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Georgetown University Undergraduate Law Review

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LETTER FROM THE EDITOR

Dear Reader,

It is my distinct pleasure to share with you Volume XII of the Georgetown University Undergraduate Law Review (GUULR).

This publication reflects a year of countless hours spent per week by our editorial staff to carefully refine and prepare each of the eleven articles now available for you to read. I am proud to present each piece in this Volume as the result of a culmination of incredible research, writing, and editing abilities by authors and staff.

Each article invites the reader to contemplate an issue of public significance—whether climate change mitigation or the data privacy of our own minds—and considers both its legal and social consequences. Evidently, student researchers take interest in impactful topics and perceive the law in innovative ways. This volume starts with an exploration of Unitary Executive Theory before covering several aspects of US policy and constitutional law: the First Amendment, advanced AI-generated content, and tribal sovereignty. The final article delves into unique legal regimes tailored to address harm to the environment.

Some of the articles in this Volume are a new feature in our publication. I am pleased to introduce the Giles's Articles, made possible through our partnership with Professor Joseph Hartman. Professor Hartman is the Walter I. Giles Professor of the Practice in Constitutional Law at Georgetown University. Professor Hartman offers the Giles First-Year Seminar each fall in honor of Walter "Jack" Giles, who taught constitutional law at Georgetown for more than four decades. Professor Giles's constitutional law course became an intellectual rite of passage for generations of Georgetown students; most notably, in his autobiography My Life, Bill Clinton described Professor Giles's class as his "most memorable" college course.

In consultation with Professor Hartman, GUULR has selected the top three journal articles written by Georgetown first-year students enrolled in the Fall 2025 Walter I. Giles First-Year Free Speech Seminar. These pieces are featured on pages 69, 91, and 107 of the Review. I express my deepest thanks to Professor Hartman and three of Professor Giles's former students—Steve Sullivan, John Halebian, and Rich Lucas— for their generous support of GUULR. It is due to this collaboration that we are able to offer a printed edition of the Review for the first time in GUULR's history.

GUULR is proud of our diversity in thought, including articles from authors across the world. To each of our authors, I am grateful to you for sharing your thoughtful convictions with GUULR during some of the most important times in legal history.

Along with this publication, I encourage you to visit the GUULR Blog, which publishes weekly during the spring semester. I am deeply pleased to announce GUULR's first blog collaboration made possible this year, as well. For four months, GUULR partnered with Spain's IE University to produce sixteen blog pieces on topics covering different facets of international law. I graciously thank IE University's IPR team for their dedication and collaboration. My hope is for this collaboration to foster others and continue building community to share pertinent legal analyses with others.

I further thank the GUULR editorial staff and leadership team for their invaluable contributions to this publication. Each of you is an essential component of our team and your dedication to GUULR for ten months, including weekends, exams,, and holidays, does not go unnoticed.

Finally, I would like to sincerely thank the Georgetown University Center for Student Engagement and Media Board for their support in enabling our organization's operation and growth. Through their support and funding, GUULR will be able to continue expanding our programming for both our members and the broader community.

Please do not hesitate to relay your thoughts and feedback to us at guundergraduatelawreview@gmail.com. I hope you enjoy the Georgetown University Undergraduate Law Review, Volume XII.

Sincerely,

Ria Maheshwari
Editor-in-Chief

LETTER FROM THE FACULTY SPONSOR

It is my distinct pleasure to introduce this special section of the Georgetown Undergraduate Law Review, featuring the work of three first-year students in the Giles Free Speech Seminar. Offered in memory of longtime Georgetown constitutional law professor Walter I. Giles, the seminar guides students through both the theoretical and practical dimensions of American First Amendment law and requires them to propose, research, and draft a long-form law journal article for publication. This section grew out of a series of conversations over the past year with the GUULR editorial board about how best to recognize—and publish—the truly exceptional work emerging from that seminar.

I am sincerely grateful to the editors for their willingness to invest in this effort and for their belief that these students' work merits a wider audience. The essays that follow reflect both the students' hard work and creativity and the careful editorial guidance of the GUULR staff.

I hope readers will approach this section in the spirit in which it was assembled: as an opportunity to engage with talented young scholars who have tackled fascinating, and sometimes novel, First Amendment questions with enthusiasm, curiosity, and skill. The Law Review's editors, for their part, have ensured that each essay meets GUULR's exacting publication standards.

My thanks go to the editorial board for their partnership, to my students for their commitment to rigorous legal inquiry, and to three of Professor Giles's former students—Steve Sullivan, John Halebian, and Rich Lucas—whose generous support of the Giles Professorship has made this work possible.

Enjoy!

Joseph E. Hartman
Walter I. Giles Professor of the Practice in Constitutional Law
Georgetown University

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MISSION STATEMENT

Among the nation's leading undergraduate law journals, Georgetown University Undergraduate Law Review analyzes the most consequential issues in law, policy, philosophy, history, and politics. GUULR is dedicated to providing a visible forum for legal debate, discussion, and reflection. In providing a platform for authors to explore and articulate their innovative legal thoughts and ideas, we hope to promote a more nuanced understanding of prevalent questions and concerns about our legal institutions.

GUULR is entirely student-run. The year-long process commences with an extensive search for the most notable works from students at the nation's finest universities, as well as from judges, professors, and legal practitioners. Every GUULR article then endures a rigorous editing and revision process in order to ensure that it reaches its full potential and strength before publishing. Furthermore, undergraduate students are given the unique opportunity to engage in every stage of the publishing process, from conducting thorough legal research and investigating, to writing and re-writing drafts, to polishing Bluebook citations. GUULR strives for excellence, both in our final product, and in shaping more capable and experienced writers.

SUBMISSIONS

Georgetown University Undergraduate Law Review is calling for submissions of academic articles, essays, and research papers which discuss current domestic or international legal issues, legal or political philosophy, or any other subject of significance to a vast legally-minded readership.

Each paper will be thoroughly evaluated by The Editorial Board. The strongest submissions will earn a place in GUULR Volume XIII, which will be published in Spring of 2027. Submissions will be evaluated on relevance to the legal field, quality and depth of research, originality of the argument, and clarity of the analysis and writing.

Please send all law review submissions as a Word Document attachment to guundergraduatelawreview@gmail.com. In the body of the email, include:

Name
Email & Phone Number
University, Class, and Fields of Study
Submission Title
Abstract (150 word maximum)

Submissions for Volume XIII are open now and are expected to be due in October 2026. Please stay tuned for the official call for submissions and confirmed deadline.

A Legal History of the Unitary Executive Theory Case Study: The Smithsonian Institution

Robin Mills

Georgetown University Class of 2026

ABSTRACT:
The term "Unitary Executive Theory" has become increasingly prevalent in public discourse. However, understanding its modern implications requires tracing its constitutional origins. This paper examines the legal evolution of presidential removal power, situating the debate within the broader framework of the Unitary Executive Theory. Beginning with the Decision of 1789 and proceeding through key Supreme Court cases, it examines how shifting interpretations of Article II have expanded presidential control over executive officials. The study applies this doctrine to a 2025 controversy in which President Trump claimed authority to remove Kim Sajet, Director of the Smithsonian's National Portrait Gallery. Through detailed legal and institutional analysis, the paper presents arguments that the Smithsonian's unique status as a congressional trust instrumentality may place it outside the executive branch and thus beyond presidential removal power. The case underscores tensions between autonomy and accountability in preserving nonpartisan cultural institutions under an increasingly unitary presidency.

I. Introduction

On May 30, 2025, President Donald Trump used social media to announce, "Upon the request and recommendation of many people, I am hereby terminating the employment of Kim Sajet as Director of the National Portrait Gallery. She is a highly partisan person, and a strong supporter of DEI, which is totally inappropriate for her position. Her replacement will be named shortly. Thank you for your attention to this matter!"[1] Although this seemed to be just one of many anti-DEI firings carried out by the President, it raised important legal questions about the President's Article II powers and the executive's authority over personnel within federal agencies and departments. President Trump has made it clear that he believes that the executive wields expansive influence, stating in 2018 that he has the "unfettered power to fire anyone" in the executive branch.[2] The White House confirmed Trump's removal of several inspectors general by announcing, "He is the executive of the executive branch, and therefore, he has the power to fire anyone within the executive branch that he wishes to."[3] Following Trump's announcement about the Director of the NPG, the Smithsonian Institution responded that it had control over hiring and firing decisions at the Gallery. Despite this degree of support, Kim Sajet chose to resign, making the question of Trump's authority over the Smithsonian Institution an open legal question within the broader debates over presidential authority and removal power.

II. Constitutional History and the Decision of 1789

The Constitutional Convention and the First Congress debated numerous questions about the separation of powers and checks and balances. The founders were determined to prevent a

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[1] Donald Trump, (@realDonaldTrump), TRUTH SOCIAL (May 30, 2025), https://truthsocial.com/@realDonaldTrump/posts/114597966895334541.
[2] Steve Vladeck, *Trump Tweeted That He Can Fire Anyone (Including Robert Mueller). Here's What the Law Actually Says,* NBC NEWS (May 3, 2018, 4:52 PM), https://www.nbcnews.com/think/opinion/trump-tweeted-he-can-fire-anyone-including-robert-mueller-here-ncna871166.
[3] *White House Holds First Press Briefing of Trump's Second Term,* CNN (Jan. 28, 2025, 1:30 PM), https://transcripts.cnn.com/show/cnc/date/2025-01-28/segment/08.

situation in which one branch could exercise broad and unchecked power. At the forefront of the discussions was the need for guardrails to protect against tyranny and abuse of power, a component of which was preventing one branch from encroaching on the authority of another. Thus, the framers knew that it was of paramount importance to strike a correct and constitutionally grounded balance between presidential authority and the legislature's ability to oversee and, when necessary, limit executive actions.

Today's debates on presidential power are not unlike those engaged in by the framers of the Constitution as they endeavored to reach a consensus on the scope of executive power. Some were focused on narrowing the role of the executive branch. At the Constitutional Convention in 1787, Edmund Randolph proposed maintaining the structure set by the Articles of Confederation, which would limit the executive to "all the executive powers of the Congress under the Confederation."[4] Benjamin Franklin supported Randolph's proposal for a plural council rather than a single executive official. In contrast, Alexander Hamilton opposed the weak role of the executive under the Articles of Confederation and called for a strong, energetic executive, declaring in Federalist 70 that a "feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[5] When the Constitution was finalized in 1787 and ratified in 1789, the executive branch was established in Article II as a unitary executive, but the language defining presidential power was left somewhat vague.[6]

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[4] 1 LOUIS FISHER & KATY JEAN HARRIGER, AMERICAN CONSTITUTIONAL LAW: CONSTITUTIONAL STRUCTURES: SEPARATED POWERS AND FEDERALISM 199 (12th ed. 2019).
[5] Two of the elements needed in an energetic executive were "adequate provision for its support" and "competent powers." THE FEDERALIST NO. 70 (Alexander Hamilton).
[6] This is particularly striking given the specificity of its constitutional counterparts, wherein Article I specifies powers of the legislative as only "powers herein granted," and Article III dictates that "the judicial power shall extend to" followed by clearly enumerated powers; U.S. CONST. art. I, § 1; U.S. CONST. art. III, § 1.

Article II begins with an ambiguous clause that lacks specific limiting language. Article II, §1 declares "The executive Power shall be vested in a President of the United States of America," and §3 outlines the President's broad duty to "take Care that the Laws be faithfully executed."[7] By 1789, it became clear that while the Constitution had laid an "architectural plan for the executive branch,… the actual above-ground structure could have taken on enormously different aspects."[8] With only these vague authorizations, it became clear that a "machinery of government needed to be erected to carry out the business of the emerging American state."[9] What executive agencies should be created? How should they function? What is the nature of the relationship between these departments and the President? The answers to these complex questions proved contentious. The crux of the problem is that while Article II, Section 2 of the Constitution affords the President the power to "nominate, and, with the advice and consent of the Senate, to appoint ambassadors and other public ministers, judges of the Supreme Court, and in general all officers of the United States established by law, and whose appointments are not otherwise provided for by the Constitution," the Constitution is largely silent on the issue of removal.[10] Without specific guidance on this question, there was room for a variety of theories among the members of the First Congress, whose views ranged among four positions: (1) impeachment "is the only mode of removal recognized by the Constitution and Congress cannot confer any other mode," (2)

> advise and consent: the Constitution vests the removal power jointly in the president and the Senate and Congress cannot confer any other mode; (3) Congressional delegation: the Constitution is silent or ambiguous about where it vests the removal power, so (a) Congress ought to vest it in the president, or (b) Congress has some latitude but ought not vest it in the president alone; and (4) Executive power theory: the Constitution vests the removal power in the president alone.[11]

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[7] U.S. CONST. art. II, §§ 1, 3.
[8] *Id.*
[9] J. DAVID ALVIS, JEREMY D. BAILEY & F. FLAGG TAYLOR IV, THE CONTESTED REMOVAL POWER, 1789-2010 16–17 (2013).
[10] FISHER & HARRIGER, *supra* note 4, at 171.
[11] ALVIS, *supra* note 9, at 18.

While each position had the support of several Congressmen, this paper will focus on the two arguments that proved most consequential: the advice-and-consent model and the executive power theory. Those who feared an unchecked, all-powerful executive with total removal power contended that the Constitution supported a Senate advise-and-consent method.[12] In contrast, "Senator George Read, defending executive power theory and citing the take care clause, asked, "How can he [the president] do his duty or be responsible, if he cannot remove his instruments?"[13]

This issue incited particularly divisive deliberation in the First Congress and culminated in the Decision of 1789,[14] which centered around the debate of what the Constitution said in terms of removal power, specifically as to whether it granted the President the unilateral authority to remove officials.[15] The issue came before the First Congress as a result of legislation sponsored by James Madison, which would establish an executive department called the Department of Foreign Affairs. The first clause of the proposed legislation stipulated that the principal officer was "to be removable from office by the President of the United States."[16] On June 22nd, Representative Egbert Benson proposed an amendment to the bill, wherein "new language would be inserted into a clause related to a chief clerk appointed by the Secretary of Foreign Affairs." This clerk would handle the paperwork "whenever the said principal officer [the secretary] shall be removed from office by the president of the United States." If this amendment were agreed to, Benson would

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[12] Senator William Maclay "warned against any diminishment of the Senate's power, suggesting that 'by the Checks which are entrusted with them upon both the executive and the other branch of the legislature, the Stability of the Government is evidently placed in their hands.'" *Id.* at 23.

[13] Complicating matters further was Hamilton's view. He had been seen as "the great defender of executive power," but in Federalist 77, he declared matter-of-factly that the "consent of the Senate would be necessary to displace as well as to appoint." *Id.*

[14] The debate "has been widely praised for the depth and seriousness that its participants brought to the chamber," and William Smith of South Carolina proclaimed that "This has been the most important question and the most solemn debate we have had since the meeting of Congress… yet I never saw a debate conducted with so much temper and good humour." *Id.* at 17.

[15] The Articles of Confederation had vested the appointment of certain executive officers in Congress. When the Articles were in effect, Congress also exercised removal power; however, now that the Articles were abandoned and the Constitution ratified, it was necessary to interpret and apply the powers as outlined in the new document.

[16] FISHER & HARRIGER, *supra* note 4, at 199.

then move to discard the old language, specifically the phrase "to be removable by the president."[17] Benson believed that these legislative changes would strengthen the President's authority to remove the principal officer by removing the "possibility that the legislation could be viewed as a legislative grant of power and would thus be interpreted as a mere 'legislative construction' of the Constitution."[18] Madison, an increasingly keen supporter of the executive power theory, partnered with Benson to clarify this meaning for the members. They explained that this alteration to the original bill, including the new language and removing the old, "would mean an affirmation of an executive removal power rooted directly in the Constitution."[19] The resolution for the bill's adoption passed in the House, and Vice President John Adams cast the tie-breaking vote in the Senate to pass the bill that included identical language to that of the House.[20] Two other bills were subsequently passed with the same language. These events suggest that the framers intended the President to possess full removal power.

Despite the legislative history of the Decision of 1789, there is some debate surrounding the deciding votes for Madison's Foreign Affairs Bill: a group of three Congressmen "voted for the inclusion of the new language (Benson's first amendment), but against the deletion of the old (Benson's second amendment)" in the bill; thus, scholars question "whether this group can be counted as endorsing executive power theory."[21] It must also be noted that these votes were passed narrowly, and many present during the First Congress remained staunch supporters of the theories of impeachment-only or advise-and-consent removal. No overwhelming consensus was ever reached.

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[17] ALVIS, *supra* note 9, at 22.
[18] *Id.*
[19] *Id.* at 21.
[20] The Senate twice rejected the motions that would have removed the clause referring to the President's removal power.
[21] ALVIS, *supra* note 9, at 24.

The Decision of 1789 left more questions than answers. Since then, Congress has taken charge in determining "the structure of government, the powers and functions of agencies, limitations on the President's power, the qualifications of appointees, and the level of funding."[22] The courts have upheld various constraints and restrictions on the President's power to remove certain officers. However, the ideas of Senator George Read and others at the First Congress are once again gaining attention and sympathy. This view, most recently adopted by President Trump and his team, is known as the Unitary Executive Theory.

III. The Unitary Executive Theory and Strict Separation

The concept of the Unitary Executive Theory is rooted in the notion that inherent powers exist and can be wielded by the President, an assumption that is controversial and undecided. The theory posits that the "president of the United States controls the entire executive branch of the government and that he occupies a position of primacy in our constitutional system of separated powers and thus may exercise vast unilateral powers for the public good."[23] Some scholars maintain that "Congress cannot check the president when he is exercising executive powers."[24] These ideas are grounded in the concept that there are various types of presidential power. *Expressed* powers are those explicitly outlined, or enumerated, in the Constitution.[25] The Unitary Executive Theory relies on the Article II vesting of executive power in the President of the United States. *Implied* powers are those that can be reasonably drawn from those that were enumerated. *Inherent* powers are the most controversial category, and scholars disagree whether they actually exist. Inherent powers cannot be found in the Constitution, nor can they reasonably be "implied

[22] FISHER & HARRIGER, *supra* note 4*,* at 177.
[23] JEFFREY CROUCH, MARK J. ROZELL & MITCHEL A. SOLLENBERGER, THE UNITARY EXECUTIVE THEORY: A DANGER TO CONSTITUTIONAL GOVERNMENT 2 (2020).
[24] *Id.* at 10.
[25] As mentioned, the expressed powers of the executive branch are relatively vague and brief.

from express powers."[26] As outlined by constitutional scholar Louis Fisher, when "presidents claim inherent powers, they are operating outside the Constitution and are not restrained by it. In this scenario, the president would enjoy a tremendous amount of power at the expense of Congress and the courts."[27]

Regarding departments and agencies of the executive branch, some supporters of the Unitary Executive Theory go so far as to argue that a President can exert control over "all decisions made by departments, agencies, and commissions."[28] However, there is little evidence to suggest that the framers intended the legislative branch to have no influence whatsoever on the creation or functioning of executive agencies or departments. Indeed, James Madison argued that the legislative branch retained authority over executive agencies when he declared during the First Congress that the "legislature creates the office, defines the powers, limits its duration, and annexes a compensation."[29] Furthermore, it appears likely that the framers recognized a need for greater independence from the President for officers performing specific governmental functions; for example, Madison suggested that officers performing adjudicative functions should be insulated. In 1941, constitutional law scholar Robert Cushman concluded that "Congress may constitutionally give to an officer a practical sort of independence from Presidential control by specifying in elaborate detail the nature and scope of his duties and the methods to be followed in performing them."[30] If this were the case, it would be largely inconsistent with the most aggressive versions of the Unitary Executive Theory.

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[26] CROUCH, *supra* note 23, at 2.
[27] *Id.* at 10.
[28] *Id.* at 30.
[29] Chief Justice John Marshall proclaimed in his 1819 opinion in *McCulloch v. Maryland* that Congress has the ability through the Necessary and Proper Clause to create government structures that "shall be necessary and proper for carrying into Execution" its express powers. McCulloch v. Maryland, 17 U.S. 316, 412 (1819) (quoting U.S. CONST. art. I, § 8, cl. 18).
[30] CROUCH, *supra* note 23, at 2.

Those who disagree with the Unitary Executive Theory emphasize that agencies are creatures of statute, not wholly under the control of the President. They believe that the Constitution divides governmental power among all three branches, and that each branch possesses the unique power to influence the others. These scholars posit that an executive with total authority over agency officers and their agendas undermines the principles of separation of powers and checks and balances. While Hamilton contended that such dispersion of power fostered inefficient governance to the detriment of the people, Madison argued that dividing powers among the branches prevents tyranny, protects against abuse of power, and promotes liberty. Throughout history, both viewpoints have dominated at different times, ebbing and flowing in the sphere of government, and catalyzing clashes between the President and Congress. It has been the role of the Courts to adjudicate these questions of law. In a series of pivotal cases, the Courts have laid the framework for understanding the scope of congressional limits on presidential removal power and, in this context, the Decision of 1789 would prove to have a lasting legacy in legal history.

IV. The Case Law

Despite this long history of debate, it was not until 1926 that Chief Justice Taft, a former president, finally addressed the question of presidential removal power on behalf of the Supreme Court in *Myers v. United States*. Until then, the Supreme Court had "contrived to sidestep every occasion for a decisive pronouncement regarding the removal power."[31] The case concerned an 1876 statute which declared that postmasters of the first, second, and third classes were to be appointed and may be removed by the President "by and with the advice and consent of the Senate."[32] Despite this clear language, President Wilson removed Postmaster Frank S. Myers

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[31] CONG. RSCH. SERV., CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, art. II, § 2, cl. 2, 549 (2022).
[32] Act of July 12, 1876, 19 Stat. 80.

without seeking or obtaining Senate approval. The question before the Court became whether Congress had the authority to interfere with or restrict the President's removal power.[33] Chief Justice Taft, writing for the majority, citing the final votes that took place in the First Congress during the Decision of 1789, concluded that "there is not the slightest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone."[34] Taft argued that "the power of removal must remain where the Constitution places it, with the President, as part of the executive power."[35] The decision in *Myers v. United States* grants the President sweeping power and supports a stronger version of the Unitary Executive Theory. Despite this, Chief Justice Taft recognized that there may be "duties so peculiarly and specifically committed to the discretion of a particular officer" as to raise a question to the President's influence or removal power. Here, he mentions positions of a quasi-judicial character and distinguishes them for their inherent discretionary duties. Still, Taft says that the President must wield ultimate removal power. Without it, he would not be discharging his "constitutional duty of seeing that the laws be faithfully executed."[36]

While Taft outlined a picture of almost unlimited presidential authority regarding the removal of executive branch personnel, he acknowledged that the relevant officer's function is an important consideration. This latter notion became central to the later ruling in *Humphrey's Executor v. United States*, a landmark decision that is essential to understanding the events and debates unfolding today. The case arose when President Roosevelt fired William E. Humphrey

[33] FISHER & HARRIGER, *supra* note 4, at 198–99.
[34] Myers v. United States, 272 U.S. 52, 114 (1926).
[35] He also stated that the "natural meaning of the term 'executive power' granted the President included the appointment and removal of executive subordinates." CROUCH, *supra* note 23, at 36.
[36] *Id.*

from his position as Commissioner of the Federal Trade Commission, following the Senate's confirmation of Hoover's appointment of Humphrey in 1931. Central to the case was the FTC Act, which included a provision dictating that the Commissioner may be removed only for "inefficiency, neglect of duty, or malfeasance in office."[37] The unanimous Court ruled that the FTC Act was constitutional, clarifying that *Myers v. United States* allowed the President to remove officers who were "units of the executive department." According to the Court, the FTC Commissioner is not a parallel for the postmaster in *Myers* because the FTC performs quasi-judicial functions.[38] In *Humphrey's Executor*, the Court affirmed that the Constitution had never given "illimitable power of removal to the president."[39] Thus, the Court clarified that for-cause removal protections are constitutionally permissible for officers performing quasi-judicial or quasi-legislative functions. This case introduced a limitation on the Unitary Executive Theory, emphasizing checks and balances by way of legislative oversight of the executive branch.

Still, many removal questions remained, and the creation of the Federal Election Commission in 1976 posed new challenges. The case, *Buckley v. Valeo*, principally centered around campaign finance law, but the Court's opinion established a more concrete framework for distinguishing between officers of the United States and mere employees. The Court deemed an officer to be "any appointee exercising significant authority pursuant to the laws of the United States."[40] These distinctions became central to the next major administrative law ruling twelve years later. This case, *Morrison v. Olson,* concerned the Ethics in Government Act of 1978, which

[37] Humphrey's Executor v. United States, 295 U.S. 602, 620 (1935).
[38] Justice Sutherland claimed that "the office of a postmaster is so essentially unlike the office now involved that the decision in the Myers case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power," *Id.* at 627.
[39] *Id.*
[40] Buckley v. Valeo, 424 U.S. 1, 126 (1976).

created the independent counsel.[41] Under this statute, the independent counsel was to be appointed by a panel of three judges and to be removed by the U.S. Attorney General only for "extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such special prosecutor's duties."[42] In May 1986, Alexia Morrison was appointed as independent counsel to investigate Theodore Olson, an attorney in the Office of Legal Counsel, for allegedly giving misleading testimony before a House Subcommittee. Olson challenged the constitutionality of the independent counsel statute. He claimed that federal prosecutors must be under the President's control, and thus any law that interferes with that power is unconstitutional.[43] The Supreme Court disagreed, ruling 7-1 that the independent counsel statute did not violate the doctrine of separation of powers. Because the independent counsel was subject to removal by the Attorney General, a higher executive branch official, and because the independent counsel had limited duties, jurisdiction, and tenure, the position was that of an inferior officer. With this determination, the independent counsel, as an inferior officer, was not in a direct relationship with the President that would permit at-will removal, and the statute under which Morrison was appointed was ruled constitutional. The manner of appointment set out by the independent counsel statute posed no constitutional issue because the appointments clause states that the "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the courts of Law, or in the Heads of Departments."[44] Morrison's appointment by the Special Division—an article III Court—met this standard. Again, this case

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[41] In the time between these cases, the Watergate scandal had transpired. As a result, a large portion of the public had lost faith in the government's ability to investigate itself. In an attempt to regain the public's trust, Congress passed the Ethics in Government Act of 1978 to provide for the appointment of a special prosecutor to handle specifically areas where the Department of Justice may have a conflict of interest. Pub. L. No. 95-521, 92 Stat. 1824.
[42] 28 U.S.C. § 596(a)(1) (1978).
[43] CROUCH, *supra* note 23, at 66.
[44] *Morrison v. Olson* clarified the difference between superior and inferior officers while affirming that Congress could authorize the judiciary to appoint officers of an inferior nature. Furthermore, Congress could limit the president's removal power over inferior officers by statute. *Morrison*, 487 U.S. at 654.

emphasized the Court's attitude towards presidential power, upholding its decision in *Humphrey's Executor* that it is not unlimited and that the President does not have total control over the executive branch.

The 1997 *Edmond v. United States* case is important because it clarified the *Morrison* framework of inferior and principal officers. The case affirmed that Department Heads, in this case the Secretary of Transportation, had the authority to appoint civilian judges to the Coast Guard Court of Criminal Appeals because these judges were inferior officers. In ruling, the Court clarified the definition of an inferior officer as one "whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate."[45]

In 2009, the Court ruled in *Free Enterprise Fund v. Public Company Accounting Oversight Board* that double-layer for-cause removal provisions are not constitutionally permissible. Although *Humphrey's Executor* found one layer of for-cause protections to be constitutionally permissible, here the Court said that a second level of for-cause insulation from the President is not permissible.[46] In this case, the Public Company Accounting Oversight Board (PCAOB) had a double-layer for-cause removal structure where members of the five-member board were removable only for cause by a group of SEC Commissioners, who themselves were removable only for cause by the President. The Court ruled that this added layer of tenure protection made it

[45] This is another example of the Court fashioning its own distinguishing standard for an inferior officer. The Appointments Clause simply stipulates that Congress may vest, by law, the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." Edmond v. United States, 520 U.S. 651, 659 (1997) (citing U.S. CONST. art. II, § 2).

[46] Previously, the courts upheld for-cause removal provisions in cases where "only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—" who decided whether an officer in question's conduct merited removal under the for-cause standards. Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477, 495 (2010).

so that the President was too far removed from the actions of the Board.[47] This case marked a shift by the Roberts Court from the *Humphrey's Executor* line of cases. Speaking for the majority, Chief Justice Roberts echoed the Unitary Executive Theory, asserting that the PCAOB provisions rendered the Board so sheltered as to inhibit the President from executing his Article II duties. He cited Madison's words to the First Congress: "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."[48] The Court concluded that the "growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."[49]

In 2020, the Roberts Court further expanded presidential removal authority in *Seila Law LLC v. Consumer Financial Protection Bureau* (CFPB). Litigant Seila Law argued that the structure of the CFPB, headed by a single director removable only for inefficiency, neglect, or malfeasance, violated the separation of powers doctrine. Chief Justice Roberts, writing for the majority, announced a new test for examining the constitutionality of for-cause removal protections for high-level agency officials. The test asks whether the removal provision in question applies to the head of a "single-head agency" or a group of officials in charge of a "multimember

[47] If this added layer did not exist, and the Commissioners were able to remove members of the Board at will, the President could then hold the Commissioners to account for their supervision of the Board as well as any other actions the Commission took. However, since the Commissioners could not remove Board members except for cause, the President

> [could not] hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does. The Commission is not responsible for the Board's actions but only for its determination of whether for-cause standards are met. Even if the President disagrees with this determination by the Commission, he is powerless to act unless the Commission's determination is so absurd as to warrant for-cause removal for "inefficiency, neglect of duty, or malfeasance in office."

Id. at 496.

[48] *Id.* at 492.

[49] *Id.*

expert agency."[50] This test marked a significant departure from the ideas espoused in *Humphrey's Executor,* which focused on an agency's function. Here, the majority shifted the law to focus on structure. To the majority, the Constitution outlines two methods for ensuring accountability within the branches: election and subdivision.[51] In the legislature, the framers relied on subdivision as a check, whereas the executive branch used the prerequisite of an election to ensure political accountability to the people. The Court then applied this analysis to the removal context, asserting that when Congress designs an agency, it should implement one of two formats: either it should be led by a single, politically accountable officer, or it should have the structural protections inherent in multi-member boards to prevent abuse of power. The Court ruled that, with respect to the CFPB, Congress failed to sufficiently comply with one of these methods by vesting "significant governmental power in the hands of a single individual accountable to no one."[52]

The majority distinguished the *Seila Law* case from earlier Court rulings. The Court explained that *Humphrey's Executor* did not apply to the case in *Seila Law* because of two main differences, either of which sufficed to place the CFPB agency outside the narrow *Humphrey's Executor* fact pattern. Firstly, the FTC, the agency in question in *Humphrey's Executor*, was headed by a multi-member board, in contrast to the single director appointed to the CFPB in *Seila Law*. Secondly, the FTC did not wield any executive power, whereas the CFPB in *Seila Law* wielded significant executive authority. The Court also distinguished this case from the ruling in *Morrison* because that case involved a statute creating an independent counsel, which relied on maintaining total independence from executive branch interference. Thus, vesting appointment

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[50] Lisa Schultz Bressman, *What Seila Law Says About Chief Justice Roberts' View of the Administrative State*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://lawreview.uchicago.edu/online-archive/what-seila-law-says-about-chief-justice-roberts-view-administrative-state; *see also* Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 197 (2020).
[51] *Seila Law*, 591 U.S. at 224.
[52] *Id.*

and removal power away from the President did not render the *Morrison* independent counsel statute unconstitutional. More importantly, the independent counsel in *Morrison* was an inferior officer while the CFPB Director in *Seila Law* was considered a principal officer. The majority stated that whereas the independent counsel in *Morrison* had narrow duties, jurisdiction, and tenure, constituting an inferior position, in this case, the duties of the CFPB director are "far from limited."[53]

Despite separating the Court's ruling in *Seila Law* from earlier case law, the Court did not totally disavow the functional considerations present in *Humphrey's Executor.* However, whereas *Humphrey's Executor* focused largely on the function of an agency as the determining factor for for-cause or at-will removal provisions, the Court added its own gloss to *Humphrey's Executor*. The Court indicated that the multi-member leadership structure of the FTC was imperative, despite the fact that "the Court mentioned multiple agency heads only to describe the agency" and there is no indication this structure was important to the decision.[54] However, under this framework, the Court stated that its ruling in *Seila Law* simply follows precedent by stating that the President has absolute removal authority over principal officers except in cases involving multiheaded agencies.

This is the first time the Court has drawn a distinction of this kind between agencies headed by multiple members and those headed by a single director. A single director structure for an agency with significant executive power is now a sufficient condition for at-will removal, and Congress may not impose for-cause provisions on agencies of this kind.[55] This raises the question

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[53] *Id.* at 219.

[54] Jack M. Beermann, *Seila Law: Is There a There There?*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://lawreview.uchicago.edu/online-archive/seila-law-there-there-there.

[55] Richard L. Revesz, *Toward a 'Unitary Executive' Vision of Article II?*, THE REGULATORY REVIEW (Aug. 5, 2020), https://www.theregreview.org/2020/08/05/revesz-toward-unitary-executive-vision-article-ii/; *see also* Bressman, *supra* note 50. A less critical analysis of Roberts' opinion would be to conclude that *Seila Law* simply shows that the Chief Justice holds the view of the administrative state that agency power must be effectively checked to prevent abuse of power and protect individual liberty.

of what other distinctions the Court might make as it evaluates agencies in future cases. What are the agency characteristics that might be enough to place the agency in question outside the scope of Congressional influence in removal provisions? What distinctions will be sufficient to warrant presidential removal of agency officials for any reason at any time? Would these considerations pertain to an agency's scope of power, the type of power, or even the number of employees at an agency? The *Seila Law* opinion could prove extremely consequential because it could make scores of agencies vulnerable to litigation, while providing little guidance about what the Court will consider an important distinction.

In writing for the majority in *Seila Law* and *Free Enterprise*, Roberts indicated a modest sympathy for a unitary executive, but various other members of the Court have been more explicit about their support of a stronger version of a Unitary Executive Theory. Justice Clarence Thomas, joined by Justice Samuel Alito, issued a concurring opinion in *Seila Law*, agreeing with the judgment but adding, "[w]ith today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*. In a future case, I would repudiate what is left of this erroneous precedent."[56] He decried *Humphrey's Executor* as a "fundamental departure from our constitutional structure with nothing more than handwaving and obfuscating phrases such as 'quasi-legislative' and 'quasi-judicial.'"[57] Furthermore, Thomas cited Justice Scalia's dissent in *Morrison*, that *Humphrey's Executor* is "devoid of textual or historical precedent for the novel principle it set forth."[58] In 2018, current Supreme Court Justice Brett Kavanaugh, then on the U.S. Court of Appeals for the District of Columbia Circuit, authored a vigorous dissent in *PHH Corp. v. Consumer Fin. Prot. Bureau*, also citing Scalia's *Morrison* dissent and expressing criticism for

[56] *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring).
[57] *Seila Law*, 591 U.S. at 246 (Thomas, J., concurring).
[58] *Id.* (citing *Morrison*, 487 U.S. at 726). While Scalia was the lone dissent in that case, his views seem to now be shared by several members of today's Court.

the constitutional grounding of the modern regulatory state. He espoused the Unitary Executive Theory while condemning independent agencies as "a headless fourth branch of the U.S. Government."[59] It is challenging to gauge the reasoning of the members of the Court who have not been so explicit, but some have leaned towards presidential deference in other cases.[60] Others have made their disapproval plain. In her dissent in *Seila Law,* Justice Kagan, joined by Justice Sotomayor, wrote that for-cause removal protections provide "a measure of independence from political pressure" and that "the text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance—all stand against the majority's opinion."[61]

The 2021 opinion, *Collins v. Yellen,* delivered by Justice Alito, largely confirmed the ruling in *Seila Law*. Again, the case dealt with an agency, the Federal Housing Finance Agency (FHFA), headed by a single director with for-cause protections. Defendants in *Collins* argued that the FHFA director administered fewer statutes and regulated fewer individuals compared to the CFPB director in *Seila Law*. Thus, perhaps the President did not need at-will removal power because the director wielded less significant power. The majority disagreed, stating "Courts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies, and we do not think that the constitutionality of removal restrictions hinges on such an inquiry."[62] Thus, they determined that *any* amount of executive power possessed by a single director would warrant at-will removal, an even greater step towards total presidential control of this agency and

[59] Kavanaugh continues that agencies "hold enormous power over the economic and social life of the United States," so without Presidential supervision they "pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." PHH Corp. v. CFPB, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).
[60] *See* Trump v. Hawaii, 585 U.S. 667 (2018); Trump v. United States, 603 U.S. 593 (2024).
[61] *Seila Law*, 591 U.S. at 264.
[62] Collins v. Yellen, 594 U.S. 220, 253 (2021).

of the executive branch than found in *Seila Law*, which seemed to only apply to agencies wielding significant executive power.

In early 2025, President Trump fired Cathy Harris, a member of the Merit Systems Protection Board, and Gwynne Wilcox, a member of the National Labor Relations Board. Although both were subject to removal only for "neglect of duty or malfeasance," both were fired without cause.[63] Although the District Court ordered reinstatement of the two officers, the Supreme Court, in *Trump v. Wilcox*, granted the Trump administration's application to stay the lower court's order.[64] Solicitor General John Sauer argued on behalf of President Trump that neither agency falls into the narrow exception outlined in *Humphrey's Executor*. According to Sauer, that case applies only to multimember boards executing no executive authority, whereas the agencies in question here wield "substantial executive authority."[65] The Court found "that the Government is likely to show that both the NLRB and MSPB exercise considerable executive power."[66] Although the Court has not ruled definitively on these matters, if the Court applies the holdings in *Seila Law* and *Collins*, these removal restrictions would likely intrude upon the executive's authority and be rendered unlawful.[67]

Most recently, on July 23, 2025, the Supreme Court issued an order in *Trump v. Boyle* that allowed President Trump to fire three members of the five-member Consumer Product Safety Commission. Even though these members were appointed by the President, confirmed by the

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[63] 5 U.S.C. § 1202(d); 29 U.S.C. § 153(a).
[64] Trump v. Wilcox, 145 S. Ct. 1415 (2025). In this unsigned order, the Court said its decision "reflects our judgment that the Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty." *Id.* at 1416.
[65] Application to Stay at 15, Trump v. Wilcox, 145 S. Ct. 1415 (2025) (No. 24A996).
[66] *Wilcox*, 145 S. Ct. at 1415.
[67] Shaun Boedicker et al., *The Fed Can Stay, but the Rest of You Have to Go: Why a Temporary Supreme Court Decision Might Signal the End Is Near for Independent Agencies*, STEPTOE (May 29, 2025), https://www.steptoe.com/en/news-publications/the-fed-can-stay-but-the-rest-of-you-have-to-go-why-a-temporary-supreme-court-decision-might-signal-the-end-is-near-for-independent-agencies.html.

Senate, and subject to for-cause removal provisions, they were removed without cause. While this unsigned order is not the final verdict because the case is pending in the Court of Appeals for the Fourth Circuit, the interim order states that the CPSC commissioners will not be reinstated. In the cases of Harris and Wilcox, the Court based their reason for granting the stays in their "judgment that the Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty."[68] The *Boyle* order cites this reasoning exactly, indicating they will treat the case similarly in their analysis.

These rulings appear to effectively confine *Humphrey's Executor* to the facts of its case; however, lawyers for the officers who have been fired insist that *Humphrey's Executor* is good law unless and until it is overturned. This may be imminent. Indeed, Justice Kavanaugh's concurrence in *Boyle* declares that a stay of the kind implemented here is advisable "when an emergency application turns on whether this Court will narrow or overrule a precedent, and there is at least a fair prospect (not certainty, but at least some reasonable prospect) that we will do so."[69] If the Court does overturn *Humphrey's Executor,* it would mark a decisive step towards deference toward presidential removal authority in the executive branch, and it would demonstrate the degree of sympathy on the Court for the Unitary Executive Theory.

