textile waste. Both AI and the fashion industry are experiencing skyrocketing growth and demand, resulting in prioritizing speed and profit and leading to immense overconsumption, resource-intensive production, and environmental costs.

Despite being specific in their use and domains, both industries heavily rely on societal pressures, whether it be from influencer-driven hauls on social media or widespread advocacy for the use of AI-powered websites and apps for daily usage at the expense of environmental sustainability. Thus, these resource-intensive practices are embedded into everyday life and continue to amplify ecological footprints on a global scale, fuelling the narrative that environmental consequences can be disregarded for the sake of technological innovation and accessibility of fashion.

Overconsumption and Its Environmental Costs

Overconsumption has emerged to become a significant challenge—one that drives ecological stress and accelerates climate change. The rapid rise of trend cycles is one amplified by social media platforms, ultimately fuelling consumer demands for products at incredibly high speeds, resulting in quick production and even faster consumption to be discarded and replaced. Platforms like TikTok and Instagram encourage impulse buying habits, promoting the rapid rise and fall of trends in a perpetual cycle, making products as quickly disposed of as they were quickly purchased. Fast fashion takes advantage of this pattern, using resource-intensive processes of production and labor to provide inexpensive clothing that just as quickly depletes freshwater supplies and generates large amounts of carbon emissions.

Similarly, the rapid rise of artificial intelligence has sparked growing concerns over its environmental footprint, particularly in terms of carbon emissions and water consumption. Large-scale models, such as OpenAI's ChatGPT, have immense environmental impacts. Training advanced language models requires enormous computational power, and the energy consumed in this process is significant. For instance, OpenAI's ChatGPT-3 model consumed approximately 1,300 megawatt-hours (MWh) of electricity during training—comparable to

the annual energy use of roughly 130 U.S. homes.[2,3] Even just one prompt for a 100-word email reportedly consumes about one bottle of water,[4] a hidden water cost embedded in the usage of AI systems due to the cooling needs of data centers.

In addition to its carbon cost, the water footprint of artificial intelligence has also become difficult to ignore. Operating AI models rely on large data centers that use evaporative cooling systems, which require large amounts of freshwater to prevent overheating of the servers. It is estimated that for every kilowatt-hour of energy a data center uses, about two liters of water are needed for cooling.[5] By this measure, ChatGPT-3's training likely consumed more than 700,000 liters of freshwater, which is enough to manufacture more than 250 pairs of jeans.

The water use simply isn't confined to just training, as water is consumed during real-time AI usage after the model is trained to run inference engines for applications or generating images. With millions of prompts and queries submitted every single day across large-scale models like ChatGPT and Copilot, high demands continue to strain current water systems. AI data centers exacerbate pressures on limited freshwater resources as AI expansion increases to meet demand. Microsoft's water usage increased by approximately 34% in a single year[6], and Google reported using about 5 billion gallons of water in just the year 2022[7]. Such figures highlight the costs of growing competition over scarce freshwater supplies as AI usage continues to expand, indicative of an upward-growing trajectory of prioritizing growth over

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[2] Anna Garrison, "How Much Water Does AI Use? How AI Harms the Planet," Green Matters, January 10, 2025, https://www.greenmatters.com/big-impact/how-much-water-does-ai-use.

[3] Adam Zewe, "Explained: Generative AI's Environmental Impact," MIT News Massachusetts Institute of Technology, January 17, 2025, https://news.mit.edu/2025/explained-generative-ai-environmental-impact-0117.

[4] Anna Garrison, *How Much Water Does AI Use? How AI Harms the Planet*, Green Matters, January 10, 2025, https://www.greenmatters.com/big-impact/how-much-water-does-ai-usehttps://www.greenmatters.com/big-impact/how-much-water-does-ai-use.

[5] Adam Zewe, *Explained: Generative AI's Environmental Impact*, MIT News (January 17, 2025), https://news.mit.edu/2025/explained-generative-ai-environmental-impact-0117.

[6] Andrew Collier, "Artificial Intelligence Is Using a Ton of Water. Here's How to Be More Resourceful: Veolia WTS," Watertechnologies.com, August 22, 2024, https://www.watertechnologies.com/blog/artificial-intelligence-using-ton-water-heres-how-be-more-resourceful.

[7] Google, "Sustainable Innovation & Technology - Google Sustainability," Sustainability, July 2023, https://sustainability.google/reports/google-2023-environmental-report/.

the existence of local communities and surrounding ecosystems that depend on these resources.

This culture of overconsumption is a destructive force that normalizes waste and unsustainable production and allows for energy costs to be "justified" under the notion of progressing in technological advancement without serious thought towards their impact on sustainability. As corporations continue to profit from such trends, environmental costs are externalized to be the burden of vulnerable communities who live near these factories and AI plants, therefore having to deal with the environmental destruction of pollution and depleting water sources,[8, 9] which should raise ethical concerns. The perpetuation of this cycle will only result in a deeply embedded system of overconsumption as a default of economic growth globally, which is not sustainable socially or environmentally.

The Current State of US Environmental Law

As these two industries continue to grow at a fast pace, regulations must follow suit; however, with the reelection of Donald Trump, there have been multiple cutbacks on environmental and climate efforts. This shift reflects a broader deregulatory approach that prioritizes economic growth and domestic industry over environmental protection. This has often led to weakened enforcement of existing statutory frameworks such as the Clean Air Act and the National Environmental Policy Act. Most notably, the *Big Beautiful Bill* would get rid of business incentives such as the tax credits for electric vehicles and other clean energy programs[10]. Removal of these incentives not only discourages corporate entities from investing in sustainable innovation but also signals a retreat from utilizing market-based incentives as a mechanism to historically drive reductions in emissions in the private sector. Further pressure from this administration is also causing federal agencies to take steps back on environmental measures, as in August 2025, the EPA stated that they will no longer be upholding that climate pollution endangers public health and welfare. This proves particularly significant, as the endangerment

[8] Cecilia Marrinan, "Data Center Boom Risks Health of Already Vulnerable Communities," Tech Policy Press, June 12, 2025, https://www.techpolicy.press/data-center-boom-risks-health-of-already-vulnerable-communities/.
[9] Nancy Cardona, "Environmental Impact of Fast Fashion Statistics," UniformMarket (UniformMarket, May 28, 2025), https://www.uniformmarket.com/statistics/fast-fashion-statistics.
[10] Samantha Harrington, "One Big, Beautiful, Climate-Killing Bill," Yale Climate Connections, May 22, 2025, https://yaleclimateconnections.org/2025/05/one-big-beautiful-climate-killing-bill/.

finding has long stood as a legal foundation for the federal regulation of greenhouse gas emissions; now, its removal raises serious questions about the true scope of agency authority moving forward.

In light of increasingly lax environmental regulations and the erosion of our domestic green energy supply, our increasing dependence on water-intensive industries, such as AI and fast fashion, risks exacerbating the effects of domestic carbon emissions. These industries not only contribute directly to emissions and the depletion of resources, but also operate within regulatory gaps that fail to adequately account for lifecycle environmental costs. Due to this, their true environmental impact remains underregulated and externalized.

And while climate action is being taken, we are running into problems because of the current administration. At the federal level, a bill was proposed, named the Labeling Bill in February 2025. This bill would have the EPA establish the Labelling Program[11]. This voluntary sustainability effort would allow participating brands/manufacturers to have a verified label on their products that has information about their carbon footprint and other environmental effects. Disclosure-based strategies like this are consistent with a broader trend in environmental law that emphasizes transparency and consumer awareness as tools for market correction, rather than imposing mandatory emission limits or production caps.