V. Understanding Insulation and Accountability

A central tension regarding removal power lies between the degree of leadership insulation *from* the President and the extent of leadership accountability *to* the President. The insulation aspect turns on the idea that agencies need a degree of autonomy to allow their leaders to make informed decisions away from political pressure, which in turn fosters expertise and continuity

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[68] *Wilcox*, 145 S. Ct. at 1415; Trump v. Boyle, 145 S. Ct. 2653 (2025).
[69] *Boyle*, 145 S. Ct. at 2654 (Kavanaugh, J., concurring).

across administrations.[70] The Court has previously recognized that some positions within the executive branch require more of this insulated autonomy than others, and has consequently granted its approval for for-cause removal protections for agency officials in agencies such as the Federal Reserve, the Federal Trade Commission, and the Federal Communications Commission. Still, these rulings have not stopped President Trump's repeated calls for the removal of Jerome H. Powell, head of the Federal Reserve, without evidence of cause.[71]

Conversely, proponents of the Unitary Executive Theory emphasize that accountability is needed because executive agencies operate as extensions of the President himself. The use of the removal power permits the "President to take responsibility for the conduct of the executive branch." If the President is not fully in charge of executive officials who execute the laws, he cannot wholly execute his duty.[72] The President, as the only executive official elected by the people, is responsible for holding other executive officials to account, a duty he cannot fulfill if officers are insulated from removal. Justice Roberts expressed support for this theory in *Free Enterprise Fund*, writing,

> Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people.[73]

In practice, a government run under the Unitary Executive framework presents its own dangers. It risks all agency positions becoming less meritocratic: valuing loyalty over expertise

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[70] The ideas of insulation were expounded upon in the opinions of *Humphrey's Executor* and *Morrison*.
[71] On August 25, 2025, in an unprecedented step, President Trump fired Lisa Cook, one of the Federal Reserve Governors. He claims he meets the for-cause standard; however, she is suing him claiming that he has not. *See* Cook v. Trump, 804 F. Supp. 3d 14 (D.D.C. 2025).
[72] *See Myers*, 272 U.S. at 52.
[73] *Free Enterprise Fund,* 561 U.S. at 499.

and allowing partisan values to influence all executive agencies. Agencies carry out duties that affect all realms of life, including areas that have been traditionally kept partially insulated, such as labor relations, interest rates, and elements of trade and communications. If agency personnel decisions become more political, then the government workforce would be more likely to turn over with each presidential administration, hindering stability and fostering institutional amnesia.

Total accountability and insulation are inherently at odds with each other. Based on the Roberts Court's decisions and orders discussed above, a majority of the Court prefers accountability over insulation, and, by extension, favors a stronger version of the Unitary Executive Theory. This shift marks a larger move by the Court towards upholding greater exercises of presidential power. Will such deference mean that the Court will permit the President's assertion of control over the Smithsonian Institution and into the spheres of art and culture? The question consequently evolves: how far will the President go and how far will the Court let him? President Trump has demonstrated no qualms about targeting agencies that other presidents have traditionally left to operate independently. In the case of the Smithsonian, the Court has never ruled on whether the Institution is an executive agency, or one of a *sui generis* nature that is outside of the scope of presidential power over traditional agencies. Due to Director Kim Sajet's resignation from the National Portrait Gallery, this issue will not rise to the Supreme Court at this time, but if the Court had had the opportunity to legitimize President Trump's removal of Sajet, he would have been granted legal authority to exert greater influence over the Smithsonian, posing a threat to its autonomy and freedom.

VI. The Smithsonian Institution

A. The Smithsonian Board and Secretary

Established in 1846 at the bequest of James Smithson, the Smithsonian Institution promotes the "increase and diffusion of knowledge."[74] Congress established the Smithsonian as a trust instrumentality to be led by a Board of Regents called the Regents of the Smithsonian Institution.[75] Seventeen members make up the Board, including the Vice President and the Chief Justice of the United States Supreme Court, who serve as part of their official duties. The Speaker of the House appoints three members of the House of Representatives, and the President pro tempore appoints three Senators. These members' terms on the Board coincide with their terms in Congress, and if reelected to their positions, they may also be reelected by the Board. Nine civilian members, "two of whom shall be resident in the city of Washington, and seven of whom shall be inhabitants of some State, but no two of them of the same State," are recommended by the Board and appointed by joint resolution of Congress to six-year terms.[76] The President of the United States then signs these civilian appointment resolutions into law. The Board is central to the governance of the Institution and is responsible for its strategic planning and direction. The Board also appoints the Secretary of the Smithsonian, who is subject to Board removal whenever "in their judgment, the interests of the institution require such removal."[77] Despite this level of detail for the appointment and election of the Board and the Secretary, the statute does not provide comparable details for the management of the Smithsonian's museums, or for the removal of the institutional officers.

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[74] *A Brief History of the Smithsonian Institution*, SMITHSONIAN INSTITUTION (Apr. 14, 2021), https://www.si.edu/newsdesk/factsheets/brief-history-smithsonian-institution.
[75] 20 U.S.C. § 42.
[76] *Id.*
[77] 20 U.S.C. § 48.

The appointment and removal of museum directors has traditionally been under the discretion of the Secretary of the Smithsonian; for example, Secretary G. Wayne Clough appointed Kim Sajet to be the director of the National Portrait Gallery in February 2013. While precedent and tradition are not in themselves binding in law, the Secretary has handled all director removals in the past, and this power is largely understood throughout the Institution to be a part of their position. The bylaws are largely silent on the removal process. However, the fact that the Secretary wields appointment power would suggest that it is not the role of the President of the United States to be in charge of removals. Chief Justice Roberts indicated as much in the *Free Enterprise Fund* opinion, writing, "*Humphrey's Executor* did not address the removal of inferior officers, whose appointment Congress may vest in heads of departments. If Congress does so, it is ordinarily the department head, rather than the President, who enjoys the power of removal."[78]

B. National Portrait Gallery

Title 20 of the U.S. Code establishes the Smithsonian Institution, including its museums and art galleries, such as the National Portrait Gallery (NPG or Gallery). Section 75b(b) states that the Gallery "shall function as a free public museum for the exhibition and study of portraiture and statuary depicting men and women who have made significant contributions to the history, development, and culture of the people of the United States" and the artists "who created such portraiture and statuary."[79] Section 75f provides that the Gallery is to be headed by a single

[78] *Free Enterprise Fund,* 561 U.S. at 493.

[79] According to the National Portrait Gallery (NPG) website, their mission is to "tell the story of America by portraying the people who shape the nation's history, development, and culture." The NPG possesses the "nation's only complete collection of presidential portraits outside the White House, and the "America's Presidents" exhibition lies at the heart of the Portrait Gallery's mission to tell the country's history through the individuals who have shaped it." *About Us*, NATIONAL PORTRAIT GALLERY, SMITHSONIAN, https://npg.si.edu/about-us; 20 U.S.C. § 75b (explaining the functions of the National Portrait Gallery).

director, for whom the Smithsonian Board of Regents "may appoint and fix the compensation and duties."[80]

The legislative language is brief regarding the Gallery's functions, and there is no language pertaining to the removal of the Gallery's director. The director reports to the Smithsonian's Secretary and the Board of Regents; this Board has been responsible for all appointments and removals of directors of the Gallery and other Smithsonian institutions in the past. The Smithsonian has not been considered as an executive agency in the traditional sense. 5 U.S.C. § 105 defines executive agencies to include executive departments, government corporations, and independent agencies. Although there is no formal definition of powers, executive agencies are typically responsible for implementing laws, managing public services, and enforcing regulations.[81] It is unclear whether or not the President wields authority over or influence within the Smithsonian. Although the President has traditionally refrained from engaging in personnel decisions at the Smithsonian, this does not necessarily mean he is powerless to do so.

No one has previously questioned or objected to the hiring and firing process that the Smithsonian follows. Indeed, it came as an utter shock to the members of the Board that President Trump would try to interfere in practices that have long operated independently, practices that have never raised conflict or objections. Senator Gary Peters (D-Michigan), a member of the Board, disputed Trump's claim that he had "fired" Sajet, asserting to the Washington Post that "Clearly, the president has no authority whatsoever to fire her… The Smithsonian is an independent institution, and the director of the Smithsonian is the one who she reports to, and that's

[80] 20 U.S.C. § 75f(a).
[81] 5 U.S.C. § 105.

the person who makes the decision as to hiring and firing of individuals."[82] The Board of Regents also issued a statement following Trump's Truth Social post, affirming "all personnel decisions are made by and subject to the direction of the secretary, with oversight by the board."[83]

With respect to Kim Sajet, the issue became technically moot when she chose to resign her position, but the issue remains important for legal analysis in light of the Trump Administration's efforts to extend executive power in new directions. Using the facts of Sajet's case, one can develop arguments for and against the Smithsonian's position that the President does not have and should not have power over the Smithsonian personnel. Those arguments can then be reviewed in the context of the case law and the indications of the Roberts Court.

C. The Smithsonian Board's Potential Argument

Recognizing that the current Court appears to be sympathetic to a strong version of the Unitary Executive Theory, the Smithsonian Institution could argue that, properly understood, the Unitary Executive Theory is centrally a view about the President's power *within* or *over* the Executive Branch (i.e., a view about the proper construction of Article II) and not a license to expand the power of the Executive Branch or the President over the other branches or other spheres of government or society. Consequently, the Smithsonian would argue that the Court should not extend its line of removal cases to the Smithsonian or the National Portrait Gallery. This approach would allow this case to align with the Court's rulings in support of a strong executive because it simply places the Smithsonian outside of the executive branch altogether.

[82] Maura Judkis, Manuel Roig-Franzia & Meryl Kornfield, *Defying Trump, National Portrait Gallery Director Kim Sajet Is Still at Work*, WASHINGTON POST (June 4, 2025), https://www.washingtonpost.com/entertainment/art/2025/06/04/national-portrait-gallery-kim-sajet-trump/.
[83] Jeffrey Brown, Anne Azzi Davenport & Simon Epstein, *Smithsonian Board Rejects Trump's Attempt to Fire Top Leader*, PBS NEWS (June 10, 2025), https://www.pbs.org/newshour/show/smithsonian-board-rejects-trumps-attempt-to-fire-top-leader.

There are various arguments to be made against Trump's claims of authority over the Smithsonian and its appointed directors. The Smithsonian Institution could argue that the Smithsonian is not a regular executive agency and that it possesses distinct characteristics that render it *sui generis* and outside the scope of direct Presidential influence. This would mean that the precedents outlined in the Court's removal cases do not even apply to the Institution. They could point to the fact that the Smithsonian exercises no regulatory authority over the public. Furthermore, the Smithsonian is not subject to the Freedom of Information Act and the Administrative Procedure Act in the way traditional executive agencies are. The fact that Congress established the Institution as a trust instrumentality rather than an independent agency signifies that it intended the Smithsonian to operate distinctly. Indeed, the White House acknowledged its unique nature, one that some are unwilling to broadly define. Deputy Assistant Attorney General Douglas Kmiec wrote in a 1988 Office of Legal Counsel memo that "The Smithsonian Institution has long been regarded as having a special relationship to the federal government."[84] He conceded that the "unique nature of the Smithsonian counsels reluctance toward a sweeping declaration of the Smithsonian's status within the federal government" and "counsels in favor of determining the status of the Smithsonian on a statute-by-statute basis."[85] Kmiec's memo cites a letter from Peter G. Powers, General Counsel for the Smithsonian Institution, that states the Smithsonian is "not a government agency in any ordinary use of the term, but a charitable trust for the benefit of humankind whose trustee is the United States. As such, it cannot carry out the functions of any of the three branches of government, but must be devoted exclusively to its educational and scientific

[84] Douglas W. Kmiec, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, *The Status of the Smithsonian Institution Under the Federal Property and Administrative Services Act*, Memorandum Opinion for the General Counsel, Gen. Servs. Admin., 12 Op. O.L.C. 122, 123 (1988), https://www.justice.gov/file/150986/dl?inline=.

[85] Kmiec, *Status of the Smithsonian Institution*, *supra* note 84, at 124.

purposes, 'for the increase and diffusion of knowledge among men.'"[86] The fact that "the government has chosen to support the trust with substantial appropriations and Federal property," does not alter the fact that the Institution is "separate from the three main branches of government." Chief Justice Taft, speaking as Chancellor of the Smithsonian Board of Regents, also asserted "that the Smithsonian Institution is not, and never has been considered a government bureau."[87] Under this view, in which the Institution was intended to retain higher degrees of independence and autonomy, the President would not possess the same authority regarding the Smithsonian as he would with traditional agencies. Furthermore, the Smithsonian could point to the composition of the Board of Regents as providing adequate opportunity for partisan or political influence over both the Secretary's selection of the Gallery's director and over the Secretary's decision to fire such a person in favor of selecting another. The Vice President sits on the Board, ensuring that the White House's agenda is considered as part of the Board's deliberation over personnel matters. The six members of Congress who sit on the Board are also able to bring partisan influence to bear on Board deliberations.

Despite these channels for influence, this unconventional Board and Secretary structure is intentional and permits a degree of independence. The function of the agency is central to its structure, and its insulation is necessary to protect institutions of art and culture. These areas are of particular concern because of their deeply rooted interest in remaining independent and autonomous.[88] The case of Kim Sajet and the National Portrait Gallery is part of a larger mission

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[86] Peter G. Powers, Gen. Counsel, Smithsonian Inst., Letter to Douglas W. Kmiec, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, at 1 (Apr. 10, 1987) (quoting 20 U.S.C. § 41) ("Powers Letter").

[87] Kmiec, *The Status of the Smithsonian*, *supra* note 84, at 123 (citing William H. Taft, *The Smithsonian Institution—Parent of American Science* 16, quoted in Memorandum from Leon Ulman, Dep't Assistant Att'y Gen, Office of Legal Counsel, U.S. Dep't of Justice to Peter G. Powers, Gen. Counsel, Smithsonian Inst. at 8 (Feb. 19, 1976) ("Ulman Memorandum")).

[88] Lisa Strong, director of the Art and Museum Studies MA program at Georgetown University, expressed her concern that if the president were to assume such great power over directors of U.S. museums, they "just become political arms instead of independent institutions that share America's history." Elizabeth Blair, *President Trump*

by President Trump and his team to expand his influence in a variety of spheres, including art and culture.[89] Yet, for decades throughout liberal democracies, there has been an emphasis on maintaining independent and autonomous institutions in the realms of art, sciences, and culture.[90] The Smithsonian could argue that this should not change now.

Justice Black, writing in *Youngstown Sheet & Tube Co. v. Sawyer,* declared that the President's power to act "must stem either from an act of Congress or from the Constitution itself."[91] This would seemingly reject the existence of an inherent presidential power to control the entire executive branch. However, the fact that challenges to the Smithsonian's autonomy are unprecedented, and that the governing statutes lack specificity, could help the case for President Trump. Justice Jackson wrote a concurrence in Youngstown to highlight that without "a congressional grant or denial of authority," the President operates in an uncertain zone of twilight, where his powers and Congress's powers may be concurrent.[92] However, when the President "takes measures incompatible with the expressed or implied will of Congress, his power is at its

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Said He Fired a Smithsonian Museum Director. Can He Do That?, NPR (June 9, 2025), https://www.npr.org/2025/06/09/nx-s1-5424548/national-portrait-gallery-kim-sajet-trump.

[89] Her departure is part of Trump's larger mission to shape cultural institutions to his desire. Earlier in the year, the President permitted the Department of Government Efficiency (DOGE) to make drastic budgetary cuts to the National Endowment for the Arts and Humanities. In February, he broke with decades of tradition by dismantling the bipartisan, sitting Board of Trustees of the Kennedy Center and installing himself as Chairman while denouncing the Center for having become "too woke." On March 27, Trump issued an executive order entitled "Restoring Truth and Sanity to American History," dispatching Vice President JD Vance to "remove improper ideology" from the Smithsonian museums. He calls for the erasure of all "divisive narratives," of which he identifies systemic racism as one. Trump also instructed the removal of all "race-centered ideologies," which he criticizes as an effort to marginalize white people and "rewrite history," as well as "anything recognizing the achievements of trans people." Trump's firing of Sajet marks his intent to carry out this EO, citing her partisanship and commitment to DEI as inappropriate. Giselle Ruhiyyih Ewing, *Trump Says He's Fired National Portrait Gallery Director Amid Washington Arts Scene Takeover*, POLITICO (May 30, 2025), https://www.politico.com/news/2025/05/30/trump-portrait-gallery-smithsonian-00377156.

[90] Part of this tradition arose as a result of the abhorrent tactics employed by authoritarian and totalitarian leaders in their consolidation of power. The Nazis mounted targeted efforts to remove art that did not promote their ideology. Loyalists were installed to head museums and oversee the display of "acceptable works." Art became a means to spread propaganda, tailor a particular version of history, and reinforce their control over German society. Similarly, in Mao Zedong's China, art became a tool for promoting communist ideology, with organizations established to ensure that artists' works conformed to the party line.

[91] 343 U.S. 579, 585 (1952).

[92] *Id.* at 637.

lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[93] If Congress had included particular removal provisions for Smithsonian directors, this would constitute an expressed will, and the President could rely only on his constitutional powers. He may still argue the Constitution affords him such authority, but he could not point to a zone of twilight that may grant him greater power. With Sajet's resignation, these arguments on behalf of the Smithsonian remain hypothetical, but they could become relevant in the case of another director who chooses to remain after being fired by the President. The Court cannot issue a ruling unless a case is brought, and Trump's actions to remove Sajet have gone legally unchallenged because she decided to resign, rather than to remain and fight for the Board's authority over any removal. This President has shown that he does not feel constrained by norms, and therefore, Congress would have to provide a real check by turning these norms into law. In the absence of such legislative constraints, the president's claim to power is heightened.

D. The Risks of Challenging: President Trump's Potential Argument

In outlining potential arguments the Smithsonian could have brought to challenge Sajet's removal, it is equally important to consider the risks to the Smithsonian of bringing such a challenge in the first place. If the Court upholds President Trump's removal of a director, he now has legal legitimacy buttressing his actions. No longer operating in a "zone of twilight," he would have the legally reviewed and expressed ruling placing his power "at its maximum."[94] President Trump could assert his power to fire Smithsonian directors in a strong interpretation of the Unitary Executive Theory. Under this argument, the Smithsonian would be viewed as an executive agency, and the museum directors would be executive officials. According to Trump, the President is the head of the executive branch, and the President has the power to remove executive officials for

[93] *Id.*
[94] *Youngstown*, 343 U.S. at 635.

any reason.[95] To date, the Court has not adopted such an expansive view, but a majority of the current Court is sympathetic to the Unitary Executive Theory.

A case such as this one would raise other arguments before the Court about the nature of the Smithsonian Institution and whether or not it is an agency. The Court has never ruled definitively on this question, and a ruling that limits the Smithsonian to agency status could jeopardize its independence. Given this current Court's trend towards deferring to greater presidential authority, the President may find a majority within the six Republican appointees by challenging the entire structure of the Smithsonian, that of the Board of Regents, the Secretary, and the Directors.

The Trump Administration could make an argument that the current structure of the Board renders it wholly unaccountable to the executive branch, despite the fact that it wields far-reaching authority over matters that the executive branch believes it should control. The Administration would argue that the Board is essentially completely insulated, as the Chief Justice, Vice President, and members of Congress on the Board serve the duration of their terms in office as established in the governing statute. Therefore, unless they are impeached in their main line of duty, they will remain on the Board. Vacancies on the Board from death, resignation, or otherwise "shall be filled as vacancies in committees are filled."[96] The civilian members serve terms of six years, and there are no specifications about their removal, only that vacancies arising from identical circumstances will be filled by joint resolution of Congress. This insulated Board is responsible for appointing the Secretary who exercises broad influence and authority over all of the Smithsonian departments,

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[95] The idea goes that the nation is formed on ideas of popular sovereignty, and our officials must be accountable to the people. As *Seila Law* indicates, if the President has no capacity to reach the official, they are essentially operating unchecked, placing executive power "in the hands of a single individual accountable to no one." *Seila Law*, 591 U.S. at 224.

[96] 20 U.S.C. § 43.

including the directors who lead them. The directors, in turn, are given wide latitude and discretion in executing the mission statement of the department as stipulated in the statute. As seen in the NPG's governing statute, the mission is vague, affording great interpretive power to the director. The actions of the directors reach large, national, and international audiences. The departments cover a wide variety of subjects and fields, and the directors put forth exhibits and works that reflect particular choices, views, and agendas. Under this possible line of reasoning by the Trump Administration, the Smithsonian directors would be seen as speaking for and as the Government. The relevant case law in *Myers* and *Humphrey's Executor* indicated that the purpose and function of the agency impact the President's need for removal power over the officials. Trump could argue that directors of Smithsonian museums clearly do not serve legislative or judicial functions in the way of the FTC director in *Humphrey's Executor*. Rather, the President could say that the directors of the Smithsonian function in an executive manner, a characteristic *Myers* says warrants at-will presidential removal, by leading departments created by Congress, carrying out statutes created by Congress, and performing their duties using federal funding in the same manner as other agency officials. Despite these executive agency characteristics, the President has no means of influence or measures to ensure accountability at the Smithsonian Institution. The directors are only accountable to the Secretary, and the Secretary is accountable to the Board, and removable by the Board "whenever, in their judgment, the interests of the institution require such removal."[97] Thanks to the specific legislative language creating the Board, the President is powerless to reach the Board, the Secretary, or the department and museum directors.

Furthermore, the Trump Administration could argue that the Smithsonian treats the Secretary as the head of the Institution. This means the Smithsonian is headed by a single director

[97] 20 U.S.C. § 48.

and *Seila Law* and *Collins* precedent dictate that this officer must be removable at-will by the President. If President Trump were to attempt to fire the Secretary of the Smithsonian, it seems likely that the Court would apply these legal tests to that executive action and would rule in favor of the President assuming they regarded the Institution as an agency, but in this instance he attempted to fire the director of the Portrait Gallery, a subordinate position that arguably should remain insulated. To conclude, the President lacks influence or removal authority at any level of the Smithsonian, despite the fact that these officers are endowed with responsibilities and capabilities of an executive nature. The Administration could argue that these structural elements of the Smithsonian's governing statute, taken as a whole, are unconstitutional.

E. The Smithsonian: "Special" Status or Government Agency?

When considering the question of the Smithsonian's agency status, it is helpful to view the Institution in light of the Court's past statements regarding the Federal Reserve, an institution that the Court found to be exceptional, warranting unique provisions. Some legal scholars suggest the Smithsonian is similarly special, a claim that could support the Smithsonian's arguments for independence and insulation from presidential action.

However, the Trump Administration could concede that the Fed is unique in terms of agency status while arguing that the Smithsonian lacks such a distinction. The Supreme Court noted that the Fed "follows in the distinct historical tradition of the First and Second Banks of the United States."[98] Its insulated status reflects sentiments held by the founders. President Trump could argue that the Smithsonian has no such roots in case law or legislative history. Furthermore, he could argue that people understand that the actions taken by the Fed are separate from those of

[98] In *Wilcox v. Trump*, plaintiffs argued that upholding Trump's removal of a member of the National Labor Relations Board could undermine the legal protections for officers at the Federal Reserve (the Fed). The Court disagreed, asserting that "the Federal Reserve is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States." *Wilcox*, 145 S. Ct. at 1415.

the political branches of the government. The Trump team could say that the Smithsonian, in a way quite unlike the Fed, speaks as and for the government by offering displays, exhibitions, or publications that express a certain viewpoint. Indeed, Federal Reserve Chairman Powell has repeatedly affirmed that he is apolitical. Although the Fed's policies have significant effects, the duties of the Fed are narrowly focused on monetary policy. Using this line of reasoning, the Trump Administration could argue that the Fed does not have the Smithsonian's capacity to speak for the government when it presents a specific worldview or partisan viewpoint.

The Trump Administration could argue that the Smithsonian Institution is understood by the public to be an extension of the federal government, and that when individuals go to Smithsonian entities or read Smithsonian works, they understand themselves to be attending exhibitions or reading materials put out by or approved by the government. Using this reasoning, visitors to the Smithsonian would view exhibitions as public statements, as opposed to interpretations or viewpoints of individual museum employees or decision-makers. The museums are free, and the American public views the Smithsonian as linked to the federal government, regardless of definitional differences between agencies and trust instrumentalities. The President has an interest in correctly representing his agenda, and the current structure gives him no influence to do so.

Applying this theory to the case at hand, President Trump could argue that Kim Sajet, in her role as NPG Director, represented the government when she made intentional choices for the Gallery about the works she displayed and the captions she chose to print, and when she made public statements that did not support the Administration's policies. For instance, the caption accompanying the photograph of President Trump, curated by Sajet, reads "Impeached twice, on charges of abuse of power and incitement of insurrection after supporters attacked the US Capitol on January 6, 2021, he was acquitted by the Senate in both trials. After losing to Joe Biden in 2020, Trump mounted a historic comeback in the 2024 election."[99] This content, while accurate, represents a curatorial choice that Trump could argue was made on behalf of the Smithsonian, arguably an executive agency of the government, without Trump having the ability to control the director in her curatorial role. The Trump Administration could also point to public statements made by Director Sajet that indicate the political nature of her role at the Smithsonian, both in terms of specific policy choices for exhibitions and with respect to electoral politics in general. Speaking at the NPG during the *Richardson Symposium: Racial Masquerade in American Art and Culture*, Sajet said most of her time was spent on "identity politics," including the example of "outlining why we show the portrait of Sylvia Rivera, the transgender activist in the galleries."[100] She declared the 2024 election to be "the most uncivil, mistrustful, racially insensitive, sexually exploitative, factually untruthful, digitally manipulated, secretive and inflammatory election of the modern era."[101] In both cases, Sajet's messages indicated her lack of alignment with the Trump Administration's policies and preferences. If the Smithsonian Institution is viewed as an executive agency, or even only an extension of the federal government, it is easy to understand why the President would need some form of influence over these choices and actions. However, the Trump Administration would have to argue that the Smithsonian's Board and Secretary structure is insufficient for this purpose, and that the President ought to be able to fire a museum director directly while bypassing the existing Smithsonian structure.

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[99] Greg Wehner, *Donald Trump Fires National Portrait Gallery Director for Being 'Strong Supporter' of DEI*, FOX NEWS (May 30, 2025), https://www.foxnews.com/politics/donald-trump-fires-national-portrait-gallery-director-strong-supporter-dei.
[100] *Id.*
[101] *Id.*

President Trump could further argue that even if the Court is unwilling to view the entire Smithsonian as an executive agency, instead adopting the case-by-case approach outlined in Assistant Attorney General Kmiec's OLC memo, there are compelling reasons to treat the appointment and removal processes of the Smithsonian personnel in the same way as other agencies. This need not mean the Smithsonian adopts the same APA and Freedom of Information rules other agencies follow, but in the realm of personnel, it must be treated as a regular agency.

F. President Trump's Potential Argument: The Unconstitutionality of the Smithsonian's Appointment Process

The greatest risk to the Smithsonian's governing statute as written comes from the appointment process, which could fail the tests set out under the law for the identification of and control over officers of executive agencies. The Trump Administration would have a number of arguments that could render the statute unconstitutional, regardless of which position is under threat of removal. Assuming the Smithsonian is considered to be an agency of the executive branch, the President could argue that the appointment process is inconsistent with the law. Using this reasoning, he could argue that the members of the Board, the Secretary, and the various Smithsonian directors are not simply federal employees, but instead are officers of the agency. This would trigger the legal tests for principal and inferior officers.

The Court's decision in *Buckley* establishes an officer (compared to an employee) to be one who "exercise[s] significant authority pursuant to the laws of the United States."[102] Starting at the lowest level, Trump's possible argument assumes that directors of the Smithsonian's museums exert this type of significant authority. If the Smithsonian museum directors are considered to have the requisite authority to be officers, then, pursuant to the appointments clause and exemplified in

[102] *Buckley*, 424 U.S. at 126.

Morrison and *Edmond*, they must have been appointed by the President, the members of the federal judiciary, or the heads of departments.[103] This appointment process would not meet the legal standards for officers under the law because they are appointed and removed by the Secretary of the Smithsonian, which does not fall into one of the three accepted categories for appointment of officers.

The only way that the Smithsonian statute would be constitutional would be if the Smithsonian Secretary, the person who appointed the museum directors, fell into one of these three categories, which in this case could only be the heads of departments group. However, this presents a new problem for the statute because, under the Appointments Clause of the Constitution, department heads are considered to be principal officers, who must be appointed by the President and confirmed by the Senate. There is ample evidence of the authority wielded by the Smithsonian Secretary, who "oversees 21 museums, 21 libraries, the National Zoo, numerous research centers, and several education units and centers."[104] The Secretary is responsible for the direction and vision of the entire umbrella organization and certainly fits the mold of at least an inferior officer, using the authority test.[105] However, the law under *Morrison* and *Edmond* says that inferior officers must be appointed in a certain manner, and the statute, by directing the appointment of the Secretary by the Board of Regents, fails this constitutional test.

Turning to the Smithsonian's Board, President Trump could assert that the Smithsonian's statute could only be found constitutional if the members of the Board of Regents were considered the "head of the department," one of the three acceptable categories that would make them principal officers. This would also render them eligible to appoint inferior officers. In order to

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[103] U.S. CONST. art. II, § 2, cl. 2.
[104] *Secretary Lonnie G. Bunch III*, SMITHSONIAN INSTITUTION, https://www.si.edu/about/secretary-lonnie-bunch.
[105] ERIC R. PETERSON, CONG. RSCH. SERV., IF12718, SMITHSONIAN INSTITUTION: BACKGROUND, ENTITIES, AND LEADERSHIP (2024), https://www.congress.gov/crs-product/IF12718.

meet this standard, the Regents as principal officers would have to report to the President, be appointed by the President, and confirmed by the Senate. However, the Board of Regents would not pass this test because they are selected according to the language of the statute, and they report only to themselves. If, rather, the members of the Board are considered inferior officers, the Smithsonian statute's structure also fails the constitutional test because they are not appointed by the President, the federal judiciary, or a department head. Additionally, the members of the Regents could not be considered to be inferior officers because they do not meet the standards set out in *Edmond*, in which inferior officers perform work that is "directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate."[106]

Finally, the President could argue that the Smithsonian's statute fails constitutionally because he could point out that Congress is explicitly precluded from appointing officers, yet several of the civilian Board members are appointed by congressional joint resolution after being nominated by the Board. The Speaker and President of the Senate pro tempore also appoint members to the Board. For this variety of reasons, the Trump Administration could assert that the appointment and removal structure set out in the Smithsonian's governing statute is unconstitutional.

G. Judicial Remedies

In the past, the Court, when possible, has attempted to resolve issues of unconstitutional agency structures in ways that do not throw out the entire existing organization. In *Seila Law*, the majority proclaimed the director's removal protection as severable from the rest of the Dodd-Frank Act, which established the CFPB and outlined its powers.[107] A similar situation could arise here.

[106] *Edmond*, 520 U.S. at 663.
[107] *Seila Law*, 591 U.S. at 237.

For example, the Court may agree with President Trump if he were to argue that a reasonable way to save the existing appointment structure of the Smithsonian would be to give the President adequate removal influence in the process.[108] This paper will not propose specific removal provisions, whether pertaining to the directors, the Board, or the Secretary. It will only posit that were Trump and his lawyers to demand *some* level of removal power for the President somewhere throughout the chain, this proposition could prove reasonable in the eyes of the Court.

In sum, President Trump could contend that unless no official outside of the Board members, the Secretary, or any of the museum directors are officers, the structure must be unconstitutional. Therefore, any legal effort by the Smithsonian to uphold its current structure may rest entirely on whether the Supreme Court would be convinced by the idea that the Smithsonian is of a "Fed-like" *sui-generis* nature, thus allowing its unconventional structure to stand. If the Smithsonian could not be resolutely confident that the Court would decide this way, the door could be opened for Trump to challenge the entire structure of the Smithsonian. As *Seila Law* demonstrates, the Court is open to considering a variety of elements that could render the agency distinct from the *Humphrey's Executor* exception and subject to Presidential at-will removal. Could the characteristics of the Smithsonian be enough to lead the Court in this way, or at least towards some level of presidential influence, be that for-cause removal or some other manner? Based on this Court's rulings on previous cases and their indications that they are heading towards a Unitary Executive Theory approach, the answer is creeping ever closer to yes. The outcome, even partially sympathetic to Trump's claims, could lead to increased presidential influence over the Smithsonian Institution. Trump's subsequent actions would enjoy legal legitimacy and Court

[108] *Free Enterprise Fund* demonstrated that double-layered for-cause protections are not permissible and highlighted the dangers of the President being too far removed and attenuated from the officers down the chain of the agency, so any "solution" like this would not be considered adequate.

backing. It is not possible to know how the Court will rule on future controversies, but using the past as a guide indicates a potential for similarly deferential rulings.

VII. Conclusion

While the importance of maintaining institutions of art, culture, and science as insulated and outside of executive control seems too significant to disrupt, uncertainty has fostered fear, animus, and conflict. Still, without Director Kim Sajet's case as a true test, the exercise of presidential removal power over the Smithsonian remains unresolved with respect to legality and constitutionality. Congress, potential litigants, scholars, and the public can venture any number of educated guesses on how the Court will rule on a particular matter, but there is no definitive answer until the Court is presented with a case. There are significant risks to the Smithsonian Institution in litigating a case of this type at this time, given the trend of the Court's opinions, the question of agency status, and the constitutionality of the governing statute. If the Supreme Court is presented with a comparable case in the future, and if it rules that the Smithsonian's appointment and removal structure is constitutionally flawed, then Congress should act to amend that structure in accordance with the Court's guidance in a manner that allows the Smithsonian to continue to carry out its congressionally chartered mission with independence and autonomy from the executive branch.

The FTC's Monopoly on Speech: Revisiting the Intersection of the First Amendment and Antitrust for Social Media

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ABSTRACT:

Speech is rarely protected if it factors into a violation of antitrust law. The sole exception to this principle is the right to petition, as a core value to democracy—which should similarly apply to the speech of social media companies. They are vulnerable to having their speech curtailed by antitrust proceedings because the line is often unclear between their business practices and speech, and technological developments obscure the expressive value of their speech. Social media companies' algorithms and data usage are both 'business practices,' yet have been protected under the First Amendment. Giving algorithms and data usage the full brunt of FTC regulation imposes not just an incidental burden on speech made in the course of business, but a restriction on the companies' core speech. Thus, the Court must develop a new doctrine that allows it to invalidate antitrust regulation that alters the contents of social media companies' speech.

I. Introduction

While speech is one of the most vigorously protected rights in the United States, like any right, it can have limits when other governmental interests are implicated. A significant governmental interest for the past century has been ensuring that consumers are protected from the various ways powerful economic actors can pervert market dynamics, from monopolization to deception. Speech is thus almost never protected if it factors into a violation of antitrust law, the logic being that the mere usage of speech as a means to violate the law should not prevent an actor from being held liable. The sole limit to this logic is the Noerr-Pennington doctrine, which holds that antitrust violations cannot be predicated on petitions made to the government, even if they are anticompetitive.

The right to petition is protected because it is a core value to democracy—which can be applied with equal force to the speech of social media companies as forums of news and discourse. Today, they are uniquely vulnerable to having their speech curtailed by antitrust proceedings for two reasons. First, as companies with a business model *based* in speech, the line is often unclear between what constitutes a business practice, prosecutable by the Federal Trade Commission (FTC), and what is mere speech created by the companies. Second, the development of technology obscures these platforms' speech from being recognized for the expressive value it holds. This dual vulnerability is demonstrated by the FTC's targeting of social media companies' algorithms and data usage. Both technologies are a part of the 'business model' of the companies, yet have been protected under the First Amendment by the Supreme Court as editorial discretion and speech-based information sharing, respectively. Algorithms and data usage are modern forms of expression by social media companies, yet their novelty obscures their expressive value. Giving algorithms and data usage the full brunt of planned regulation by the FTC allows not just an *incidental* burden on speech made in the course of business (which is common and necessary to antitrust law), but rather a *fundamental* modification to the forums created and messages sent by the companies—a restriction on their core speech. Allowing such regulation to continue unabated sets the precedent that the content of the speech disseminated in a modern-day public square can be regulated by the government. Thus, the Court must develop a new doctrine that provides it with the opportunity to invalidate antitrust regulation that alters the contents of social media companies' speech.

II. Background

A. The Federal Trade Commission's Authority

In 1890, Congress passed its first comprehensive piece of antitrust legislation in the form of the Sherman Act. The Sherman Act focuses primarily on ensuring competition occurs and that markets are not dominated by one or two particular actors. Section 1 of the Sherman Act makes illegal contracts or conspiracies "in restraint of trade or commerce." Section 2 then makes guilty of a felony "every person who shall monopolize, or attempt to monopolize… any part of the trade or commerce."[1] These two authorities thus enable the Department of Justice, State Attorneys General, and other actors to bring suits against private companies.

In 1914, Congress passed the Federal Trade Commission Act, creating the Federal Trade Commission (FTC) and granting it authority to regulate other activities that harm competition, making it broader than the Sherman Act. Critically, because the Supreme Court has ruled that any violation of the Sherman Act also violates the FTC Act,[2] this paper focuses exclusively on the work of the FTC and the FTC Act in light of its cross-applicability to the Sherman Act. Often, the FTC brings suit against corporations under Section 5 of the FTC Act, which declares unlawful

[1] Sherman Act, 15 U.S.C. §§ 1, 2.
[2] Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

"unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[3] The FTC thus has the power to prosecute attempts at monopolization, as well as practices that are viewed as unfair or deceptive toward consumers.

B. Social Media Companies

As defined by Justice Elena Kagan in *Moody v. NetChoice* (2024), social media companies are "websites and mobile apps that allow users to upload content—messages, pictures, videos, and so on—to share with others. Those viewing the content can then react to it, comment on it, or share it themselves." On the technological side, "the scheme is prioritization of content, achieved through the use of algorithms."[4] Most often, social media is free to use and companies earn money by placing advertisements. Social media companies thus handle a few layers of speech: user-created content, company-created algorithms, and externally-sourced advertisements selected by the company. Primarily implicated in antitrust regulation are algorithms, which can promote or even remove user-created content, and advertisements.

C. The FTC and Social Media Companies

For the past decade and a half, the FTC has grown increasingly wary of social media companies, especially as they consolidate market share, leaving consumers with increasingly few options but to use their platforms.[5] In 2014, Chairwoman Edith Ramirez began initiatives to ensure that consumer protection is not eroded online and carried out the FTC's investigation of Google for anticompetitive practices.[6] These introductory examinations of large technology companies

[3] Federal Trade Commission Act, 15 U.S.C. § 45.
[4] Moody v. NetChoice, LLC, 603 U.S. 707, 711 (2024).
[5] *FTC Staff Report Finds Large Social Media and Video Streaming Companies Have Engaged in Vast Surveillance of Users with Lax Privacy Controls and Inadequate Safeguards for Kids and Teens*, FED. TRADE COMM'N (Sept. 19, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-staff-report-finds-large-social-media-video-streaming-companies-have-engaged-vast-surveillance.
[6] Edith Ramirez, *Statement Regarding the Google Investigation*, FED. TRADE COMM'N (Mar. 25, 2015), https://www.ftc.gov/news-events/news/press-releases/2015/03/statement-chairwoman-edith-ramirez-commissioners-julie-brill-maureen-k-ohlhausen-regarding-google; Edith Ramirez, *Media Statement on Google's Settlement with*

laid the groundwork for Chairwoman Lina Khan to raise scrutiny on social media companies, with a focus on their "surveillance" of users through the collection of data.[7] In 2025, Chairman Andrew Ferguson transitioned to examining the 'censorship' of social media companies, or how they determine which users may not post on their platforms.[8] Across both Democrat and Republican administrations, the FTC has manifested a desire to scrutinize social media companies for a large variety of practices. This paper will confront the potential for action with regard to algorithms and data usage, handling not particular past or active actions, but rather their implications about the latent danger of the FTC's scope of authority in those spheres.

III. Antitrust Jurisprudence and the Noerr-Pennington Doctrine

The First Amendment is, mostly, no defense against a violation of antitrust law. The Court's jurisprudence is that violating antitrust law does not become permissible merely because speech was the means to do so. This doctrine was developed in *Associated Press v. United States* (1945), in which the Associated Press, a news distribution agency, "prohibited all AP members from selling news to nonmembers" and disallowed nonmember competitors from joining AP. In other words, no competitors could gain access to the information found by AP members, which constituted a bar to competition in the news industry. Outside of an antitrust context, it is near undeniable that a private organization has the right to decline to share news items (protected speech), should it not wish to. However, "the fact that the publisher handles news, while others handle food, does not … afford the publisher a peculiar constitutional sanctuary in which he can

FTC over In-App Billing Practices, FED. TRADE COMM'N (Sept. 4, 2014), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/chairwoman-edith-ramirez-media-statement-googles-settlement-ftc-over-app-billing-practices.

[7] Lina M. Khan, *Statement Regarding the Social Media and Video Streaming Service Providers Privacy Report*, FED. TRADE COMM'N (Sept. 18, 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-regarding-social-media-video-streaming-service-providers-privacy-report.

[8] *Federal Trade Commission Launches Inquiry on Tech Censorship*, FED. TRADE COMM'N (Feb. 20, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/02/federal-trade-commission-launches-inquiry-tech-censorship.

with impunity violate laws regulating his business practices."[9] The result of the Court's analysis is thus that once antitrust law has been violated, speech is no defense. Hillary Greene, Professor at the University of Connecticut School of Law, describes this category of jurisprudence as half of speech's "binary treatment" in an antitrust context. Greene describes, "Either the speech at issue receives First Amendment protection and is immunized from antitrust enforcement," or, as in *Associated Press*, "it is subject to the full force of the antitrust laws. There is no middle ground."[10]

As for the second half of speech, there exists only one area of speech which the Court 'immunizes' from antitrust enforcement: the right to petition the government. The Noerr-Pennington doctrine reverses the Court's typical antitrust analysis: speech in a petition to the government is protected, *even if* it violates antitrust law. Indeed, the Court in *Eastern R. Conference v. Noerr Motors* (1961) makes clear that the speech in question would have otherwise violated the Sherman Act: the Eastern Railroads Presidents Conference adopted a smear campaign to force truckers out of the market. The "malicious" and "fraudulent" campaign was motivated by destroying the truckers as competitors and misrepresented information to portray them poorly. Critically, though, the Court states that "at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had."[11] Because the right to petition is *categorically* protected from antitrust liability, no matter how monopolistic that petitioning may be, it will not violate antitrust laws.

In *Noerr* and later in *United Mine Workers v. Pennington* (1965), the Court explained that its distinction between speech in petition of the government and all other speech lay on the basis of political activity. The Court argued that the right of *all* individuals (and thus their corporations)

[9] Associated Press v. United States, 326 U.S. 1, 4, 7 (1945).
[10] Hillary Greene & Dennis A. Yao, *Antitrust as Speech Control*, 60 WM. & MARY L. REV. 1215, 1222 (2019).
[11] E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 139–40 (1961).

to petition the government is essential to the functioning of democracy because it is how a representative government informs its actions. As such, it could not have been the intent of Congress to restrict this speech with the Sherman Act. The Court wrote, "to hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity."[12] Central to the Court's logic is that the Sherman Act should be limited to the sphere of business activity. Speech such as the AP's communication or lack thereof with its competitors was fundamentally business activity, so it was subject to antitrust prosecution. Simultaneously, the Court understands speech *made by businesses* in the realm of politics as political speech, rendering it untouchable by the Sherman Act. Importantly, *Pennington* goes on to clarify that the political goals need not be genuine: they may be entirely self-motivated, or even monopolistic. Nevertheless, "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent of purpose."[13] In sum, certain speech that democracy relies upon is fundamentally political, placing it outside of a regulatable sphere of business activity—*even if made to further business interests, or in the course of business*.

Out of respect for the fundamental right to petition—and fear of its erosion—the right is protected even when it is used for a repugnant purpose, such as monopolization. The Court did not wish to allow antitrust to infringe on this realm of speech because it was in "respect to problems relating to the conduct of political activities."[14] The Noerr-Pennington doctrine is thus significant

[12] *Id.* at 137.
[13] United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965).
[14] *Noerr*, 365 U.S. at 141.

for laying the groundwork for how rights may be reserved for social media companies on the basis of speech they make *in the course of* business, but that is fundamentally political in nature.

IV. Social Media as Core Speech to be Protected

The principle preventing antitrust law from inhibiting the right to petition extends with equal force to social media companies' speech as the modern mediator of the press. Looking at the freedom of the press throughout history and case law is a helpful instrument to understand the rights that social media companies may hold today, as they lack this same historical backdrop. At the same time, antitrust's interaction with the true, printed press has not demonstrated that a new doctrine is *needed* to protect newspapers, limiting the scope of this paper's recommendation to social media. The role of technology in social media makes it distinctly more vulnerable to repression by disguising the speech at hand. Algorithms provide a demonstrative example—while the FTC would not attempt to prosecute a newspaper for which article appears on its front page as opposed to its back page, it has shown a willingness to investigate the ordering created by technological algorithms—despite the Court holding the two as equally 'speech' (see Section VI). As such, the press serves as a *tool* to understand the rights of social media companies, but does not itself require a doctrine to protect its speech from antitrust proceedings.

A. The Argument for the Press

The logic behind *Noerr*'s protection of the right to petition is not exclusive to the right to petition. Similar protection should be extended to another fundamental right: the freedom of the press. It is illogical that solely *one* type of speech can transform antitrust legal analysis from ignoring speech to using speech to derive a complete exemption. It is nearly self-evident to reference that in *Noerr*, the Court writes, "the right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."[15] The Bill of Rights includes the freedom of the press—the restriction of which, by this logic, could *not* have been the intention of antitrust legislation.

An argument similar to that underpinning *Noerr*'s protection of the right to petition applies to the freedom of the press. *Noerr* prevented antitrust law from inhibiting the right to petition because it would have restricted fundamentally political activity that is crucial to the operation of our democracy. The freedom of the press was similarly understood as instrumental to democracy by James Madison, its author. Madison saw the value of the press as its ability to discuss and oppose the government. He justified the freedom of the press in its exertion of "a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law."[16] Madison valued the ability of the press to deride the government. Such criticisms hold the government accountable by informing the people of its actions. He continued that making the press "wholly exempt from the power of Congress" was the only construction of the First Amendment that satisfied the states and increased "public confidence in the Government."[17] Madison's statement that the First Amendment intended for the press to be 'wholly exempt' from the power of Congress leaves little room for interpretation. Paradoxically, the very emphasis that Madison put on ensuring the government had no power over the contents of the press demonstrates that the press is inherently political. A free press increases "public confidence in the Government" by informing the people of its actions and errors—information that is crucial to the democratic process that may correct them.

As case law more clearly defined the freedom of the press, the Court preserved Madison's vision of the press as a political right. The Court has found the freedom is so substantial as to bar

[15] *Id.* at 138.
[16] James Madison, *The Report of 1800* (Jan. 7, 1800), in 17 THE PAPERS OF JAMES MADISON 303, 309 (David B. Mattern et al. eds., 1991).
[17] *Id.*

the government from intervening in the press *even to promote a marketplace of ideas*. In other words, the Court has disallowed interventions in the press that may be positive for discourse in the name of keeping it fully independent. In *Miami Herald Pub. Co. v. Tornillo* (1974), the Court rejected a Florida statute that created a right for political candidates to reply to criticism in a newspaper. Vitally, the Court acknowledges in its decision that the newspaper industry had immensely concentrated power: "Newspapers have become big business… [the press] has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events."[18] The marketplace of ideas had become defective. Fixing it, though, would come at the immense cost of telling the press what it could or could not publish—a cost far too high. The Court found a responsible press to be "an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution, and, like many other virtues, it cannot be legislated."[19] While not an antitrust case, *Miami Herald* establishes that the true freedom of the press is a good which rises above a government desire to *improve* our public forums—which is what it seeks to achieve through their antitrust regulation. This principle is highly relevant because it indicates that the FTC should not have the right to use its authority to promote a marketplace of ideas. Its power is only over 'business activity,' and just like the rest of the government, it should have no power over speech—especially political discourse.

While the FTC has not often attempted to regulate the press' marketplace of ideas, Congress explicitly *declined* to extend it this power when it perceived FTC regulation as playing a role in the flow of speech. When presented with FTC regulation of newspaper mergers, Congress diminished its statutory authority to prevent them. The impetus to do so came in *Citizen Publishing Co. v. United States* (1969), when the Court allowed the FTC to strike down a joint operating

[18] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 249 (1974).
[19] *Id.* at 256.

agreement between two competing newspapers in the same city, despite one being on the brink of bankruptcy.[20] In response, Congress made clear that this restriction was never the intent of the Sherman Act by drafting an *exception* to the Act for joint operating agreements between newspapers to save one of them from failure.[21] This was the Newspaper Preservation Act of 1970. In the interpretation of this statute, a circuit court decision, *Michigan Citizens for an Independent Press v. Thornburgh* (1989), affirmed that the exemption was created to preserve the independence of the press. The law was passed because of "a congressional desire embodied in the Newspaper Preservation Act that diverse editorial voices be preserved despite the unique economics of the newspaper industry."[22] In essence, the Act disallowed the FTC from intervening in the natural dynamics of the newspaper industry to change the number of voices in the press. When given the option, Congress expressly undelegated this decision about the flow of speech from the FTC, indicating that—just like for the rest of the government—the power to influence the speech of the press should not be within the FTC's scope of authority.

One important precedent, *Lorain Journal Co. v. United States* (1951), cuts against the idea that the speech of the press should be isolated from antitrust regulation. The Lorain Journal Company restrained interstate commerce under the Sherman Act by refusing to grant advertisement space to its competitors. However, the Court in *Lorain* declined to consider a speech defense for newspaper advertisements. As to the suggestion that ads in a newspaper are speech, the Court stuck with the doctrine it developed in *Associated Press*: "the injunction applies to a publisher what the law applies to others. The publisher may not accept or deny advertisements in

[20] Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).
[21] John R. Vile, *Newspaper Preservation Act of 1970*, FREE SPEECH CENTER AT MIDDLE TENNESSEE STATE UNIVERSITY (July 2, 2024), https://firstamendment.mtsu.edu/article/newspaper-preservation-act-of-1970/.
[22] Michigan Citizens for an Independent Press v. Thornburgh, 868 F.2d 1285 (D.C. Cir. 1989).

an "attempt to monopolize . . . any part of the trade or commerce." In essence, it matters not that speech was the means, if the end was a violation of the Sherman Act.[23]

Today, though, *Lorain* should not be read as a controlling precedent for the weakness of all First Amendment claims in antitrust proceedings against the press. Professor Greene references that flowing from *Lorain* is the principle that the presence of speech, even in content-oriented media, confers no First Amendment protection from the antitrust laws.[24] This understanding, however, ignores that in 1951, commercial speech—such as the advertising space in newspapers in question—was afforded *no* protection at all by the First Amendment. Before 1976, there was effectively "a 'commercial speech' exception to the First Amendment."[25] For this reason, the Court in *Lorain* would not so much as have *viewed it as a case in which speech was implicated*. *Lorain*'s decision hence dismissed the value of the press' speech in antitrust proceedings because, then, advertisements had none. Commercial speech, though, was afforded protection in 1980, which may have altered the outcome of a case such as *Lorain*.[26]

B. The Extension of the Argument to Social Media

While the speech of the press is not vulnerable to FTC action, the speech of social media companies is. The argument to safeguard the press from the FTC's reach applies to social media as well. This is first supported by recent case law that draws a parallel between social media and the press, in argument for their similar treatment as speech. In *Moody v. NetChoice*, the Court determined that, like a newspaper, social media companies create "expression" in the form of "a particular edited compilation of third-party speech."[27] Because "a private party's collection of

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[23] Lorain Journal Co. v. United States, 342 U.S. 143, 155–56 (1951).
[24] Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 B.U. L. REV. 35 (2015).
[25] Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748, 758 (1976).
[26] Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).
[27] *Moody*, 603 U.S. at 728.

third-party content into a single speech product" constitutes expression, the Court has described that social media companies have nearly the same editorial, or curatorial, discretion over the content of their applications as newspapers might over the content of their issues.

Furthermore, the function of social media *as* the modern press should be understood to render much of the companies' speech not business activity, but political activity, in line with the distinction created in *Noerr*. The importance of the press to democracy derives not from the physical newspaper, but rather the eyes that read it, which today more often land on social media as a source of news. In 2024, 54% of Americans got their news from social media at least some of the time.[28] Social media platforms are also forums for political activity: in 2024, 48% of TikTok users under 30 years old use the application to 'keep up' with politics.[29] Importantly, an upward trajectory in the share of news consumption as well as the young age distribution of political consumption indicates that the use of social media as a political tool will only increase with time. The prevalence of social media as a mediator of American political life indicates that Madison's argument for the political value of the freedom of the press holds similar relevance to the speech of social media companies. Relevantly, the true role that social media has in the lives of Americans demonstrates that, often, the speech of the companies behind the forums lies *far* from the realm of 'business activity' that *Noerr* held bounds the Sherman Act. While they engage in business dealings like any company, their *outward*-facing speech like algorithms and advertisements is, like the press, political. Hence, the same logic that rendered petitions distinct treatment under antitrust proceedings should be applied to social media.

[28] Jacob Liedke & Christopher St. Aubin, *Social Media and News Fact Sheet*, PEW RESEARCH CENTER (Sept. 17, 2024), https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/.
[29] Colleen McClain, *About Half of TikTok Users under 30 Say They Use It to Keep up with Politics, News*, PEW RESEARCH CENTER (Aug. 20, 2024), https://www.pewresearch.org/short-reads/2024/08/20/about-half-of-tiktok-users-under-30-say-they-use-it-to-keep-up-with-politics-news/.

V. Constructing an Antitrust Doctrine for Social Media

To construct an antitrust doctrine for social media companies, the Court should make use of an existing categorization for speech regulation: content-neutral and content-based. The most suspect speech regulation by the government discriminates based on the content—or worse, the viewpoint—expressed by the speaker, and must pass strict scrutiny.[30] On the other hand, content-neutral regulations need only pass intermediate scrutiny.[31] A regulation is content-neutral so long as it is "justified without reference to the content of the regulated speech.'"[32]

A differentiation between content-neutral and content-based regulations would permit the FTC to regulate the *business* activity of social media companies while preventing it from regulating their *political* speech. In such a scheme, speech would continue to hold no weight as a defense against a content-neutral regulation. For example, mandated disclosure of privacy policies to consumers compels speech, but it would be neutral as to the *content* of the policies and thus allow for no speech defense. On the other hand, modifications to algorithms would alter the content of companies' expression. In considering such content-based regulations, the Court must break the 'binary treatment' received by speech-antitrust claims that either ignores speech or uses speech to grant complete immunity. Courts must be able to balance the interest of the modern press' fundamentally political speech against the FTC's interest in competition—-to ensure that the FTC's power to modify speech does not overflow the bounds of its power to regulate the business sphere. While the ideal method of balancing those interests is outside of the scope of this paper, content-based regulations of speech are *almost always* examined with strict scrutiny because

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30 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).
31 Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989).
32 Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

government restrictions upon the subject matter or substantive message of speech target the very core of what the First Amendment was built to protect.[33]

VI. The Danger of FTC Action on Algorithms

The FTC has assumed it possesses the authority to regulate an algorithm, as shown in its investigation of Google. While Google is not a social media company, the algorithm it uses to sort search results is fundamentally similar to those of social media. Namely, Google's algorithm weighs the importance of content items to determine the order in which they should be shown to consumers; like a social media algorithm, it is subjective and a speech product.

A. An FTC Investigation of Speech

On January 3, 2013, the FTC closed its investigation, *In the Matter of Google Inc.* This investigation looked at Google's search algorithm and sought evidence to substantiate allegations that Google unfairly platformed its own products over its competitors' in its search results. Finding no evidence, the FTC closed the investigation on the grounds that Google's market was not monopolistic.[34] More importantly, though, the FTC was prepared to act on its authority to regulate the construction and output of Google's search algorithm. The Statement of the FTC on the case closure read, "the Commission considered whether Google manipulated its search algorithms and search results page in order to impede a competitive threat posed by vertical search engines."[35] By implication, the FTC assumed that it had the authority to regulate an algorithm that presents a user with information *should* there be evidence that it was an unfair method of competition or it attempted monopolization. An algorithm that presents a user with information, though, is speech.

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[33] VICTORIA L. KILLION, CONG. RSCH. SERV., R47986, FREEDOM OF SPEECH: AN OVERVIEW (2024), https://www.congress.gov/crs-product/R47986.
[34] Leah Nylen, *How Washington Fumbled the Future*, POLITICO (Mar. 16, 2021), https://www.politico.com/news/2021/03/16/google-files-ftc-antitrust-investigation-475573.
[35] Julie Brill, *Statement of the Commission Regarding Google's Search Practices*, FED. TRADE COMM'N (July 31, 2013), https://www.ftc.gov/news-events/news/speeches/statement-commission-regarding-googles-search-practices.

Under current jurisprudence, there would be no First Amendment violation here—an anticompetitive aim would overwhelm *any* speech consideration. However, the danger of the latitude that the FTC wielded in the Google case solidifies the call to modify antitrust jurisprudence concerning the First Amendment in a social media environment.

To begin, the algorithm Google uses would be considered speech. As early as 2003, a U.S. district court found that Google's algorithm was indeed speech. The suit, brought by Search King, argued that Google had maliciously assigned it a falsely low PageRank (in exception to its typical algorithm). In *Search King, Inc. v. Google Tech Inc.*, the court decided that Google was immune from tort liability on the basis of its PageRanks being speech with "full constitutional protection."[36] PageRanks were granted full protection because they are fundamentally subjective. The court found that each search engine algorithm "is different, and will produce a different representation of the relative significance of a particular web site depending on the various factors, and the weight of the factors, used to determine whether a web site corresponds to a search query."[37] In other words, one cannot base a tort claim on a PageRank being 'wrong,' because even a mathematical algorithm is a matter of opinion—making it subjective speech.

While *SearchKing* is not a controlling precedent, in *Moody v. NetChoice*, the Court found social media algorithms to be expressive—using logic that applies to *non*-social media algorithms, like Google's, too. While *Moody* vacated and remanded the decisions of the lower courts on the facial validity of the laws in question, Justice Kagan did not waver on the expressive value of an algorithm. The algorithm "compil[es] and curat[es] others' speech," which is a modern-day outgrowth of "the editorial function."[38] In making this determination, the Court highlights that an

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[36] Search King, Inc. v. Google Technology, Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *7 (W.D. Okla. May 27, 2003).
[37] *Id.* at *2.
[38] *Moody*, 603 U.S. at 731.

algorithm is not objective: rather, human beings had to make decisions for what content to prioritize, and what to exclude.

> [H]uman beings decide to remove posts promoting a particular political candidate or advocating some position on a public-health issue. If they create an algorithm to help them identify and delete that content, the First Amendment protects their exercise of editorial judgment—even if the algorithm does most of the deleting without a person in the loop.[39]

In this manner, the humans at Meta or other media companies curate what the algorithm spits out, making it protected speech. While *Moody* may not itself adjudicate about Google's algorithm, as *SearchKing* decided, it is similarly the result of human discretion—making it speech.

Further, algorithms should not be considered commercial speech because, although they are used in the course of business, their expression is not solely economic. The Court in *Moody* had no need to find algorithms non-commercial because the Texas law involved did not even survive intermediate scrutiny.[40] However, this does not restrain the argument that algorithms are non-commercial. In *Central Hudson*, the Court defines commercial speech as "expression related solely to the economic interests of the speaker and its audience."[41] In determining if expression is solely related to economic interests, the Court has a malleable test consisting of three factors: if it is an advertisement, if it references a product, and if the speaker has an economic motivation for the speech.[42] These are factors for *consideration*, meaning that all three need not be met in all cases of commercial speech.[43] A social media algorithm is neither an advertisement nor a reference to a product, meaning only the third factor remains. While social media companies certainly have an economic motivation for creating an algorithm, the same is true for *all* newspapers. Such

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[39] *Id.* at 745–46.
[40] *Id.* at 740–41.
[41] *Central Hudson*, 447 U.S. at 561.
[42] Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66–67 (1983).
[43] Michael Mazur, *Commercial Speech and the First Amendment in the 21st Century: Does the Nike Test Help to Keep Corporations Honest?*, 8 U.C. DAVIS BUS. L.J. 999 (2008).

motivation is rarely enough to sustain speech as commercial: *Bigelow v. Virginia* (1975) held that a mere motive of "financial gain" cannot narrow the "protection of expression secured by the First Amendment."[44] Indeed, this principle applies with force to algorithmic expression, because algorithms are modern parallels to newspaper editing—which is definitively non-commercial.[45] A mere technological development in how people receive news should not change its handling under speech law.

In light of *Moody* and *SearchKing*, algorithms become the near-perfect parallel of editorial discretion. This makes algorithms' speech 'content' their ordering of posts—as it is predicated on the human choice of which factors go into them and with what weight. Thus, an investigation by the FTC into Google's search practices is predicated on the assumption that it is free to alter the content of protected speech, if found anticompetitive. The vital need to prevent such content-based regulation can be illustrated through the fact that the FTC's authority to investigate Google lays the groundwork for it to investigate *other* content that is pure speech. The FTC acted upon the principle that speech itself—the editorial control of algorithms—can be so misleading to consumers as to be anti-competitive. This implies that the FTC has the authority to regulate the *content* of pure speech should it be anticompetitive or perhaps deceptive.

B. The Danger of FTC Authority Over Speech

Under the same authority that allowed it to investigate Google, the FTC could target instances of 'fake news,' or misinformation. So long as speech is a 'business practice,' misinformation could be considered an "unfair or deceptive" practice that affects "commerce" under Section 5 of the FTC Act.[46] Some have argued that the FTC can regulate fake news because

[44] Bigelow v. Virginia, 421 U.S. 809, 818 (1975).
[45] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
[46] Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).

it *is* commerce in the sense that the authors use false writing to generate revenue.[47] Importantly, the FTC has *already* categorized fake news as 'deceptive' under Section 5, and held not just the news sites themselves, but those who interact with them, liable under the law. In *FTC v. LeadClick* (2016), the United States Court of Appeals for the Second Circuit validated the FTC's holdings by finding LeadClick, an advertising agency, liable for the deceptive information practices of its *affiliates*. The court ruled that "while LeadClick did not itself create fake news sites to advertise products… [it] knew that fake news sites were common in the affiliate marketing industry and that some of its affiliates were using fake news sites," which was enough.[48] The implication of this ruling is that not only is fake news deceptive, but businesses which do not *themselves* create it may still be prosecuted for its dissemination—just as social media companies often are.

Case law provides two explanations for why allowing the FTC to regulate pure speech, such as algorithms and misinformation, on the basis of its content is problematic. First, this authority permits the government to use its power to promote a marketplace of ideas—the very power that was rejected in *Miami Herald*. If the FTC can be allowed to determine that the very editorial control, or algorithm, of Google is disadvantageous to competitors, this is the equivalent of allowing the government to modify one actor's protected speech in order to allow for an increased flow of ideas. The Court in *Miami Herald* held such intrusions to be unconstitutional.

Second, this authority requires the FTC to declare that the content of a certain type of speech is *inherently deceptive*. The FTC, though, is a government agency—and the government may not declare certain information to be false, and therefore not protected by the First Amendment. This applies to information whether it is a type of news promoted by a media

[47] Pete Love, *Fake News and Intent to Distribute: How the FTC Can Stop the Spread*, 27 J. TECH. L. & POL'Y 100 (2022).
[48] Fed. Trade Comm'n v. LeadClick Media, LLC, 838 F.3d 158 (2d Cir. 2016).

company, or whether it is the PageRank generated for a certain type of content by an algorithm. The case of *Murthy v. Missouri* (2024) makes clear that the government may not deem speech to be false, especially as applied to misinformation. In 2020, many social media platforms used misinformation policies that either flagged content or removed it entirely. In *Murthy*, many censored individuals alleged that government coercion was behind these policies, and thus their speech rights had been violated. While the Court ended its analysis with an issue of standing,[49] the circuit court held that, so long as the government truly *was* coercing the companies, there was a violation of their speech rights. Indeed, the unconstitutionality of such quasi-censorship was so obvious to the circuit court that it mostly figured in terms of footnotes, in which the court explained, "With very limited exceptions… censorship—'an effort by administrative methods to prevent the dissemination of ideas or opinions thought dangerous or offensive'... is prohibited by the First Amendment."[50] The fundamental question of *Murthy* nearly *assumed* that government action toward the development of misinformation policy would be unconstitutional. The takeaway, though, is that the government cannot make such a value judgment about speech, because it is censorship—allowing the FTC to do so would be carving out its position as the *only* arm of government who can.

Miami Herald and *Murthy* make clear that even for admirable goals, like promoting a marketplace of ideas or preventing misinformation, government power over the content of speech *still* constitutes censorship. The FTC was not created to be the government's lone censor. Rather, *Noerr* makes clear that its power was intended to be limited to speech in the sphere of business, not political speech. Not only are social media algorithms, as arms of the press, political speech at

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[49] Murthy v. Missouri, 603 U.S. 43 (2024).
[50] Missouri v. Biden, 83 F.4th 350, 399 n.21 (5th Cir. 2023), *rev'd sub nom.* Murthy v. Missouri, 603 U.S. 43 (2024).

a conceptual level, but they have now been considered by the Court as speech akin to any other speech. The terrifying implication, then, is that if the FTC possesses the power to regulate an algorithm, it *already* possesses the power to censor the content of other speech. There is no limiting principle for why it should end with algorithms. This vulnerability thus solidifies the impetus to create an antitrust doctrine that would recognize regulations of speech that are content-based, and allow a speech interest to be considered by courts of review.

VII. The Danger of FTC Action on Data

In recent years, the FTC has sought to limit the data collection practices of social media companies. While the goal is admirable—and indeed permissible—the FTC's chosen means of doing so has often been to regulate the *usage* of data in social media companies' possession. In light of the Court ruling in *Sorrell v. IMS Health* that the usage of data is considered speech, the FTC's actions on data have actually become regulatory of company speech. Much like with algorithms, the advanced technology involved in the usage of data allows the FTC to hide what is truly a regulation of speech content behind a regulation of 'business practice.'

A. An FTC Proposed Regulation of Speech

First, the FTC's Proposed Decision and Order in its long-term investigation of Meta's privacy practices often proposes regulation of data usage. In its decision, the FTC enjoins Meta from using or benefitting from "Covered Information from Youth Users, except for the purposes of operating the website or online service; maintaining or analyzing the functioning of the website or online service; performing network communications; [or] authenticating Youth Users and their Covered Information…"[51] The proposed decision goes on to specifically enjoin Meta from using their data for such purposes as targeted advertising or developing algorithms. While such a

[51] In re Facebook, Inc., Docket No. C-4365, Proposed Modified Decision and Order (F.T.C. May 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/c4365facebookproposedmodifieddecisionandorder.pdf.

regulation is seemingly innocuous, the salient element is its focus upon data *purpose*. The FTC does not bar Meta from collecting the data in the first place, but rather claims that some uses are okay, and some are not.

The same tendency to regulate the usage of data appears in the FTC's 2024 report on data collection, "A Look Behind the Screens." One usage of data that the FTC delves into is targeted advertising; it describes, "Ad targeting restrictions, particularly restrictions based on sensitive categories, would benefit from greater clarity and consistency. Ad targeting that is in any way based on sensitive categories can be distressing to users and result in a spectrum of harms."[52] The FTC here describes one goal of its restrictions on data: to regulate its usage in targeted ads, similar to its restriction of Meta's usage of data. Further, the FTC seeks to allow *some* uses of data for advertising, but not others—with a delineation based on if the ad is targeted based on a 'sensitive category,' such as race or sexual orientation. In other words, the FTC is regulating not just the *collection* of data, but rather *what companies may do with data they already possess*.

Restrictions such as these on the usage of data implicate the First Amendment. In *Sorrell v. IMS Health* (2011), the Court considered a Vermont restriction on the sale of physician data to detailers, who are effectively advertising agents of prescription drug companies. In this case, Justice Anthony Kennedy writes that data which *already* lies in a speaker's possession is merely information that he possesses—akin to a book he owns, or a poll he conducted on the street. Then, "[a]n individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated."[53] Indeed, when presented with the opportunity, the Court declined to rule that data—although clearly possessed

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[52] FED. TRADE COMM'N, A LOOK BEHIND THE SCREENS: EXAMINING THE DATA PRACTICES OF SOCIAL MEDIA AND VIDEO STREAMING SERVICES (Sept. 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Social-Media-6b-Report-9-11-2024.pdf.
[53] Sorrell v. IMS Health, Inc., 564 U.S. 552, 568 (2011).

here for commercial purposes—was a mere commodity. Instead, data are facts possessed by a company, and "[f]acts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."[54] For these reasons, the government may not restrain the way data is used or disseminated. To be clear, this does *not* restrain the government from barring the collection of data *in the first place*. Rather, once data is *already* in private hands, restrictions on its usage or dissemination are akin to restricting individuals from speaking about any information in their brain—which implicates the First Amendment.

Like the restrictions on data in *Sorrell*, many of the FTC's proposed actions are content-based restrictions on speech. The central problem within the *Sorrell* case was that those in possession of physician data could sell it for some purposes, but not for others: "pharmacies may sell the information to private or academic researchers… but not, for example, to pharmaceutical marketers."[55] Because marketing was singled out as disallowed, the sale of information was restricted based on the content of the speech, making this law an example of "content discrimination."[56] Such purpose-based restrictions on data usage pepper the FTC's Proposed Decision and Order toward Meta. Here, the 'speech' involved is Meta's dissemination of its own private data. Indeed, Meta *may* use information on Youth Users for, say, analyzing how well its website algorithm works. It may not disseminate it, though, for any reasons other than the ones listed, especially "serving targeted advertising."[57] Similar prohibitions apply to the FTC's limitations on the sharing of telephone numbers that were obtained to enable account security

[54] *Id.* at 570.
[55] *Id.* at 563.
[56] *Id.* at 565.
[57] FED. TRADE COMM'N, *supra* note 51.

features. Those phone numbers cannot be used "for the purpose of serving advertisements."[58] Akin to *Sorrell*, the usage of both youth data and phone numbers is "forbid[den]... subject to exceptions based in large part on the content of a purchaser's speech."[59] Like *Sorrell*, dissemination for advertising is singled out as a uniquely disadvantaged usage for data. This makes the FTC's order a content-based restriction on speech.

Seemingly relevant to this analysis is if the usage of data for ads is commercial or noncommercial speech (or varies). However, the Court's decision in *Cincinnati v. Discovery Network* (1993) suggests that even if it *were* deemed to be commercial speech, categorically disallowing the usage of data for advertising would not survive scrutiny because it is a content-based distinction. In *Cincinnati*, the Court found that a categorical *ban* on commercial speech cannot be justified as mere *regulation* of commercial speech, because it is actually a content-based distinction that affords significantly diminished value to the content of commercial speech. The Court ruled that the city cannot ban commercial publications on newsracks, yet allow other newspapers on newsracks, on the logic that "commercial speech has low value." Problematically, "the very basis for [Cincinnati's] regulation is the difference in content between ordinary newspapers and commercial speech."[60] This basis made this restriction content-based, and would apply similarly to regulations by the FTC for which the 'very basis' is the lower value of advertising content compared to other usages of data. As Justice Blackmun stated, "significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day."[61] While the contents and perhaps locations of advertising may be regulated, *Cincinnati* implies that the lower protection afforded to

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[58] *Id.*
[59] *Sorrell*, 564 U.S. at 564.
[60] Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993).
[61] Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977).

commercial speech cannot justify singling out advertising as a uniquely worthless function of data usage, just as it could not be singled out as uniquely worthless function of newsracks. This implies that the FTC's suggested regulations against using youth data and phone numbers to target advertising would be content-based restrictions on Meta's speech.

B. The Danger of FTC Authority Over Speech

While disallowing the usage of data for advertising may restrict the speech of media companies, it does not create a particularly compelling call to action. Indeed, in a balancing test, the Court might find consumer protection easily outweighs the speech interest involved in using data for advertisement. However, in the FTC's recommendations on the usage of data for targeted advertising, the true danger of allowing FTC regulation of data usage comes to light: it can be used as an *indirect means* of regulating the contents of other speech. For example, the FTC recommends that the usage of data to create targeted advertising "based on sensitive categories" be subject to especially stringent restrictions.[62] In other words, the FTC wishes to restrict to a higher degree how data may be used in targeting ads based on categories such as race or sexual orientation. On its face, this restriction singles out various categories of content as uniquely bad.[63] It thus enters the insidious realm of viewpoint discrimination by singling out advertisements that are based on a particular aspect of the self as more harmful than the rest.

First, the FTC is able to regulate within this dangerous realm *through* regulations upon the usage of data. The FTC's own description of *how* ads are targeted makes clear that a restriction on that process would operate by restricting the usage of data: ads are targeted "based on demographic information, including, for example, age range, gender, education, and language" (parentheses

[62] FED. TRADE COMM'N, *supra* note 52.
[63] *Sorrell*, 564 U.S. at 564–66.

omitted).[64] As such, a restriction upon *what* ads can be targeted based on would necessarily restrict *how* companies may use and disseminate the 'demographic information,' or data, they possess. It would thus regulate the data usage that is defined as speech in *Sorrell.* Further, the regulation would be based on purpose: the usage of data for some types of targeted advertising is fine, not the usage of data for other types.

Second, the impact on speech that the FTC can have *through the indirect means of data regulation* would be constitutionally impermissible outside of an antitrust context. Time and again, the Court has struck down regulations that limit a particular type of speech because it is sensitive, even hateful. In fact, while advertisements would be considered commercial speech, the Court has ruled in *Matal v. Tam* (2017) that even commercial speech restrictions cannot survive intermediate scrutiny when the asserted interest is to prevent speech based on the ideas within it (or their purported effect on the listener). In *Matal*, Justice Samuel Alito reiterated on behalf of a unanimous Court that a clause which "evenhandedly prohibits disparagement of all groups… is viewpoint discrimination: Giving offense is a viewpoint."[65] The restriction of speech on the basis of the potential offense it may give is viewpoint discrimination, yet this is *explicitly* the FTC's logic for increasing restriction of targeted advertisements. The FTC writes that "targeted ads based on knowledge about protected categories can be especially distressing," and "these injuries run a wide spectrum and include… emotional distress, stigma, reputational harm, embarrassment, and invasion of privacy."[66] This logic shows that the FTC seeks to limit a certain type of speech *because* of its content. Such viewpoint discrimination would not survive First Amendment scrutiny *if it was promulgated by any other government agency*.

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[64] FED. TRADE COMM'N, *supra* note 52.
[65] Matal v. Tam, 582 U.S. 218, 243 (2017) (plurality opinion).
[66] FED. TRADE COMM'N, *supra* note 52.

Today, data is power—data develops algorithms, advertisements, and a slew of other personalized content. By giving the FTC free rein to restrict the usage of data, it has the power to, by extension, alter the content of all of the above, targeted advertisements being just one example. Critically, though, these consequences would be averted by revoking the FTC's complete immunity from First Amendment claims, as its method would no longer be clean. Because its regulation upon the usage of data *is* a regulation on speech, if speech interests could be brought in defense of a social media company, the FTC would have to answer for its violation of *Sorrell*. Should a data regulation be content-based, akin to its recommendation for targeted ads, the FTC could not defend it without a compelling interest—and by extension would be prevented from indirectly altering the slew of speech that data is used for today.

VIII. Conclusion

Rather than unilaterally preventing the FTC from taking action on harmful practices of social media companies, distinguishing between content-based and content-neutral regulations merely ensures that the FTC does not have the power to inhibit constitutionally-protected speech. Illustratively, impactful provisions in the spaces of both algorithms and data collection could be implemented by the FTC in the name of consumer protection, if the Commission finds evidence of potential harm to consumers. First, the FTC could compel social media companies to disclose the elements that create its algorithm to its users. The FTC frequently uses this instrument of 'clear and conspicuous disclosure' to protect consumer privacy by ensuring that consumers are fully informed about the platform they are using.[67] Second, the FTC could prevent social media companies from *ever* collecting a certain type of data in the first place. Such a regulation would not touch the First Amendment, which merely concerns the usage of information that a speaker

[67] FED. TRADE COMM'N, *supra* note 51.

already possesses, but would radically alter the ‘commercial surveillance’ landscape at hand. Such content-neutral restrictions are vastly preferable to the status quo, in which the FTC wields the authority to (1) alter the algorithms which consumers use as a primary means of information consumption, akin to the press, and (2) isolate certain types of content as disallowed through the inconspicuous instrument of data collection. With both algorithms and data usage protected as core, unqualified speech under the First Amendment, allowing unfettered FTC regulation sets the precedent that a government agency may censor the information that shapes Americans’ lives.

The Fragile Corporate Shield: Compromises of Free Speech in the Marketplace

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"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1]

— U.S. Constitution Amendment I

I. Introduction

Regulation of corporate speech stems from the need to protect investors from harm and corruption. Intentionally misleading information often results in legal trouble—for good reason: if shareholders cannot trust the corporations of which they own a part, accountability and responsibility are lost in the sea of market information. A well-functioning system optimizes for truth. This regulation is necessary, and its agent is the Securities and Exchange Commission (SEC). The courts have recognized cases in which this regulation has breached First Amendment protections as held by these corporations. However, this recognition ensures a real and present danger. Financial and corporate actors have abused First Amendment protections as a tool for deregulation and the creation of a fragile corporate shield. The SEC and the system in which it is embedded have failed in their duty to prevent such abuse of constitutional power.

The courts have distinguished categories of speech based on its content, secondary effects and implications, the speaker, and the receiver. With different characteristics, speech contains different weights of constitutional protection. Speech can present risks and provoke societal consequences. If speech corrupts young minds, demeans someone, or threatens national security, its claim to First Amendment safeguarding has been repeatedly contested.

[1] U.S. CONST. amend. I.

When speech means money—when words operate as promises and signals in the marketplace—the lines between constitutionally protected expression and unlawfulness are jagged. The judges and regulators who have overseen relevant cases have defined these lines in an attempt to clarify the role of corporate actors' speech in investor protections through the fog of disagreement, dissatisfaction, and confusion with the efficiency of capital markets. In this essay, I will present several key cases that have shaped the contours of what corporations may say, what investors must know, and how the law acts as a mediator in that exchange of information.

II. A New Social Bubble: The SEC's Role in Transparency

The cycles of crisis, distrust, and restoration of trust in American financial systems have provoked reform in the interest of the people. In 1934, Congress responded to the need for an organization to oversee the securities industry. The importance of such an establishment was clear to legislators as the protection of institutionalized markets became "a national public interest."[2] Indeed, the general public had become increasingly involved in these transactions on a scale that necessitated their protection from the forces of market power. The optimistic goal of the SEC was to "perfect the mechanisms of a national market system for securities," thereby ensuring the preservation and promotion of "fair and honest markets."[3] The commission was given an immense obligation and power: the *perfection* of an evolving, expanding, and uncontrollable system based on millions of tangible and intangible factors.