However, we learned from the anonymous advisor of Congressman Sean Casten in D.C. that further action on this bill is paused due to the current tariff situation. The advisor stated that because most apparel is manufactured overseas, the tariffs have halted all industry discussions around this bill that were taking place beforehand. This development highlights the complex intersection between trade policy and environmental regulation: protectionist economic measures can still ultimately stall initiatives regarding sustainability. Unfortunately, until these extreme tariffs are lifted, it seems we won't be able to move forward with fast fashion regulation at the federal level, but it's good to know that once lifted, progress can be made. As such, environmental governance becomes contingent on the priorities of the broader geopolitical and economic landscape, which further delays meaningful reform.

[11] Rachel Gartner and Dianne Phillips, "Sustainable Fashion Law Update: Critical Legislation and Compliance Requirements for 2025," Hklaw.com, April 2, 2025, https://www.hklaw.com/en/insights/publications/2025/04/sustainable-fashion-law-update-critical-legislation.

With fast fashion at least being taken into consideration, AI is not on the same course. Despite not having tariff restrictions like fashion regulations, AI policy is not moving at an even slower pace, as currently existing laws are being applied to regulate AI since the President issued the Removing Barriers executive order to dismiss any of Biden's previous executive orders on AI safety to help further enhance our AI dominance[12].

This now puts more emphasis on states to do their parts in ensuring climate policy stays strong. State action, especially that of California, has always been crucial when environmental roll-backs occur at the federal level. It is important now more than ever for pro-climate states such as California and New York to work together to combat these federal actions. Historically, states have functioned as experimental entities that have more stringent environmental standards, which later, through meticulous consideration, inform changes in national policy. Luckily, states are doing their part by creating their own regulations on fast fashion and AI, such as the Colorado AI Act, and New York has reintroduced their Fashion Environmental Accountability Act. Initiatives like this one demonstrate a growing avenue where subnational governments may be better suited to respond to emerging environmental challenges posed by such rapidly growing industries.

U.S. Climate Policy and Accountability

The United States is preparing to withdraw from the Paris Agreement in 2026.[13] This anticipated withdrawal raises significant questions regarding the scope of federal authority on international environmental commitments and the extent to which executive action can alter the United States' obligations under non-self-executing treaties. To fill in the subsequent gap of federal efforts to improve climate policy, states may assume a greater role in designing and upholding environmentally conscious programs and laws. This reflects principles of cooperative federalism, where, under statutes like the Clean Air Act, states are able to retain the authority and are able to

[12] White & Case, "AI Watch: Global Regulatory Tracker - United States | White & Case LLP," www.whitecase.com, May 13, 2024, https://www.whitecase.com/insight-our-thinking/ai-watch-global-regulatory-tracker-united-states.

[13] Taylor Pullins and Suzanne Knijnenburg, "US Withdrawal from the Paris Agreement: Impact and next Steps | White & Case LLP," Whitecase.com, January 21, 2025, https://www.whitecase.com/insight-alert/us-withdrawal-paris-agreement-impact-and-next-steps.

implement more stringent environmental protections than those at the federal level.

The Paris Agreement

The Paris Agreement is an international treaty on climate change, adopted by 195 countries at the UN Climate Change Conference (COP21) in 2015.[14] As described by Article 2, the treaty coordinates a global response to climate change by encouraging countries to establish effective climate action plans that will collectively limit the rise of greenhouse gas emissions.[15] Interestingly, the Agreement operates through a facilitative and non-binding framework, focusing on transparency and reporting pressure as opposed to enforceable sanctions that ensure proper compliance. It also tracks the progress of countries and supports the efforts of developing nations by providing financial support. Every five years, participating nations must prepare and submit a Nationally Determined Contribution (NDC). These NDCs convey the specific strategies the country will take to reduce its greenhouse gas emissions in order to reach the treaty's long-term goals. Furthermore, Article 13 requires that the information provided by the participating countries be subject to expert review.[16] This transparency piece serves to be the primary accountability mechanism, providing reputation and diplomacy consequences as opposed to traditional enforcement.

The History of the United States in the Paris Agreement

The United States formally joined the agreement in September 2016. In June 2017, the Trump Administration announced plans to withdraw from the treaty, and the U.S. officially exited on November 4, 2020. The U.S. rejoined in 2021 under the Biden Administration, but as of January 20, 2025, the U.S. has once again initiated the process of withdrawing, following an executive order titled "Putting America First in International Environmental Agreements." Under the articles of the Paris Agreement, the withdrawal will not be formalized until January 2026.[17]

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[14] United Nations, "The Paris Agreement," United Nations, 2015, https://www.un.org/en/climatechange/paris-agreement.
[15] UNFCCC, "The Paris Agreement" (UNFCCC, December 12, 2015), https://unfccc.int/sites/default/files/resource/parisagreement_publication.pdf.
[16] UNFCCC, "The Paris Agreement" (UNFCCC, December 12, 2015), https://unfccc.int/sites/default/files/resource/parisagreement_publication.pdf.
[17] "Broken Promises, Rising Temperatures: US Paris Agreement Withdrawal and Its Impact on Global Climate Finance." *International and Comparative Law Review*, 9 Mar. 2025

When the United States announced its intention to leave the Paris Agreement in 2017, this signaled a broader shift in federal environmental priorities, leading the responsibility for advancing climate-conscious policy to shift largely to the states. In 2017, in response to the initial exit, several states formed the U.S. Climate Alliance[18] and launched initiatives such as America's Pledge, and We Are Still In[19] to demonstrate their continued commitment to climate action. These coalitions are a key example of transnational environmental governance, where subnational actors are able to participate in global climate efforts despite overall national withdrawal.

According to the Center for Climate and Energy Solutions, as of August 2025, 22 states and the District of Columbia have maintained greenhouse gas emissions targets.[20] Furthermore, 33 states have established climate action plans to reduce emissions and ensure climate resilience.

Now, as the U.S. once again prepares to exit the Paris Agreement, state-level action becomes increasingly important. States will likely form new coalitions, enact climate legislation, and lead environmental efforts at the local and regional levels. However, this decentralized approach may raise potential questions regarding the Constitution and regulation, which may complicate compliance, particularly for industries that operate beyond a single state.

State-Led Actions Can Bring Hope to U.S. Climate Policy

When the U.S. formally exits the Paris Accords in 2026, it will no longer be required to submit NDCs, reducing formal national commitments to improving climate policy. Since January, the Trump administration has reversed over 100 environmental regulations. Additionally, as of February 2026, the Environmental Protection Agency (EPA) repealed the Endangerment Finding, which states that greenhouse gases pose a threat to public well-being, forming the basis

[18] "U.S. Climate Alliance," usclimatealliance.org, accessed April 8, 2026, https://usclimatealliance.org/.
[19] Melissa Denchak, "Paris Climate Agreement: Everything You Need to Know," NRDC, February 19, 2021, https://www.nrdc.org/stories/paris-climate-agreement-everything-you-need-know#sec-whatis.
[20] Center for Climate and Energy Solutions, "State Climate Policy Maps," Center for Climate and Energy Solutions, June 20, 2019, https://www.c2es.org/content/state-climate-policy/.

of greenhouse gas regulation.[21] The combination of federal policy shifts in climate policy, combined with the repeal of EPA standards,[22] may lead to fewer environmental protections at the national level.