The SEC has two main functions in serving the interest of protecting investors, the first of which is to provide information needed to trade free from fraud and abuse. The regulatory actions by the SEC that contribute to this role, sometimes referred to as the "sunlight" SEC, have generally

[2] 15 U.S.C. § 78b.
[3] *Id.*

received public praise.[4] The other role granted and entrusted to the SEC by Congress includes subtleties that increase the difficulty of its operations. This second role is the regulation of trading markets to "ensure the effective and responsible operation both of those markets and of the securities industry."[5] Historically, the SEC has shied away from this type of regulation because of the delicacy of modern market operations. John Maynard Keynes is said to have put it aptly: "Markets can remain irrational longer than you can remain solvent." A whisper may move the market long before fact does. Congress granted the SEC "broad discretionary power" to confront market regulatory issues too "delicate or taxing" for Congress to handle. This delegation entrusted the SEC with a responsibility and also gave it a dangerous power: a certain level of nonoversight. The SEC, instead of treating this responsibility and power with the delicacy Congress anticipated, largely delegated (again) those responsibilities to self-regulatory organizations (SROs).[6] The praise for the "sunlight" SEC allowed the negligence of the security regulatory SEC to reside in "comparative obscurity."[7]

The SEC's role in the relationship between investors and management, particularly under the guise of First Amendment investor protections, has also been subject to criticism. The widening of corporate speech power has led to the "erosion of shareholder power."[8] The balance of free speech power in the investor-corporation relationship has trended towards the latter, resulting in an "upper hand"[9] granted to the corporate authority. The social power accumulated by corporations is mirrored in a social consciousness of investors, but the legal framework has only accommodated thus far the needs of the corporate entity. Interest groups are continually in the business of effecting

[4] Originally coined by Justice Brandeis. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 62 (1933).
[5] Walter Werner, *The SEC as a Market Regulator*, 70 VA. L. REV. 755, 755 (1984).
[6] *Id.* at 756.
[7] *Id.*
[8] Karl M. F. Lockhart, *A "Corporate Democracy"?: Freedom of Speech and the SEC*, 104 VA. L. REV. 1593, 1606 (2018).
[9] *Id.* at 1613.

change in social attitudes and opinions. As a result, these promotional and socially conscious activities by corporations are "particularly pronounced for people with relatively little information about a policy."[10] The investors with the *least* information can only exist in the general public, whose interests in free speech are secondary in the eyes of the SEC.

In the sectors of advertising, elections, and compelled disclosures, courts have progressively granted First Amendment rights to corporations.[11] This steady expansion of protections has further complicated the already uneven dynamics between investors and management. As corporate influence infiltrates public discourse through political spending and strategic messaging, the SEC's traditional mandate to safeguard investors appears increasingly outpaced by contemporary reality. The regulatory structure has struggled and failed to adapt to a landscape in which corporations not only engage in speech acts more often, but also with a greater reach and degree of sophistication than the individuals meant to be protected. Consequently, the informational asymmetry that once existed primarily within boardrooms of directors now spills into the public domain. The result is a different market behavior. Without a recalibration of regulatory priorities and a reinvigorated commitment to centering investors' informational rights and interests, the imbalance will worsen.

Part of the powers granted by Congress to the SEC was the requirement of a proxy disclosure "as necessary or appropriate in the public interest or for the protection of investors."[12] The public interest includes that about which the general public may be concerned when deciding to invest in a security, especially when that security is stock in a company with policies or practices that may condition that concern. Essentially, this phrase can be interpreted as the ability for a

[10] Andreas Dür, *How Interest Groups Influence Public Opinion: Arguments Matter More than the Sources*, 58 EUR. J. POL. RSCH. 514, 514–35 (2019), https://doi.org/10.1111/1475-6765.12298.
[11] Lockhart, *supra* note 8, at 1614.
[12] 15 U.S.C. § 78n.

certain degree of "social" disclosure of information—as long as it advances the public interest and relates to the general purpose of the Securities Act and the Exchange Act.[13] For example, recent petitions to the SEC include arguments for disclosure of tobacco-related revenue on the basis of a lack of "ability of investors to assess the risk faced by those retailers from the continuing decline in tobacco sales" in addition to investor values.[14] Whether or not the tobacco-related profitability is of sufficient public interest remains to be determined by the courts, but the ability of the SEC to require such a proxy disclosure is relatively clear.[15]

Social effects of a corporation's operations are relevant to some investors.[16] These obviously differ from the legality of a corporation's operations (which is an established sufficient public interest). Social effects can include where the company does business, its international (as contrasted with U.S.) labor practices, supplier and vendor standards, charity and political contributions, and environmental effects.[17] Scholars have discussed the importance of including those types of disclosures in the functioning efficiency of the market. These disclosures would start to create "social transparency"[18] in conjunction with the modernly accepted financial transparency.[19]

II.A *National Association of Manufacturers v. SEC* (2015)

[13] Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1204 (1999).
[14] Steven Glass, *Petition for Rulemaking: Tobacco and Nicotine ("Tobacco") Disclosure for Retailers* 2–3 (Sept. 29, 2023), https://www.sec.gov/files/rules/petitions/2023/petn4-813.pdf.
[15] For an extended discussion on the capability of the SEC to perform this function and its relevance, see Williams, *supra* note 13, at 1201.
[16] Williams, *supra* note 13, at 1201.
[17] *Id.* at 1202.
[18] *Id.* at 1201.
[19] Financial transparency in this context refers to the availability of information such as earnings, expenses, assets, and liabilities to investors.

In response to the 2008 financial crisis, the SEC enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[20] Within that act, the SEC's "conflict mineral" disclosure rule was part of an attempt at undertaking this social responsibility. This disclosure rule created a requirement by the SEC to disclose if their products contained conflict materials sourced from areas of the world, such as the Democratic Republic of the Congo, with evidence of the sale of those minerals in funding local armed conflicts. The label "DRC conflict-free" specifically states that it "does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country."[21] The goal of the policy was to limit financing violence in the volatile area with the assumption that investors would act in response to concern for the issue. In 2015, the National Association of Manufacturers, among others, challenged the regulation on the grounds of its overly burdensome and speech-compelling nature.

In its original opinion, the D.C. Circuit held that the conflict-mineral disclosure violated the First Amendment because it was "unrelated to curing consumer deception" and did not, therefore, qualify for the relaxed standard of review First Amendment test outlined in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.[22] The SEC sought a rehearing in light of a related decision which held that *Zauderer* applied to compelled disclosures beyond advertising and product labels.[23] The court reaffirmed its original judgment that § 1502 of the Dodd-Frank Reform Act violated the First Amendment to the extent that the requirement obliged issuers to state that their products did not contain DRC conflict minerals.

The court held that even if the governmental interest was sufficiently proven, the

[20] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
[21] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 2213 (2010).
[22] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).
[23] The related decision was Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014).

government failed to prove that the disclosure alleviated the harm caused by such corporate practices. Further, disclosures required by the rule were not “purely factual and uncontroversial” in the sense required for application of *Zauderer*.[24] The majority described the disclosure as “compelling an issuer to confess blood on its hands” as well as claiming “moral responsibility for the Congo war.”[25] The proposition that a corporation using conflict minerals in its products would, with a disclosure to investors of such use, automatically assumes “blood” on the hands of the investor is an assumption of multifaceted and unwarranted proportions. In this case, the issue is not with the actions of the SEC (which were enacted in accordance with the public interest) but with the system in which it operates. The purpose of the regulatory body and its system is to promote the security of the financial industry in the interest of the general public, but this purpose is undermined by the actions and reactions of those actors.

The antipathy an investor might feel when deciding whether to own shares in a corporation purchasing conflict minerals does not automatically warrant the interpretation presented by the court. The disclosure of such a practice does not, therefore, impose an inappropriate moral obligation on the potential investor; rather, it provides information that may or may not be relevant to their decision. In his dissenting opinion, Judge Sri Srinivasan argued that the rule required mere factual disclosure of the geographic origin of materials, analogous to other constitutionally valid disclosure mandates, and therefore should be qualified for the relaxed standard outlined in

[24] The “relaxed Zauderer standard” refers to a much less strict First Amendment test that applies when the government compels commercial speakers to disclose factual information. Under this standard, the government (in this case, the SEC) can force commercial entities to disclose the information as long as this requirement 1) compels only “purely factual and uncontroversial” information, 2) is reasonably related to a legitimate governmental interest, and 3) is not unjustified or overly burdensome.
[25] *SEC’s Conflict Mineral Rule Disclosure Requirement Unconstitutional Again*, NEWSTEX BLOGS SECURITIES LAW BLOG (Aug. 25, 2015), https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:5GSD-1Y21-JB5Y-N00Y-00000-00&context=1519360.

Zauderer.[26] A factual condition with legitimate reason in investor interest should fall within the rights of the SEC to enforce.

Contrary to the idea that the SEC has a right to enforce such a policy, the majority opinion communicates that the dissenting opinion fails to understand the applications of the two tests. If, in fact, the conflict mineral disclosure was required at the time of the sale of the product, *Zauderer* would apply. However, if the disclosure is required annually on the company's website, *Central Hudson* applies. For *Zauderer* to apply, the disclosure must also be of "purely factual and uncontroversial" information about the goods and/or services.[27] Four parts compose the *Central Hudson* test used in evaluating whether government regulations surrounding commercial speech are constitutional: the regulated speech must concern lawful activity and not be misleading, there must be a substantial government interest, the restriction must directly advance that interest, and it must be narrowly tailored.[28] The conflict mineral disclosure fails on two counts: the advancement of the government interest and the narrow tailoring. If the SEC were to issue regulations that complied with the *Zauderer* test, its responsibilities would have been fulfilled.

The very fact that the National Association of Manufacturers (NAM) challenged this disclosure requirement is evidence of its effect on investors, or at least corporations. The First Amendment challenge exists as a constitutional right to speak, or in this case, not speak. If NAM did not feel the need to reduce such a regulatory restriction, then they would not have seen the need to challenge the law. The statute must have had tangible implications for corporate behavior, decision making, and the overall dynamic between the private and public sector. The cost to corporations is the exposure to public scrutiny, reputational damage, or potential legal liability. If

[26] *Id.*
[27] *Id.*
[28] Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

the rule were enforced as written, companies would be required to dedicate resources and reforms to comply: the implementation of supply chain audits, for example, or the establishment of compliance departments.

NAM argued that conflict-mineral disclosure poses a threat to freedom: the chilling effect on corporate speech. This argument overstates the burden on free speech and understates the government's regulatory interest. The SEC's rule was aimed at increasing transparency in global supply chains rather than compelling political advocacy. The disclosure concerns factual information directly related to risk assessment, supply chain stability, and long-term sustainability and growth. Corporations routinely disclose similarly sensitive information and data in the context of securities without claiming constitutional injury.

Globalization has increased the relevancy of disclosure of corporate practices that surpass compliance with the law. U.S. labor protections and social norms differ widely from those of others, particularly and more obviously in major exporting powers. Increasing globalization and international trade mean that international corporate conduct can and will result in financial repercussions domestically.[29] Social issues, when radiated and compounded throughout market practices and conventions, become financial ones. The correlation between environmental sustainability and stock market performance, for example, shows this relationship clearly.[30] Investors increasingly favor companies with more sustainable investment into environmental, social, and corporate governance. Banks and financial institutions incorporate these investments into their credit assessments and therefore offer superior interest rates, which in turn reduces that company's debt burden. The actual corporations benefit, and so do the consumers, who "are more

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[29] Williams, *supra* note 13, at 1283.
[30] Xiao-Na Yin et al., *How Does ESG Performance Affect Stock Returns? Empirical Evidence from Listed Companies in China*, 9 HELIYON e16320 (2023), https://doi.org/10.1016/j.heliyon.2023.e16320.

likely to increase their investment in a company that has established a positive brand image and social reputation."[31]

The internet creates a world of possibility to which legislation has yet to respond sufficiently. In many cases, companies are pressured to align their practices with the expectations of investors faster than regulators are able to establish legal frameworks. The resulting increase in transparency demands robust accountability as the market dynamics of investors shift. This has fostered a culture in which corporations can no longer afford to disregard emergent ethical considerations. Brands are increasingly facing trouble for their sourcing, labor conditions, and environmental footprint. This shift underscores the complexity of modern corporate governance, where failure to act responsibly can undermine financial stability and viability in the long run. The SEC's duty to ensure investor protection and the promotion of stable truth is subverted in the interest of corporate free speech.

III. The SEC's Role in the 2008 Financial Crisis

As was true during the late 1920s and early 1930s, the 2008 Financial Crisis effectively engendered widespread distrust in financial institutions: the credit-rating agencies, banks, and authorities whose negligence incited the crisis. The credit-rating agencies in particular were the prime targets of confusion and anger both pre- and post-crisis. The tremendous losses accumulated by investors in "AAA"- or "AA"-rated securities resulted in a large number of lawsuits. In some cases, the rating agencies—primarily S&P and Moody's—shielded themselves from some of these using the claim to First Amendment protections. The SEC allowed these agencies to advance their power and dominate the market as a dual monopoly.[32] The failure of the SEC to properly execute

[31] *Id.*
[32] Term used in RAWI ABDELAL, CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE (2007).

its duty as delegated by Congress has allowed abuses of the First Amendment as seen in the credit-rating agencies post-2008.

Moody's and S&P emerged in response to the American railroad system: one unique in size, regulation, and financing. Their job was to evaluate the creditworthiness of the bonds sold by American railroads and sell their analysis to investors. In 1909, Moody categorized these designations in the form of letters. They look like this:

RATING SCALES

	Moody's	Standard & Poor's
INVESTMENT GRADE	Aaa	AAA
	Aa1	AA+
	Aa2	AA
	Aa3	AA-
	A1	A+
	A2	A
	A3	A-
	Baa1	BBB+
	Baa2	BBB
	Baa3	BBB-
SPECULATIVE GRADE	Ba1	BB+
	Ba2	BB
	Ba3	BB-
	B1	B+
	B2	B
	B3	B-
(close to) DEFAULT	Caa	CCC+
	Ca	CC
	C	C
		D

[33]

The public need for the assessment of the creditworthiness of a bond arose such that the credit-rating agencies could not charge the investors. Instead, they charged the issuers. But these fees and privileges presented by the agencies were subject to bias. Mass layoffs or reductions in state expenditure (e.g., the cutting back on public services) was "a common sacrifice" that rating agencies insist upon to avoid degradation.[34]

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[33] Dieter Kerwer, *Rating Agencies Setting a Standard for Global Financial Markets*, 3 ECON. SOCIO.: EUR. ELEC. NEWSL. 40, 40 (2002).

[34] *Id.* at 43.

In 1936, the Office of the Comptroller of the Currency prevented banks from investing in securities with ratings below a certain threshold. "BBB" or better, on the S&P scale, were permitted investments and not "speculative." These regulations essentially "endowed third-party safety judgments with the force of law."[35] In 1975, the SEC designated "nationally recognized statistical rating organizations" or NRSROs—S&P, Moody's, and Fitch. These NRSROs were elevated in their authority with distinct purposes in mind, including the limiting of exposure of investment funds to high-risk securities.[36] The importance of the ratings is evident in the fact that the security necessitated "one or two (usually two)" ratings "for the security to be held widely."[37] From its reasonable origins as a new form of investor protection, the credit-ratings industry evolved into a third-party powerhouse with unprecedented legal authority.

Even within the credit-rating industry, there existed contradictory levels of responsibility in regards to their role in the global financial system. The regulation to require ratings created artificial demand for their ratings, even as admitted by S&P itself.[38] The unintended consequences of the NRSRO designation meant that the U.S. government delegated "the difficult task of judging risk to experts whose mistakes seemed insulated from market discipline and government review alike."[39] S&P claimed First Amendment protections on its reports and announcements even before the crisis by likening them to journalism. They supported the NRSRO designation; Moody's, however, argued for the elimination of the practice, claiming that it "necessarily leads to demands

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[35] Lawrence J. White, *A Brief History of Credit Rating Agencies: How Financial Regulation Entrenched This Industry's Role in the Subprime Mortgage Debacle of 2007–2008*, MERCATUS CTR. (Oct. 2009), https://www.mercatus.org/research/policy-briefs/brief-history-credit-rating-agencies-how-financial-regulation-entrenched.

[36] White, *supra* note 35.

[37] ABDELAL, *supra* note 32, at 170.

[38] ABDELAL, *supra* note 32, at 172.

[39] ABDELAL, *supra* note 32, at 192.

for oversight" and siding with the U.S. Department of Justice's assessment of the inherently anticompetitive nature of its implementation.[40]

With all their power, the rating agencies apparently and then evidently were difficult to hold accountable. Dieter Kerwer, in his criticism of the power of the agencies, outlines key explanations for their lack of accountability: the extent to which the agencies are regulated only involves their necessity in the operation of the markets, but a non-extensive regulation of their processes or practices. They are not required to compensate any losses for mistakes in the quality of their ratings, resulting in an "accountability gap." As Kerwer put it aptly, "Why is it that rating agencies have power without responsibility?"[41]

The dominance of the credit-rating agencies presents challenges: how did we end up here? Kerwer offers a solution: market dynamics and reputation. The dynamics of the credit market are such that firms are not bound by dealing with other reputable organizations, like, for example, the investment banking industry. They are free from the "reputation signal" implied by conducting business with another entity, because "the rating agency's reputation is not tarnished, as long as it issues a low rating" to a riskier bond issuer.[42]

In an oligopolistic market-sharing competitive stalemate—for example, Coke and Pepsi—a few (in this case, two) corporations dominate a single market. In microeconomic theory, there exists a multitude of headaches for both parties, particularly when price and its elasticity of demand are concerned. S&P and Moody's avoided these by operating as a duopoly: the market demanded both ratings, one as a "reality check for the other."[43] Monopolistic market regulations exist to promote healthy marketplace competition. One of those considerations includes the freedom of

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[40] ABDELAL, *supra* note 32, at 192.
[41] Kerwer, *supra* note 33, at 43.
[42] Kerwer, *supra* note 33, at 44.
[43] ABDELAL, *supra* note 32, at 171.

firms to enter and exit the industry. Without NRSRO designation, firms were "essentially irrelevant" to both regulators and issuers; however, the designation "requires that firms already be 'nationally recognized.'"[44] With the implementation of the NRSROs, the SEC—a regulatory organization with the responsibility to limit public exposure to risk—prevented entry into the market, and thus ensured dominance in the form of a dual monopoly.

The other relevant microeconomic principle was the "network effect": the increase in the value of a good or service as consumption increases. As the credit-rating agencies reputation climbed, the use of their ratings as lawfully recognized measures of uncertainty followed. The more they were used, the more they were integrated into the financial system's inner workings, and the more they accumulated value as an organizational habit. Their integration into practice and business meant that even the SEC since 1975, had been "using ratings to adjust capital requirements for investment banks and similar institutions to their risk exposure."[45] The network of ratings amassed on the heels of economic negligence, paired with the monopolistic barriers to entry created by the SEC itself, essentially privatized public financial security.

Rating agencies were in the business of "absorbing uncertainty."[46] They aggregated data in the form of payment history, the amount and types of debt it carries, and financial performance. They analyzed macroeconomic and industry-specific conditions, management quality, and financial policies. They distilled these factors into letters and symbols, composing a simple figure with a world of complexity shuddering beyond its reach. These ratings, while easy to judge, contained secrets and stories incomprehensible to an investor's eye. The SEC's promises—the perfect market mechanism, the effective and responsible system—were lost in an endless process

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44 ABDELAL, *supra* note 32, at 173.
45 Kerwer, *supra* note 33, at 44.
46 *Id.* at 43.

of irresponsible delegation of responsibility: one which resulted in the corporate abuse of the most fundamental American right to freedom.

III.A *OH Police & Fire Pension Fund v. Standard & Poor's Fin. Servs., LLC* (2012)

Between 2005 and 2008, five Ohio public pension funds invested in 308 mortgage-backed securities. After the crisis, their losses amounted to $457 million. Each of the 308 securities was rated "AAA" or similar by Moody's, S&P, and Fitch, as required by regulation enacted by governmental authorities like the SEC. In accordance with Ohio state law, a pension fund may purchase a security if "[t]he bonds or other obligations are rated at the time of purchase in the three highest classifications established by at least one nationally recognized statistical rating organization and purchased through a registered securities broker or dealer."[47] State law, the requirement to purchase investment-grade securities, ensured the function of federal law, the NRSRO status, which effectively allowed for the misuse of constitutional law: the First Amendment.

In 2012, the investors sued S&P on the grounds of 1) Negligent misrepresentation: the plaintiffs argued that the agencies intentionally misled the investors in the funds, and 2) a violation of the Ohio Securities Act: the plaintiffs argued that misrepresentations in the credibility of securities violated the act. S&P argued that their ratings were opinions and therefore entitled to First-Amendment protection (unless the plaintiffs could prove that the CRA's knew their ratings were false). The court ruled that subjective opinions, as S&P had issued, about future market performance are not liable unless they are reckless. In addition, there was no "duty of care"; the

[47] OHIO REV. CODE § 135.14.

ratings were issued for general market use rather than for specific investors, so they could not have intentionally misled their investors.[48]

The question remains: how did we end up with a financial system so warped that two private giants—armed only with their own 'opinions'—wielded essentially legal authority over global markets, yet emerged from disaster with a shield against accountability? The answer: delegation. Government regulators have been in the business of delegating financial responsibility to those with more "delicate"[49] touches. The SEC's delicate touch allocated that responsibility—the public's exposure to risk—to the credit-rating agencies.[50]

III.B *Abu Dhabi Commercial Bank v. Morgan Stanley & Moody's* (2009)

The fragility of the First Amendment defense is evident in other applications. Preceding the crisis, plaintiffs invested in notes rated by Moody's Investor Service and Standard & Poor's Rating Services. In this case, the fees paid to the agencies were raised in order for the sellers' standards to be met. In the wake of the collapse of the sub-prime mortgage market, the agencies again used the free speech defense on the basis of ratings as opinions. However, they were not qualified for First Amendment protections. The ratings were issued *specifically* to a narrow institutional audience rather than the general public and therefore were liable. In addition, the plaintiffs successfully argued that the agencies may not have believed their ratings, thereby confirming their negligent misrepresentation.[51]

The distinction between public and private issuance of the ratings creates a process threshold for this series of cases. If the rating was determined to be public speech, First

[48] Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC, 700 F.3d 829, 842 (6th Cir. 2012).
[49] Werner, *supra* note 5, at 756.
[50] ABDELAL, *supra* note 32, at 171.
[51] Abu Dhabi Com. Bank v. Morgan Stanley & Co., 651 F. Supp. 2d 155 (S.D.N.Y. 2009).

Amendment protection applies, and the case would be dismissed unless plaintiffs prove malice—a nearly impossible feat. When the speech is a matter of public concern, its value is enhanced. Does the need for speech in matters of public concern trump the need for protection of public exposure to risk? If the rating were issued privately, transaction-specific speech for a limited group of investors meant that the First Amendment shield breaks. The case may proceed. After the privacy concern is breached, the court may evaluate the negligence of the credit-rating agencies' representation.

The plaintiffs must prove that the agency's relationship with the defendant constituted a "special" one. Under New York law, a "special" financial relationship occurs when the governmental or professional institution (ex. an insurance broker, a credit-rating agency) bears a duty to its client.[52] There are three ways to determine this relationship: firstly, if the agent receives compensation for consultation services separately from a premium; secondly, if there was "some interaction" between the insured customer, relying on the agent, about a "question of coverage;" thirdly, if repeated interactions over a sustained period of time that would indicate a reasonable amount of trust—in other words, the insured person sought that agent's expertise specifically.[53] In the case of Moody's and S&P, it seems as though the American public had no choice but to seek their "expertise" specifically. This is particularly true in terms of the agencies' role as, essentially, gatekeepers to access to investment-grade securities and loans.

One might argue that the governmental authorities, including the SEC, had entrusted a degree of responsibility to the American public. This perspective suggests that authorities believed public scrutiny and the inherent checks and balances in capitalist society would suffice to mitigate

[52] Christopher Martin & Benjamin Mehic, *Relationships Are "Special"—But Insurance Brokers Ought to Be Wary*, NAT'L L. REV. (Mar. 13, 2024), https://natlawreview.com/article/relationships-are-special-insurance-brokers-ought-be-wary.
[53] *Id.*

risks or correct errors in the system. From this viewpoint, if the public blindly trusted Moody's and S&P, they exercised a degree of self-reliance rather than deception by the agencies. Further, maybe the SEC and other regulatory bodies did not intend to establish such a "special relationship" between these agencies and the investors, believing that market forces and consumer diligence would ultimately prevail to correct errors in process and judgment by the rating agencies.

While the argument that public scrutiny and market forces might have played a corrective role in some cases, it overlooks the critical nature of the relationship between rating agencies and those who relied on their assessments. First, the argument that the public had no choice but to seek their expertise is grounded in the fact that the ratings were not merely advisory; they were essential to the functioning of global financial markets. Investors did not experience the luxury of choice in their reliance. Their ratings determined access to capital, opportunity, and risk assessment on a global scale. Furthermore, the argument that the SEC may have believed in the self-correcting nature of capitalism ignores the reality of asymmetric information. The public relied on these ratings because of their perceived expertise and objectivity. The result was a systematic breakdown of trust between the public and regulatory bodies. Moreover, the obvious institutionalized conflict of interest of Moody's and S&P—set up by the system where they were paid by the issuer—contradicts the idea that market forces would have easily exposed systemic errors.

The SEC misjudged the dangers of enveloping uncertainty and risk into mere letters. The "agents" of the 2008 financial crisis "employed social conventions to cope with uncertainty," which "embodied history that had been incorporated into routinized practices."[54] These social conventions influenced regulators and financial and corporate actors to the point of negligence. The SEC has a duty to protect the public from misleading financial information, especially from

[54] Stephen C. Nelson & Peter J. Katzenstein, *Uncertainty, Risk, and the Financial Crisis of 2008*, 68 INT'L ORG. 361 (2014).

entities such as the credit-rating agencies, who wielded enormous influence over markets in the years leading up to the 2008 financial crisis. The SEC's role in overseeing the operations of these industries included that of insurance of independence and transparency. As early as the 1990s, warnings were raised about the conflict of interest in the issuer-pays model, yet the SEC failed to address those concerns. Even though it possessed the authority, ability, and responsibility to do so, the SEC failed to regulate the agencies effectively. This failure to regulate credit-rating agencies effectively granted them the opportunity to operate without transparency but with independence, ultimately contributing to the systematic failures that led to 2008. Misleading information could proliferate unchecked with devastating consequences for investors and the broader economy. The SEC's inaction, or rather, reinforcement of the agencies' market power, undermined its credibility as a regulator.

Chairman Mary L. Schapiro of the SEC in 2010 testified to a "siloed financial regulatory framework" that "depart[ed] from the agency's traditional approach of establishing clear rules and enforcing compliance with them." [55] The SEC, further, "did not do enough as [a] consolidated supervisor to identify certain risks" that arose, leading to the "need to continue our reforms…and instill a culture of collaboration" after their "shortcomings."[56] The "once-proud"[57] SEC faced significant challenges in reform and reputation. The inspector general's report in September of 2008 found that almost a third of the firms under the SEC's trading market supervision had not filed correct documentation, in addition to their failure in adequate revision of the other filings.[58] In this way, the SEC's responsibility in the abuse of First Amendment protections is twofold: the

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[55] Mary L. Schapiro, *Testimony Concerning the Lehman Brothers Examiner's Report Before the House Financial Services Committee*, U.S. SEC. & EXCH. COMM'N (Apr. 20, 2010), https://www.sec.gov/news/testimony/2010/ts042010mls.htm.
[56] *Id.*
[57] Stephen Labaton, *S.E.C. Concedes Oversight Flaws Fueled Collapse*, N.Y. TIMES (Sept. 26, 2008), https://www.nytimes.com/2008/09/27/business/27sec.html.
[58] Labaton, *supra* note 57.

negligence of misinformation spread in the form of risk assessment to the American people, and the ability of the agencies to shy away from accountability.

IV. Conclusion

In the years leading up to the financial crisis, the SEC neglected its duty to prevent the misuse of constitutional power, as financial and corporate entities exploited First Amendment protections to push for deregulation and establish the fragile corporate shield. The assurance of financial and emotional safety of the American public in regards to their investments rests on the shoulders of the SEC. When emotional distress becomes a financial issue in the form of conflict minerals, the SEC and the judiciary system failed to ensure that safety. In the years after the financial crisis, the SEC has tried and failed to establish sufficient accountability legislation in the form of investor protection and transparency under the law. Their responsibility to do so relies on their fundamental promotion and protection of the "national public interest."[59] When the "national public interest" changes, however, the SEC lags in its responsiveness. The environmental, social, and humanitarian concerns of the American public necessitate a revision in economic policy. Transparency does not necessarily impose a social concern; the social concern emerges from the investors themselves. The SEC and the system in which it is embedded opened paths to corporate free speech abuse at the expense of the "national public interest."

The political and financial systems of the United States have long focused on balance; between the branches of government, between the public and the legislators, and between the borrowers and the lenders. These balances reflect a commitment: one to stability, equity, and mutual responsibility within the economy. The modes of implementation of the freedom of expression should focus on enhancing and enriching that delicate balance; yet, through evolution,

[59] 15 U.S.C. § 78b.

technological transformation, and expansion of expressive platforms, the balance has shifted. Some voices are amplified, some marginalized. The original equilibrium envisioned by the framers of the Constitution has become increasingly difficult to maintain. In a rapidly changing society, our fundamental freedoms often face tests of integrity, accountability, and application. When money is speech, or rather, when speech is money, values collide and the responsibility of regulatory systems dissolves. Cycles of distrust and restoration of trust in American financial systems pose a danger to the financial security of the future: when will its failure result in a disaster beyond recovery?

Closing the Door: Why an Academic Exemption to the Garcetti Standard Must Exist

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ABSTRACT:

In *Garcetti v. Ceballos*, the Supreme Court ruled that government employees who speak "pursuant to their official duties" would not be afforded First Amendment protection for such speech. When applied to the speech of public university academics, however, whose official duties are to create and disseminate knowledge, *Garcetti* empowers the government to censor, and thereby control, academia. This essay will trace the case law that predated Garcetti, explore the decision's flawed application to academics, analyze the Court's pre- and post-*Garcetti* jurisprudence, and offer an outline for a new categorical exception for academic speech. Ultimately, this essay will argue that *Garcetti is inherently* inapplicable to public university academics, and that such application is dangerous to the larger role academia plays in American democracy.

"Teachers… must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die."

— Mr. Chief Justice Warren, *Sweezy v. New Hampshire*[1]

I. Introduction

On May 30, 2006, the Supreme Court decided *Garcetti v. Ceballos*, announcing a new standard for the regulation of government employee speech.[2] At first glance, it appeared disarmingly categorical: "When public employees… [speak] pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate them from employer discipline."[3] And yet, despite issuing such a certain opinion, the Court refused to rule on *Garcetti's* relevance to cases "involving speech related to scholarship or teaching."[4] This dichotomy signaled a constitutional anxiety the Court did not resolve but could not ignore, and naturally raised the question: why did the Court find it so necessary to include two sentences about a potential academic exception to *Garcetti*?[5] Beyond placating Justice Souter's dissent, what is the value of an academic exception?[6]

This paper will address these questions by first analyzing pre- and post-*Garcetti* First Amendment jurisprudence and how its logic collides with a role whose "official duties" are defined by the very absence of rigid intellectual parameters. Section III traces the doctrinal foundations — namely *Pickering*'s[7] balancing test and *Connick*'s[8] public-concern threshold — that governed public employee speech before *Garcetti*. Section IV examines *Garcetti* itself, emphasizing the

[1] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
[2] Garcetti v. Ceballos, 547 U.S. 410 (2006).
[3] *Id.* at 421.
[4] *Id.* at 425.
[5] *Id.*
[6] *Id.* at 438–39.
[7] Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
[8] Connick v. Myers, 461 U.S. 138 (1983).

managerial theory of government speech that fueled the decision. Section V explains why applying *Garcetti* to teaching and scholarship would invert the Court's long-standing protection of academic freedom and undermine the democratic function of universities. Section VI examines how the federal courts of appeal have interpreted an academic exception to the *Garcetti* rule.. Section VII then proposes a workable framework for applying an academic exception. Courts should treat "speech related to scholarship or teaching" as categorically exempt from *Garcetti*'s official-duties bar and evaluate it under a more *Pickering*-*Connick*-like standard,[9] while allowing *Garcetti* to govern genuinely administrative faculty speech. The conclusion returns to the core claim: the academic exception preserves a boundary that prevents the state from encroaching on intellectual independence.

II. The Disconnect Between *Garcetti* and Academics

Garcetti v. Ceballos involved Richard Ceballos, a deputy district attorney who claimed that he had been unconstitutionally retaliated against for recommending to dismiss a case based based on a faulty warrant.[10] *Garcetti*'s central holding—that speech "made pursuant to official duties" is not constitutionally protected—was efficiency-minded, deferring to the government's authority to direct workers in accordance with its operational mission.[11] The decision affirmed "the exercise of employer control over what the employer itself has commissioned or created" and that employees do not have a "right to perform their jobs however they see fit."[12] For traditional public employee settings like police departments and prosecutors' offices, where uniformity is an operational necessity, this restriction makes sense.[13] But in academia, particularly within the

[9] *Garcetti*, 547 U.S. at 425.
[10] *Id.* at 410.
[11] *Id.* at 413.
[12] *Id.* at 422 (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)).
[13] *See* Connick v. Myers, 461 U.S. 138, 151 (1983) (citing Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

context of public universities,[14] where faculty are hired precisely to produce distinctive, extra-institutional knowledge, diversity of thought is uniquely important.[15] The Court has repeatedly romanticized this vision of higher education: a "marketplace of ideas," a training ground for democratic citizenship, a site where truth emerges not from authority but from contestation.[16]

Applying *Garcetti* to academics twists the administrative desire for operational consistency into a "pall of orthodoxy over the classroom," the First Amendment forbids.[17] When the public employee's official duty is to engage in inquiry, critique, and production of new knowledge, the legal distinction between employee speech and citizen speech collapses. *Garcetti*'s logic becomes constitutionally hazardous, as all academic speech is created "pursuant to official duties," thus stripping away any constitutional protections.[18]

The special role of higher education emphasizes that the government can be an employer in two separate capacities: sovereign administrator and educator.[19] Public universities are semi-autonomous generators of knowledge that contribute to the marketplace of ideas. Adopting the academic exception to *Garcetti* is embracing a boundary line that keeps the First Amendment meaningful in the very institutions that teach it.

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[14] Although it could be argued that the sentiment of university officials hiring academics to produce new, contributory scholarship can be applied to both public and private academia, the scope of this essay will stay within the context of public universities. In terms of primary, secondary, and higher education, this essay will focus on the last. Primary and secondary schools are fundamentally different from higher learning in terms of educational purpose, democratic accountability, and individual teacher discretion. For a more detailed analysis of the structural differences between these education levels and their consequences for First Amendment protections, see Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54 (2008). For the purposes of this essay, any reference to "academic speech" is constrained to the speech produced by public university faculty.

[15] Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 J.C. & U.L. 313, 314 (2007).

[16] *Rosenberger*, 515 U.S. at 850.

[17] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[18] *Garcetti*, 547 U.S. at 444.

[19] Judith C. Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 992 (2009).

III. Pre-*Garcetti* Jurisprudence

The First Amendment has always imposed an administrative burden on the government. The government cannot simply ban negative press coverage or a citizen's attempts to take action against government grievances, for example.[20] The Constitution is designed precisely to ensure that the state cannot compromise certain fundamental liberties in the pursuit of effective administration. First Amendment jurisprudence, following this natural dynamic, has centered around the need for the government to regulate certain speech to ensure effective state administration and the right of citizens to speak as they please.[21] Public employees, however, may speak both as individuals and as extensions of the government, creating a jurisprudential gray area. For much of the 20th century, the Supreme Court was silent on this question. The prevailing understanding was that a private citizen may be protected by the First Amendment, but their choice to become a public employee would trump their normally afforded free speech rights.[22] But as the modern administrative state expanded, that neat division became less plausible. Before *Garcetti*, the Court's public employee speech jurisprudence was defined by compromise. The government is not merely a regulator of speech; it is also an employer, and employers must control their workplaces to function. The Court's solution was not to deny protection altogether, but to manage conflict through balancing tests and thresholds.[23]

In 1968, the Court ruled in *Pickering v. Board of Education* that a public school teacher was unconstitutionally fired for criticizing the school board's budget allocation.[24] Recognizing that teachers are uniquely qualified to keep schools democratically accountable,[25] the Court held that

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[20] U.S. CONST. amend. I.
[21] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
[22] McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).
[23] Marni M. Zack, Note, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893 (2005).
[24] *Pickering*, 391 U.S. at 565.
[25] *Id.* at 572.

the First Amendment protected Pickering because his speech on matters of public concern outweighed the school's interest in efficiency and discipline.[26] *Pickering* reveals that the Court is more than willing to use a contextual — rather than a categorical — speech analysis that focuses on whether there is a legitimate public interest in protecting a public employee's speech. In turn, the Court established a test where courts must "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[27] Then, in 1983, the Court heard *Connick v. Myers*,[28] where an assistant district attorney was fired for circulating a questionnaire about office morale and transfer policies after objecting to a reassignment.[29] The Court held that most of her questionnaire addressed personal grievances, not issues of public concern, and thus fell outside *Pickering's* protection.[30] Aiming to prevent federal courts from constitutionalizing routine personnel disputes, the Court instructed judges to examine the "content, form, and context" of the speech, imposing a threshold to limit what kind of speech deserved a *Pickering* balancing test.[31] But even then, the Court's solution was to filter for public value, not to declare whole categories of speech constitutionally invisible.

Rather than turn only on context, these approaches required judges to evaluate interests, taking special consideration for speech with socio-political value. This standard left plenty of room for litigation from both parties, ensuring that the government could not unreasonably constrain employee speech while still affording it some latitude for management and discipline. The balancing test recognized both the government's legitimate interest in running schools efficiently

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[26] *Id.* at 574–75.
[27] *Id.* at 568.
[28] Connick v. Myers, 461 U.S. 138 (1983).
[29] *Id.* at 138.
[30] *Id.* at 154.
[31] *Id.* at 147–48.

and instructors' interest in freely contributing to debates about education, policy, and other matters of public concern. Balancing tests can be inconsistent, but they allow constitutional law to reflect institutional complexity. That flexibility is precisely what *Garcetti* threatened to remove.

IV. *Garcetti*'s Faulty Rationale

Garcetti introduced a new threshold question that short-circuits *Pickering*: was the employee speaking "pursuant to official duties"?[32] If yes, the speech is not protected by the First Amendment and the inquiry ends. If not, only then would the Court conduct a *Pickering-Connick* analysis. Rather than balance the competing interests of government employers and individual citizens, *Garcetti* centers only the managerial authority of government employers. In *Garcetti* itself, the Court found that a district attorney's speech was not protected because his speech was made within his contractual obligation as a district attorney.[33] This marked a significant shift in federal jurisprudence, transforming a balancing regime into a categorical exclusion standard. Under *Pickering-Connick*, job-adjacent speech could be protected if it concerned public matters and did not overly disrupt workplace function. With the 2006 ruling, however, even if a public employee is speaking on a matter of utmost public concern, if their speech was produced in simple relation[34] to their job, there exists no constitutional protection for the employee's speech.[35] The Court justified this change by invoking the government's right to control "what the employer itself has commissioned or created"—employers must be able to ensure that commissioned work reflects institutional policy, law, and professional standards.[36] A prosecutor's memo, a police officer's

[32] *Garcetti*, 547 U.S. at 421.
[33] *Id.* at 420–25.
[34] The degree to which speech is "related" to a public employee's duties was left for lower courts to determine. Different districts consider different factors, including but not limited to "subject matter, audience, formal job descriptions, and comparisons to relevant citizen analogues." For more information on the history and range of circuit court *Garcetti* analyses, see Thomas Keenan, *Circuit Court Interpretations of Garcetti v. Ceballos and the Development of Public Employee Speech*, 87 NOTRE DAME L. REV. 841 (2013).
[35] *Garcetti*, 547 U.S. at 417.
[36] *Rosenberger*, 515 U.S. at 833; *Garcetti*, 547 U.S. at 422.

report, or a social worker's evaluation are not examples of individual expression, but instruments of the state's operational power. If each were considered constitutionally protected citizen speech, governmental institutions could become unmanageable. This train of logic, the Court argued, would "not infringe any liberties the employee might have enjoyed as a private citizen."[37] *Garcetti*, by focusing on this employee-citizen distinction, however, moves away from the Court's previous emphasis on the public value of government employee speech.

V. Academic Speech Cannot Coexist with *Garcetti*

If *Garcetti* were applied cleanly to public universities, the consequences would be immediate and sweeping. Professors are employed to teach and produce published research. Lectures, syllabi, peer-reviewed articles, conference presentations, lab findings, and public-facing academic commentary could all be considered "employee speech" under the umbrella of official duties, meaning that a professor's most characteristic expression would become unprotected. *Garcetti's* constitutional paradox is that it punishes speech for being central to a job, while in academia, the job is speech and thought. Moreover, the *more* central the speech is to professional identity, the easier it is for the state to discipline it as employee speech—the "academic job" would become the perfect machine for university officials to censor hired academics. Though protections for academic freedom vary, America's historical relationship[38] with higher education affirms the Court's long-held belief that orthodoxy is fundamentally dangerous for universities. Indeed, applying the Enlightenment principles that inspired the Constitution, prominent political theorist John Stuart Mill asserted that objective truths are best revealed through vigorous debate, and that open and diverse academic inquiry is the means by which one can search for this truth.[39] This

[37] *Garcetti*, 547 U.S. at 421–22.
[38] This paper will only briefly address certain topics of First Amendment public employee speech jurisprudence, for a more comprehensive analysis of the jurisprudential history, see Keenan, *supra* note 34.
[39] JOHN STUART MILL, ON LIBERTY 23–25 (Batoche Books 2001) (1859).

marketplace of ideas functions when individuals are allowed to research, develop, and share their ideas, comparing, contrasting, and contextualizing their findings with others over and over until a final understanding of truth can be established.[40] Indeed, Mill's search for truth parallels the academic's work in producing knowledge through "science, objectivity, and intellectual rationalism."[41] In universities, the marketplace of ideas describes an actual method of producing knowledge. Scholarship advances through criticism, replication, disagreement, and revision. Teaching, at its best, trains students to evaluate arguments, evidence, and premises.[42]

Beyond its roots in the country's social and political upbringing, the Supreme Court has also codified academic freedom in numerous cases. In *Sweezy v. New Hampshire*,[43] the Court condemned government intrusion into a university lecture, emphasizing the importance of intellectual freedom in higher education.[44] In *Keyishian v. Board of Regents*, the Court affirmed the classroom's identity as a marketplace of ideas.[45] Even when the Court did not treat academic freedom as an independent constitutional right, it recognized that the nation itself "is deeply committed to safeguarding academic freedom."[46] If *Garcetti* were applied without exception, these stated protections for an independent academia would mean nothing. The state would have the power to discipline professors for the content of their lectures and scholarship precisely because

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[40] Mill did not ever use the explicit term "marketplace of ideas." Jurisprudentially, it was first mentioned in Justice William O. Douglas' concurring opinion in *United States v. Rumely*, 345 U.S. 41, 56 (1953). However, this term still derives from Mill's argument of competing ideas determining societally accepted truth. For the purposes of this essay, marketplace of ideas will reference the general notion of any environment where the free exchange of ideas determines truth over falsehood.
[41] Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 J.C. & U.L. 313, 317 (2007).
[42] Moving from theory to practice, many early notions of academic freedom and American colleges drew inspiration from Lehrfreiheit, the German concept that public professors enjoy the legal right to research and teach without government interference. *Id.* at 316.
[43] Sweezy v. New Hampshire, 354 U.S. 234 (1957).
[44] *Id.* at 261 (Frankfurter, J., concurring).
[45] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).
[46] *Id.*

those classes and articles are part of their job. The "pall of orthodoxy"[47] would no longer be a warning; it would be a managerial option. The danger is not merely that a professor will be punished for a controversial view. The danger is that an entire scholarly system of peer review, departmental debate, and scholarly contestation will be replaced by managerial preference. Once administrators claim that classroom instruction represents state-owned speech, the distinction between education and propaganda becomes fragile. And when education becomes propaganda, public trust in universities as producers of credible knowledge collapses. The scholarly work that challenges society's pre-existing notions or understandings is muddied by government-influenced partiality; independent researchers may instead be seen as government mouthpieces. In fact, modern developments[48] have expanded state encroachment on academic freedom.

The theoretical extremes and real suppression threaten the critical role universities serve to our larger society. Unlike other state agencies, public universities produce expertise and critique. They generate research that informs public policy and challenges governmental decisions, research that will be critical to properly informing future members of Congress, NIH doctors, and other key positions in keeping our democratic society functional. In a democracy, the state should not be able to monopolize the production of knowledge about itself. Public universities, ironically, may be among the most important sites for independent scrutiny of public power precisely because they are publicly funded and accessible, yet have institutional capacity for independent critique. If *Garcetti* can be used to discipline professors for research findings that are inconvenient to political authorities, the university's role as an independent knowledge producer becomes contingent on

[47] *Id.* at 603.
[48] Increased American nationalism post-9/11 and heightened sensitivity toward hot-button political issues such as gay rights, race relations, and general political correctness have influenced university officials to curb free speech surrounding such issues, see Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 J.C. & U.L. 313, 314 (2007).

politics rather than the scholarly pursuit of truth. Therefore, the constitutional issue is not only the professor's autonomy but also the public's interest in a system where truth is verified through a rigorous, multidisciplinary, opinioned process, rather than declared by bureaucracy.

VI. Exploring the Exception

In the years after *Garcetti*, circuit courts heard frequent cases involving professors punished for books, op-eds, curricula, departmental criticisms, and scholarship.[49] The question was always the same: is this employee speech unprotected by *Garcetti*, or is academic speech different? Here, the Supreme Court's opinion offered little guidance, leaving the lower courts broad liberty to rule as they saw fit.

Broadly speaking, post-*Garcetti* decisions have taken one of two paths. The first treats professors like other public employees: if the speech is part of their job, it is unprotected. Under this approach, the university's managerial authority is decisive, and academic freedom becomes a contractual concept[50] or professional norm[51] rather than a constitutional constraint. The second treats teaching and scholarship as a completely different jurisprudential category. Under this approach, courts either hold that *Garcetti* does not apply to core academic speech or interpret "official duties" very narrowly to preserve a *Pickering* balancing test for teaching and scholarship.[52]

In *Demers v. Austin*, for example, the United States Court of Appeals for the Ninth Circuit held that *Garcetti* does not apply to "teaching and academic writing."[53] Under this model, academic speech is evaluated under the *Pickering-Connick* test, where the court balances the

[49] *See also* Keenan, *supra* note 34.
[50] Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008).
[51] Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000).
[52] *See* Demers v. Austin, 746 F.3d 402 (9th Cir. 2014); Heim v. Daniel, 96 F. App'x 598 (10th Cir. 2004).
[53] Demers v. Austin, 746 F.3d 402, 411–13 (9th Cir. 2014).

professor's interest in producing topical academic work against the university's interest in operational effectiveness. This model preserves the managerial authority of university administrators while rejecting the idea that core academic speech is categorically unprotected. It recognizes that universities can regulate professional standards like plagiarism, grading integrity, research misconduct, and other regulatory practices. This employer power, though, can be exercised without punishing challenging or inconvenient findings produced by teaching and academic writing.

Other decisions, like *Adams v. Trustees of the University of North Carolina-Wilmington*,[54] have emphasized that professors often speak as citizens even when their subject matter overlaps with expertise and employment, and that "no individual loses his ability to speak as a private citizen by virtue of public employment."[55] This approach is sensitive to the fact that academics routinely publish as part of a professional identity that is only partially reducible to institutional commission. In Adams's case, the United States Court of Appeals for the Fourth Circuit wrote that the plaintiff's controversial speech after his religious conversion was "not tied to any more specific or direct employee duty"[56] than the general expectation that professors engage in "writing, public appearances, and service within their respective fields."[57] The insight here is that a professor's official duties are not always defined by employer control. Academic norms often treat scholarship as the professor's own—even when produced within a public institution. That norm complicates *Garcetti*'s assumption that job-duty speech is necessarily government-owned.

The diversity in lower-court findings reveals that *Garcetti* did not set a standard as absolute as one might assume. When doctrine lacks a rule for an institution as prominent as the public

[54] Adams v. Trs. of the Univ. of N.C.–Wilmington, 640 F.3d 550 (4th Cir. 2011).
[55] *Id.* at 564.
[56] *Id.*
[57] *Id.*

university, constitutional law becomes scattered in its absence. Circuit courts have had varying degrees of interpretation on what "official duties" mean, the existence of an academic exception, and *Pickering-Connick* balancing.[58] Ultimately, this variation proves the inherently backward nature of *Garcetti* — the rule becomes overbroad and unworkable in its pursuit of an all-encompassing constitutional diagnosis.

When speech protection depends on a professor's geographic location, the First Amendment — meant to be a uniform national standard — is enforced unevenly. This is especially concerning in higher education because academic labor markets are national, scholarship is cross-jurisdictional, and public universities serve citizens everywhere. That reality strengthens the case for a clearly articulated academic exception. Without it, uncertainty itself can chill speech. A professor deciding whether to publish controversial findings or teach a politically sensitive topic should not have to become a circuit specialist to assess the risk of retaliation.

VII. Defining the Exception

An academic exception must balance the needs of administrators and faculty. One that is too narrow may ignore the less traditional forms of scholarship or teaching[59] that academics consistently find themselves in. Under a strictly defined academic exception, these nuanced forms of speech could create opportunities for employers to extend their administrative power and swallow such speech under the label of unprotected official duties. If the exception is too broad, it risks constitutionalizing every faculty dispute and undermining legitimate institutional governance. A workable framework must protect the essential intellectual functions of higher

[58] *See* Keenan, *supra* note 34.

[59] Take, for instance, the speech produced at an academic conference, class field trips, or in the office hours hosted by a faculty member. Such instances complicate the academic nature to academic speech by changing the locations, audience, and contexts necessary to evaluate *Garcetti*'s "pursuant to official duties" standard.

education while preserving the university's ability to enforce professional standards and maintain basic workplace order.

To protect these two elements, an academic exception must first recognize that professors themselves perform multiple roles. They serve as scholars and teachers, conducting research, publishing, teaching courses, designing curricula in accordance with disciplinary standards, and mentoring students. They are also institutional administrators who manage budgets, staffing, committee assignments, facilities, schedules, and other extracurricular commitments. These roles are both "official duties" for the purposes of *Garcetti*, but they should not be equivalent in First Amendment terms. The first category is the heart of a university's knowledge-production mission, and the second is the administrative work that keeps the institution running as a public workplace.

Under an academic exception, speech related to scholarship or teaching should not be immediately barred from First Amendment protections. Speech related to administrative matters, in which the professor acts like a manager or employee, would still be governed by *Garcetti*, respecting the Court's managerial insight while preventing it from swallowing academic freedom. This is not to say that the speech is perfectly protected, but that academic speech should be evaluated under the broader *Pickering-Connick* standard. This test, however, should be modified to account for the expectations of university students, straying from the Court's reasoning in cases like *Bethel v. Fraser*,[60] where the Court allowed administrators to censor lewd, vulgar, and indecent speech for the educational mission of teaching young students the "shared values of a civilized social order"[61] like decency and modesty. University students, unlike primary and secondary schoolchildren, are not a captive audience[62] and should be expected to handle unsettling

[60] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
[61] *Id.* at 683.
[62] Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54 (2008).

ideas so long as the speech does not enter into an unprotected category of speech like incitement, fighting words, true threats, obscenity, defamation, and child pornography. The balancing would evaluate the academic's interest in disseminating their knowledge — controversial or not — for educational purposes, the students' interest in hearing or not hearing such speech, and the institution's interest in maintaining effective and efficient administrative operations.

The challenge then lies in determining the practical definition of speech "related to scholarship or teaching." Similarly to the factors[63] determining speech on a matter of public concern, courts should consider the speech's context, including but not limited to its form,[64] audience,[65] method,[66] purpose,[67] and control.[68] No one factor should be dispositive. Ultimately, the question is whether the speech is part of the university's intellectual mission or part of its managerial apparatus.

VIII. Conclusion: Academic Freedom Is a Necessity

Return to the opening question: why did the Court feel so compelled to hint at an academic exception? Because even in an opinion committed to managerial authority, the Court recognized the danger of unilateral censorship. In universities, the "official duties" that *Garcetti* relies on are precisely those acts — teaching, scholarship, disciplined critique — that the First Amendment most directly serves. If *Garcetti* is applied without an academic exception, the state gains an extraordinary power: the ability to discipline the production of knowledge by labeling it employee

[63] *See* Connick v. Myers, 461 U.S. 138 (1983).
[64] Is the speech a lecture, syllabus content, academic publication, conference presentation, research report, or pedagogical material?
[65] Is the speech directed to students, scholarly peers, academic journals, conferences, or disciplinary communities?
[66] Is the speech produced through academic norms like peer review, scholarly citation, disciplinary methodology, and/or curricular design based on professional standards?
[67] Is the speech intended to convey knowledge, provoke inquiry, present research findings, or contribute to scholarly debate, rather than to execute administrative policy?
[68] Does the institution claim direct editorial control over the content, or does it evaluate the speech through professional criteria rather than ideological alignment?

speech. The classroom becomes not a marketplace of ideas, but a workplace speech zone, regulated by managerial preference rather than intellectual freedom. The value of the academic exception is therefore not symbolic. It is structural to the intellectual development of America’s future, structural to the foundations of higher education, and ultimately, structural to American democracy and the Constitution. History, society, and the Court’s precedent affirm that academic freedom should be firmly established as a new First Amendment jurisprudential category deserving constitutional protection.

The Government Fairness Doctrine: A Novel Way of Addressing the Dangers of the Government's Speech Through Historical Logic

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I. Introduction

Since the inception of the United States federal government and the Constitution, the core philosophy and system of "checks and balances" have been a great balancing act. Checks and balances are necessary for our government to function, and in the words of James Madison, when creating a government for people to govern other people, "you must first enable the government to control the governed; and the next place, oblige it to control itself."[1] Within these obligations for the government to control itself, we have regulatory boards, traditional interbranch checks and balances, inspectors general, and myriad other checks on government action. Where there has yet to be any substantial safeguard, however, is within the government's own speech.

The existing government-speech doctrine allows the government a broad scope to engage in viewpoint discrimination only when it is speaking for itself, for the purposes of pushing policy and effectively leading a country. The idea that a government can have no specific view seems to lead to a stagnant, immovable government that cannot function. For this reason, the Supreme Court has time and time again allowed the government significant discretion in how it chooses to express its speech under this doctrine. In the decades since this doctrine, though, the government has regularly overstepped its bounds and utilized its speech in ways that could be seen as counteracting the American democratic system rather than fostering it. The era of the Cold War saw the Red Scare run rampant, mostly due to propagation of the idea from and through the government. Polarization has also emerged in recent executive administrations, with the rhetoric from the executive being more targeted and antagonistic than in prior presidencies. The government is a likely cause of the clear polarization happening within the United States writ large. In the history of the United States, the fear of polarization and potential disinformation on important issues

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[1] THE FEDERALIST NO. 51 (James Madison).

spurred legislation not towards the government, but the broadcast media. The Fairness Doctrine, a now-defunct doctrine created by the FCC, required that broadcasters cover "all sides of controversial issues."[2] The fear that broadcasters would use the limited broadcasting infrastructure to push a collective view instead of fairly covering these events was a real fear of the government, so requiring this fairness was a way to maintain the important facet of understanding both sides of an issue in democracy. Over time, however, the Fairness Doctrine became less popular, as its unintended consequences started to become hard to ignore. Not only had the infrastructure for broadcast media grown since the Fairness Doctrine's induction, eliminating the problem of scarcity, but requiring broadcasters to be "fair" was unintentionally chilling speech and coverage on important issues, not fostering it.[3] Because of these unintended effects, the FCC chose to repeal the doctrine. Even when Congress tried to codify the rule into law, President Reagan vetoed the bill, citing much of the same logic the FCC employed in its initial repeal.[4]

While the specific circumstances that fostered the initial Fairness Doctrine might not be relevant in the modern day, the importance of such plurality of opinion for democracy is undeniable. The only difference is that, where before, the dangerous speaker was the broadcast media and its iron fist over the broadcast infrastructure, the most influential speaker is now the government itself. Allowing the government-speech doctrine to persist as it stands gives potential bad actors too much liberty in their rhetoric and opens the door to the government fueling political polarization, instead of working against it. While sufficient guardrails might not exist currently for the government-speech doctrine, the Fairness Doctrine gives us a framework to work with.

[2] Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).
[3] General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35,418 (Aug. 30, 1985).
[4] Veto Message Returning the Fairness in Broadcasting Act of 1987 to the Senate, S. DOC. NO. 100-10 (1987).

This paper will both analogize and reinterpret the defunct Fairness Doctrine into a new doctrine, labeled the "Government Fairness Doctrine," to create guardrails for the overly broad government-speech doctrine. To begin, this paper will summarize and analyze the history of the Fairness Doctrine both to contextualize the doctrine in question and to see what parts of the doctrine might work and which might not. Next, the paper will further analyze government-speech doctrine and, by referencing political theory and jurisprudence, transition into highlighting the dangers that an overly broad government-speech doctrine can pose. Political polarization is at the core of these dangers, and history provides many examples of the real-world consequences that can come from such rampant government speech, with contemporary examples being at the forefront. Finally, taking all the preceding parts into consideration, this paper will propose a structure, operation, and philosophy for the "Government Fairness Doctrine" and handle some potential objections thereto.

II. The Rise and Fall of the Fairness Doctrine: What's Left?

The Fairness Doctrine was a development of ideals and policy throughout the 20th century and the Federal Communications Commission's positions on these matters. In 1927, Congress passed the Radio Act, which, alongside founding the Federal Radio Commission (later abolished and absorbed into the larger FCC), stated that a radio license would only be granted if "public interest, convenience, or necessity" would be serviced by the radio broadcaster.[5] The Act set an important standard, as a radio needed to do more than abide by laid out rules; radio, as the important medium of communication that it was, had to serve the public interest in order to justify

[5] Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927).

its existence. [6] Later on, once the FCC replaced the FRC as the official communications commission of the United States, it published a report that interpreted the "public interest" to also promote the fairness of broadcasting, thus bringing about the "Fairness Doctrine."[7]

The Fairness Doctrine appeared simple in theory: the doctrine would require broadcasting stations to both set aside a fair amount of time for broadcasting of controversial issues and to be as "fair" as possible, that is, present contrasting viewpoints regarding these issues.[8] While there are several portions in the report that form the standards that the FCC would use for decades to come, the one most important for this paper recognizes the "paramount right" of the public to be informed of various viewpoints on controversial issues, as it "is the foundation stone of the American system of broadcasting."[9] In reading the report, many of the FCC's main motivations in creating the first edition of the Fairness Doctrine lay in this belief in the paramount right of the public to be informed of various viewpoints.[10] While few argued against the normative logic of the doctrine over the years that followed, many raised alleged issues with the government's implementation of the doctrine.

The first major conflict arose in the Supreme Court case *Red Lion Broadcasting Co., Inc. v. FCC*.[11] A part of the Fairness Doctrine required that stations give reasonable response time to

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[6] The Radio Act of 1927 also featured one of the first iterations of the Equal Time Provision, requiring radios to provide equal time to a rival political candidate if they allow time to another political candidate. Historically, the Equal Time Provision's logic has been to prevent pure partisanship or censorship from a broadcaster or communication medium. While this paper will further explain the importance of fairness for the public interest, it seems as though the writers of the Radio Act understood this importance too, even if not outright saying it.

[7] Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

[8] Kathleen Ann Ruane, CONG. RSCH. SERV., R40009, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES 2 (2011) (citing Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10,415, 10,426 (July 25, 1964)).

[9] Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

[10] Much debate about the Fairness Doctrine has focused on specificities introduced after the doctrines core formulation. The normative logic justifying the Fairness Doctrine isn't so heavily debated as its implementation, but the consensus since then seems to have been that as good as the logic was, no such application could be done without risking chilling speech. Not one of these analyses have pointed to the biggest speaker of all, that being the government.

[11] 395 U.S. 367 (1969).

those who had been targets of personal attacks, and when Fred J. Cook demanded his response time from Red Lion Broadcasting after having been personally attacked by them,[12] Red Lion refused.[13] Red Lion was subsequently hit with charges from the FCC, which it disputed all the way up to the Supreme Court. Red Lion questioned whether the Fairness Doctrine, in its provision to require response, was a First Amendment violation.[14] In a unanimous decision, the Court ruled that the Fairness Doctrine was constitutional, and it based its rationale primarily around the idea of spectrum scarcity. Because of the scarcity of broadcasting stations at the time of the case, the Court deemed that the FCC's enforcement of the fairness doctrine helped bolster a "marketplace of ideas in which truth will ultimately prevail," and not a "monopolization of that market, whether it be by the Government itself or a private licensee."[15]

The Court seemed worried about a monopoly of ideas that promoted one singular viewpoint, and at the time of the ruling, allowing the Fairness Doctrine to fall risked making that a reality. The justices deemed that the First Amendment protected the right of the public to receive diverse ideas, rather than solely privileging broadcasters.[16] In the years since *Red Lion*, many critics have pointed to the evolution of cable television as a decisive blow against spectrum scarcity, and thus, *Red Lion*'s rationale.[17] The critics are correct in their observance that the landscape that *Red Lion* was born in has changed, but very few address its normative logic. *Red Lion*, once boiled down, was the Court's attempt at further preserving the marketplace of ideas, a

[12] He was critiqued by the station for having critiqued the CIA and suspected of being a communist. Ouch.
[13] *Red Lion*, 395 U.S. at 372.
[14] *Red Lion*, 395 U.S. at 386.
[15] *Red Lion*, 395 U.S. at 394; *see also* Meredith Corp. v. F.C.C., 809 F.2d 863 (D.C. Cir. 1987) (agreeing with the rationale of broadcast spectrum scarcity).
[16] *Red Lion*, 395 U.S. at 367.
[17] Gregory Staple & Kevin Werbach, *The End of Spectrum Scarcity*, IEEE SPECTRUM (Mar. 1, 2004), https://spectrum.ieee.org/the-end-of-spectrum-scarcity; *see also* Richard J. Pierce, Jr., *The Supreme Court Should Overturn the Fairness Doctrine*, THE REGULATORY REVIEW (Oct. 6, 2025), https://www.theregreview.org/2025/10/06/pierce-the-supreme-court-should-overturn-the-fairness-doctrine/.

fundamental aspect of the First Amendment. They resisted a monopoly of information promoted by private licensees, but also by the government.

As decades passed, the Fairness Doctrine's foundations were put under further scrutiny, this time in *Miami Herald Publishing Co. v. Tornillo*.[18] The case challenged a Florida "Right to reply" law similar to the law challenged in *Red Lion* but applicable to newspapers, not radio stations. After the Miami Herald refused Pat Tornillo's demand to publish his reply to critical commentary, it was hit with a fine, which The Herald challenged all the way up to the Supreme Court.[19] In a unanimous decision, the Court backtracked on the "right to reply" protections exhibited in *Red Lion*, ruling that the Florida law endangered the First Amendment right to a free press. Even when the government claimed that the state of newspapers at the time was "a monopoly controlled by the owners of the market," the Court nevertheless found that any sort of government interference in the press leads to a chilling effect, as publishers would rather avoid controversy, and that the government would step into the role of the editors, violating the freedom of the press.[20] Tornillo's holding represented a distinct shift in rationale from *Red Lion*, with the Court expressing that even if a speech medium is monopolistic, the government should still refrain from interfering. While the Miami Herald was in a better constitutional position than Red Lion, being press rather than broadcasting, the decision displayed a shift towards deregulation of speech, even at the price of fairness. The government should not be stepping into private media.

The final major event involving the Fairness Doctrine came in 1987, when the FCC decided to repeal the doctrine. The FCC's 1985 Fairness Report came to several conclusions regarding the implementation of the Fairness Doctrine up to that point, highlighting the issue of having the

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[18] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).
[19] *Tornillo*, 418 U.S. 241.
[20] *Id.* at 251.

government determine what constituted "major" controversies and the growing number of broadcast stations, diversifying the marketplace of ideas.[21] In light of those findings, the FCC made the decision to repeal the doctrine, citing a burden on the publishers of the information, the chilling effect of the doctrine, and the doctrine not being narrowly tailored to address the issue it was created for, which was ensuring access to the diversity of viewpoints.[22]

The Fairness Doctrine has a long and complex history, but the controversy surrounding it can be boiled down to two main points of contention, that being the problem of scarcity, and the problem of government balancing. In its creation, the Fairness Doctrine hoped to solve both, in ensuring representation despite scarcity through government balancing, but as time went on, opinion towards these goals soured. With the growing number of news outlets and the growing recognition of the danger the government poses when interfering with speech, the two pillars that the Fairness Doctrine was founded upon weakened, and so it crumbled. While the Supreme Court hasn't officially overruled *Red Lion*, jurisprudence around its ideas has either been to diminish its role (like in *Miami Herald*) or otherwise been quiet. While the conditions that gave rise to the Fairness Doctrine had disappeared, its normative logic never did. The reason such balancing and scarcity were issues of contention in the first place was because of what was at stake: the accessibility of viewpoints to the American people, and even more fundamentally, the right of the American people to receive information that is true and accurate. The framers of the doctrine weren't blind to the potential consequences, they were aware of them, even stating "These concepts […] do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for

[21] General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35,418 (Aug. 30, 1985).
[22] Complaint of Syracuse Peace Council against Television Station WTVH, Syracuse, N.Y., Memorandum Opinion and Order, 2 F.C.C. Rcd. 5043 (1987).

the general public."[23] In fact, throughout the entire docket, the FCC credits the freedom of the people as the reason for creating the doctrine several times and liberty seems to have been the focal point. Throughout history, this focus has muddied a bit, but the original logic of creating an ecosystem of true and diverse information for the listener to access is still important, even today. It is this normative logic, then, that will be analogized further on when examining a reframing of the Fairness Doctrine as applying to the government's speech, and not to any private party.

III. A Brief History and Analysis of the Government-Speech Doctrine

The government-speech doctrine finds its roots in the 1991 decision *Rust v. Sullivan*, a case that concerned the use of Title X funds for "family planning."[24] The *Rust* majority accepted the government's position that abortion was not included under this scheme and found that the statue was not discriminating on the basis of viewpoint, as the government "has merely chosen to fund one activity to the exclusion of the other."[25] In a way, the government-speech doctrine allows certain types of viewpoint discrimination, but only when it is proven that the government is expressing its own views on something. Viewpoint discrimination is, after all, a terrible wrong, said best by Anthony Kennedy when he wrote in his opinion for *Rosenberger v. Rector* that viewpoint discrimination is an "egregious form of content discrimination."[26]

Throughout the past decades, the Court has occasionally stepped in and clarified parts of this doctrine. In 2017, the Court ruled—in the case *Matal v. Tam*—on the constitutionality of denying a trademark to an offensive band name pursuant to a statute which disallowed giving trademarks for potentially offensive names.[27] The Court ended up striking down the statute for its

[23] Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1250 (1949).
[24] Rust v. Sullivan, 500 U.S. 173 (1991).
[25] *Rust*, 500 U.S. at 193.
[26] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).
[27] Matal v. Tam, 582 U.S. 218 (2017).

viewpoint discrimination but also stated that since issuing trademarks was not an expression of speech of the government, but rather an action or function of it, the government speech defense was inapplicable.[28] *Matal* drew a clear line where the Court rejected counting all potentially expressive conduct the government engages in (like issuing a trademark) as speech, so as to not allow viewpoint discrimination to lurk under the radar.

I believe such hesitation traces back to a concurrence written by Justice Breyer in *Pleasant Grove City v. Summum*, a case concerning whether the government could disallow certain religious monuments from being erected in its public parks without engaging in viewpoint discrimination.[29] While the Court sided with Pleasant Grove City, Justice Breyer's concurrence warned against using the government-speech doctrine as a magic wand of sorts to allow the government to escape all claims of viewpoint discrimination, stating that context and purpose matter greatly, and that one should ask whether the government's actions burden speech more than necessary to achieve its end goal.[30] From this, a three-pronged analysis can be drawn, where government speech should be analyzed within its context, its purpose, and its effect. This framework will turn up later when analyzing where to apply the proposed Government Fairness Doctrine.

The government-speech doctrine has an almost inverse or opposite role to the Fairness Doctrine. While the Fairness Doctrine held broadcasters accountable for not practicing viewpoint discrimination on important issues due to the scarcity of broadcaster spectrum, the government-speech doctrine allows the government to slip out of accountability for viewpoint discrimination by claiming that its ideas are its own. It stems from the belief that the government should be

[28] *Id.* at 236.
[29] Pleasant Grove City v. Summum, 555 U.S. 460 (2009).
[30] *Summum*, 555 U.S. at 484 (Breyer, J., concurring).

allowed to say what it wants. From this doctrine, however, also stems a tension that has been increasingly amplified in the modern day.

In theory, the doctrine makes sense. The government is an important speaker, and to curtail its ability to speak would be to curtail policy proposals, political viewpoints, and pose a particular problem to the executive branch, as the nature of a president's cabinet is to push forward the agenda of the president. Like any other speaker, then, the government should be allowed to say what it would like. This view, however, fundamentally ignores the power of the government as a speaker. Just as the broadcasters held a responsibility to broadcast diverse viewpoints due to the scarcity of the airwaves, there's a built-in scarcity to being the government when it comes to being a speaker; no other speaker ever can reach both the reach and status of the government, and as such, the government inhabits a unique role. The government holds a monopoly on the official authority of the United States and can be seen to have an obligation of its own to make sure that the speech it puts out is "fair" in nature.

This idea is explored by free speech advocate and Medal of Freedom recipient Alexander Meiklejohn in his book "Free Speech and Its Relation to Self-Government."[31] The book tackles a wide range of free speech issues and pushes for a broad free speech right, especially the right to free debate, as essential for a democracy to succeed. Most importantly, however, Meiklejohn describes some of the clearest dangers to democracy, and the reason the First Amendment exists in the first place, saying in no wasted breath, "[j]ust so far as… citizens… are denied acquaintance with information or opinion… the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First*

[31] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

Amendment is directed."[32] The government-speech doctrine operates on the assumption that the government's speech is minimal more often than not, when this is far from the case.

While often attributed to Senator McCarthy, the Red Scare was also in large part the fault of the government and the way it chose to exercise its speech. The House Un-American Activities Committee, for example, was a direct use of government speech to shape public opinion, dramatize the Red Scare, and create an environment of fear.[33] Such an act fostered this culture of fear, and such a culture could be said to have scarred the country and its tolerance of other political ideologies for decades to come.

In this case, the government was caught up in the frenzy of Cold War-era politics, but this is far from where the government's interference in its own democracy ends. Overly partisan press releases from active administrations can foster an environment of partisan division; the selective dissemination of information on certain topics can warp views of a subject and lead to the acceptance of one shared truth promoted by the government; official government social media accounts, placing themselves in realms typically meant for social engagement, potentially pump out inflammatory content or propaganda. The costs of allowing such rhetoric to go unchecked are too high. The question then becomes: how much danger is the government actively posing to democracy through such unchecked government speech?

IV. Unchecked Government Speech and its Dangers

The Government's speech does not exist within a vacuum, and tackling the issue of government speech under this notion is a fruitless endeavor. Like all things in politics, what the

[32] MEIKLEJOHN, *supra* note 31, at 26–27 (emphasis in original).
[33] *See Hearings Before the House Committee on Un-American Activities: Bills to Curb or Outlaw the Communist Party of the United States*, 80th Cong. 33–50 (1947) (statement of J. Edgar Hoover, Director of the Federal Bureau of Investigation).

government says has an effect. In fact, in *Walker v. Texas Division, Sons of Confederate Veterans*, Justice Breyer cited the very notion that the government's speech *must* have an effect as part of his rationale, saying that if the First Amendment were interpreted otherwise, the government simply "would not work."[34] It's made clear, then, that the government-speech doctrine exists so that the government's speech ends up having a real effect and can shape politics and the country effectively. The problem arises, however, when the government's speech works against itself, whether that be by bad actors, or speech that we see in hindsight as harmful. If such speech damages the integrity of the government, the First Amendment that loosened its hold on the government to give it such liberties risks losing all efficacy, as an unchecked government, through its speech, can establish a totalitarian hold on speech and the very integrity of our democracy.

To first analyze how the Government's speech can have these effects, we must establish the government's role as a speaker. If the role it possesses is one powerful enough to convince the Supreme Court to loosen the First Amendment's hold on this government, then we cannot place the government on the same level as an individual speaker on a soapbox. Although treated the same, it is anything but.

One need not look only at history to find examples of a government that has wielded its speech as a magic wand. In the context of the modern Trump administration, many have critiqued its discriminatory rhetoric, and its explicit targeting of unfavorable viewpoints. If the government-speech doctrine in this case is a magic wand, then it has cast a chilling spell over the land of free speech in America. On Friday, November 28th, 2025, the Trump Administration launched a service on the official White House website entitled "Media Bias."[35] On it, one can find a hub for media outlets the Trump administration has deemed "biased" (each one of the respective outlets logos

[34] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015).
[35] The White House, "Media Bias," https://www.whitehouse.gov/mediabias/.

have been emblazoned with a large, red “EXPOSED” stamp). There is also a list of articles, complete with publication, reporter, and even category of offense, where articles are given tags ranging from “Malpractice”[36] or “Omission of context”[37] to vague and ideological accusations like “Lie”[38] and “Left-wing lunacy.”[39] On each of these is also the reporter’s name, in a very accessible database, for all to see. This puts a target on every reporter’s back who makes their way onto a page titled “Offender Hall of Shame,” where the reader can see their “lies” and use this hub to “Scroll for the Truth” (with “Truth” being capitalized). The Government, in no vague terms, is claiming ownership of the “Truth” and directly targeting media organizations, reporters, or anyone else who opposes them. What might be the reason for this? “Left-wing lunacy.”

Press releases and the White House website are a part of the Executive Branch, and as such, all aforementioned actions are government speech. The Trump Administration, regrettably, has chosen this avenue to express its ideas, and could reasonably be protected under the current government-speech doctrine. The First Amendment protects the freedom of the press, and while the administration may not be taking any direct action against the press outlets in question (at least, not in this case), the chilling effect is undeniable. It is antithetical to have the First Amendment protect the government when it is taking actions to chill the press if the government veils it under its “speech” protections.

In the current jurisprudential landscape, the government might not have protections for this type of speech. In *National Rifle Association v. Vullo*, the Court ruled in favor of the NRA and ruled that the government could not use its speech to coerce third parties into severing ties with a

[36] The White House, “Media Bias Category: Malpractice,” https://www.whitehouse.gov/media-bias-category/malpractice/.
[37] The White House, “Media Bias Category: Omission of Context,” https://www.whitehouse.gov/media-bias-category/omission-of-context/.
[38] The White House, “Media Bias Category: Lie,” https://www.whitehouse.gov/media-bias-category/lie/.
[39] The White House, “Media Bias Category: Left-Wing Lunacy,” https://www.whitehouse.gov/media-bias-category/left-wing-lunacy/.

private organization for that organization's viewpoints, in this case, the NRA.[40] While *Vullo* involved the government working through third parties to achieve its goal, the logic was that the government should not use its speech to negatively impact private organizations based on their viewpoints. Where the main jurisprudence really comes from, however, was from one of the cases that the Court cited in *NRA v. Vullo*, which was *Bantam Books v. Sullivan*.[41] In *Bantam*, Rhode Island created a commission to regulate certain types of books that they labeled "objectionable for sale, distribution, or display for youths."[42] To do so, they sent out notices to book wholesalers, notifying them of these objectionable books, and having police officers follow up on their enforcement. Even though there were no laws on the books forcing distributors to remove these books, they did so anyhow, over fear of retaliation. The Court sided with Bantam Books, holding that the pressures the government applied, even if not official, were a type of "jawboning," defined by the Cato Institute as "the use of official speech to inappropriately compel private action."[43] It seems like a cut-and-dried objection then, because wouldn't the aforementioned executive website fall under such use of official speech? Not necessarily, because while there might be protections for private actors in these cases, their application is still too limited, and the government-speech doctrine has evolved since the 1963 decision of *Bantam Books*.

Firstly, since 1963, the government-speech doctrine has expanded. In *Johanns v. Livestock Marketing Association*, the Court allowed the Government to require cattle producers to front the fees for generic beef advertisements, as the money going towards this fund funded government speech, and as such, was immune from First Amendment challenges.[44] Similarly, as seen in Part

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[40] Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175 (2024).
[41] Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).
[42] *Bantam Books*, 372 U.S. at 61.
[43] WILL DUFFIELD, JAWBONING AGAINST SPEECH: HOW GOVERNMENT BULLYING SHAPES THE RULES OF SOCIAL MEDIA 2 (Cato Inst., Policy Analysis No. 934, 2022), https://www.cato.org/sites/cato.org/files/2022-09/PA_934.pdf.
[44] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

II, *Pleasant Grove v. Summum* allowed the government to engage in viewpoint discrimination in choosing which religious landmarks could be present in a public park, as monuments were included in what could be counted as "government speech."[45] Even for something typically seen as a personal choice and part of expression, like the license plate one uses for their car, the Supreme Court's decision in *Walker v. Texas Division* declared that license plates too were another facet of government speech, preventing certain license plates from being used on personal vehicles.[46] The government-speech doctrine has broadened greatly, signaling a more sympathetic court towards the doctrine. Additionally, the precedent set in *Bantam* and *NRA* would be challenging to apply in a hypothetical case against the example of the Trump administration's "Press Hall of Shame." Both *Bantam* and *NRA* were issues primarily because the government was coercing third party actors to influence the other third-party actors. The "Hall of Shame" is the government speaking for itself, no third party involved, so there's a good chance that the test that would be used in a case about it would fall into *Johanns* and not into *Bantam* or *NRA*. Just like *Johanns*, the government can claim that all it's doing is using public funds to fund the website, and that the speech it expresses on it is its own. There's a deep irony to, again, having the government's targeting of the press be protected by the First Amendment.

According to the Pew Research Center, there's been a growing political divide in the United States that began sometime in the 1990s.[47] Since 1994, the number of people that have a highly negative view of the opposite view more than doubled, and the number of people on each ideological "tail" (that being "consistently liberal" and "consistently conservative" in the study)

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[45] Pleasant Grove City v. Summum, 555 U.S. 460 (2009).
[46] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015).
[47] *Political Polarization in the American Public*, PEW RESEARCH CENTER (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/.

increased from 10% to 21% in the past 20 years.[48] Another recent survey, conducted by Pew Research Center in the wake of Charlie Kirk's assassination and other incidents of political violence saw an overwhelming number of respondents, 85% across both parties, agree that political violence has increased in the United States.[49] In 2021, the Capitol was besieged by demonstrators protesting the certification of the election in favor of Joe Biden, and the attempted overturning was preceded by a "Stop the Steal" rally in support of the view that President Trump had had the election stolen from him.[50]

The evidence is clear about the growing political divide; what isn't so clear is the *cause*. Although there is no singular cause for political polarization, it is not an alien claim to make that the government should not be an entity that spurs such polarization. This claim is echoed by political scientists Nolan McCarty, Keith T. Poole, and Howard Rosenthal in their book, "Polarized America: The Dance of Ideology and Unequal Riches." The greater thesis of the book focuses on how income inequality is the main driver of political divide, but it hones in on a sharper point, and that's that before the masses start to divide, the elites do.[51] In fact, before the polarization that Pew Research Center recorded in the 1990s, the members of Congress and various elites began becoming polarized around the late 1970s. They write that "[t]he surge in polarization cannot be explained solely by constituency characteristics… for a given constituency, the difference between Democratic and Republican representatives has grown," displaying this initial divide that

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[48] *Id.*

[49] *Americans Say Politically Motivated Violence is Increasing, and They See Many Reasons Why*, PEW RESEARCH CENTER (Oct. 23, 2025), https://www.pewresearch.org/short-reads/2025/10/23/americans-say-politically-motivated-violence-is-increasing-and-they-see-many-reasons-why/.

[50] Jim Acosta & Evan Perez, *January 6 Subpoenas Target 'Stop the Steal' Rally Organizers*, CNN (Sept. 29, 2021), https://www.cnn.com/2021/09/29/politics/january-6-subpoenas-stop-the-steal-rally.

[51] NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2006).

eventually trickles down to their constituents.[52] The elites in Congress are the first to polarize themselves politically, and when they do so, constituents follow.

Research conducted by political scientists James N. Druckman, Erik Peterson and Rune Slothuus in their paper *How Elite Partisan Polarization Affects Public Opinion Formation* takes this a step further, displaying that partisanship that begins with the elite ends up directly polarizing the people under it.[53] The people in these elite categories lead the people who vote for them through political party "cues," which are signals that voters see from elites they trust. When the elites polarize, their cues change alongside their views, which in turn polarize the people relying on their cues to know how to vote. Ultimately, the reason these voters are dependent on such cues is because they don't have suitable access to the knowledge necessary to understand political issues in the first place, therefore relying on the elites for their cues, seeing them as experts or trustworthy.