However, an increase in state-led climate initiatives, such as the U.S. Climate Alliance, could provide a counterbalance. Launched in 2017 by the governors of California, New York, and Washington, the alliance now includes over 24 governors who have committed to collectively reducing greenhouse gas emissions, with targets that increase in ambition each decade. [23]

Programs such as California's Cap-and-Trade Program[24], which sets a cap on emissions from the state's largest polluters and lowers that cap over time, may serve as models and inspire similar programs in other states. Specialized programs addressing environmental challenges, such as the National Coastal Zone Management Program, which currently includes 34 participating coastal states and territories, can offer a model for other states with shared environmental challenges to coordinate efforts.[25]

In the coming years, the shift in federal environmental priorities could impact federal environmental protection policies. However, stronger state-led actions and a growing sense of responsibility at the state level present a promising future for climate-conscious commitments.

Meanwhile, the rise of fast fashion, with the industry projected to grow by over $140 billion[26] by 2032, poses increasing environmental challenges. The environmental impacts of fast fashion, including high energy use and greenhouse gas emissions, highlight the urgency of effective climate governance. By implementing sustainable practices and developing specialized climate regulations, states have the power to mitigate the industry's environmental harm and take the lead as the drivers of environmental protection in the U.S.

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[21] Sarah Brown, "EPA Repeals Legal Basis for Regulating Greenhouse Gases. What It Means for the US — and the World," World Resources Institute, February 19, 2026, https://www.wri.org/insights/endangerment-finding-repeal-explained.
[22] Lisa Friedman, "E.P.A. Is Said to Draft a Plan to End Its Ability to Fight Climate Change," The New York Times, July 23, 2025, https://www.nytimes.com/2025/07/22/climate/epa-endangerment-finding-rescind.html.
[23] "U.S. Climate Alliance," U.S. Climate Alliance, accessed April 8, 2026, https://usclimatealliance.org/.
[24] "Cap-And-Invest Program | California Air Resources Board," Ca.gov, 2026, https://ww2.arb.ca.gov/our-work/programs/cap-and-invest-program.
[25] "NOAA Office for Coastal Management | the National Coastal Zone Management Program," coast.noaa.gov, accessed April 8, 2026, https://coast.noaa.gov/czm/.
[26] "Fast Fashion Statistics (2025)." *Uniform Market*, 28 May 2025/

Although climate issues remain split along partisan lines, some bipartisan efforts have been pursued to mitigate the climate effects of fast fashion. The DJLS team reached out to the Congressional Offices of Sean Casten and María Elvira Salazar—two of the coauthors of the Sustainable Apparel Labeling Act[27]—which requires a numerical summary of the total greenhouse gases released during the lifecycle of a piece of clothing. Thus far, the bill remains in congressional limbo as it awaits review by the House Committee on Energy and Commerce.

[27] Sean D-IL-6, "Text - H.R.1239 - 119th Congress (2025-2026): Voluntary Sustainable Apparel Labeling Act," Congress.gov, 2025, https://www.congress.gov/bill/119th-congress/house-bill/1239/text.

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Machine Learning in Clinical Prediction: Challenges with Intellectual Property and Regulatory Frameworks

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Abstract

Adaptive machine learning systems are playing a growing role in healthcare through clinical prediction tools that estimate patient risk, support diagnosis, and inform treatment decisions. These systems differ fundamentally from traditional medical technologies in that they rely on large-scale data, produce probabilistic outputs, and evolve over time. This paper examines how these characteristics challenge existing intellectual property and regulatory frameworks. Drawing from key patent law cases, including *Mayo Collaborative Services v. Prometheus Laboratories, Inc.* and *Alice Corp. v. CLS Bank International*, it analyzes persistent barriers to patent eligibility for data-driven clinical prediction systems. In parallel, the paper evaluates the U.S. Food and Drug Administration's evolving regulatory approach to Software as a Medical Device, including lifecycle-based oversight and Predetermined Change Control Plans for adaptive systems. The analysis demonstrates that intellectual property and regulatory constraints jointly shape the development and commercialization of machine learning systems, shifting emphasis toward data access, controlled model updates, and strategic partnerships. These findings suggest that legal and regulatory frameworks not only govern machine learning in healthcare but also influence the trajectory of innovation in clinical prediction technologies.

Introduction

Machine learning is increasingly embedded in healthcare through computational tools such as clinical prediction systems, which estimate the likelihood of health outcomes using patient data to support diagnosis, risk stratification, and treatment planning. These

technologies enable more personalized, data-driven care by identifying patterns in complex biomedical data that are not easily captured through traditional methods.

The integration of this new technology into clinical practice raises new legal and regulatory challenges. Unlike conventional medical technologies, machine learning systems are adaptive, probabilistic, and dependent on large-scale data, complicating how they are protected, validated, and safely deployed.[1] As a result, these systems do not fit within existing frameworks that assume fixed, fully specified technologies.

This paper focuses on how adaptive machine learning clinical prediction systems expose a fundamental mismatch with current intellectual property and regulatory frameworks. Patent law, designed for static and fully disclosed inventions, struggles to capture evolving, data-driven systems, while FDA regulatory pathways, historically built for fixed software, must adapt to technologies that change over time.

This shift has significant implications for how these technologies are governed, protected, and integrated into healthcare systems. Together, these constraints shape not only regulatory and legal oversight, but also broader patterns of development, investment, and adoption across the healthcare ecosystem.

Overview of Machine Learning in Clinical Prediction Systems

Clinical prediction systems are computational tools that estimate the likelihood of health outcomes using patient data, supporting decision-making in diagnosis, risk stratification, and treatment planning. Machine learning enables clinical prediction systems to analyze complex, high-dimensional biomedical data and identify patterns not easily captured through traditional approaches. These models can also integrate diverse data sources, including electronic health records, imaging, and genomic data, supporting more accurate and context-specific predictions.[2]

Machine learning exists within a broader hierarchy of artificial intelligence techniques, encompassing multiple learning paradigms that vary in complexity and application. Machine learning operates within a broader hierarchy of artificial intelligence techniques, where

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[1] Orestis Efthimiou et al., *Developing Clinical Prediction Models: A Step-by-Step Guide*, 386 BMJ e078276 (2024).

[2] Benjamin A. Goldstein et al., *Opportunities and Challenges in Developing Risk Prediction Models With Electronic Health Records Data: A Systematic Review*, 24 J. Am. Med. Informatics Ass'n 198 (2016).

artificial intelligence refers to systems designed to perform tasks that typically require human intelligence, and machine learning represents a subset focused on learning patterns from data. Within machine learning, approaches such as supervised, unsupervised, and reinforcement learning enable systems to identify relationships in data without being explicitly programmed. More advanced methods, including deep learning, further extend these capabilities by using layered neural networks to model complex, high-dimensional patterns.[3] This hierarchy highlights that machine learning-based clinical prediction systems are not standalone tools, but part of a broader set of computational approaches designed to extract insights from data.

The shift from traditional statistical models to machine learning reflects a broader evolution in predictive analytics. Earlier approaches, such as logistic regression and rule-based systems, relied on predefined assumptions about variable relationships. Advances in data availability and computational power have enabled machine learning models to learn directly from data. Unlike conventional models that assume linear relationships and require manual feature selection, machine learning can capture non-linear interactions and adapt to complex datasets, improving the accuracy and specificity of clinical prediction.[4]

Machine learning-based clinical prediction technologies are applied across a wide range of healthcare settings. In medical imaging, convolutional neural networks detect abnormalities in X-rays, CT scans, and MRIs, in some cases matching or exceeding human performance in identifying conditions such as cancer and diabetic retinopathy. In cardiac and neurological monitoring, models analyze continuous physiological signals such as electrocardiograms (ECG) and electroencephalograms (EEG), with techniques such as recurrent neural networks and long short-term memory models enabling prediction of events such as arrhythmias and seizures. These capabilities extend to wearable and implantable devices, where continuous data streams support monitoring of metrics such as heart rate, activity levels, and oxygen saturation, enabling ongoing risk assessment and earlier detection of health conditions.[5]

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[3] Harry Yang. "Regulatory Perspective on Big Data, AI, and Machine Learning," in *Data Science, AI, and Machine Learning in Drug Development* 23 (2022).

[4] Efthimiou et al., *Developing Clinical Prediction Models*, supra note 1.

[5] Mariano Vargas-Santiago et al., "A State-of-the-Art Review of Artificial Intelligence (AI) Applications," in *Healthcare: Advances in Diabetes, Cancer, Epidemiology, and Mortality Prediction*, 14 Computers 143 (2025).

Machine learning-based clinical prediction systems operate within a continuous lifecycle that extends beyond initial model development, challenging traditional evaluation methods. This lifecycle includes data collection, model training, validation, deployment, and ongoing performance monitoring. Unlike traditional medical technologies that remain fixed after approval, machine learning systems may require periodic updates, recalibration, or retraining as new data becomes available. This iterative structure reflects the dynamic nature of clinical environments and patient populations and underscores that these systems must be evaluated and managed over time rather than at a single point of deployment. Taken together, these characteristics distinguish machine learning-based clinical prediction systems from traditional medical technologies. Rather than functioning as fixed tools with clearly defined inputs and outputs, these systems operate as dynamic, data-driven processes that evolve over time.[6]

Several technical characteristics of machine learning-based clinical prediction systems are particularly relevant to legal and regulatory frameworks. First, these systems have the capacity for adaptation, allowing models to update and improve as new data becomes available. This dynamic behavior means that deployed systems may evolve over time, differing from the versions initially developed or validated. Second, they produce probabilistic predictions rather than deterministic outputs, generating risk scores or likelihoods that reflect clinical uncertainty but complicate validation, reliability, and accountability. Third, these systems rely on large clinical datasets, including electronic health records, imaging, and physiological data, making data access central to both performance and competitive advantage while raising issues of governance, privacy, and ownership.

Intellectual Property in Machine Learning Clinical Prediction Systems

Adaptive machine learning clinical prediction systems challenge intellectual property law because they are not static inventions with stable boundaries. Instead, they derive value from continuous training, probabilistic prediction, and iterative improvement over time. In healthcare, this is especially pronounced, as clinical prediction systems generate risk estimates from patient data rather than discrete, mechanistic inventions. The result is a fundamental mismatch between

[6] Haider J. Warraich et al., "FDA Perspective on the Regulation of Artificial Intelligence" in *Health Care and Biomedicine*, 333 JAMA 241 (2024).

machine learning systems and intellectual property doctrines designed for fixed, human-defined innovations.

Under U.S. law, patents are governed by 35 U.S.C. §§ 101–103, which protects inventions that are novel, useful, and non-obvious by granting inventors exclusive rights for a limited period in exchange for full public disclosure of a clearly defined invention.[7] This framework assumes that an invention can be fully specified at a single point in time; however, adaptive machine learning systems resist this assumption. A clinical prediction model may be retrained, recalibrated, or updated as new data becomes available, meaning the system's most valuable feature, its ability to evolve, is not readily captured at the time of patent filing.

This structural tension is reflected in patent eligibility doctrine. In *Mayo Collaborative Services v. Prometheus Laboratories, Inc.* (2012), the Supreme Court held that diagnostic methods based on correlations between biological markers and clinical outcomes are not patentable unless they include an additional inventive concept beyond the natural relationship itself.[8] Clinical prediction systems often operate by identifying such correlations between biomedical data, raising similar patent eligibility concerns under *Mayo*.

In *Alice Corp. v. CLS Bank International* (2014), the Court held that implementing a fundamental concept, such as organizing or analyzing information, on a generic computer does not render it patentable.[9] Building on *Mayo*, the decision established a two-step framework that asks whether a claim is directed to a fundamental idea and, if so, whether it includes a meaningful technical improvement beyond applying that idea using standard computing tools. Together, *Mayo* and *Alice* create a framework under which systems that identify patterns in data or generate predictions, core functions of machine learning, face significant barriers to patent eligibility unless they can be framed as concrete technological improvements rather than methods of analyzing information.[10]

Subsequent cases illustrate how this framework is applied in practice. In *Athena Diagnostics, Inc. v. Mayo Collaborative Services, LLC* (2019), the Federal Circuit invalidated a diagnostic method for detecting neurological disorders despite its clinical value, holding that

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[7] 35 U.S.C. §§ 101–103.
[8] *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012).
[9] *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014).
[10] *Mayo*, 566 U.S. 66, supra note 8.

it relied on a natural law implemented using conventional techniques[11]. The decision highlights that even clinically significant diagnostic innovations may fail to meet patent eligibility requirements when characterized as applications of underlying biological relationships.

More recently, in *Recentive Analytics, Inc. v. Fox Corp.*, the Federal Circuit Court held that applying machine learning techniques in a new domain does not, by itself, render claims patentable[12]. The court characterized such claims as abstract because they rely on using standard computing tools to analyze data or generate predictions. This decision reinforces that the limitations established in *Mayo* and *Alice* extend to modern machine learning systems.[13] In particular, systems whose primary contribution lies in predicting outcomes from data, rather than introducing a specific technological improvement, remain vulnerable to ineligibility. This distinction is especially significant for clinical prediction systems, whose core function is to generate probabilistic risk assessments from patient data, placing them at the center of ongoing patent eligibility challenges.

Limitations of patentability for machine learning contributed to a shift in litigation focus from algorithms to data. Cases such as *New York Times v. OpenAI/Microsoft* address whether machine learning models can be trained on copyrighted data and how value should be allocated across inputs and outputs.[14] Although these cases arise outside healthcare, they reflect a broader trend in which data, rather than algorithms alone, has become central to the value of machine learning systems.

In response to these constraints, there has been an increase in alternative intellectual property strategies centered on data control and confidentiality. Trade secret law has emerged as a key mechanism for protecting machine learning systems where patent protection is unavailable or uncertain. Unlike patents, trade secrets do not require public disclosure or satisfaction of novelty and eligibility requirements, allowing firms to protect a broad range of information, including models, training processes, and datasets, so long as the information derives value from being kept secret and is subject to reasonable efforts

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[11] *Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 915 F.3d 743 (Fed. Cir. 2019).
[12] *Recentive Analytics, Inc. v. Fox Corp.*, No. 23-2437, 2025 WL 1142021 (Fed. Cir. Apr. 18, 2025).
[13] *Mayo*, 566 U.S. 66; *Alice*, 573 U.S. 208
[14] *N.Y. Times Co. v. Microsoft Corp.*, No. 1:23-cv-11195, 2025 WL 1009179 (S.D.N.Y. Apr. 4, 2025).

to maintain confidentiality.[15] This flexibility makes trade secrecy particularly well-suited to machine learning systems, where valuable components such as model architectures, feature engineering techniques, and training data may not independently qualify for patent protection but remain commercially significant. In addition, trade secret law can extend to AI-generated outputs that fall outside traditional patent and copyright regimes, further expanding its relevance in this domain.[16]

Trade secrecy reliance additionally introduces important limitations. Because protection depends on maintaining confidentiality, inventors have strong incentives to restrict access to model design, training data, and system behavior. This can limit transparency, reproducibility, and external validation, particularly in clinical settings where understanding how predictions are generated may be critical.[17] Trade secret protection is also inherently fragile; it can be lost if information becomes publicly known or is independently discovered, and it does not prevent reverse engineering in many contexts.[18] As a result, while trade secrecy offers a flexible and immediately available form of protection, it does not provide the same level of legal certainty or exclusivity as patents.