All of this is to highlight the importance the government holds in many facets, and that its speech is not something that exists in a void, but rather a force that plays a substantial role in the lives of the American people. It may not function to directly influence the voters, but it does have an amplifying effect on the speech it puts out. With such an important role, having a hands-off approach to government speech isn't sustainable, as this freedom can be co-opted by bad actors within the government to present overly partisan and divisive perspectives that work only to further the political divide in the country. The consequences of this divide have been stark, and the goal of the government should be to decrease such polarization, not fuel it. In the era where the current executive administration has taken several steps to further this divide, whether it be in inflammatory campaigns delegitimizing democratic processes, creating a "Press Hall of Shame,"

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[52] MCCARTY ET AL., *supra* note 51, at 31.
[53] *See generally* James N. Druckman, Erik Peterson & Rune Slothuus, *How Elite Partisan Polarization Affects Public Opinion Formation*, 107 AM. POL. SCI. REV. 57 (2013).

or labeling the beliefs of the opposite party as "Left-Wing Lunacy," this form of government speech is self-destructive, and only leads to the furthering of the worst parts of our political systems. While the government should be able to express itself to function properly and govern effectively, the government-speech doctrine as its stands has insufficient guardrails, even though said guardrails are present in many other facets of our governance, whether that be campaign finance law, regulation for government projects, or the very logic behind the system of checks and balances! What the government-speech doctrine needs now is that same check, and that check can come in the form of the Government Fairness Doctrine.

V. The Government Fairness Doctrine

The proposal of the Government Fairness Doctrine (GFD) aims to resolve the tensions found in the first three parts of the paper with a synthesized answer, while maintaining the foundational principle that a functional government must be able to speak for itself. First, the structure of the original Fairness Doctrine must be revisited. The Fairness Doctrine served to address (1) the scarcity of the broadcasters due to the infrastructure of the times, (2) the people's democratic interest in being exposed to multiple viewpoints on important issues and (3) the potential harm of broadcasters pushing a single viewpoint to its wide audience on these important issues. This normative logic can be analogized to the government as well.

The government, by nature, is the only source of "official authority" in the United States, so there's a natural scarcity of this type of speech operating in our speech landscape, giving us scarcity. Next, the idea that people have a democratic interest in seeing multiple viewpoints is still a real interest, and in fact, is more important than ever. In our modern divided political landscape, being able to assess and understand multiple viewpoints combats polarization, and thus, we have the interest. Finally, just as broadcasters should not be able to push a single viewpoint to its wide audience, the government, even if it has the right to speak for itself, should not be able to push its solitary viewpoint to the entirety of its constituency. Altogether, the logic that gave the original Fairness Doctrine its teeth, teeth so strong that by the 1970s, the FCC was calling it "the single most important requirement of operation in the public interest—the sine qua non for grant of a renewal of license."[54] Similar logic can be applied in the modern day, only in this case, the speaker required to be "fair" ought to be the government.[55]

The first order of business is defining what it means to be "fair" in the context of government speech. The idea of "fairness" itself shouldn't be different across the two doctrines. Fairness requires the platforming of balanced broadcasting of important issues, which usually involves two sides of a battle. Sometimes a problem requires more nuance, requiring more than two perspectives, but such challenges based on the plurality of opinions that may exist are splitting hairs, as to maintain the efficacy of the doctrine, its main purpose should be to promote this fairness. As such, platforming a vast plurality of views doesn't need to be the case all the time. At the very least, issues can be divided into two camps, the yays and the nays, as well as the reasons behind both camps. From this point, we can move to say that to be "fair" in a government speech context means that the government must platform speakers of the camp other than the one the government stands in. Like the original Fairness Doctrine, however, the government will not have to do this extensively. The original Fairness Doctrine did not mandate equal time, for example, only equal coverage. An application of the Fairness Doctrine could, for example, be a blurb at the end of the press release (the blurb would have to be determined to make a significant enough claim for the opposite camp), or perhaps a "GFD Disclaimer" containing the views of the other side, mandated to be visible.

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[54] Comm. for the Fair Broadcast of Controversial Issues, 25 F.C.C.2d 283, 292 (1970).
[55] *Id.*

Now, opponents of the GFD could point to the fact that the GFD could chill genuine political speech out of potential fear of being "GFDed," or having to be platformed with an opposing narrative that seeks to combat it. While such a fear is a reasonable one to have upon first introduction, it's a fear that'll see itself to be unrealized, as the GFD would operate differently from the original Fairness Doctrine. The original Fairness Doctrine was repealed for its chilling effect on broadcasters,[56] but that came from pressure from the government on these broadcasters and fear of retaliation. To resolve this first issue, two things can be done. Firstly, the GFD will be written clearly to only apply to official government communications (press releases, government websites, executive press conferences), not to individual government actors (congresspeople, politicians, or the president). This eliminates the risk of politicians not being able to express their views precisely and clearly. Secondly, the type of platforming that would be seen from the government is handled differently from the press. The government isn't compelling private actors, only itself, and the function becomes more like that of a political debate rather than a forced acknowledgement. Frankly, if a viewpoint can't hold up to the debate spurred by the GFD, then the issue is not with the GFD, but the weak rhetoric of the original viewpoint.

Theory only becomes effective when sketched out as a real legislative plan, and having this revamped version of the Fairness Doctrine be a part of the government in the parts that matter will prove to solve a lot of the issues with the original Fairness Doctrine. The GFD would operate through an Office of Government Fairness, which would operate as a non-partisan entity (like the Congressional Budget Office). The Office of Government Fairness would not claim to represent

[56] Many broadcasters were wary of covering controversial issues in the era of the Fairness Doctrine, fearing complaints from viewers about their coverage under the Doctrine. While not all these complaints were valid, the legal costs and legal headache that came alongside it discouraged coverage of these matters. This had a chilling effect on this type of speech as a result. Bruce Fein, *First Class First Amendment Rights for Broadcasters*, 10 HARV. J.L. & PUB. POL'Y 81 (1987).

the "official" position of the government (so as to not undermine the authority of the greater government), but still present visible footnotes or affixations to official government communications (press releases, government websites, social media posts, to name a few) and act as a governmental form of dissent. The Office will not explicitly dispute the position of the government. Instead, it will present this dissent for the purpose of presenting citizens with competing interpretations in the currently monopolized space of government speech, to combat extremism, partisanship, potential deception, and political polarization. The Office must also be uniquely insulated from the pressures of the rest of government, especially the executive branch, and operate as an independent agency. Under no circumstances could the President be involved in the hiring or firing of officials in this Office.[57]

The idea that dissent is a key facet of democracy is nothing new. In fact, dissent is widely echoed in our already existing governmental structures. The National Transportation Safety Board allows its members to affix a dissent to their official investigations for purposes of transparency, and EPA Science Advisory Boards officially publish the minority scientific reports when scientific disagreement arises alongside the greater publication. Even the highest Court in the land has a function to platform these dissents. Alongside the greater opinion of the Court, the one that holds legal authority, dissents are published not as a side note, but alongside the same opinion, on the same docket. Sometimes, history redeems these dissents, with legal scholars looking back on them, and recognizing the value in the words the dissenters wrote. Consider an alternate history, in which

[57] At the time of writing this paper, the Supreme Court seemed sympathetic to the overturning of the 1935 case *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). If overturned, the creation of this office in a real-world hypothetical would be hampered for two reasons. Firstly, the Court would most likely not accept the absolute insulation of this hypothetical office from the Executive. Secondly, the Court in its ruling is turning to the idea that the people are the ones who should hold the government accountable, instead of the government holding itself accountable. This runs directly contrary to the fundamental proposal of this paper. For these reasons, I will refrain from addressing the hypothetical rulings of the court, as I feel that if the court does move in such a direction, the question to be asking isn't whether Humphrey's Executor will save this hypothetical office, but whether the Court's new interpretation would fit the creation of such an office. This paper is written with the status quo in mind.

the Supreme Court didn't platform its dissents. Legal scholars would have no history to build off of to challenge controversial cases, and the public would see the Court as a singularity that publishes its opinions with no nuance as to the issue in question, nor challenges on its answer. Its reputation would go from a court of fairness to one of totality. To platform dissent is to acknowledge the importance of the plurality of opinion and combat a totalitarian hold on ideas.

Keen observers might acknowledge the importance of platforming dissent but distinguish that value from *forcing* the platforming of dissent. The freedom of expressive association is an idea the Court has repeatedly reaffirmed,[58] and the government as a speaker also holds this right. Would platforming a dissenting viewpoint by force violate the government's right to expressive association? Not necessarily. *Boy Scouts* placed a great emphasis on expressive association being highly dependent on whether the association will truly be associated with the organization in question. In *Boy Scouts*, the Court affirmed that having James Dale, a gay man, be an adult leader within the Boy Scouts would be directly contrary to the Boy Scouts' position on homosexuality. It's both a matter of membership and a matter of direct association, and even the dissent seemed skeptical of whether James Dale's inclusion of the Boy Scouts would have the representative effect the majority believed it would have.[59] In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* the Court rejected an expressive association claim by making an even greater distinction, saying that military recruiters who were recruiting at law schools weren't even participating in speech to begin with, but rather in conduct.[60] Since the recruiters were not members of the law school itself, any expressive association claim brought by FAIR failed as a matter of law.

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[58] Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).
[59] *Dale*, 530 U.S. at 663 (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.).
[60] Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47 (2006).

Through this analysis, there exists a structure to parse whether a speaker is engaging in expressive association with its speech, and in the context of the GFD, steps can be taken to tiptoe around this challenge. To reiterate, the GFD would *not* claim to be the official position of the government, nor would it claim that the government is explicitly *wrong*. Its status as an independent agency would also grant it a degree of separation from the government, and its public nature would work to inform the public that its operations are separate from the main opinion of the government. If the public then is well informed of how the GFD works and operates, then there would be no confusion about the positions of the government versus the work of the GFD, and expressive association would be a much weaker challenge. This is similar to what was seen in *Rumsfeld*, as Justice Roberts in his oral announcement of the opinion of the case made it clear that expressive association did not apply in *Rumsfeld*, as the recruiters in question were only there to recruit, but not "to become members of the school's expressive association."[61] The GFD has no interest in becoming a member of the government's expressive association in terms of its positions, only to present the public with sufficient information on controversial issues to foster the greater goal of democracy.

This clarification of the GFD's role to the public will come alongside its official functions, as unlike other forms of platforming dissent with the government, its dissent would be aimed at informing the people, almost as a public announcement. To effectively communicate its message, the GFD is incentivized to additionally make its role clear, to steer clear of the challenges mentioned above. To avoid the challenges broadcasters faced with their own slew of Fairness Doctrine challenges made against them, if a constituent has an issue with the operations of the GFD, they can lodge a complaint, but such a complaint would be taken under consideration by the

[61] *Rumsfeld*, 547 U.S. at 69.

Office in question, and not hinder the Office in its functions, as it would have hindered the broadcasters under the original doctrine. The incentive for the Office to review such challenges would come from maintaining its role as an accurate dissenter in its mission to disseminate information to the public.

Many issues of the Fairness Doctrine would also be effectively resolved by folding it inwards towards the government, as another big issue with the Fairness Doctrine was the government's inherent targeting of third-party speakers.[62] The press will not be chilled as the press is not the one being targeted by the GFD. The original Fairness Doctrine also at its height targeted more than 1,300 television stations and over 10,000 radio stations.[63] The scarcity that fostered the original Doctrine no longer applied, and the role of broadcast media also changed during this time from a niche, non-press method of disseminating information to a standard pipeline of information for a broad number of Americans. This scarcity, however, cannot be applied to the Government, as the government, by design, has a monopoly on its own official authority. As an independent agency, the Office in charge of executing the GFD would, ideally, face fewer pressures than the original broadcasters as well.

As a broad sketch, members of the Office in charge of executing the GFD wouldn't be appointed by Congress, nor the executive. In history, the best dissenters of the government have been the press, so having journalists make up the office might be a plausible way to go about this. The journalists would come from a range of ideological backgrounds, but would all be classified as non-partisan. These journalists could be appointed by journalism schools, press freedom organizations, and vetted by the Government Accountability Office, which even in the current political climate, has continued unbiased work, and has since its inception as its internal structure

[62] General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35,418 (Aug. 30, 1985).
[63] Robert D. Hershey Jr., *F.C.C. Votes Down Fairness Doctrine in a 4-0 Decision*, N.Y. TIMES, Aug. 5, 1987, at A1.

was built around it.[64] It would comprise 5 left-leaning members, 2 independents, and 5 right-leaning members.[65] Members would serve 5-year terms, be immune from removal, and only impeachable for high crimes or misdemeanors. Like real journalists, they'd be made to do extensive research on their dissents, and work to present information, with ideological rhetoric having to be backed up by evidence, not mere words. The journalists would be free to dissent as they pleased, so an official government communication could go on with no dissents, or it could go on with five dissents. This would also encourage a plurality of opinions from the journalists themselves.

One might ask: how does the Office differ from how the press already operates? To begin with, the press as it currently operates can fall into ideological buckets based on the source of the press. The Office would function as an overall ideologically neutral entity, even if it takes political stances here and again. To be co-opted by political actors would be hard considering it would also be overseen by the GAO. One might then ask why this entity would exist on its own and not as part of GAO, to which I'd say that GAO serves a specific purpose. It's an accountability office, not very popular in the press or in popular culture and not trying to be a public watchdog like the press. It's unbiased and non-partisan, whereas the Office would require some degree of partisanship and bias from its members, even if those members eventually balance each other out. What is proposed here is a very rough sketch, and not immune from critique, but it's what such an office *could* look like, and the goals it'd achieve.

Where the pressures on broadcasters caused them to evade important issues instead of handling them in accordance with the original Fairness Doctrine, the Office in charge of handling

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[64] U.S. Government Accountability Office, *GAO Is Nonpartisan. Here's How We Do It* (Aug. 28, 2025), https://www.gao.gov/blog/gao-nonpartisan-heres-how-we-do-it.
[65] GAO could likely come up with suitable definitions for "right-leaning" and "left-leaning."

the GFD would have the insulation necessary to still execute its responsibilities even with pushback from a potential complaint from a constituent or executive pressure. Executive pressure is an important note to make, as the GFD should not function as a political mouthpiece for any member within the government to wield as a weapon, as the original Fairness Doctrine oftentimes allowed, but merely to present its dissent and go about its day. For example, a government run by a Democratic Congress and a Democratic President should not be able to co-opt the GFD to push a "dissenting viewpoint" that only affirms the viewpoint being challenged. Such false viewpoints only serve to deceive the masses about the reality of the "duality" of any such issue, and as such, great measures must be taken to insulate the Office in charge of the GFD. The dissents it presents must be available to both sides of the political spectrum whenever the opposite side may be in power. A conservative footnote headed by the GFD in a liberal government would be as valid as a liberal GFD footnote in a conservative government.

At its core, the GFD would exist to foster both transparency about the nuances of controversial issues within the speech of the government, and to foster debate within those who receive the information spoken by the government. Political polarization has grown within the United States, and there's good political science to back up the claim that this polarization begins with the government, not the people. If the government is therefore compelled to embrace a standard where it can still speak as it would like but also would have to platform dissenters along with proponents—almost as a disclaimer—it would further protect against anti-democratic dangers, as many existing functions in the government already do. If a government is elected that is anti-democratic in nature, we must acknowledge the power of its rhetoric and have safeguards against that as well. The current sketch of the GFD echoes the same benevolent goals as the original Fairness Doctrine, yet it strikes a balance between acknowledging the importance of the government's role as a speaker and acknowledging the importance of platforming dissenting opinions as a safeguard. In the era of political polarization, unhampered government speech works against the functions of democracy, and what the GFD challenges one to think is that perhaps the government should be a little "fairer" in how it handles its speech and rhetoric, for the good of the country, and its constituents.

VI. Conclusion

The key function of a democracy, and governance, is to promote not only human comfort, development, and prosperity, but also fairness. Democracies should strive towards fairness as their goal, as unfairness would result in a self-cannibalizing democracy, based on unequal standards brought down upon unequally treated people. To have suitable access to information, so citizens can be well-informed of the goings-on of the world around them, and to have balance in our public discourse, to make sure every side of an important issue or subject is platformed, is of great importance to further pursue this fairness. Fairness is a precondition for citizens who can think independently, as without the previous two, citizens would be subject to the information promulgated by biased sources, whether that be the media, or in this case, the government. Even if fairness can be a vague concept that can mean different things to different people, to strive for it should be a universal aim.

Fairness promotes legitimacy and creates a shared reality for its people as well. In a country so divided, these bedrock principles keep citizens connected with one another. In a world lacking fairness, public discourse becomes one of vitriol and competition, where the aim is no longer to entertain a discussion, but to "win" against the other side. Enough polarization breeds within this environment to divide a country in two. America has already seen what can happen from such a division: a civil war that killed approximately 620,000 people.[66]

The Government Fairness Doctrine makes bold strokes, and unconventional ones, but it does so in pursuit of this fairness. It represents one attempt to operationalize such fairness, but its greater significance lies in the idea that at some point, the government itself must promote fairness and discussion for such ideas to make its way down to its citizens. Even if the Government Fairness Doctrine never comes to be, its prevailing idea must survive. Regardless of one's opinion on a current administration or a political candidate, all can unite under the idea that having a government entity one believes is corrupt with full rein over government rhetoric communicated to the rest of the American people is a danger that must be quelled.

In the spirit of the introduction of this paper, James Madison said that "a popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both."[67] When a government actively tries to target reporters who report contrary to the views of the government, that's a tragedy. When a government creates an environment of fear, fear of a certain ideology or belief, that's a tragedy. When a government omits and silences dissent, claiming to hold the "Truth" of a matter, that's a tragedy. Lest we fall into the pits the founding fathers warned us of, one should see the inherent value of a proposition such as the Government Fairness Doctrine. Unchecked government speech is not neutral governance, but a crack in the foundation of democracy that, if left unchecked and allowed to spread, will lead to the quiet erosion of democratic self-rule.

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[66] *Civil War Casualties*, AMERICAN BATTLEFIELD TRUST, https://www.battlefields.org/learn/articles/civil-war-casualties (last visited Dec. 15, 2025).
[67] Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 1 THE FOUNDERS' CONSTITUTION 690, 690–91 (Philip B. Kurland & Ralph Lerner eds., 1987).

The Contract of the Mind: Consent and Coercion in Neurocapitalism

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ABSTRACT:
As brain-computer interfaces convert neural activity into commercial data, their End User License Agreements reveal a "contract of the mind." This article argues that consent to neural data harvesting, when framed through private adhesion contracts, cannot satisfy the requirements of informed and voluntary consent under contract and data protection law. This paper researches U.S. principles of disclosure, as well as EU frameworks of data regulation to demonstrate how asymmetries of power and knowledge render such consent illusory. By comparing Neuralink's and Meta's data practices against doctrines of contractual fairness and bodily autonomy, it shows that existing private law mechanisms are insufficient to protect mental privacy. The article concludes that neural data requires treatment as an inalienable category protected by regulation and norms to ensure that access to neurotechnology does not come at the cost of autonomy over thought itself.

I. Introduction

In the age of neurocapitalism, the human mind is becoming a marketplace. Technological advancements in brain-computer interfaces (BCI), ranging from Elon Musk's Neuralink implants to Meta's electromyography wristbands, promise to treat diseases and unlock untapped human potential. However, hidden within these promises are End User License Agreements, or EULAs, that turn neural activity into a commodity. Users are asked to sign contracts for brain data, often without fully understanding the implications attached. This raises the question: can consent to neural data harvesting ever be truly non-coercive? This piece analyzes emerging BCI EULAs through contract law and data protection. It examines how neurotech companies obtain expansive rights over our neural data, and whether such consent is valid given users' lack of power and knowledge. I discuss the concept of neurocapitalism and the ways in which these contracts effectively become contracts of the mind, or rather, privatized agreements that grants access to one's innermost thoughts.

II. Neurocapitalism: The Mind as a Market

The term neurocapitalism encompasses the convergence of neuroscience and profit-driven systems of private ownership, market exchange, and commodification. Modern capitalism is increasingly targeting the brain as a source of value, extending its logic from physical goods and industrial labor to cognition, attention, emotion, and decision-making. In the past, wealth was created through physical labor and industrial production, but today's "mental economy" depends on cognitive labor. Under this paradigm, minds are the places of production, and mental skills become commodities. Hess and Jokeit of respectively Sonntagszeitung and Zurich University, have famously stated that, "neurocapitalism adapts the innate neurobiological capacity of humans as a productive force to the technologies of globalization."[1] Our brains' activities in attention, emotion, and decision-making are being used as a raw material for new markets.

BCI technologies accelerate this trend by providing direct access to the brain. For example, Neuralink's implant translates brain activity into digital commands, allowing paralyzed patients to control computers or prosthetics with just their thoughts. Meta's prototype EMG wristband, similarly, reads electrical nerve signals from the arm to control augmented reality interfaces. The innovation blurs the line between treating the brain and exploiting it. On one hand, these technologies offer potential treatments for ALS, blindness, depression, and other conditions; on the other, they open the door to cognitive colonization, or the possibility that private companies can access, analyze, and monetize forms of mental activity that have historically remained beyond commercial reach.[2] The line between health innovation and the commodification of thought is vanishing.

Indeed, tech corporations seek not only to sell neurodevices, but also to capture the data that those devices generate. Brain signals through EEG recordings, implant telemetry, and EMG patterns can either feed artificial intelligence (AI) algorithms or improve products.[3] This is the core of neurocapitalism: turning the mind into a market. The primary mechanism to legitimize this extraction is consent through a contract. Before we research whether that consent is truly informed, we should understand what today's BCI contracts ask of users.

III. Signing Away Your Brain Data with EULAs

[1] Ewa Hess & Hennric Jokeit, *Neurocapitalism*, OPENDEMOCRACY (Mar. 3, 2010), https://www.opendemocracy.net/en/neurocapitalism/.
[2] Cinthya Lourdes Toledo-Peral et al., *Virtual/Augmented Reality for Rehabilitation Applications Using Electromyography as Control/Biofeedback: Systematic Literature Review,* 11 ELECTRONICS 2271 (2022).
[3] Aditya Kumar et al., *Artificial Intelligence and Machine Learning in Biomedical Signal Processing*, *in* EVOL. MACH. LEARN. & IOT APPL. BIOMED. ENG. 185–210 (Arun Kumar Rana, Vishnu Sharma, Sanjeev Kumar Rana & Vijay Shanker Chaudhary eds., 2024).

EULAs for brain-computer interfaces often provide companies with sweeping control over neural data. In fact, a recent survey of 18 leading neurotechnology firms globally found that every single one had agreements that allow the company to take full possession of all data generated by users' brains.[4] In 17 of these cases, the firms also reserved the right to share the cerebral data with third parties who, as neuroscientist Rafael Yuste paraphrased at a UNESCO conference, could then "do whatever they [wanted] with it." Wrapped around the small print, this text outlines how neurotech EULAs treat brain data as corporate property. Users sign away ownership and control, and often indefinitely.

For example, though it is still in clinical trials, Neuralink likely requires participants to consent to data collection, as the company's privacy policy, per its website, already includes broad processing of personal information, where users have to relinquish direct access to raw neural data.[5] More telling is the industry pattern, which shows medical device giants like Medtronic and upstarts like NeuroPace already having trial agreements that allow them to keep and analyze brain implant data without any meaningful guardrails. Participants in Neuralink's trials likely also sign lengthy consent forms that allow their neural recordings to be used for research and product development. Given Neuralink's commercial goals that are underscored by Musk's rhetoric on mass-market BCI's "unlocking human potential," it is imaginable that the eventual consumer EULA will grant Neuralink rights to use brain signal data to improve its AI. Even further, Meta's EMG wristband provides a preview of consumer neurotech terms. Meta's *Wrist Input Privacy Notice* and related policies control its prototype neural interface for AR glasses. While the full text is proprietary, Meta has suggested that the device processes electrical muscle signals and motion

[4] Peter O'Brien, *Mind Control: Top Neurotech Firms Can Hoard and Share Patients' Brain Data*, FRANCE 24 (July 14, 2023, 4:02 PM), https://www.france24.com/en/tv-shows/tech-24/20230714-mind-control-top-neurotech-firms-can-hoard-and-share-patients-brain-data.
[5] *Neuralink Privacy Policy*, NEURALINK (Mar. 12, 2025), https://neuralink.com/privacy-policy/.

data to translate gestures to commands. Such data, which is biometric, is extremely sensitive, because it can identify users by their neuromuscular signature and even reveal health information like tremors or fatigue. Meta has built a business reliant on the harvesting of user data for targeted advertising, so there are concerns about similar use of neural interface data. Meta's past practices with Oculus VR data by integrating it into the Facebook ad ecosystem could implicate a similar application for neural inputs.[6] Absent limitations, Meta's terms could allow using EMG signals to personalize content, track user engagement, and even figure out emotional states under the service improvement consent clause.

These examples show how permissive these contracts are when measured against the legal standards of specific, informed, and limited consent. Rather than clearly restricting neural data collection to what is necessary for the device to function, many neurotechnology agreements authorize broad retention, sharing, and secondary use. Emotiv, a maker of consumer EEG headsets, stated in its policy that users could request deletion of their personal data "except for EEG data." Emotiv reserved the right to retain and share EEG recordings with third parties for scientific and historical research purposes. This means that once a user's brainwaves are uploaded, Emotiv could keep them and pass them on freely. Only after a legal dispute in Chile did Emotiv relent and agree to change this policy. The NeuroRights Foundation, after surveying different BCI companies, similarly found that nearly all provide "no meaningful limitations" on their access to and use of consumers' neural data. In this sense, clicking "I agree" functions more like a blank check to mine, monetize, and potentially sell neural information.

These agreements are also typically contracts of adhesion, which are standardized forms that users can not negotiate. Whether it's a clinical trial consent or a consumer app's terms of

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[6] Ben Egliston & Marcus Carter, *Critical Questions for Facebook's Virtual Reality: Data, Power and the Metaverse*, 10 INTERNET POL'Y REV. 1 (2021).

service, the individual is presented with a take it or leave it deal. This leaves many who are faced with the therapeutic hope of walking again with a brain implant no other option but to agree to let the company record and study your every neural spike. The exchange is stark: access to technology in return for access to your mind. This imbalance of power is the foundation for the question: can such consent ever be considered informed and thus legally voluntary?

IV. The Illusion of Informed Consent

Informed consent requires understanding the risks and consequences of an agreement and freely choosing to accept them. When it comes to neural data, achieving true informed consent is extraordinarily difficult. The nature of neurotechnology and the opacity of data practices ensure that users often cannot fully understand what they are signing up for. A recent journal of law and biosciences finds that "the complexity of BCI technology may prevent users from fully understanding what information is being extracted from their brains and how it is subsequently utilized."[7] Even the engineers and scientists developing BCIs are still learning what can be decoded from neural signals. How can the average user realistically anticipate how their brain data might be used, now and in the future?

Several factors weaken informed consent in BCI EULAs. First is that neural data is not intuitive. A user might know an EEG headset measures "brainwaves," but not that those waves could reveal signs of depression or predict cognitive decline. Studies show that AI can already start figuring out personality traits, emotional states, even political leanings from brain signals when combined with other data.[8] The average user cannot be expected to know or anticipate these

[7] Bin Wei, Shuyao Cheng & Yang Feng, *Neural Personal Information and Its Legal Protection: Evidence from China*, 12 J.L. & BIOSCIENCES 1, 2 (2025).
[8] JAY KUMAR PANDEY & MRITUNJAY RAI, USING MACHINE LEARNING TO DETECT EMOTIONS AND PREDICT HUMAN PSYCHOLOGY (2024).

uses. Worse, the companies themselves may not yet know all the information they will be able to procure, but their contracts still secure permission for any future use. This asymmetry of knowledge means consent is given in uncertainty. At best, it is broad consent to unspecified exploitation of brain data. From a contract law view, such vagueness and unilateral advantage should be re-evaluated. From a privacy law view, it fails the requirement that consent be specific and informed about purposes of processing.

Second, BCI user agreements bury details in legalese. Just as few people read 30-page software EULAs, a desperate patient is unlikely to read through a detailed neural data rights clause. Important provisions, such as the right to share data with third parties, or to retain data indefinitely, may be mentioned once in a paragraph full of jargon. Courts have long recognized that if a contract contains especially onerous or unexpected terms, they *must* be made conspicuous to achieve actual consent. In the context of BCIs, it is convincing that signing away rights to one's brain data is an *exceptional* term warranting clarity. Yet in practice, the "small print" nature of these agreements continue. Users remain largely unaware of what they have authorized.

Third, informed consent also requires understanding about how data will be used over time. BCI companies often demand open-ended rights, such as the ability to use your neural data for research, product development, or service improvement indefinitely. A user might assume the data is only used to make their device function, but in reality, it may be added into giant datasets, used to train AI models, or sold to partners (ex. a pharma company interested in cognitive patterns). These secondary uses are often buried in generic terms like "for research" or "to improve products." Is the user informed that "research" might include, for example, developing mind-reading advertising algorithms or government contracts for lie-detection systems? Without clear, granular consent for each use, a blanket agreement cannot be called "informed." It's a blank check.

Overall, the informational asymmetry skews consent. Neurotech firms have advanced knowledge and the profit motive to maximize data use, while users have little detail. The result is a pseudo-consent: an official agreement that legally allows data harvesting, but one that stretches the ethics of informed consent to its breaking point.

V. Is Consent Freely Given?

Even if a user signs a neural data EULA, consent may not be freely given, but instead clouded by coercion or pressure. In contract law, valid consent requires not only knowledge, but also voluntariness, which is freedom from duress or undue influence. In privacy law such as GDPR, consent must be freely given, which means that the individual had a genuine choice and control. There are several conditions around BCI for freedom of consent.

First, many early BCI adopters are patients with severe disabilities or illnesses. For a paralyzed person, a neural implant like Neuralink's might be their only hope of communication or mobility. Requiring such a patient to surrender expansive rights to their brain data as a condition of access is inherently coercive. The power imbalance is reflected in the fact that one party holds potentially life-changing technology, and the other is in urgent need. Ethically, this creeps toward undue influence. The patient's "consent" is obtained under a kind of duress: the duress of their medical condition.

American courts have recognized that exactly this kind of pressure exerted on someone whose vulnerability impairs free judgment can void an agreement. In *Odorizzi v. Bloomfield School District*, the California Court of Appeal held that undue influence requires two elements: undue susceptibility on the part of the weaker party, and excessive pressure by the dominant one. The court identified specific markers of overpersuasion, including insistent demands that the transaction be completed at once, extreme emphasis on the consequences of delay, the absence of third-party advisors, and statements that there is no time to consult counsel.[9] Each of these markers is recognizable in BCI consent: a patient signs sweeping data terms in the lead-up to surgery, with no realistic window to retain a lawyer who understands neural-data licensing, and with the unstated cost of refusal being continued paralysis or illness. The vulnerability of subjects demands higher standards for consent as well, as private BCI firms operate in a gray zone with fewer checks. The case of Neuralink's first human trial participant illustrates this: reportedly a big fan of Elon Musk, he may have been predisposed to consent without skepticism. In such a high-profile trial, withdrawing consent could mean public attention or disappointing powerful figures, which carries significant social pressure.[10] This complicates the idea of a free, unpressured choice.

As BCI and neurotech devices become more mainstream, opting out could also have social costs. Legal scholar Janus Bublitz writes about "worries over social pressure" in a neuro-enhanced society, because if cognitive enhancement or brain-interface use becomes widespread, non-users may face expectations to join in. He finds that in competitive job markets, once some people improve their capabilities through neurotech or even a "smart" drug, others feel pressure to do the same to keep up. If this were to be translated to BCIs, workplaces where wearing an EEG headband to monitor focus could become normalized, or AR interfaces could be used to make staff more productive. Those who abstain might be seen as less productive or committed.[11] The "consent" to use a workplace BCI and thus consent to brain data to one's employer or the device provider, could hardly be called free; it would be coerced by economic necessity. Companies have already piloted EEG monitors for truck drivers to ensure alertness, and some have tracked employees'

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[9] Odorizzi v. Bloomfield Sch. Dist., 246 Cal. App. 2d 123, 133 (1966).
[10] Jessica Mathews, *18 Months After Becoming the First Human Implanted with Elon Musk's Brain Chip, Neuralink "Participant 1" Noland Arbaugh Says His Whole Life Has Changed*, FORTUNE (Aug. 23, 2025, 5:00 AM), https://fortune.com/2025/08/23/neuralink-participant-1-noland-arbaugh-18-months-post-surgery-life-changed-elon-musk/.
[11] Jan-Christoph Bublitz, *My Mind Is Mine!? Cognitive Liberty as a Legal Concept*, *in* COGNITIVE ENHANCEMENT 233–64 (Elisabeth Hildt & Andreas G. Franke eds., 2013).

concentration or mood through wearable sensors. An employee in such a program may formally "consent" but in reality has no practical way to refuse without risking their job. European regulators recognize this imbalance: the European Data Protection Board's Guidelines 05/2020 on consent state that, given the dependence inherent in the employer-employee relationship, it is unlikely that an employee can deny consent "without experiencing the fear or real risk of detrimental effects."[12] For this reason, the EDPB deems it problematic for employers to rely on employee consent as the legal basis for processing personal data at all, and instructs them to look to alternative bases such as legal obligation or legitimate interest.[13] This guidance operationalizes Recital 43 of the GDPR itself, which provides that consent is not a valid legal ground for processing where there is a "clear imbalance" between the data subject and the controller.[14] The same logic applies to any context where opting out means losing opportunities, and it maps directly onto the BCI scenarios above, where the "controller" holds something the data subject cannot realistically walk away from, whether that is a job, a therapy, or a means of communication. If GDPR treats employee consent to ordinary HR monitoring as suspect on power-imbalance grounds alone, consent to neural data harvesting in the same employment context, or in the still more lopsided clinical one, fails the test by an even wider margin.

Even today, consider a user who wants to participate in VR: Meta is one of the only providers, and using its devices includes agreement to data practices. As neurotech ecosystems grow, switching costs might be high. Courts have occasionally voided contracts for being

[12] EUROPEAN DATA PROTECTION BOARD, GUIDELINES 05/2020 ON CONSENT UNDER REGULATION 2016/679, VERSION 1.1 (May 4, 2020), https://www.edpb.europa.eu/documents/guideline/guidelines-052020-on-consent-under-regulation-2016679_en.

[13] *General Data Protection Regulation, Recital 43, Freely Given Consent*, GDPR-INFO.EU, https://gdpr-info.eu/recitals/no-43/ (last visited Aug. 10, 2026).

[14] Joseph J. Lazzarotti, *Is Employee Consent Under EU Data Protection Regulation Possible?*, JACKSON LEWIS (Feb. 27, 2018), https://www.jacksonlewis.com/insights/employee-consent-under-eu-data-protection-regulation-possible.

"unconscionable" when one side has all the bargaining power and the terms outrageously favor that side. In a future scenario where, for instance, a Neuralink-like service is the sole provider of brain-controlled prosthetics, the take-it-or-leave-it data policy could be challenged as violating public policy or rights. Freedom of contract has limits when public interests are at stake.

Finally, companies can also subtly push users into consent. Free trials, rewards, or emotional branding can create soft pressure. Also, once a BCI is in use, users may become dependent on it, which can coerce continued data sharing. The user might feel they can't live without the device, which cripples the meaningfulness of continued consent. In theory, consent can be withdrawn at any time, especially under EU law, but if doing so, it would deprive someone of an ability, such as communication or competitiveness at work, which is not a true option.

Because of these pressures on individuals' decision-making, calling current practices "non-coercive" is doubtful. The voluntariness of neural data consent is often compromised by circumstance, which is a legal red flag. Contract law has doctrines of duress, undue influence, and unconscionability that, in extreme cases, void agreements made under pressure.[15] Even though these doctrines traditionally apply to more overt coercion, BCIs must fit into their framing in order to uphold meaningful consent. Is it truly voluntary for a patient to consent to data exploitation in exchange for a chance to walk again? The spirit of the law would suggest not. Furthermore, human rights frameworks, such as the right to *freedom of thought*, deem that certain aspects of our mind should never be subject to coercive surrender. We are approaching that line if consent becomes effectively mandatory to function in society.

VI. Contracts, Consumer Law, and the Limits of Consent

[15] Don Mayer et al., *Duress and Undue Influence*, *in* LAW FOR ENTREPRENEURS, § 10.1 (Saylor Foundation, 2012), https://saylordotorg.github.io/text_law-for-entrepreneurs/s13-01-duress-and-undue-influence.html.

Under contract law, BCI EULAs fall within a gray area. On one hand, they are private contracts in which users "agree" to terms, which is a manifestation of freedom of contract, but on the other, they could complicate the prerequisites contract law calls for.

First, BCI EULAs are vulnerable on at least two contract-law grounds: their core terms, which are perpetual, transferable rights over a user's neural data, are arguably unconscionable, and the broader bargain they impose may violate public policy by extracting an open-ended waiver of privacy in the most intimate domain imaginable, the mind itself. For example, it can be argued that a clause granting a company perpetual, transferable rights to all of a person's neural data is so one-sided as to be unconscionable. The user receives a service, but in exchange, yields an open-ended license to their cognitive information, which is something so personal that it borders on releasing a piece of identity. Courts have voided contracts for far less.[16] Also, if such data use is seen as violating our rights to privacy, a court could decide that the agreement is void as against public policy. For instance, contracts that require a person to waive future unknown claims for injury are generally invalid because a person can't waive rights without knowing what they're giving up.[17] Here, a user is asked to waive privacy over thoughts they haven't even had yet, since the device will keep collecting. Some jurisdictions might refuse to enforce that on policy grounds. In 2023, the Chile Supreme Court ruled that a neurotech firm's policy on EEG data violated rights to mental integrity, and they ordered the company to delete a user's brain data and end sales until the policy was fixed. The company, Emotiv, argued that users consented voluntarily, but the court prioritized constitutional rights over that "consent." This precedent suggests that a private contract should not be allowed to trump constitutional protections and rights.

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[16] Charles R. Calleros, *Non-Enforcement of Contract Obligations for Illegality, Violations of Public Policy, and Unconscionability*, *in* CONTRACTS: CASES, TEXTS, AND PROBLEMS 9–41 (2016 ed.).
[17] RESTATEMENT (SECOND) OF CONTRACTS §§ 161, 162 (AM. L. INST. 1981).

Even further, in both tort and contract law, if one party has special knowledge, they may have a duty to disclose important facts.[18] Companies selling BCIs know far more than their users about what could be done with neural data. If they fail to adequately inform users of the facts, such as the device for example, being able to capture indicators of neurological health, there is arguably no "meeting of the minds." The user's consent could be said to be based on insufficient understanding, which can nullify a contract, which is similar to a consent obtained by misrepresentation or mistake. Even though EULAs usually contain disclosures for the company's legal cover, the quality of that disclosure is at issue. Fine-print wording might not be enough to truly inform. In industries like finance, law includes clear, plain-language disclosures for products, so it is reasonable that neurotech contracts should meet a higher bar for clarity due to how difficult the subject is to understand. Otherwise, the consent is not meaningfully informed and could be deemed defective. At the very least, regulators could consider such practices deceptive.

Certain contracts are also unenforceable because they ask someone to give up an inalienable right. For example, it is not possible to sell oneself into slavery by contract. Some scholars have argued that aspects of cognitive liberty and mental privacy belong in the same category. Wrye Sententia, an early proponent of cognitive liberty as a legal concept, has argued that the freedom to control one's own consciousness is the necessary substrate for nearly every other freedom.[19] Legal philosopher Jan Christoph Bublitz has similarly framed mental self-determination as a basic human right that should guarantee individual sovereignty over the mind.[20] Nita Farahany goes further, arguing that the existing U.S. Fourth and Fifth Amendment frameworks already provide doctrinal infrastructure to protect mental information from coerced

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[18] *Id.*
[19] Wrye Sententia, *Neuroethical Considerations: Cognitive Liberty and Converging Technologies for Improving Human Cognition*, 1013 ANNALS N.Y. ACAD. SCI. 221 (2004), https://pubmed.ncbi.nlm.nih.gov/15194617/.
[20] Bublitz, *supra* note 11.

extraction.[21] If the law recognized a right to mental privacy as fundamental in this strong sense, a boilerplate contract clause forcing its waiver would be invalid, a robust analogue to the rule against contracts of self-enslavement. The idea of "neurorights" is to enumerate exactly such rights, including the right to preserve the privacy of thought.