A useful illustration of these challenges is a startup developing a machine learning model to predict epileptic seizures using wearable EEG data. The system continuously improves as it is trained on new patient data, making it difficult to define a fixed invention at the time of patent filing. When seeking patent protection, the inventor may face eligibility barriers under *Mayo* and *Alice*, as the model's core function, identifying correlations between physiological signals and seizure risk, can be characterized as an abstract idea or natural law implemented with conventional computing. At the same time, fully disclosing the model architecture and training process risks undermining competitive advantage, particularly where performance depends heavily on proprietary datasets. As a result, the inventor may turn to trade secret protection, limiting disclosure of both the model and underlying data.

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[15] Asress Adimi Gikay, *Trade Secrecy in Automated Decisions: Against the Myth of Irreconcilability and the Imposition of Patents*, 20 J. Intell. Prop. L. & Prac. 552 (2025).
[16] Camilla A. Hrdy, *Trade Secrecy Meets Generative AI*, 100 Chi.-Kent L. Rev. (2025).
[17] Gikay, *Trade Secrecy in Automated Decisions*, supra note 15.
[18] John G. Sprankling, *Trade Secrets in the Artificial Intelligence Era*, 76 S.C. L. Rev. (2024).

However, this strategy introduces its own challenges, including reduced transparency, difficulty in clinical validation, and vulnerability to reverse engineering, highlighting the tradeoffs that shape how machine learning innovations are protected in practice.

For machine learning clinical prediction systems, these tradeoffs are especially pronounced. Trade secrecy enables firms to protect adaptive models and data-driven processes that are difficult to patent, but it does so by prioritizing confidentiality over disclosure. This reinforces a broader shift in which competitive advantage is tied not only to algorithmic design, but to control over data, model development processes, and access to clinical environments.

In clinical prediction machine learning systems, the primary source of value often lies not in the algorithm itself, but in the data used to train and refine it. Access to high-quality clinical datasets, such as electronic health records, imaging data, and patient monitoring outputs, is both difficult to obtain and subject to significant regulatory constraints. As a result, competitive advantage increasingly depends on control over proprietary data rather than patent-protected inventions.[19]

Industry practices reflect this shift toward data-centric value. Platforms such as Apple's HealthKit and ResearchKit enable large-scale collection and aggregation of patient-generated health data from mobile devices and wearables, allowing researchers to build datasets that would be difficult to obtain through traditional clinical studies. ResearchKit, for example, allows investigators to recruit thousands of participants and collect health data at scale through smartphone-based studies.[20] Similarly, Apple's Health platform aggregates data from devices such as iPhones and Apple Watches, including metrics like heart rate, activity, and physiological signals, creating a centralized repository of longitudinal health data. These platforms illustrate how access to large, continuous datasets, rather than proprietary algorithms alone, enables the development of machine learning models in healthcare.

For machine learning clinical prediction systems, these dynamics converge around a fundamental shift in how value is created and protected. Because model performance depends on access to high-quality clinical data and the ability to iteratively refine systems

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[19] Vargas-Santiago et al., *State-of-the-Art Review of Artificial Intelligence Applications in Healthcare*, supra note 5.

[20] Marco V. Perez et al., *Large-Scale Assessment of a Smartwatch to Identify Atrial Fibrillation*, 381 New Eng. J. Med. 1909 (2019).

over time, competitive advantage increasingly derives from control over data, model development processes, and clinical integration rather than from exclusively patentable inventions. This has led firms to prioritize strategies built on proprietary datasets, exclusive partnerships with healthcare institutions, and controlled deployment environments.[21]

As a result, existing intellectual property frameworks do not simply constrain machine learning innovation; they actively shape its direction. Patent limitations and the rise of trade secrecy encourage a move away from disclosure-based protection toward models of controlled access and data exclusivity. In healthcare, where clinical prediction systems depend on continuous learning from patient data, this shift has significant implications for how technologies are developed, validated, and adopted. Adaptive machine learning systems therefore do not fit within traditional intellectual property regimes, but instead drive a broader reconfiguration of how innovation is protected and controlled in clinical settings.

Inventors of machine learning clinical prediction systems face a structural tension between intellectual property and regulatory strategy. On one hand, patent law incentivizes applicants to emphasize how their invention is novel and non-obvious relative to existing technologies, requiring them to clearly distinguish their system from prior art. On the other hand, FDA regulatory pathways, particularly 510(k) clearance, favor similarity, as demonstrating substantial equivalence to an existing predicate device can significantly streamline approval. As a result, developers are placed in a contradictory position: they must frame their technology as fundamentally different to secure intellectual property protection, while simultaneously presenting it as sufficiently similar to existing devices to navigate regulatory approval efficiently. This dual framing highlights how legal and regulatory regimes can impose competing narratives on the same technology, shaping both how innovations are described and how they are strategically developed.

FDA Regulation of Adaptive Machine Learning Clinical Prediction Systems

Adaptive machine learning clinical prediction systems present novel considerations for regulatory oversight, particularly within the

[21] Ernst & Young, "Realising the Value of Health Care Data: A Framework for the Future" (n.d.), https://www.ey.com/content/dam/ey-unified-site/ey-com/en-gl/insights/life-sciences/documents/ey-value-of-health-care-data-v20-final.pdf.

U.S. Food and Drug Administration (FDA) framework for software-based medical technologies. In the United States, software intended to diagnose, treat, or inform clinical decision-making may be regulated as a medical device.[22] Many clinical prediction systems fall within the category of Software as a Medical Device (SaMD), defined as software intended to perform one or more medical purposes without being part of a hardware medical device.[23] These applications span a wide range of clinical use cases, including diagnostic, monitoring, and risk prediction functions.

While many machine learning clinical prediction systems are regulated as SaMD, classification depends on how the system is deployed. In some cases, machine learning models are embedded within hardware devices, such as imaging systems or wearable monitors, and are regulated as part of a broader medical device, often referred to as Software in a Medical Device (SiMD). This distinction is particularly relevant for clinical prediction technologies that rely on continuous physiological monitoring, where software functionality is integrated with device hardware.[24] Additionally, certain clinical decision support tools may fall outside FDA regulation if they allow clinicians to independently review the basis of recommendations.[25] As a result, regulatory classification is shaped not only by the use of machine learning, but by intended use, level of clinical reliance, and system integration within clinical workflows.