Whether U.S. law would actually move in that direction is a separate question. The trajectory so far is one of incremental statutory protection rather than constitutional declaration. In April 2024, Colorado became the first state to extend its consumer privacy law to neural data, classifying it as "sensitive data" requiring opt-in consent.[22] California amended the CCPA later that year to follow suit, though with weaker opt-out rather than opt-in protection.[23] In April 2025, a group of U.S. Senators urged the FTC to use its existing unfair-and-deceptive-practices authority to police neural data exploitation as BCI technologies advance.[24] But none of these measures treat neural data as inalienable. They operate within a consent framework: as long as a covered company secures the right form of permission, the contractual transfer of neural data is permitted. The structural choice U.S. law has made, at least so far, is to insist on better-quality consent rather than to declare certain transfers categorically off-limits. The harder constitutional path, recognizing mental privacy as a non-waivable fundamental right enforceable against private contracts, remains theoretically available through First Amendment, Fourth Amendment, or substantive due process doctrine, and scholars have begun to map it.[25] But no U.S. court has yet taken it. Even now,

[21] Nita A. Farahany, *Incriminating Thoughts*, 64 STAN. L. REV. 351 (2012).
[22] H.B. 24-1058, 74th Gen. Assemb., 2d Reg. Sess. (Colo. 2024), https://leg.colorado.gov/bills/hb24-1058.
[23] S.B. 1223, Consumer Privacy: Sensitive Personal Information: Neural Data, 2023–2024 Reg. Sess. (Cal. 2024), https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202320240SB1223.
[24] *Cantwell, Schumer, Markey Call on FTC to Protect Consumers' Neural Data*, SENATE COMMITTEE ON COMMERCE, SCIENCE, & TRANSPORTATION (Apr. 28, 2025), https://www.commerce.senate.gov/press/dem/release/cantwell-schumer-markey-call-on-ftc-to-protect-consumers-neural-data-2025-4/.
[25] Emma Schambach, *"Cognitive Liberty" and the First Amendment as a Weapon in the Fight Against Technological Intrusions of the Mind*, FIRST AMENDMENT L. REV. (Apr. 17, 2024), https://journals.law.unc.edu/firstamendmentlawreview/cognitive-liberty-and-the-first-amendment-as-a-weapon-in-the-fight-against-technological-intrusions-of-the-mind/.

constitutions and treaties like the European Convention on Human Rights protect freedom of thought, and mass data-mining of thoughts through contract undermines that freedom in spirit. As a result, contract law may need to yield to a higher order of rights when it comes to protecting the privacy of the mind, though whether U.S. law will get there through its courts, its legislatures, or not at all remains an open question.

The EU has gone somewhat further on the consumer-protection side, even without reaching the inalienable-rights framing. Consumer protection law there scrutinizes standard contract terms for fairness, and the EU Unfair Terms Directive can nullify terms that create a significant imbalance in consumer rights and obligations contrary to good faith.[26] A clause that allows a company to exploit all of a user's neural outputs while disclaiming all liability would be positioned squarely for such an "unfairness" challenge. Similarly, if a term is not transparent, it can be deemed unenforceable. European courts have not yet confronted a BCI EULA in this way, but it is reasonable that a judge might find it unconscionable in U.S. parlance, or abusively unfair in EU terms, for a company to profit from a user's neural data for purposes unrelated to the service without clear, separate consent. At minimum, meaningful consent is questionable.

VII. Data Protection and Neurorights

Given how limited contract-based consent is, regulators are beginning to treat neural data as a special category that warrants stricter protection. In the EU, existing law like the General Data Protection Regulation already provides a standard that could apply to BCI data. New laws from U.S. state statutes to international “neurorights” initiatives try to ensure that the contract of the mind is not entirely one-sided.

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[26] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013.

Under the GDPR, personal data revealing health or biometric identifiers is considered "special category" data and is thus subject to higher protections. Neural data falls under both, because it can point out health conditions and can be a biometric identifier through unique brain or muscle activity patterns. GDPR prohibits processing such data unless a specific exception applies, one of which is explicit consent by the data subject (Article 9(2)(a)).[27] Explicit consent under GDPR is stricter than the usual "clickwrap" agreement, because it requires a specific statement of consent for the sensitive data use. In the EU, companies like Neuralink or Meta would be legally obligated to obtain a separate, explicit consent from users for collecting neural signals, instead of just burying it in general terms and conditions. Even further, GDPR mandates that consent be freely given, specific, informed, and unambiguous (Article 4(11), Recital 32).[28] If the service is essential to life, it is doubtful that consent is "freely given," which is why GDPR guidance explicitly warns that consent is not valid if the data is required for a contract and the user has no real choice. Accordingly, a company should not be able to condition access to a BCI on consent to data processing that is not strictly necessary for the device's core function. For example, if a brain implant collects extra data for research unrelated to the patient's therapy, GDPR would require that the patient can refuse that secondary use and still get the treatment. In practice, enforcing this is challenging, but the law at least provides a pushback against these all-or-nothing consents.

GDPR's principles of purpose limitation and data minimization also counteract extremely broad EULAs. A company must specify the exact purposes for which neural data is collected and can not later use it for incompatible purposes without getting new consent again. The blanket clause of using brain data for anything that could be useful is incompatible with this, because any

[27] Regulation (EU) 2016/679 of the European Parliament and of the Council, art. 9, 2016 O.J. (L 119) 1, 38.
[28] *Id.* art. 4, at 34.

unspecified future use would be unlawful. In the same vein, only data necessary for the stated purpose should be collected. If a BCI is meant to help a user control a cursor, continuing to record emotional state data might be excessive and violate data minimization. Regulators could thus demand that BCI firms justify every type of neural signal they log. To this end, data protection law externalizes the consent process., because rather than relying on the user to negotiate, the law sets default limits. The EU's approach would force companies to limit their data use or face huge fines. Enforcement is another matter, but large tech firms like Meta are already under EU scrutiny, and neural data would come under that scope.

European institutions are paying attention. The European Data Protection Supervisor's office noted that certain uses of neurodata "pose unacceptable risks to fundamental rights and are likely unlawful under EU law." The EU is also finalizing an AI Act that indirectly covers some neurotech. For instance, AI systems that do "emotion recognition" or biometric categorization may be tightly regulated or banned. A brainwave-interpreting AI for law enforcement interrogation would likely be prohibited or require explicit consent. The Council of Europe has called for updates to human rights frameworks to address neurotechnologies and have emphasized mental privacy. Europe is moving toward neurorights implicitly by treating certain invasions of the mind as off-limits even with consent. These ideas are gaining popularity globally, as seen in Chile's example and UNESCO's work.

Chile has been a leader in this by explicitly recognizing neurorights. In 2021, Chile amended its constitution to include rights to mental integrity and the protection of brain data. This commitment yielded results in the *Girardi vs. Emotiv* case discussed earlier. The Chilean Supreme Court ordered the deletion of a user's EEG data and even stopped sales of the device until the company improved its privacy policy. It held that the company's practices violated the user's rights and prioritized them over contractual consent. The ruling was considered the first of its kind, and it encouraged other countries in Latin America (Argentina, Brazil, Mexico) and some U.S. states to take note. For Chile, brain data deserves maximum protection, and individuals can not sign those protections away lightly. It suggests a model where collection of neural data must be subject to external oversight regardless of user "agreement."

In the absence of a federal foundation on neuro-rights, several U.S. states have begun passing laws to secure neural data rights. Colorado was first, as it amended its consumer privacy law in 2024 to define "neural data" as sensitive data, and thus required opt-in consent before collection or use. This means companies must ask proactively for permission and can not simply rely on implied consent. Colorado's law defines neural data as any information from the measurement of the nervous system. California followed by adding neural data to the sensitive category under the CCPA. However, California's approach is slightly weaker on consent, because it allows processing by default if it's necessary for the service, and it only gives consumers a right to opt-out for secondary uses. Still, these laws are taking the step in acknowledging that brain data isn't just another piece of data. For example, Illinois wants to fold neural data into its biometric privacy act, which requires express written consent before collection. Massachusetts proposed barring collection of neural data unless strictly necessary for a product or service, and flatly banning use of neural data for targeted advertising. Such measures directly target the neurocapitalism business model, and if enacted, a company like Meta could not exploit your neural signals for ads just because you clicked "I agree," since that practice would be illegal regardless of consent.

At the federal level, there is also more attention. U.S. Senators wrote to the FTC in 2025 asking it to protect Americans' neural data from "exploitation or sale" as BCI tech progresses.

They stressed how revealing this data is, where even anonymized, it can expose mental and emotional conditions. While no federal law exists yet, the FTC could use its consumer protection authority to police egregious misuses. Also, the FDA will be involved for devices, although their focus is safety and effectiveness rather than privacy. Still, it is possible that there are future FDA requirements that force implant makers to have robust data governance and informed consent processes as part of device approval.

VIII. Conclusion

Neurocapitalism treats the mind as a site of extraction and exchange, and modern BCI EULAs are the instruments that facilitate that trade. The central claim has been that consent to neural data harvesting is currently ill-equipped to satisfy the demands of information and voluntariness that give consent its normative force. With BCIs, asymmetries of knowledge, power, and alternatives are not constitutive.

Contract law is not a complete remedy either. Unconscionability and public-policy limits can address egregious terms, and consumer-protection standards can require clarity ex ante. However, the contract frame still presupposes a negotiable bargain over alienable interests. Neural data, which is highly revealing and difficult to contain once disclosed, challenges that premise. Rather than assuming that all neural-data rights are already legally non-waivable, this article argues that law should move in that direction for certain core interests in mental privacy and cognitive liberty. Chile's neurorights reform offers one early model: in 2021, Chile amended its Constitution to protect mental integrity and information derived from brain activity, signaling that some interests in the mind require protection beyond ordinary consent. If neural data can expose thought patterns, emotional states, health information, and identity-linked cognitive traits, then private ordering should not be the final word. Public law must provide the necessary foundation, as data-protection principles already resist the “blank check” EULA by requiring consent to be explicit, freely given, specific, and informed. Where power imbalances are structural and contingent on clinical dependence, workplace coercion, or de facto monopolies, consent should not serve as a universal solution.

If neurocapitalism is impending in the coming decade, it calls into question whether people remain protectors and authors of their own thoughts. By limiting what may be taken, establishing what cannot be given out at all, and clarifying how consent must be given, only then will the law honor the promise of neurotechnology without sacrificing the privacy of the mind.

The Tales Dead Men Tell: Likeness Ownership & Actor Compensation in the Age of Digital “Reanimation”

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ABSTRACT:

The 2023 WGA and SAG-AFTRA strikes sparked the current debate about AI implementation in the film industry and its legal and economic effects on deceased actors and extras. Within this context, this paper attempts to find a solution to the conundrum of compensation for said actors in two ways: the first is by defining standards of likeness ownership by actors and their estates, and the second is by proposing a new nationwide standard of ownership to promote consistency and stable financial guidelines for the AI appropriation of an actor’s image. Within those frameworks, this paper analyzes the definitions of “likeness” and “persona”; legal precedents for likeness usage as it relates to an actor’s right to privacy and the First Amendment right to publicity; the line between commercial and entertainment-focused speech; and the tension between “transformative” works and the public domain to provide a roadmap for this system of ownership standardization.

"What is our business, our likeness, our gestures, our acting, our voices? That's what we're selling. That's who we are… Everybody's watching dystopia series as entertainment while my members are living it."

– Fran Drescher, SAG-AFTRA President[1]

"Digital cloning has arrived… We can't afford to lose a generation of creative artists because our laws couldn't keep up with emerging technologies."

– Jessica Ramos, New York Senate Labor Committee Chair[2]

I. Introduction

Artificial intelligence (AI) can now be found in nearly every area of the film industry, including script development, marketing, sound design, distribution, and most notably, visual effects.[3] The latter category has consequently sparked debate around the extent to which AI is a "revolutionary" technological and artistic development versus a threat to people's jobs and the integrity of the art form. Historically, AI has been used to make minor corrections or tweaks to visual effects; for example, *The Irishman* (2019) used the technology to de-age its leading actors, while *Avengers: Infinity War* (2018) garnered attention for adjusting expressions in post-production.[4] While these changes seem minor within the greater scope of filmmaking, the 2023 Writers Guild of America (WGA) and Screen Actors Guild–American Federation of Television and Radio Artists (SAG-AFTRA) strikes have indicated that uncertainty is rising among creative

[1] Robert Scucci, *Fran Drescher Thinks Poisonous AI Is Deadly for Actors and Writers*, GIANT FREAKIN ROBOT (Aug. 9, 2023), https://www.giantfreakinrobot.com/ent/fran-drescher-poisonous-ai.html.
[2] Sharon Knolle, *New York Bill to Protect Actors from AI Voice and Likeness Replicas Passes Assembly*, THEWRAP (June 7, 2024), https://www.thewrap.com/digital-contracts-act-new-york-sag-aftra-ai-protections/.
[3] Neil Sahota, *The AI Takeover in Cinema: How Movie Studios Use Artificial Intelligence*, FORBES (Mar. 8, 2024, 10:00 AM), https://www.forbes.com/sites/neilsahota/2024/03/08/the-ai-takeover-in-cinema-how-movie-studios-use-artificial-intelligence/.
[4] *Id.*

professionals around AI's potential as it grows more sophisticated, opening the door to the use—and abuse—of deepfakes to cut costs by replicating actors' likenesses. Extras, who often have the least amount of access to legal representation, are at the highest risk of replacement should they attempt to advocate for themselves. Deceased actors, whose estates can get tangled up in complicated legal battles if there was no will determining the ownership of their likeness and voice, are at the highest risk of exploitation.

The end of the SAG-AFTRA strike in November of 2023 left numerous unanswered questions about the future of AI in the industry; while the introduction of new contract legislation represented a major milestone in protecting performers' rights and likenesses, it was not far-reaching enough to establish blanket protections for actors across the country. To date, only 25 states have existing legislation for right of publicity statutes, and each state handles the balance between the rights of publicity, privacy, and speech differently.[5] Additionally, very few of those states have brought forth cases related to postmortem rights of publicity.[6] These inconsistencies pose risks to actors living outside of states lacking legislation.[7] In this paper, I will advocate for the need for consistent AI-based legislation on the federal level and an overhaul of labor compensation standards. However, to propose such legislation requires answering several questions: What is a likeness, and how does the use of AI complicate that definition? Who owns a likeness, and are the rules different for living and deceased performers? Where are the lines between a performer and their estate's right to privacy and production companies' First Amendment rights? I will argue that one's likeness should be considered their property for all

[5] Jennifer E. Rothman, Rothman's Roadmap to the Right of Publicity, THE UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL, https://rightofpublicityroadmap.com/.
[6] *Id.*
[7] This could have been accomplished through S. 4875 (118th), or the "No Fakes Act," a bipartisan bill which aimed to protect performers' intellectual property rights on a broader scale. The bill was introduced in a 2024 session of Congress, and had until January 3, 2025 to be passed, but thus far no votes have been held, and the bill has been considered "dead." *See* NO FAKES Act of 2024, S. 4875, 118th Cong. (2024).

economically driven purposes. Given that the current development of AI likenesses in the film industry could infringe upon an actor's intellectual property rights, federal regulations are necessary to establish a boundary between actor privacy and the First Amendment right to free speech.

II. Background

Much of the fear surrounding AI in the film and visual effects industry concerns the development of increasingly convincing deepfakes. A *deepfake* (a portmanteau of "deep learning" and "fake") is a type of "synthetic media," an AI-led altering of video or audio content to create fake content—most often, in an effort to imitate or impersonate a celebrity.[8] Deepfake use became widely publicized in 2021 when AI effects artist Chris Umé posted videos featuring deepfakes of *Mission: Impossible* franchise star Tom Cruise on TikTok.[9] During the SAG-AFTRA strike, actors expressed concern about the potential for a production company to pay a background actor for one day's work, but use and profit off of their likeness in perpetuity via deepfakes, as well as the possibility of using an actor, living or dead, to produce content they never consented to, such as political propaganda.[10]

Within the bounds of this paper, I will define a likeness as an "appearance" or "semblance." In a legal context, "likeness" refers to any visual presentation of a subject, whether that be through a photograph, drawing, video, or other form of media.[11] There is limited legal precedent for the digital recreation of an actor's likeness, and the majority of it centers around the tension between an actor's *right to privacy* and the general *right to publicity*. The right to privacy, in its current

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[8] Jye Sawtell-Rickson, What Is a Deepfake?, BUILT IN, https://builtin.com/machine-learning/deepfake.
[9] Rachel Metz, *How a deepfake Tom Cruise on TikTok turned into a very real AI company*, CNN (Aug. 6, 2021, 8:00 AM), https://www.cnn.com/2021/08/06/tech/tom-cruise-deepfake-tiktok-company/index.html.
[10] Katey Rich, *The AI Issue in the SAG-AFTRA Strike May Have Finally Been Resolved*, VANITY FAIR (Nov. 7, 2023), https://www.vanityfair.com/hollywood/2023/11/sag-strike-ai-issue-resolved.
[11] "Likeness," MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/likeness.

form, has existed in American legal canon since c.1960, when Dean William Lloyd Prosser of UC Berkeley determined that there existed four categories of "invasion," these being: "(1) intrusion upon the plaintiffs seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiffs name or likeness."[12] The concept of the "right of publicity" emerged from this theory in an effort to prevent the appropriation of an actor's likeness (or even painting them in a "false light," in the case of advertisements) by companies intending to use them for commercial benefit.[13] The first major legal case concerning the right of publicity was *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* (1953), in which the court found that baseball players could sell the exclusive rights to use their images to sell baseball cards, setting the precedent that likenesses could be bought and sold as a form of property.[14] To this day, the ownership of a likeness is still considered a form of intellectual property, although there are specific conditions that make any strict definitions difficult to ascertain.[15]

There are three main roadblocks to determining such ownership. One complicating factor is that there is no federal precedent for the right to publicity; publicity laws exist at the state level, and many still have not ratified related legislation. As previously mentioned, only 25 states have official publicity statutes,[16] and at least 13 of those have established that likenesses can be owned and inherited. Each state's level of statutory protection is also different.[17] Some states, such as

[12] Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887 (2010).
[13] Joel Anderson, *What's Wrong with This Picture? Dead or Alive: Protecting Actors in the Age of Virtual Reanimation*, 25 LOY. L.A. ENT. L. REV. 155 (2005).
[14] Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).
[15] Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006).
[16] Jonathan Faber, *Right of Publicity Statutes & Interactive Map*, RIGHT OF PUBLICITY (2020), https://rightofpublicity.com/statutes.
[17] Anderson, *supra* note 13, at 160.

California and New York, have recently increased likeness appropriation protections for actors and their estates, while others, such as Georgia (notable due to many Marvel Studios productions being filmed in the Atlanta area), have no such protections.[18]

Another complicating factor is the common-law understanding of "tangibility." According to the Copyright Act of 1976, copyrightable material is any original work fixed in a "tangible form," but only the "unique components" of a creator's work are protected by copyright law.[19] When determining whether copyright infringement has occurred, both the distinction between an idea and its "expression," as well as the level of similarity between one form of expression and another are taken into consideration. This determination and the current understanding of what constitutes a "tangible" expression of art mean that while a human actor cannot be copyrighted, a use of their likeness, such as a character that person plays in a movie or a voice recording they may produce, could be.[20] However, a crucial point of consideration here is that digital reanimation essentially turns a likeness into a tangible, inhuman object, though with the intent of flawlessly replicating all that makes an actor human. This results in a massive legal conundrum.[21]

A third complicating factor is the definition of "likeness appropriation." Crucially, recreating a person's likeness does not require a "precise reproduction," nor does it require that their face be shown, as long as it evokes their "identity in the eyes of the public."[22] The nebulous definitions of the right to publicity, what constitutes a novel and tangible work, and the limits of the appropriation of a likeness leave actors' rights open to too broad of an interpretation. I argue that, factoring in commerciality as I do below, likenesses can be tantamount to a tangible,

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[18] Faber, *supra* note 16.
[19] 17 U.S.C. § 102.
[20] Anderson, *supra* note 13, at 164.
[21] Karen Kaplan, *Old Actors Never Die; They Just Get Digitized*, LOS ANGELES TIMES (Aug. 9, 1999, 12:00 AM), https://www.latimes.com/archives/la-xpm-1999-aug-09-fi-64043-story.html.
[22] *Using the Name or Likeness of Another*, DIGITAL MEDIA LAW PROJECT, https://www.dmlp.org/legal-guide/using-name-or-likeness-another (last visited Aug. 8, 2026).

marketable object and that a common-sense ruling of likeness reproduction should apply to films that use digital replicas when judging likeness appropriation versus ownership. However, neither of these considerations can reasonably be applied to the film industry in a tangible way without setting a federal precedent. I will explain the state of current national legislation to provide context as to the current state of likeness rights, and to use as precedents from which new legislation should develop below.

III. Review of Literature

As this is a new and quickly-developing topic, there is not much literature in the field of likeness appropriation as it pertains to Hollywood from before the early 2000s. One of the earliest works related to digital reanimation is scholar Joel Anderson's 2005 Loyola California Entertainment Law Review article titled "What's Wrong with This Picture – Dead Or Alive: Protecting Actors in the Age of Virtual Reanimation," which I will use as my foundational reference text. The rest of my work relies on legal and popular culture cases for related topics such as copyright, property rights, and the public domain, as well as more contemporary legal review articles, to intervene specifically in the debates of compensation for likeness use and promoting consistent nationwide legislation for said compensation.

Public Domain

A complicating factor in determining whether a creator is exercising their First Amendment rights while using deepfakes is whether a part of someone's likeness exists in the "public domain," which are works that are not protected by intellectual property or copyright laws. Works in the public domain are "creative materials" that are not protected by copyright or intellectual property laws; they are not owned by an individual, but by the public as a whole. No one can "own" a public domain work, but anyone can use it without permission.[23] There is one loophole, however, called the "collective works copyright," which allows someone to compile multiple public domain images or works into a singular collection that can then be copyrighted. A person could still use one of those individual images without obtaining permission, but would be prevented from using or appropriating the collection in its entirety.[24]

One example of this can be seen in rapper Kendrick Lamar's 2022 music video, "The Heart pt. 5," in which Lamar uses deepfakes over his own face to imitate controversial Black pop culture figures, such as OJ Simpson, Kanye West, Jussie Smollett, Kobe Bryant, Will Smith, and Nipsey Hussle. While the video was widely praised for its inventive use of AI technology, concerns arose about whether the celebrities imitated in the video had grounds to sue Lamar. In this case, the AI models used to create the deepfakes were trained on thousands of images available in the public domain. Those images would be the property of whoever took them, but it would be nearly impossible in this situation for a photographer to pick out one image used and claim copyright infringement.[25] Interestingly, Lamar collaborated with *South Park* creators Trey Parker and Matt Stone's AI entertainment startup, Deep Voodoo, to produce the deepfakes used in the video. The company's largest production up to that point was a comedic video featuring deepfakes of celebrities such as Donald Trump, Mark Zuckerberg, Al Gore, Jared Kushner, and Ivanka Trump, all saying things that they would never say on live television. The company's primarily satirical focus adds an extra layer of depth to the debate over the rights of creators to use deepfakes of celebrities for projects from which they profit.[26]

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[23] Rich Stim, *Welcome to the Public Domain*, STANFORD UNIVERSITY (Apr. 11, 2017), https://fairuse.stanford.edu/overview/public-domain/welcome/.
[24] *Id.*
[25] *Id.*
[26] Jem Aswad, *Kendrick Lamar's 'The Heart Part 5' Video Kicks Off Partnership With 'South Park' Creators Trey Parker and Matt Stone*, VARIETY (May 9, 2022, 2:05 PM), https://variety.com/2022/music/news/kendrick-lamar-heart-part-5-video-south-park-trey-parker-matt-stone-1235262356/.

The aforementioned collection of public domain images raises further questions about digitally captured likenesses as an extension of a performer: does a performer have any claim to a photo or video taken of them, publicly available or not, or is having one's likeness captured and circulated generally considered an occupational hazard? Along the same lines, scholars such as Anderson have posited that a performer as an individual should be viewed as independent from their public persona, and increased popularity and recognition of that performer in the mainstream is due, in part, to the public responding to and sharing content related to said persona. Therefore, an argument could be made in support of a celebrity's public image being classified as a part of the public domain. However, the degree to which a performer is actually separated from their persona and celebrity status is bound to be so inconsistent that making a blanket statement about the public use of a performer's likeness (before applying a transformative use test) would be difficult to support, to say the least.

While determining the boundary between a performer's public and private personas is an obviously difficult task, the Kendrick Lamar case may actually help to provide a clearer understanding of ownership from the perspective of the creation of the footage itself. As previously mentioned, Lamar and Deep Voodoo took publicly available images from the Internet to create their celebrity deepfakes. While, again, it would be incredibly difficult for anyone to go through the footage and claim that any one segment or image is theirs, it is, in theory, possible, and for the sake of this argument is worth investigating. Below, I will shift to a discussion of the tension between free speech, financial interests, and an actor's right to own their likeness and performances.

Free Speech and Constitutional Precedent

The right to free speech poses one of the biggest challenges to establishing cases of violations of privacy and misappropriations of likeness. The First Amendment of the Bill of Rights states that "Congress shall make no law… abridging the freedom of speech, or of the press," and the Fourteenth Amendment solidifies this ruling, adding that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (14th Amendment, US Constitution, Due Process Clause). Due to these precedents, there is a burden on the courts to determine the extent to which a company is permitted to appropriate an actor's likeness for commercial purposes, and the extent to which an actor can claim that their right to privacy has been infringed upon by said appropriation.

When determining whether an artistic replication of a person is lawful, the courts must first consider both the "Fair Use Doctrine" and "Transformative Use Test." Fair use broadly refers to reproductions of copyrighted material that are not considered infringement as they are sufficiently distinct, or "transformative" enough to be considered a part of an original work. Media generally protected under fair use includes but is not limited to parody, satire, news broadcasting, criticism, and scholarship.[27] Other means of determining the originality of a creative work are frequently determined by various "transformative use tests." For example, a performer's name and likeness can currently be used in a work that is about them, such as in a biopic. Simple as it may sound, this is referred to as the "relatedness test."[28]

As such, the majority of biographical works could be protected under this transformative use test. The second major test is the "transformativeness test," in which it is determined whether

[27] 17 U.S.C. § 107.
[28] Anderson, *supra* note 13, at 180.

a work that has been accused of violating a copyright possesses enough new creative or interpretive input and produces enough new "transformative" cultural value to be protected under the First Amendment.[29] The 2001 *Comedy III* case, which will be described in more detail below, is one of the most famous examples of the application of this type of test. The third type of test is the "predominant purpose" test, which is more closely related to the discussion of commercial versus entertainment speech.[30] In short, this type of test is generally used when considering the economic interests of a performer and any threats to their earning potential should media related to their work (i.e. unauthorized photographs, recordings, etc.) be released to the public without their consent.

Current Legislation

The goal of this paper is to outline the legal precedent for digital reanimation and the factors (i.e. right to privacy vs. right to publicity, First Amendment rights, commercial vs. entertainment speech, public domain, celebrity status and personas, and postmortem rights) that must be considered when determining the compensation that actors and their estates should receive for their digital labor. Taking these factors into account, it has become clear that for any level of consistency in likeness ownership and compensation to occur, a federal standard must be implemented, rather than continuing with the current state-based system. Ben Laney, a legal scholar and researcher of the intersection of post-mortem "acting" and property ownership, has

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[29] *Id.* at 181.

[30] Commercial vs. entertainment (noncommercial) speech is an issue of its own, particularly as the exact definitions of both categories are vague to this day. For context, since the 1970s it has been agreed that works using the persona or likeness of a performer that are considered informational or "newsworthy" are generally protected under the First Amendment. Works using a performer's likeness with the intent of profiting off of that persona are still protected in certain cases, but are generally subject to more intense scrutiny. To date there have been two main definitions of commercial speech: "(1) the speech is an advertisement, (2) that refers to specific products, and (3) the speaker is economically motivated," according to the Supreme Court post-Bolger v. Youngs Drug Products Corp 463 U.S. 460 (1983); and "(1) the message in question is directed by a commercial speaker, (2) to a commercial audience, and (3) the representations are made primarily to sell the speaker's products," according to the California Supreme Court post-Kasky v. Nike, Inc. 27 Cal. 4th 939 (2002). *See also* Anderson, *supra* note 13, at 178.

argued that there is no need to implement a federal standard other than convenience.[31] However, as the film industry has gradually spread outside of Hollywood, and since there are many actors who reside in states other than those in which they work, a federal standard is a necessity. What would happen if a New York citizen resided in California and worked for a Hollywood production company, but passed away in their home in Manhattan? New York and California each have different rules regarding the postmortem right to privacy, as well as property ownership, which includes the ownership of that actor's likeness. A federal standard would eliminate the legal confusion that would undoubtedly arise. Without one, barring SAG-AFTRA standards (that only apply to union members, leaving non-union actors vulnerable), the only way to ensure fair and consistent labor standards would be for all production to remain in California—an impossible feat given the breadth of film production that occurs across the country.

The federal standard can draw from existing state legislation, as states such as California, Tennessee, Texas, and New York have already begun drafting ownership agreements with production companies and estates, regarding property inheritance. For the most complete federal framework, I propose taking from current California and New York legislation, in particular California AB 2602 and 1836, New York's Digital Contracts Act, 2022 Name, Image, and Likeness bill, and 2021 right of publicity bill aimed at deceased performers.

AB 2602, recently signed into effect by California Governor Gavin Newsom, raises the requirements of consent for the use of digital replicas; descriptions of the applications of those replicas are required to be included in actor contracts. Additionally, the actor must be represented by either a union representative or a lawyer. Most importantly, a digital replica generally may not be permitted if it results in a performance that the original actor could reasonably have given in

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[31] Ben Laney, *Bringing the Dead Back to Life: Preparing the Estate for a Post-Mortem Acting Role,* 12 TEX. TECH UNIV. SCH. OF LAW EST. PLAN. & CMTY. PROP. 1, 14 (2020).

person, and a voice replica may not be used to train AI models.[32] AB 1836 stipulates that deceased actors' likenesses cannot be used without consent, and that all violating parties must pay a fine of either $10,000 or the actual damages incurred, whichever value is higher.[33]

New York introduced the Digital Contracts Act after actor Scarlett Johansson alleged that OpenAI's voice, "Sky," was too similar to her own, knowing she turned down an earlier offer to provide her voice for the project.[34] Just as with AB 2602, this bill works in conjunction with SAG-AFTRA, requiring informed consent for all actors working on projects for which a company could gain the rights to use their likeness or voice, and mandates legal representation when entering into contracts. The Name, Image, and Likeness legislation was primarily intended for student-athletes, but if broadened, could also provide important protections for actors. The bill empowers student-athletes to take control of monetizing their own likenesses, and allows them to receive compensation for doing so.[35] Granted, an expansion of this bill would still require the matter of ownership to be addressed—for example, could an actor control their likeness even if playing an iconic franchise character?

The final piece of New York legislation, sections 50-f and 52-c of the New York Civil Rights Law, could prove to be the most influential for deceased actors' rights. This set of rulings, introduced in 2019 and ratified in 2021, establishes liability for any entity that uses an actor's likeness for commercial purposes without consent (unless the work is purely informational or newsworthy, or is satirical). It also formally establishes likeness rights as property rights, which

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[32] *Governor Newsom signs bills to protect digital likeness of performers*, GOVERNOR GAVIN NEWSOM (Sept. 17, 2024), https://www.gov.ca.gov/2024/09/17/governor-newsom-signs-bills-to-protect-digital-likeness-of-performers/.
[33] *Id.*
[34] Sharon Knolle, *New York Bill to Protect Actors From AI Voice and Likeness Replicas Passes Assembly*, THEWRAP (June 7, 2024, 3:51 PM), https://www.thewrap.com/digital-contracts-act-new-york-sag-aftra-ai-protections/.
[35] Bennett Liebman, *Name, Image, and Likeness Legislation Reaches New York State*, ALBANY LAW SCHOOL (Sept. 1, 2022; updated Dec. 1, 2022), https://www.albanylaw.edu/government-law-center/name-image-and-likeness-legislation-reaches-new-york-state.

allows an actor's likeness to be inherited by their children or otherwise managed by their estates. This also means that if said actor dies without a will, their likeness will be treated as any other form of property, placing it under the control of a conservator. Under this bill, any claims to inherit a likeness must be passed through the Secretary of State, and claimants must not have any intention to misappropriate the likeness for commercial purposes at the time of filing.[36]

Operating with the input of SAG-AFTRA and establishing universal guidelines for contracts, legal representation, and property ownership and inheritance are increasingly important in the effort to protect actors from their likenesses and right to privacy being abused. In the interest of establishing a universal definition of a commercial film, there is no real good solution that feels stable in the long term, particularly as the level of sophistication that AI can reach is yet unknown (as well as the inevitable decrease in cost when other companies begin to produce deepfakes cheaply). However, in the short term, it may be beneficial, albeit artistically disappointing, to consider all films that apply this technology as having a primarily commercial intent.[37] This solution would create a system of blanket protections that extends across the entirety of the mainstream film industry. In doing so, an actor can consider their likeness a commodity just as those films are, which may result in actors having more bargaining power in the future. This could also serve to eliminate some of the confusion around the public domain and actor versus production

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[36] In addition, it protects against the creation of sexually explicit deepfakes, a topic which is beyond the scope of this paper but is nonetheless crucial to the study of AI imagery. *See* "NY State Senate Bill 2023-S1042A." 2023. Www.nysenate.gov. February 3, 2023. https://www.nysenate.gov/legislation/bills/2023/S1042/amendment/A.

[37] For a studio, it can be automatically assumed that the intent of creating a deepfake is for commercial gain. After all, AI technology is relatively new, and the recent trend of revitalizing franchises indicates that nostalgia sells (for example, *Jurassic World* (2022, dir. Colin Trevorrow) set a record for grossing $1 billion globally in the shortest amount of time); so far, aside from minor corrections, most deepfakes have been of deceased actors from some of those beloved franchises, and, in keeping with *Nike*, are created by primarily commercial entities for the overall purpose of selling a product (movie tickets), so commercial intent would be nearly impossible to deny. The line between commercial and entertainment speech is more blurred with independent creators, however. If someone were to make a deepfake of a deceased actor strictly for entertainment purposes and kept it to themselves, they would not be in violation of any rights to privacy. However, if they were to post that video on a social media platform such as YouTube, even if their intent is still strictly entertainment, it should automatically be considered a commercial endeavor based on that platform's monetization guidelines.

company ownership; if likeness rights, or shares of those rights, are standardized, there is less room for a company to claim First Amendment rights to nonconsensually use video or audio footage, although the issue of the public domain may still persist. These protections would also prevent the exploitation of extras, by providing legal grounds for preventing the cheap reuse of their likenesses in other films, as well as deceased actors, by encouraging a more systemic inclusion of postmortem likeness rights in wills and more structured systems of ownership for property inheritors. Overall, likeness ownership is a crucial element in the effort to manage workers' rights during the instability and uncertainty that is AI's rise to prominence.

Economic Interests

The subjects of compensation and economic interests are perhaps the most important to discuss regarding AI's impact on actors. There is currently much debate regarding the tension between an actor's value as a performer and their value as a recognizable figure. As there is usually a direct correlation between an actor's celebrity status and their marketability and earnings, the amount of compensation celebrity and non-celebrity actors should receive for the use of their likeness (particularly in light of the popular argument that celebrity actors' personas, as public cultural figures, should be a part of the public domain) remains an unanswered question.[38]

To begin to address that question, one must first explore where the boundary is between an actor's right to control the commercialization of their likeness and production companies' First Amendment right to use that likeness. The root of both queries lies, in part, in the difference between commercial and noncommercial speech. Commercial speech is protected under the First Amendment, the Supreme Court having created the Central Hudson Test which determines the

[38] Anderson, *supra* note 13, at 173.

necessity of free speech regulations on a case-by-case basis.[39] There exists a "three-part hierarchy" of speech, which determines the level of constitutional protection granted to certain types of speech: news receives the most protection, followed by fiction or entertainment, and finally, commercial or advertising speech, which thus receives the most constitutional scrutiny.[40] Notably, *misleading* commercial speech is not protected under the First Amendment.[41]

There is no true national standard for what comprises commercial speech; generally, commercial speech protections are applied using a "common sense" approach by the Supreme Court. However, several jurisdictions have created their own tests of determination, two of which are the most relevant to this investigation. The *Bolger* test, established by the Supreme Court during *Bolger v. Youngs Drug Products Corp.* (1983), declared it unconstitutional to mail unsolicited birth control advertisements. The test had three main factors: (1) the speech featured is an advertisement; (2) that advertisement refers to specific products; and (3) the speaker is economically motivated.[42] The California Supreme Court created a second test during *Kasky v. Nike, Inc.* (2002), in which Marc Kasky sued Nike, alleging that Nike "made false statements" to the press related to working conditions at their manufacturing plants. The state supreme court ruled that Nike's statements were considered commercial speech.[43] For this test, it was determined that for a statement to be classified as commercial speech, (1) the message is stated by a commercial speaker; (2) the audience must be commercial; and (3) the speech or "representation" is crafted with the primary intent of selling said speaker's product(s).[44] Two particular landmark cases in

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[39] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).
[40] Anderson, *supra* note 13, at 176.
[41] Justin P'ng, *The Resurrection Will Not Be Televised: Legal Remedies for Posthumous Deepfakes*, 8 GEO. L. TECH. REV. 338, 346 (2024).
[42] Anderson, *supra* note 13, at 178.
[43] While the U.S. Supreme Court granted review in *Nike*, it ultimately dismissed the case as improvidently granted. Nike, Inc. v. Kasky, 539 U.S. 654 (2003).
[44] Kasky v. Nike, Inc., 27 Cal. 4th 939, 960–64 (2002).

intellectual property law led to the establishment of a precedent of commercial speech based on another's performance.

Zacchini v. Scripps-Howard Broadcasting Co. (1977)

Zacchini was a landmark case in establishing the boundaries of likeness usage as it pertains to the economic impact on the subject. In this case, stunt performer Hugo Zacchini had a 15-second "cannonball" act (in which he would be shot from a cannon into a net), which was recorded at an Ohio county fair and broadcasted on television the same day without his consent. Zacchini brought forth a case against the Scripps-Howard Broadcasting Company, claiming that they "unlawfully appropriated" his "professional property," impacting the amount of revenue he could make from future performances due to the convenience of watching his act on television versus in person. However, while the Ohio Supreme Court agreed that Zacchini had a right to the "publicity value" of his performance, the majority held that Scripps-Howard was protected under the Constitution to broadcast stories of public interest, despite the fact that Zacchini had previously asked onlookers at the fair not to film the act. Their argument was that ultimately, TV news broadcasting stations have the right under the First and Fourteenth Amendments to show content which would normally be protected by an actor's right to publicity, unless it can be proven that the intent was to either privately profit off of that content or do financial or other harm to that actor.

The dissent, however, argued that it was not the *showing* of the footage that Zacchini was suing for; it was the lack of *compensation* for having broadcasted it. They claimed that the broadcasting of the entire act instead of a segment of it hindered Zacchini's ability to capitalize on his labor, and that while the news clip was certainly still considered entertainment speech, it also had commercial implications (according to Zacchini, to the tune of $25,000), which should thus be protected under Zacchini's right to publicity. The dissent began its conclusion with this statement summarizing the extent to which a solid boundary of right of publicity is still a nebulous concept:

> 'Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent'… I doubt that this formula provides a standard clear enough even for resolution of this case."[45]

With the novelty of AI technology, it is also impossible to deny that the use of deepfakes in mainstream media is a spectacle in and of itself, and one could argue that production companies' knowledge and application of the technology is inherently monetarily driven. Certain film organizations actually do categorize films as commercial and noncommercial, with the main distinguishing feature between them being the intent of the filmmakers (although, as I mentioned above, larger budgets and high-concept features tend to fall primarily into the former category).[46]

While determining true intent is inherently difficult without an intimate knowledge of individual productions, for the purposes of this paper, it may be prudent to consider all films that use deepfake technology as "commercial speech." Referring back to the commercial speech tests previously mentioned, these films seem to check every box: they are at their core commercial entities addressing a commercial audience, and when considering box office, digital, and merchandise sales, they are produced at least partially with the intent to sell specific products.