Historically, the FDA has regulated software-based medical technologies through established premarket pathways, including 510(k) clearance, De Novo classification, and premarket approval, which provide different steps for new technologies to follow to earn regulatory approval.[26] This variation largely depends on if there are predicate technologies, which are already approved and therefore can be leveraged to strengthen a new regulatory filing. These pathways evaluate safety and effectiveness based on a defined version of the

[22] "Artificial Intelligence in Software as a Medical Device," U.S. Food & Drug Admin., https://www.fda.gov/medical-devices/software-medical-device-samd/artificial-intelligence-software-medical-device.
[23] "Software as a Medical Device (SaMD)," U.S. Food & Drug Admin., https://www.fda.gov/medical-devices/digital-health-center-excellence/software-medical-device-samd.
[24] "Understanding the Regulatory Difference Between SiMD and SaMD, Gilero," https://www.gilero.com/regulatory-difference-samd-simd.
[25] Liron Pantanowitz et al., *Regulatory Aspects of Artificial Intelligence and Machine Learning*, 37 Mod. Pathology 100609 (2024)
[26] FDA, *Artificial Intelligence in Software as a Medical Device*, supra note 22.

product at a specific point in time, reflecting an assumption that software is static at submission. Machine learning-based systems, however, may update or improve as new data becomes available. The FDA has recognized that this capability distinguishes AI- and ML-enabled software from conventional software, noting that such systems can learn from real-world use and improve performance over time.[27]

This distinction is particularly relevant for clinical prediction systems. Models may require recalibration as clinical environments and patient populations change. As a result, regulatory evaluation extends beyond initial validation to considerations of how model performance is maintained over time.[28] Traditional regulatory approaches have often involved reviewing machine learning models in a "locked" state, assuming that the approved version does not change over time.

Beginning with its 2019 discussion paper and continuing through more recent guidance, the FDA has developed a series of frameworks to address these challenges. The agency has increasingly emphasized a total product lifecycle approach, recognizing that safety and effectiveness for AI-enabled devices must be evaluated across development, deployment, and real-world use.[29] The January 2025 draft guidance, "Artificial Intelligence-Enabled Device Software Functions: Lifecycle Management and Marketing Submission Recommendations," outlines expectations across data collection, model development, validation, deployment, and postmarket performance evaluation.[30] This reflects a shift toward evaluating device performance over time rather than solely at the point of premarket review.

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[27] U.S. Food & Drug Admin., *Proposed Regulatory Framework for Modifications to Artificial Intelligence/Machine Learning (AI/ML)-Based Software as a Medical Device (SaMD): Discussion Paper and Request for Feedback* (n.d.), https://www.fda.gov/files/medical%20devices/published/US-FDA-Artificial-Intelligence-and-Machine-Learning-Discussion-Paper.pdf.

[28] Mahima Saini et al., *Regulatory Challenges and Opportunities: A Review of U.S. Food and Drug Administration-Approved Artificial Intelligence and Machine Learning-Enabled Cardiovascular Devices*, 60 Therapeutic Innovation & Regul. Sci. 393 (2025).

[29] FDA, *Proposed Regulatory Framework for AI/ML-Based Software as a Medical Device*, supra note 27.

[30] U.S. Food & Drug Admin., *Artificial Intelligence-Enabled Device Software Functions: Lifecycle Management and Marketing Submission Recommendations* (Draft Guidance, Jan. 7, 2025).

A central component of this evolving framework is the Predetermined Change Control Plan (PCCP), an essential piece of FDA documentation. Under the August 2025 final guidance, manufacturers may define anticipated model modifications and associated validation methods in advance. When authorized, these predefined changes can be implemented without requiring a new marketing submission for each update, provided they remain within the approved scope.[31] This mechanism is particularly relevant for clinical prediction systems, as it provides a pathway for incorporating iterative model updates while maintaining regulatory oversight.

In parallel, the FDA has emphasized transparency and postmarket evaluation. The June 2024 transparency guiding principles highlight the importance of communicating intended use, data sources, performance characteristics, and limitations of machine learning-enabled devices.[32] Additionally, lifecycle-oriented guidance recommends ongoing monitoring of device performance in real-world settings, including evaluation across patient populations, to support continued assurance of safety and effectiveness.[33]

Empirical analyses provide additional context for how these frameworks are applied in practice. Many AI/ML-enabled devices have been cleared through the 510(k) pathway which reflect continued reliance on established regulatory mechanisms as predicate devices are referred, making the approval process more efficient. Similarly, while premarket validation and performance testing are commonly reported, postmarket monitoring practices continue to evolve alongside newer guidance.[34] These findings suggest that FDA oversight of AI-enabled devices is developing within existing structures while incorporating additional considerations specific to machine learning.

For companies developing clinical prediction systems, these regulatory frameworks have direct implications for commercialization. Demonstrating safety and effectiveness requires access to large,

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[31] U.S. Food & Drug Admin., *Marketing Submission Recommendations for a Predetermined Change Control Plan for Artificial Intelligence-Enabled Device Software Functions* (Aug. 18, 2025).

[32] U.S. Food & Drug Admin., Health Can., & U.K. Medicines & Healthcare Prods. Regul. Agency, *Transparency for Machine Learning-Enabled Medical Devices: Guiding Principles* (2024).

[33] FDA, *Artificial Intelligence-Enabled Device Software Functions*, supra note 30.

[34] Saini et al., *Regulatory Challenges and Opportunities*, supra note 28.

high-quality clinical datasets and rigorous validation processes, often necessitating partnerships with healthcare institutions.

The regulatory process also imposes significant time, cost, and evidentiary demands. Requirements for clinical validation, performance documentation, and ongoing monitoring, combined with expectations around predefined model updates, shape both development timelines and capital needs. These constraints influence the design of machine learning systems themselves. The need for robust validation data, clearly specified update protocols, and continuous performance oversight favors models that can be reliably evaluated within existing regulatory pathways.

A similar set of challenges arises in the regulatory context for a startup developing a machine learning model to predict epileptic seizures using wearable EEG data. To bring the product to market, the system would likely be regulated as Software as a Medical Device, requiring the developer to demonstrate safety and effectiveness through clinical validation based on a specific version of the model. However, because the model is designed to continuously improve as it is exposed to new patient data, the inventor must either "lock" the algorithm at the time of submission or pursue a Predetermined Change Control Plan that specifies in advance how the model can be updated. This creates tension between the system's adaptive potential and regulatory expectations for stability and pre-specification. Additionally, the need for large-scale, high-quality clinical data to support both initial validation and ongoing performance monitoring may require partnerships with healthcare institutions, increasing costs and complexity. As a result, the developer may be incentivized to limit the frequency or scope of model updates to remain within regulatory boundaries, illustrating how FDA oversight can shape not only how these systems are approved, but how they are designed and deployed in practice.

The FDA's evolving regulatory framework reflects an effort to accommodate the dynamic nature of machine learning systems, but it remains grounded in assumptions of stability, predictability, and pre-specification. As a result, adaptability is often constrained in practice, channeling development toward more controlled, incrementally updated models rather than fully autonomous, continuously learning systems. While these requirements support safety and oversight, they also highlight a persistent mismatch between adaptive machine learning technologies and regulatory

structures designed for static systems. Accordingly, regulatory oversight does not simply govern machine learning in healthcare; it shapes the form that innovation can take.

Conclusion

Adaptive machine learning clinical prediction systems expose a fundamental misalignment between emerging technologies and existing intellectual property and FDA regulatory frameworks. Patent law, grounded in assumptions of static and fully disclosed inventions, struggles to capture systems that derive value from continuous learning and evolving datasets. As a result, patent protection is often difficult to obtain or enforce, leading firms to leverage alternative strategies, including trade secrecy and data control.

Regulatory frameworks have begun to adapt but remain anchored in stability and pre-specification. The FDA's lifecycle-based approach enables oversight of adaptive systems while channeling development toward more controlled, incrementally updated models. In practice, these constraints shape both how systems are evaluated and how they are designed and deployed.

These dynamics extend beyond legal doctrine to structure incentives across the healthcare ecosystem. For startups and investors, value increasingly depends on high-quality data, clinical partnerships, and clear regulatory pathways. For healthcare providers, data generation becomes both a source of innovation and a strategic asset, while clinicians must integrate machine learning tools within existing standards of care. Adoption and reimbursement further depend on demonstrating clinical utility and reliability.

While this paper focuses on intellectual property and FDA regulation, adaptive machine learning systems raise additional legal challenges, including data privacy, liability, and accountability, which further complicate their integration into clinical practice.

Adaptive machine learning systems therefore do not simply challenge existing frameworks, they expose their limits. Aligning legal and regulatory structures with the realities of adaptive, data-driven systems will be critical for ensuring that clinical prediction technologies can be effectively developed, evaluated, and deployed. Legal and regulatory frameworks do not merely respond to technological change; they actively shape the direction and form of innovation in clinical machine learning systems.

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Why the United States Needs Federal Artificial Intelligence Regulation

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Abstract

The rapid development of artificial intelligence technologies has outpaced the United States' ability to establish regulatory frameworks, resulting in a patchwork of governance systems driven largely by individual states. This paper explores the limitations of previous executive actions and highlights how the inconsistencies formed by independent state policies create practical and legal uncertainty for developers as well as insufficient protections for consumers. By investigating state initiatives in California and Colorado, as well as examining the power of Congress to regulate economic activities that affect interstate commerce under the Commerce Clause, as exemplified in *Gonzalez v. Raich*, the necessity for legislative action in terms of standardization and regulation is further established. Historical context, such as the Telecommunications Act of 1996, provides further precedent and sets the stage for comprehensive federal legislation that ensures standardized governance, promotes technological innovation, and protects consumers in an increasingly AI-forward society.

Introduction

Artificial intelligence has rapidly transformed modern development, reshaping industries from healthcare to finance to national security. As machine learning systems and large language models are increasingly implemented into everyday activities, governments have struggled to determine how to appropriately regulate these technologies. Despite the accelerating rate of innovation and technological development, the United States lacks a comprehensive federal statutory framework to govern and regulate emerging technologies. In the absence of uniform federal guidelines, some individual states have begun to adopt unique regulatory approaches towards artificial intelligence. Colorado's Consumer Protection for Artificial Intelligence requires AI developers and

deployers to disclose algorithmic bias to promote consumer protection, and California's AI Transparency prohibits apps and websites from using generative AI without prior disclosure[1]. Other states, however, lack any type of related protections, forming an uneven legal environment in which companies developing artificial intelligence technologies must navigate erratic state-specific loopholes in order to proceed with their work.

This inconsistency raises an important question regarding the appropriate balance between state authority and the federal legislature in the regulation of emerging technologies. Because artificial intelligence systems are developed and distributed across states, inconsistent state regulations stifle the developing market through compliance burdens placed on US companies while simultaneously allowing for regulatory gaps in consumer protections; instead of promoting United States technological dominance, lax guidelines restrain the market and create opportunities for inconsistent AI systems within the nation itself. This paper argues that the current system of state-level artificial intelligence regulation creates inconsistent legal standards that undermine the effective governance of emerging technologies. Standardized regulations would not only help to promote technological innovation, as developers would have easier times adhering to federal guidelines, but also better protect the users of said products as they are provided with a more stable idea of how the industry functions. As artificial intelligence development and distribution operate within interstate commerce, Congress possesses the constitutional authority under the Commerce Clause to establish uniform federal regulations to both provide clearer legal standards for developers and to better protect consumers in a world that is increasingly shaped by artificial intelligence systems.

Background

Over the past decade, artificial intelligence, machine learning, and large language model technologies have experienced rapid development. The primary regulatory methods for these technologies have been implemented through a variety of Executive Orders. In October 2023, the Biden Administration issued Executive Order 14110, or Safe, Secure, and Trustworthy Development and Use of Artificial

[1] "SB24-205 Consumer Protections for Artificial Intelligence." *Colorado General Assembly*, n.d. https://leg.colorado.gov/bills/sb24-205; "Bill Text - SB-942 California AI Transparency Act." n.d. https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB942.

Intelligence, the best effort made up until that point to address AI regulation in the United States. The order outlined principles governing the usage of artificial intelligence, developing standards for several federal agencies to improve upon their usage of AI systems. It instructed the National Institute of Standards and Technology (NIST) to establish guidelines for evaluating the safety of generative artificial intelligence, and also for it to launch the National AI Research Resource to accelerate AI innovation and ensure equitable access across research.[2]

However, Executive Order 14110 demonstrates a fundamental limitation of executive action across the board: executive orders cannot in themselves create statutory law. Instead, they function directly with federal agencies to exercise legal authority solely within the federal branch. As a result, the executive order primarily relied on pre-existing statutory authorities to encourage AI developers to share safety information with the federal government and assist federal agencies in adopting AI governance standards. The executive order failed to establish binding nationwide regulations governing technological development, and therefore its reach was limited to federal agencies, federal contractors, and areas in which pre-existing laws granted executive organizations regulatory authority. This structural limitation only serves to further support the idea that nationwide regulation of artificial intelligence requires congressional action. Without legislation enacted by Congress, the executive branch cannot impose regulatory obligations on private firms beyond those already permitted under existing laws. Therefore, while Executive Order 14110 represented a significant policy initiative in terms of artificial intelligence regulation, its legal force was limited by the limited scope of executive regulatory authority.

The limits of executive authority became even more apparent following the subsequent changes in federal policy. In January 2025, the Trump Administration issued Executive Order 14179, which rescinded several initiatives previously associated with Executive Order 14110. This order focused on maintaining American technological leadership by reducing regulatory constraints on AI

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[2] Federal Register. "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence," November 1, 2023. https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence.

developers and encouraging private innovation.[3] This shift in federal policy further demonstrates the instability of executive-based regulation. Because executive orders can be modified or rescinded by following administrations, they often lack the permanence necessary to establish concrete regulations, especially during a period of rapidly emerging technological development. In this case, the rescission of Executive Order 14110 effectively left the United States without any nationwide regulation for artificial intelligence.

In the absence of comprehensive legislation, states have increasingly had to bear the burden of artificial intelligence regulation. Individual state governments have formulated different strategies to approach issues such as consumer protection and algorithmic bias. However, in December of 2025, the Trump administration issued Executive Order 14365, which aimed to establish a national regulatory approach to artificial intelligence by directing federal agencies to coordinate efforts toward developing a standard. Notably, the order attempts to override state regulations on AI by establishing the AI Litigation Task Force within the Department of Justice, which can challenge states that pass their own AI laws. While the order expresses a desire to establish national artificial intelligence regulation, it cannot independently preempt state legislation without congressional approval. As a result, Executive Order 14365 seeks to override existing state artificial intelligence legislation through independent interpretation rather than clear congressional authority.[4]

Comprehensive artificial intelligence regulation on the national level has already been accomplished in several other countries. In August 2024, the European Union established the EU Artificial Intelligence Act, which sets down guidelines for consumer protection across the supranational organization. The act determines the risk level of AI applications and uses it to decide whether the system is approved for usage within the union or not. This allows for organizations within the European Union to focus on developing technologies that aim to benefit their consumers, as it prohibits the

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[3] Micah Stopperich, "Removing Barriers to American Leadership in Artificial Intelligence," The White House, January 23, 2025, https://www.whitehouse.gov/presidential-actions/2025/01/removing-barriers-to-american-leadership-in-artificial-intelligence/.

[4] Mary Wales, "Ensuring a National Policy Framework for Artificial Intelligence," The White House, December 12, 2025. https://www.whitehouse.gov/presidential-actions/2025/12/eliminating-state-law-obstruction-of-national-artificial-intelligence-policy/.

creation of harmful artificial intelligence systems and products.[5] Similarly, China has pursued a centralized approach to artificial intelligence governance by adopting a series of national regulations focused on integrating AI across sectors to promote the development of competitive artificial intelligence models.[6]

The lack of appropriately standardized national regulation of artificial intelligence weakens American industrial development and leaves consumers defenseless against developing technology. Executive Orders 14110, 14179, and 14365 all demonstrate the government's attempts at a uniform regulatory landscape and highlight the weakness of executive action without congressional authority. In contrast, other industrial powerhouses such as the European Union and China have found ways to implement national, centralized frameworks that provide uniform regulations for developers while also protecting their citizens from malicious technologies. This highlights the regulatory gap in the United States as well as the need for Congress to enact legislation that establishes a consistent, national approach to artificial intelligence governance.

State-Level AI Regulation

Due to the absence of comprehensive federal legislation, there exists a regulatory vacuum in which individual states now hold the primary responsibility for governing artificial intelligence. As a result, states adopt differing standards and obligations for AI developers and consumers. Colorado and California, specifically, stand out as examples of states with significant artificial intelligence policy.

Colorado's Consumer Protection for Artificial Intelligence, or the Colorado AI Act requires AI developers and deployers to disclose algorithmic bias, or discrimination in machine learning algorithms that occurs when data training sets reflect already existing racial, gender, or socioeconomic bias, in order to prevent discriminatory outcomes in AI systems and further establish consumer protections.[7] Similarly, California's AI Transparency Act imposes requirements for AI systems to disclose captured content and distinguish AI-generated content from original materials. It also requires large websites to provide information related to AI content and prohibits apps and websites from using generative AI without disclosure. These laws are enforceable in

[5] "EU Artificial Intelligence Act: Up-to-date Developments and Analyses of the EU AI Act," n.d., https://artificialintelligenceact.eu/.
[6] "AI Laws and Regulation in China," CMS, February 17, 2026, accessed April 13, 2026, https://cms.law/en/int/expert-guides/ai-regulation-scanner/china.
[7] "Bill Text: SB-942 California AI Transparency Act."

their respective states and create clear legal outlines for organizations operating within them.[8]

States such as Kentucky and Virginia, however, have limited protections relating to artificial intelligence, leaving citizens in these states unprotected from malicious technologies. The result is an uneven distribution of legal standards across the United States, in which policies differ depending on the state in which an AI system is accessed or released. This generates significant legal uncertainty for developers operating on a national level, as there is no one set of standardized guidelines they are expected to follow. For example, a system compliant with Colorado's disclosure requirements may regardless violate California's transparency necessities if it doesn't meet the second state's standards. Developers may be held liable under one state's laws while attempting to comply with another.

Additionally, due to the substantial uncertainty, companies cannot reliably determine what applies in each jurisdiction, and courts may interpret similar language differently from state to state. This can complicate contracts and corporate regulation, as organizations may receive conflicting information depending on the state they are in and how statutes are interpreted. The inconsistent legal environment also has implications for preventing innovation. Conflicting requirements may hinder the ability of U.S. companies to develop and deploy AI systems efficiently and effectively on a national scale. Developers may be forced to alter technological implementations depending on the area, creating inefficiency and undermining development.

When technologies that operate nationally rely on state-level governance, issues are raised regarding the sufficiency of state authority to regulate AI consistently. The uncertainties that come with varying regulations further highlight the necessity of Congress' role in establishing uniform federal standards with the ability to preempt state laws and clarify legal misunderstandings.

Federal Authority to Regulate Artificial Intelligence

The standard deregulation of artificial intelligence on a state level raises the question of whether the federal government even possesses the authority to establish uniform national regulations. According to the Commerce Clause of the United States Constitution, "the Congress shall have power to regulate Commerce with foreign

[8] "SB24-205 Consumer Protections for Artificial Intelligence: Colorado General Assembly requirements.

Nations, and among the several States."[9] Because the development and implementation of artificial intelligence systems and technologies often occur across state lines, AI technology falls within the purview of congressional regulatory authority. This is supported by the Supreme Court's decision in *Gonzales v. Raich* (2005)[10], in which the Court held that Congress may regulate even local activities when doing so is necessary to enforce a broader federal regulatory framework governing interstate commerce. Artificial intelligence is produced by companies that operate across several states, and developers distribute services nationally, meaning that the operation of these systems directly implies interstate commerce. Under Supreme Court precedent, the regulation of AI falls within the scope of congressional authority.

After Congress establishes a national artificial intelligence standard, there exists the possibility of conflicting state regulations throughout the country. However, these issues would be solved through a concept established by the Supremacy Clause known as federal preemption. Preemption could effectively override conflicting state policies, such as in Colorado and California, allowing the new federal law to effectively govern the nation. Therein lies the issue regarding artificial intelligence governance through executive orders: the executive branch does not have the authority to override state law in the same way that Congress has. Therefore, executive action alone would be ineffective in establishing federal policy regarding AI.

There is also a historical precedent for Congress regulating emerging and developing technologies. In fact, congressional legislation has often set the standards to establish uniform policy regarding new industries more so than any other branch of the government. When the internet gained widespread usage, Congress passed the Telecommunications Act of 1996 to set the very first guidelines regarding technological development while also creating protections for violent and harmful actions that could possibly occur over telecommunication services.[11] Artificial intelligence stands in a similar position, regulation-wise, to the internet when it first came out: it operates in a manner that transcends state boundaries and it has the

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[9] "The 1st Article of the U.S. Constitution," National Constitution Center – constitutioncenter.org, n.d., https://constitutioncenter.org/the-constitution/articles/article-i.

[10] *Gonzales v. Raich*, 545 U.S. 1 (2005).

[11] United States Congress, "Telecommunications Act of 1996," *PUBLIC LAW*, February 8, 1996, https://www.congress.gov/104/plaws/publ104/PLAW-104publ104.pdf.

potential to be used in a harmful manner. The historical practice of congressional regulation, federal preemption, and the Commerce Clause all support the conclusion that Congress has both the constitutional authority and the means to establish nationwide legal guidelines to govern artificial intelligence.

Conclusion

The rapid development of artificial intelligence technologies has exposed significant gaps in the existing policy structure of the United States. Without comprehensive federal legislation, individual states have attempted to enact their own ways to govern artificial intelligence, producing a disjointed regulatory landscape that raises concerns regarding algorithmic bias, transparency, and consumer protection. Additionally, these irregularities create difficulties and inconsistent legal guidelines for technological innovators to abide by, stifling the development of American industry.

As AI systems are developed and distributed throughout the nation, their regulation falls under the authority of Congress through the Commerce Clause. Supreme Court precedent has consistently recognized the authority of Congress to regulate commercial and economic activity between states, and the Supremacy Clause allows Congress to effectively create regulations without individual states interfering. These two facts combined prove why congressional legislation is the optimal solution to the issue of AI regulation, as it allows for clear guidelines without the unreliable, inconsistent framework of executive orders.

To address these issues, Congress must enact federal legislation establishing a uniform national standard for artificial intelligence regulation. Such legislation would clarify operating conditions for product developers, reduce conflicts between state policies, clarify court rulings, protect consumer interests, and provide a solid foundation upon which future technologies can be developed in the United States. Without congressional action, the United States will continue to experience a fractured regulatory environment that will prevent innovation and undermine the effective governance of artificial intelligence systems.

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