Comedy III Productions, Inc. v. Gary Saderup, Inc. (2001)

This case served as a landmark in right of publicity rulings and the application of transformative use tests. Comedy III Productions, the entity that owns the rights of the Three

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[45] *Compare* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 574–75 (1977) (majority opinion), *with id.* at 579 (Powell, J., dissenting).
[46] "HOME - I.MA.F.F." 2025. IMAFF Awards. February 24, 2025. https://imaffawards.com/.

Stooges troupe (all of whom are deceased), sued artist Gary Saderup for making and selling t-shirts prominently featuring the likenesses of the characters. The images on the shirts themselves were copies of a charcoal drawing that Saderup drew, and Saderup claimed that the drawings and shirts were not an "advertisement, endorsement, or sponsorship" of the group or company.[47] Saderup made $75,000 in t-shirt sales during this period. At the end of the trial, the Court ruled in favor of Comedy III, issuing a permanent injunction preventing Saderup from further using, creating, or selling the Three Stooges' likenesses, save for his original charcoal drawing. However, Saderup later appealed and the court removed the injunction. This ruling established a precedent for the use of deceased actors' likenesses in particular: "it makes liable any person who, without consent, uses a deceased personality's name, voice, photograph, etc. either (1) 'on or in' a product, *or* (2) in 'advertising or selling' a product."[48]

Likeness Ownership Rules for Extras and Deceased Actors

Legal scholar Ben Laney establishes several different likeness ownership scenarios in his 2020 article "Bringing the Dead Back to Life: Preparing the Estate for a Post-Mortem Acting Role." According to Laney, there are several means for actors to prevent unauthorized posthumous uses of their likeness, these being "proactive recreation," "retroactive recreation," and "retroactive recreation for completely new roles."[49] Proactive recreation, often accomplished by producing three-dimensional digital scans of an actor's body, has been increasingly utilized in recent years, most famously by Tom Cruise for the film *Oblivion* (2013) and Robin Wright for *The Congress* (2013). These scans, in combination with other forms of visual and audio recordings, mean that

[47] Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 393 (2001).
[48] *Id.*
[49] Laney, *supra* note 31, at 352.

actors can "perform" in roles without actually physically participating.[50] However, without careful oversight, this means of digital reproduction can carry serious risks: the current fear of SAG-AFTRA members is that unlike Cruise and Wright, whose likenesses were scanned and used with their knowing consent and who profited as they would have for any other film, background actors could potentially be paid for one day's labor for a set of scans and their digital likenesses could then be used in perpetuity, without those actors' knowledge, consent, or ability to profit.

Retroactive recreation—the posthumous use of an actor's likeness through old footage, CGI, and body doubles—is more widely accepted in Hollywood, primarily when an actor passes away mid-production. One of the most famous examples of this can be seen in *Furious 7* (2015), when lead actor Paul Walker passed away before filming was complete. Wētā FX (formerly Wētā Digital) used a composite of 350 individual shots and Walker's brothers as body doubles so that Walker could "complete" his final performance.[51] In this case, production was stopped immediately after Walker's death and only resumed with Walker's family's permission.

Retroactive recreation for new roles, as Laney notes, is perhaps one of the most pressing threats to deceased actors. The three most famous cases of this type of recreation can be seen in *Rogue One* (2016), *Roadrunner: A Film About Anthony Bourdain* (2021), and *The Flash* (2023). In *Rogue One*, actor Peter Cushing, who played Grand Moff Tarkin in the original *Star Wars* trilogy and passed away in 1994, was digitally "reanimated" for a main supporting role in a film produced over twenty years after his death. 3D scans of Cushing's face were created and digitally inserted over a body double.[52] While Cushing did not have any clause regarding the use of his

[50] *Id.* at 353.
[51] *Id.* at 355.
[52] *Id.* at 356.

persona in his will, he ordered that the remainder of his estate be given to his secretary, Joyce Broughton, whose permission Disney sought before including Cushing's likeness in the film.[53]

While this case is a good example of a stricter adherence to the wishes of a deceased actor and/or their estate, there exist more instances in which this has not been the case. In *The Flash*, deceased actor Christopher Reeve, one of the most iconic "Superman" actors, was digitally reanimated for a brief cameo, which was ostensibly a tribute to the actor and the legacy of his persona. However, the use of Reeve's likeness was compared to "grave-robbing" by the press, sparking a public debate about the ethics and necessity of the cameo, as well as DC's intent, which was likened to a "cynical technological flex."[54] In addition, while Reeve's estate recently claimed that they were never contacted for permission to use Reeve's likeness in the film, its greenlighting by DC Studios raises further questions about the line between ownership of actors' likenesses as private citizens and as iconic, franchisable personas.[55]

The current legal understanding of this question remains vague, with courts split on whether celebrities, particularly those playing popular characters, should be considered "fictional characters," as their personas can be manipulated for different projects and are not necessarily representative of the celebrity as an individual.[56] *Roadrunner* presented a similar issue of ownership of likeness, but was unique in that it primarily concerned recently deceased celebrity chef Anthony Bourdain's voice; director Morgan Neville used AI to reproduce Bourdain's voice using lines that Bourdain himself wrote. However, that usage sparked a heated Twitter exchange

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53 *Id.*

54 Jack King, *The Flash's Christopher Reeve cameo is reigniting the CGI dead actor debate*, GQ (June 16, 2023), https://www.gq-magazine.co.uk/article/the-flash-christopher-reeve-cameo.

55 Zack Sharf, Christopher Reeve's Children Never Watched That 'Flash' CGI Cameo, Say He'd Choose 'Remains of the Day' Over 'Superman' as the Film He's Proud of Most, VARIETY (Jan. 20, 2024, 12:57 PM), https://variety.com/2024/film/news/christopher-reeves-children-the-flash-cameo-1235880290/.

56 Anderson, *supra* note 13, at 167.

between Neville and Bourdain's wife, in which she claimed that Neville had never asked her for permission to recreate Bourdain's voice.[57]

On that subject, the digital reanimation of a deceased actor, and compensation for that reanimation, has been a hotly contested issue in recent years, as it carries as many significant implications for estate law as it does for privacy law. One case that may provide the most relevant insight into the current state of digital reanimation laws versus the right to privacy is actor Robin Williams' legal battle to ensure the protection of his likeness and estate. There are currently two widely accepted means of protecting oneself from postmortem digital animation: the use of a contract and the drafting of a will. Contracts are the most straightforward means of protecting one's likeness in perpetuity with any company one worked with; SAG-AFTRA is already in favor of such protective measures, and has already implemented a clause banning the reuse of any footage postmortem without renegotiation, under the threat of having to pay the actor three times what was paid for the original project.[58]

However, the most significant complication with this method is that contracts are only applicable to companies an actor has professional relationships with, meaning that if another studio wanted to use the same footage, they could likely do so without incurring any fees; this poses a risk as without being beholden to a contract, there is no incentive for other production companies to not find loopholes to continue profiting off of an actor's labor.[59] Williams used the latter method to manage his estate after Disney disregarded the terms of his original contract with them after he

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[57] Nick Romano, *Anthony Bourdain's ex-wife says she didn't say he'd be okay with recreating his voice for documentary*, ENTERTAINMENT WEEKLY (July 16, 2021, 10:20 AM), https://ew.com/movies/anthony-bourdain-roadrunner-widow-ottavia-busia-refutes-director-twitter/.
[58] Laney, *supra* note 31, at 372.
[59] *Id.*

worked on *Aladdin* (1992), stating that no one would be permitted to use his name, voice recordings, or video footage of performances for twenty-five years after his death.

In an interview, Williams' daughter Zelda took a firm stance against digital reanimation of any kind, particularly for actors who passed before the advent of deepfake technology, arguing that (1) no one other than the actor themselves knows for certain the types of projects they would take on, so it should be no one else's right to determine that for them after they die, and (2) no one should be forced to do any kind of labor, in life or death, particularly when the compensation for that labor is only seen by a production company and/or relatives of the deceased.[60]

Scholarly Interpretations and Intervention

Legal scholars have proposed several different methods of establishing ownership over digital recreations of likenesses. The prevailing theory is that likenesses should be generally treated as inheritable property. Other scholars believe that likeness ownership should extend beyond property law and into torts, as it relates to the social harm that could be caused to the reputation of a deceased actor or extra who never consented to being featured in a particular role. In his article "The Resurrection Will Not Be Televised: Legal Remedies for Posthumous Deepfakes," Justin P'ng discusses the concept of "dignitary torts" as they relate to an actor's dignity, worth, autonomy, and respectability. He frames his argument through a discussion of the treatment of human remains, implying that just as performing certain physical actions on a corpse, such as sexual desecration, violate the deceased (as they cannot give consent) and their next of kins' "possessory

[60] Lester Fabian Brathwaite, *Robin Williams' Daughter Zelda Says AI Recreations of Her Dad Are 'Personally Disturbing'*, ENT. WKLY. (Oct. 1, 2023), https://ew.com/movies/robin-williams-daughter-slams-ai-recreations/

interest" in their remains, the misappropriation of a likeness can present a similar sense of violation and action taken without consent.[61]

Questions remain regarding what might happen if a deceased actor's next of kin sells their likeness rights to a single production company and whether their likeness would become a part of the public domain in the future. What if there is no inheritor to the actor's property—might their likeness become a part of their estate, and could it be sold just as a physical estate is? Would it be possible that a digital reproduction of an actor completing an entirely different performance be considered transformative enough to earn protections under the First Amendment, or would it be a violation of their right to privacy? Through my research, I have only discovered one scholar who considered the property rights of not just the subject of the deepfake, but also that of the creator of said deepfake: in his 2023 article "Virtual Stardom: The Case for Protecting the Intellectual Property Rights of Digital Celebrities as Software," Alexander Plansky argues that virtually created actors could be protected by copyright under whichever designer produced them. Any money made by said actor would then go directly to the production company holding the copyright, and a copyright could, in theory, prevent anyone else from creating another digital actor that could be considered to reasonably resemble the original.[62] If applied, this theory could further muddle the rights to, and inheritability of, a real actor's likeness; the precedents of transformative use and the use of source images or models must then be used to differentiate between the ownership of one's physical likeness and the copyrighting of what is essentially a corporation-owned cartoon.

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[61] P'ng, *supra* note 41, at 346.
[62] Alexander Plansky, *Virtual Stardom: The Case for Protecting the Intellectual Property Rights of Digital Celebrities as Software*, 32 U. MIA. BUS. L. REV. 150, 172 (2024).

IV. Conclusion

I posit that there is already an answer to the question of transformativeness, which can be found in Reid M. Koski's article "Warhol, Drake, and Deepfakes: Monetizing the Right of Publicity in the Generative AI Era." I argue that many of the films that feature digital replicas of actors are commercial vehicles first and modes of entertainment second. These larger-budget films, often parts of established franchises, are also produced with the goal of getting as many people in seats as possible.

In a case like *The Flash*, Christopher Reeve's cameo was certainly an element of the film that drew attention and press scrutiny, and while it was partially intended to serve as a tribute to Reeve, Reeve's family's lack of involvement with the film indicates a potential intent to generate buzz for a movie that was suffering in ratings because of star Ezra Miller's controversies. Likewise, while Peter Cushing's reanimation as Grand Moff Tarkin in *Rogue One* was not the film's most significant pulling factor, it garnered a notable amount of media attention at the time and almost certainly appealed to longtime fans who may have been further encouraged to see the film in theaters because of the cameo.

Left unaddressed, the issue of AI replication in the film industry could very well lead to further discord in and beyond Hollywood. Particularly within the last few years, the big-budget film industry has been expanding outside of Los Angeles, with major productions being filmed in New York, Georgia, and Illinois. Since the strikes, labor rights in production companies have been examined under a microscope, and unregulated AI use can and will rob actors (to say nothing of writers and VFX specialists) of their livelihoods, while still exploiting their likenesses. Current laws leave too much unregulated; extras and deceased actors are too vulnerable to abuse. Actors and musicians make royalties when their labor is reproduced and sold; considering that deepfakes are generally composites of images or videos of a subject, actors whose likenesses are replicated digitally should be granted the same protections.

This study only reaffirms that labor is property, and just as it is the responsibility of the government to set precedents for land ownership, it should be our responsibility now to set a precedent for likeness ownership. And this is just the technical side; artistically, one must consider whether an AI replica can truly replicate what makes an actor's performance their own; what could happen to the humanity in a film when the movie's vehicles for emotional impact are incapable of feeling anything of their own accord; and how that might impact narrative storytelling. It should be our responsibility to set a consistent precedent for labor rights and deepfake use within the film industry now to preserve the integrity of studios, production, and films themselves.

Native American Citizenship and Tribal Legal Sovereignty: The Historical Precedent and Modern Challenges

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ABSTRACT:

On January 20, 2025, President Donald Trump issued Executive Order 14160, denying birthright citizenship to children whose parents are not American citizens. Though aimed at undocumented immigrants, its legal grounding relies on *Elk v. Wilkins* (1884), which denied birthright citizenship to Native Americans. By citing Elk, the Trump administration argues Native Americans are citizens of their sovereign tribal nations first and of the United States secondarily. While contradicting the Indian Citizenship Act of 1924 and decades of precedent affirming Native citizenship, the order highlights broader efforts to undermine tribal sovereignty after *McGirt v. Oklahoma* (2020), which reaffirmed tribal jurisdiction. Since McGirt, state leaders, like Oklahoma Governor Kevin Stitt, have sought to limit its impact and reassert state power. Together, these moves threaten both constitutional guarantees of birthright citizenship and tribal sovereignty, representing the most significant assault on Native American legal and political status in nearly a century.

I. Introduction

In December 2023, a chaotic scuffle erupted as tensions finally reached a breaking point between state jailers and Lighthorse police, the law enforcement agency of the Muscogee Nation. When Lighthorse officers attempted to formally admit a man into the Okmulgee County Jail, jailers refused to take custody. A physical altercation ensued, resulting in a state jailer being charged with battery. Though embarrassing for both parties, neither ceded their position. Eventually, the Okmulgee County Criminal Justice Authority acknowledged its mistake and agreed to process the man.[1] Located entirely within the Muscogee Nation Reservation, Okmulgee County remains at the heart of a contentious legal battle. Although agreements between the tribe and state have mitigated the conflict, legal jurisdiction remains fiercely debated. However, the tribal courts remain untouched by compromise. As a result, the courtroom has become a battlefield where sovereignty, justice, and governance are contested. Within this pivotal conflict between the sovereign Muscogee Nation and the State of Oklahoma, tensions run high. Yet the stakes are even higher for thousands of Oklahomans and Native Americans nationwide.

Today, the Cherokee, Chickasaw, Choctaw, Muscogee, and Seminole Nations possess more legal sovereignty and authority than at any time since before Oklahoma's statehood. For the first time in centuries, these tribes can fully prosecute their own citizens on their own lands, an essential function of self-governance. Instrumentally, the Supreme Court's ruling in *McGirt v. Oklahoma* (2020), which affirmed the enduring status of reservation lands, made the unprecedented restoration of legal power possible. Yet, it was *Sharp v. Murphy* (2020) that brought forth the jurisdictional questions that McGirt would ultimately answer. Still, many across the

[1] Lex Rodriguez, *Tribal Law Expert Explains Jurisdiction Confusion Between Muscogee Lighthorse Police and Okmulgee Co. Jailer*, News on 6 (Dec. 22, 2023).

country vehemently oppose Native sovereignty.[2] As of mid-March 2026, the Department of Justice, with support from political leaders like President Donald Trump and Oklahoma Governor Kevin Stitt, is engaged in ongoing legal efforts aimed at dismantling tribal authority and the reservation status altogether. This article will explore the historical backgrounds and foundations that led to these Supreme Court decisions, examine their legal and political consequences, analyze the previous and ongoing efforts to undermine and reverse their impact, and explain why the Trump Administration's claim is baseless and incorrect.

II. Historical Background: The Rocky History of Native American Diplomacy

Since European arrival and the inception of the United States, there has been a tumultuous relationship between the Cherokee, Chickasaw, Choctaw, Muscogee, and Seminole Nations, the federal government, and the State of Oklahoma. These tribes are the primary focus of this article, particularly in light of the recent affirmation of their legal sovereignty in *McGirt v. Oklahoma* (2020) and the Trump Administration's challenges to birthright citizenship. While the Supreme Court's shocking decision occurred in 2020, the legal foundation was laid long ago with the establishment of the United States. However, the modern disparities between Native American tribes, the federal government, and the State of Oklahoma began even earlier. While this historical summary is not intended to be a comprehensive narrative of these tribes' long and rich histories, it provides critical background for the legal and political developments that will be explored in this article. Although these Nations are commonly referred to as the 'Five Civilized Tribes,' this denotation is rooted in colonialist language and values. Therefore, this article will instead refer to

[2] Laurel R. Davis-Delano et al., "White Opposition to Native Nation Sovereignty: The Role of 'The Casino Indian' Stereotype and Presence of Native Nation Gaming," Cambridge University Press (August 6, 2020).

them simply as "the Five Tribes." Understanding history is vital to grasping the current conditions of the underrepresented and suppressed, especially Native American tribes.

Shortly after establishing overseas colonies in the Americas, European powers launched a bloody and ruthless campaign against Native peoples. Through genocide, enslavement, forced removal, and the erasure of culture, approximately 95% of all Native Americans died due to European intrusion.[3] After gaining independence, the newly formed United States faced the monumental task of navigating competing claims to land and sovereignty by Native American tribes. Clashes between states and tribes were inevitable. For tribes whose territory had already been absorbed into the United States, the courtroom became a potential avenue for asserting sovereignty. For instance, in response to territorial and jurisdictional disputes with the State of Georgia, the Cherokee Nation sued, seeking full recognition of its independence. Unexpectedly, the Supreme Court ruled in favor of the Cherokee Nation in the landmark case *Worcester v. Georgia* (1832).[4] The Court held that Georgia had no authority to enforce state laws within Cherokee Nation territory and affirmed the tribe's right to self-governance, including the drafting and enforcement of its own laws.[5] Outraged, President Andrew Jackson defied the Court's ruling and signed the Indian Removal Act, expelling the Cherokee to Indian Territory (modern day Oklahoma). Alongside the Cherokee, Jackson also banished the Chickasaw, Choctaw, Muscogee, and Seminole Nations.[6] Between 1838 and 1840, these tribes endured the harrowing Trial of Tears, a journey characterized by immense suffering, disease, and death. Overall, the Indian Removal Act initiated a long and contentious legal battle over tribal sovereignty that has extended into the

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[3] Jamie E. Ehrenpreis & Eli D. Ehrenpreis, *A Historical Perspective of Healthcare Disparity and Infectious Disease in the Native American Population*, The American Journal of the Medical Sciences, U.S. National Library of Medicine (Apr. 2022).

[4] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); *see also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831).

[5] *Cherokee Nation History*, Cherokee Nation.

[6] Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830).

present day. Moreover, further removal efforts expelled 34 other tribes to Indian Territory.[7] Yet, only the Five Tribes have retained significant jurisdiction. Meanwhile, for the additional tribes, the struggle for full recognition and self-determination is far from over.

Between the Indian Removal Act and the formal establishment of Oklahoma in 1907, the federal government systematically undermined tribal sovereignty by targeting Native citizenship, land ownership, tribal governments, and legal systems.[8] Seeking full assimilation, federal officials pushed tribes to operate like states, stripping away their distinct political identities. Upon arrival in Indian Territory, the Five Tribes began developing constitutions, forming governments, and crafting legal frameworks. However, as these institutions grew stronger, the federal government became increasingly concerned.[9] Between 1854 and 1890, the federal government seized nearly half of the Five Tribes' western lands through war and questionable treaties. Targeting tribal authority, Congress passed the Dawes Severalty Act (General Allotment Act) of 1887 and the Curtis Act of 1898, which devastated tribal sovereignty and the Native way of life. Traditionally, Native peoples have viewed land as something to be shared and stewarded collectively. The Dawes Act forcibly dissolved this communal relationship by breaking up reservations into individual allotments. Although Native individuals were assigned parcels of land, the federal government retained legal ownership, holding the land in trust.[10]

To receive land allotments, Native Americans were required to enroll on the Dawes Rolls, an official government list designed to record tribal affiliation, percentage of Native blood, and

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[7] Addison Kliewer, Miranda Mahmud & Sarah Beth Guevara, *Trails to Indian Country Define Oklahoma*, GAYLORD NEWS (Dec. 8, 2021), https://www.ou.edu/gaylord/exiled-to-indian-country/content/trails-to-indian-country-define-oklahoma.
[8] Donald Fixico, *American Indians*, The Encyclopedia of Oklahoma History & Culture (Jan. 15, 2010).
[9] *Sequoyah, the U.S. State That Almost Existed,* National Geographic.
[10] General Allotment Act, ch. 119, 24 Stat. 388 (1887).

other personal information.[11] Enrollment often meant a loss of cultural identity as many abjured their tribal allegiances. Today, the buying, selling, and transferring of ownership of allotment land remains tightly controlled by the federal government. Allotments must still be verified and approved for sale by the government. In an effort to legitimize these annexations, officials organized land runs, which were public events where settlers raced to claim plots of once Native land.[12] Ultimately, the Five Tribes received no compensation for their losses. Instead, the tribes were forced to watch as unwanted settlers poured into their once-sovereign territories.[13]

Having already targeted tribal power, property rights, and cultural practices, the federal government turned its attention to dismantling tribal governments and legal jurisdiction. Congress remained wary of the tribes' continued political autonomy despite having reduced the Five Tribes' territorial holdings and significantly eroded their power. The Curtis Act of 1898 delivered a major blow to tribal sovereignty by abolishing tribal legal systems, revoking tribal authority to pass and enforce their own laws, and transferring those powers to the federal and territorial governments. Effectively, the Act dissolved the tribal governments of the Five Tribes, which undermined centuries of sovereignty and political structure.

With the conclusion of World War I in 1918, the global emphasis on self-determination and sovereignty began to influence domestic policy in the United States. Congress initiated a new era of Native American diplomacy by introducing sweeping changes to federal policies concerning Native citizenship, land, and tribal sovereignty. A major turning point came in 1924 when President Calvin Coolidge signed the Indian Citizenship Act, which granted citizenship to all

[11] *Final Rolls of the Citizens and Freedmen of the Five Civilized Tribes in Indian Territory (Dawes Rolls), 1898–1914* (National Archives).
[12] Stan Hoig, *Land Run of 1889*, The Encyclopedia of Oklahoma History & Culture (Jan. 15, 2010).
[13] *Sequoyah, the U.S. State That Almost Existed,* National Geographic.

Native Americans.[14] The Act meant Native Americans no longer needed to be enlisted on the Dawes Rolls to gain citizenship, a giant leap in Native rights. Roughly 40% of all Native Americans were not citizens at the time of its passage.[15] Despite being the continent's original inhabitants, Native Americans were the last ethnic group to receive American citizenship. Another important policy change was passed with the Indian Reorganization Act of 1934, which repealed the Dawes Act and officially ended the allotment era.[16] Encouraging tribes to adopt self-governance, revive traditional practices, and return to communal land ownership, the Dawes Act represented a new chapter for Native Americans. However, this era of change was short lived and a false illusion. Generations of cultural destruction through boarding schools, forced assimilation, and the dominance of Western values had deeply changed Native communities. Many tribal members did not want to sacrifice their own private property. While the Dawes Act permitted communal land ownership, decades of assimilationist policies meant that this land management system had become increasingly rare.

Despite launching seemingly progressive reforms to expand tribal powers, the federal government simultaneously worked to undermine the very sovereignty it claimed to support. With the passage of the Indian Termination Act of 1953, Congress renounced the sovereign status of dozens of federally recognized tribes. By redefining what counted as a 'tribe,' the Act stripped many Native nations of recognition, effectively declaring them nonexistent.[17] Without formal recognition, the federal government seized tribal lands and cut promised welfare services to their members. Vast quantities of formerly protected Native land were opened to industry, prompting

[14] "The Indian Citizenship Act at 100 Years Old," Native American Rights Fund (NARF) Legal Review 49, no. 1 (2024).
[15] Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)).
[16] Indian Law & Policy History, Bureau of Indian Affairs (BIA).
[17] H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

deforestation, resource extraction, and other large-scale environmental degradation. Tribes suffered devastating economic losses as communal lands and farmlands were confiscated or sold off. Tribal courts and legal systems were also dismantled, which left Native communities without mechanisms of self-governance or legal recourse. Nationwide, tribal sovereignty was consistently eroded.

During the termination era, the federal government also set its sights on Native identity and cultural longevity. Between 1958 and 1978, the Indian Adoption Project sought to assimilate Native children into white families under the guise of child welfare.[18] On several occasions, children were forcibly taken from their families and communities, often without due process.[19] Many adoptees grew up isolated from their heritage as the federal government tore apart families and weakened tribal involvement. Federal officials intentionally dispersed Native populations in order to eliminate identity, culture, and political power. Native families and communities are still affected by this program to this day.

Today, in courtrooms and state legislatures across the country, tribal nations are increasingly asserting their legal and political rights. These efforts aim not only to reclaim land, but also to revive sovereignty and uphold agreements. Yet, the future of tribal self-determination remains uncertain. Recent political shifts, in particular the presidency of Donald Trump, have reinforced resistance to tribal sovereignty and legal authority. Under his administration, efforts to limit tribal jurisdiction, reduce federal support on welfare for Native communities, and terminate Native citizenship have dimmed a once-bright future. At the state level, politicians like Oklahoma Governor Kevin Stitt have only further dwindled the flame of legal sovereignty.

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[18] Indian Adoption Projects History, University of Oregon—Adoption Topics.
[19] Indian Adoption Project: Dark History, KING 5.

III. *Sharp v. Murphy* and *McGirt v. Oklahoma* Explained

The Supreme Court's decisions *Sharp v. Murphy* and *McGirt v. Oklahoma* is particularly important because they affirmed Native legal authority and tribal sovereignty. Both cases established that Native nations retain authority over their lands unless Congress clearly says otherwise. In 1997, Jimcy McGirt was convicted of raping and molesting a young child in Wagoner County, Oklahoma. He received two consecutive 500-year sentences along with life imprisonment without the possibility of parole. Although his condemnation appeared final, McGirt later found hope from the most unlikely of sources: convicted murderer Patrick Murphy. Murphy, a citizen of the Muscogee Nation, had been convicted of killing George and Patsy Jacobs in Henryetta, Oklahoma in 1999. The court sentenced Murphy to death, which he later appealed. Rather than contest his guilt, Murphy challenged the State of Oklahoma's jurisdiction over his case. He argued that the crime occurred within the historical boundaries of the Muscogee Nation reservation. Under 18 U.S.C. § 1151, major crimes involving Native American defendants in "Indian Country" fall under federal - not state - jurisdiction. Since he believed the Muscogee Nation qualified as "Indian Country," Murphy appealed his sentence. Even though Oklahoma appellate courts rejected his plea, the Tenth Circuit Court of Appeals agreed to hear the case. There, Murphy would assert that the Muscogee Nation reservation had never been formally disestablished by Congress and thus retained jurisdiction.

Murphy's case primarily rested on the Treaty with the Creeks, 1866, Enabling Act of 1906, Major Crimes Act of 1907, and 18 U.S.C. § 1151.[20] After the Civil War, Congress sought to reestablish peaceful relations with the Five Tribes. In 1866, Congress signed a treaty with the Muscogee Nation that affirmed the Nation's territorial boundaries and guaranteed legal protections

[20] Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom.* Sharp v. Murphy, 591 U.S. 977 (2020).

for American citizens within this area. Importantly, the treaty recognized Muscogee land as a reservation, placing it under federal protection.[21] Thus, Murphy argued that subsequent federal laws did not disestablish this reservation. Specifically, he pointed to the Enabling Act of 1906, which paved the way for Oklahoma's statehood. Instead of abolishing the Muscogee Nation reservation, the Major Crimes Act actually protected it. In fact, the Act explicitly stated that Oklahoma could not "limit or impair the right" of tribal property.[22] Furthermore, the Major Crimes Act identified the territories of the Cherokee, Chickasaw, Choctaw, Muscogee, and Seminoles Nations as land outside state and federal ownership. Effectively, the Enabling Act defined the Five Tribes' respective territories as distinct legal and political entities, reaffirming the 1866 treaty's recognition.[23]

Complementing the Enabling Act was the Major Crimes of 1885, which granted the federal government exclusive jurisdiction over major crimes, including murder, committed by Native Americans in "Indian Country."[24] Murphy's legal team contended that, since his crime occurred within Muscogee territory, only federal courts had authority to prosecute him. Since 18 U.S.C. § 1151 defines "Indian Country" as land designated by Congress as a reservation allotment or tribal communal property, Murphy's defense team proved the Muscogee Nation fell within the statutory jurisdiction of the tribe and federal government.[25] Based on *Solem v. Bartlett*, Congress had to explicitly diminish or abolish reservation territory.[26] Therefore, Murphy asserted, the State of Oklahoma lacked jurisdiction since the Muscogee Nation reservation had not been disestablished by Congress.[27] On the other hand, the State of Oklahoma argued that Congress implied the

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[21] Treaty with the Creeks, June 14, 1866, 14 Stat. 785.
[22] Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906).
[23] *Id.*
[24] Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885).
[25] 18 U.S.C. § 1151.
[26] Solem v. Bartlett, 465 U.S. 463 (1984).
[27] McGirt v. Oklahoma, 591 U.S. 894 (2020).

dismantlement of the Muscogee Nation reservation through the Enabling Act of 1906. More specifically, the State contended that the Act clearly demonstrated Congress' intent to disestablish all reservations in Oklahoma. When combined with subsequent federal policies and statues, the State argued the Court should not meticulously apply *Solem v. Bartlett*. Instead, the Court should grant leeway due to the insinuated intent.

After careful deliberation, the Tenth Circuit Court of Appeals ruled in favor of Patrick Murphy. The court held that the State of Oklahoma lacked jurisdiction to prosecute his case. Citing the Major Crimes Act, the judges determined that only the federal government could prosecute murders committed in "Indian Country." Under 18 U.S.C. § 1151, "Indian Country" includes reservations, allotments, and tribal communal lands.[28] Additionally, the court relied on the Enabling Act of 1906, which expressly prohibited Oklahoma from diminishing tribal property or legal sovereignty. Since Congress had never formally disestablished the Muscogee Nation reservation or repealed these laws, the judges concluded that the land remained legally recognized as a reservation. Thus, Oklahoma lacked legal authority to prosecute major crimes committed in "Indian Country" by Native citizens, such as Patrick Murphy. The ruling not only secured Murphy's victory, but also raised broader jurisdictional questions about whether the state held any legal authority over Native Americans living on reservations. Although Oklahoma appealed the decision to the Supreme Court, the outcome of Murphy's victory in the Tenth Circuit Court of Appeals opened a temporary legal pathway for Jimcy McGirt to challenge the validity of his own conviction. For the first time in centuries, Native American defendants convicted of murder were no longer subject to state jurisdiction. Murphy's victory redefined tribal sovereignty as state courts no longer possess jurisdiction over Native Americans on tribal lands. In turn, authority was

[28] Act of June 25, 1948 (codified as amended at 18 U.S.C. § 1151).

restored to tribal and federal courts, which operate in conjunction with one another. The Court's decision prompted many Native American defendants to seek new trials and resentencing. However, McGirt intended to push the boundaries of the law into largely uncharted territory by advocating for the extension of federal jurisdiction over Native Americans to encompass all felonies, not just murder.

Following Murphy's legal success, Jimcy McGirt sought post-conviction relief. He argued that his conviction was illegitimate because the State of Oklahoma lacked jurisdiction over him. As a citizen of the Seminole Nation, McGirt maintained that his alleged crimes occurred on reservation land and, thus, fell under federal authority. The Major Crimes Act of 1885 had already granted the federal government over serious offenses such as murder and sexual assault committed in "Indian Country," but McGirt wished to extend this argument further. Ultimately, he claimed that Oklahoma lacked jurisdiction over all crimes committed by Native Americans on tribal land. Oklahoma courts refused to hear his case, but McGirt petitioned the Supreme Court, which agreed to hear his appeal. Consolidated on the same docket as the State of Oklahoma's appeal of *Sharp v. Murphy*, the Court was now forced to answer a landmark question. One docket would determine the future for the Five Tribes' reservations in eastern Oklahoma and their sovereign legal authority over them.

McGirt's argument closely mirrored Murphy's, but incorporated deeper historical context. He first pointed to an 1856 treaty between the Muscogee Nation and the federal government that secured the tribe the "unrestricted right of self-government" and "full jurisdiction" over tribal members and their property.[29] The treaty, McGirt contended, guaranteed the Muscogee Nation indubitably protected legal sovereignty free from interference by state governments. Since

[29] Treaty with the Creeks, art. XV, 11 Stat. 699, 703–04.

Congress had never nullified the treaty or its guarantees, its terms remained legally binding and entrenched in law. Although the agreement primarily addressed tribal control over lesser offenses, McGirt maintained that the Major Crimes Act and subsequent federal laws supplemented this authority by assigning jurisdiction over serious felonies to the federal government. Together, the treaty and the Major Crimes Act established exclusive tribal and federal jurisdiction over Native Americans on reservation land, leaving no role for the state.

Despite the Court's conservative direction, the justices ruled in favor of McGirt by a slim 5-4 margin.[30] The Court determined that only Congress, not states or courts, had the power to disestablish a reservation. As a result, the Muscogee Nation still legally existed and Oklahoma had overstepped its jurisdiction in McGirt's case. Upon the ruling's announcement, the Muscogee Nation regained its legal sovereignty and jurisdiction. Due to similar existing treaties with the Cherokee, Chickasaw, Choctaw, and Seminole Nations, these tribes likewise reclaimed legal authority. In total, the State of Oklahoma lost jurisdiction over roughly 43% of its territory.[31] Enraged, Oklahoma lawmakers and conservative commentators swiftly denounced the ruling.

Similarly, Murphy narrowly prevailed in the Supreme Court, winning by a narrow 5-4 margin. As a result, his prior conviction was overturned and a new trial process began in federal court. Under federal jurisdiction, Murphy was no longer eligible for the death penalty. In 2021, Murphy was convicted and sentenced to two life terms without the possibility of parole.[32] Meanwhile, McGirt also entered a new phase of legal proceedings. Though currently incarcerated for violating probation, further legal disputes surrounding his original conviction and broader

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[30] *McGirt*, 591 U.S. 894.
[31] FI015 Entry: Five Tribes, *Encyclopedia of Oklahoma History and Culture*, Oklahoma History Society.
[32] *Oklahoman Whose Case Led to McGirt Ruling Gets Life Sentence*, AP News (May 2025).

jurisdictional questions remain unresolved.[33] Together, Murphy and McGirt fundamentally reshaped the legal landscape of tribal sovereignty and established a new precedent that reaffirms the authority of tribal nations over their own lands and people. However, despite these victories, political opposition and ongoing legal challenges continue to threaten these restored liberties.

IV. Tribal Sovereignty and the Challenges Posed by Oklahoma Governor Kevin Stitt

Following the Supreme Court's ruling in *McGirt v. Oklahoma*, the Muscogee Nation and other Native American tribes in Oklahoma regained the authority to arrest, prosecute, and sentence Native Americans for crimes committed on tribal land. In contrast, local and state law enforcement agencies lost jurisdiction over such cases within reservation boundaries.[34] However, the Muscogee Nation soon faced significant logistical and legal challenges in exercising its expanded authority. The Muscogee Nation and other tribes voluntarily ceded certain powers, such as detention and incarceration privileges, while adjusting to their newfound authority. Through cross-deputization agreements with local and federal law enforcement agencies, the state regained equal jurisdiction to arrest and process Native individuals. Yet, despite relinquishing some aspects of sovereignty, the Muscogee court system has remained untouched by stipulations and restrictive measures. These courts were swiftly adapted to prosecute criminal offenders.[35] Today, these tribal courts represent one of the few spaces where the Muscogee Nation exercises complete and total legal sovereignty.

Although appearing cooperative, both the Muscogee Nation and the State of Oklahoma continue to battle for jurisdictional authority over tribal lands. Following the Supreme Court's

[33] Press Release, U.S. Attorney's Office for the Eastern District of Oklahoma, *Jimcy McGirt Pleads Guilty to Sex Offender Registry Violation* (June 24, 2025).
[34] *McGirt*, 591 U.S. at 899.
[35] Justice on the Rez, The Muscogee Nation (Feb. 25, 2025).

2020 ruling, Oklahoma Governor Kevin Stitt launched an aggressive campaign to undermine the decision and reassert state control over the criminal justice system. He has repeatedly attempted to extend state jurisdiction into tribal affairs by supporting legal and political efforts aimed at diminishing the Court's decision. These efforts have largely failed, but Stitt has persisted in his mission. As tensions escalate, his strategies have grown increasingly adversarial to the Five Tribes. Instead of pursuing cooperation, he has consistently sought to reclaim jurisdiction and challenge the scope of tribal sovereignty reaffirmed by the *McGirt* decision.[36] Nevertheless, courts have repeatedly sided with the Five Tribes, due to historical evidence and recent legal precedent.

While Governor Kevin Stitt and several Oklahoma lawmakers have expressed concerns about rising crime rates, lenient sentencing, and inadequate resources for tribal law enforcement, these fears are largely unfounded. In fact, crime rates within the reservations of the Five Tribes have dropped since 2020.[37] Although this decline can be attributed to a variety of factors, it directly challenges claims that tribal jurisdiction fuels criminal activity. Moreover, tribal courts do not operate outside the law. Tribal courts remain bound by nationally mandated standards such as the Indian Civil Rights Act and the Tribal Law and Order Act, which mandate procedural protections and sentencing guidelines.[38] No credible evidence suggests that tribal courts are more lenient than their state counterparts.[39] Yet, Governor Stitt has continued to publicly attack tribal courts and challenge the legitimacy of Native legal sovereignty altogether. But why? Rather than native sovereignty presenting a legal problem, the core issue appears to be political as native sovereignty presents a large issue to Oklahoma's traditional power structure.

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[36] *United States Supreme Court Declines Oklahoma's Request to Overturn McGirt*, Wirth Law Office (2022).
[37] Oklahoma Voice, *Despite What Some Politicians Say, Crime Rates Are Decreasing*.
[38] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.
[39] Barbara Creel, *The Legacy of McGirt v. Oklahoma*, 58 USF Law Review Article, University of San Francisco Repository.

Over the years, the federal government has made numerous promises to Native nations, which remain mostly unfulfilled. A notable example is the Treaty of New Echota, which guaranteed the Cherokee Nation a seat in Congress. As tribes increasingly assert their rights through historical treaties and federal law, Oklahoma lawmakers have begun to raise a pressing question: if Native tribes can reclaim jurisdiction through legal mechanisms from the 19th and 20th centuries, what might they seek next? With Native reservations comprising nearly half of Oklahoma, some officials fear a future in which tribal authority rivals that of the state itself. Unsurprisingly, *McGirt v. Oklahoma* triggered deep political anxiety among state leaders.[40] Since entering office, Governor Stitt has persistently attempted to cut funding and resources, refused to cooperate on agreements, urged the Supreme Court to revisit *McGirt v. Oklahoma*, and supported legal challenges aimed at restraining tribal sovereignty. Beyond legal maneuvers, Stitt's approach has frequently turned personal with ad hominem attacks. He has publicly insulted tribal leaders, criticized federal lawmakers who support tribal rights, and even rebuked Supreme Court justices for refusing to hear cases opposing McGirt.[41] More broadly, he has encouraged supporters to petition the federal government to dissolve tribal reservations.[42] As a result, negotiations between the State of Oklahoma and the Five Tribes have deteriorated significantly. While not entirely at a standstill, critical discussions regarding gaming compacts, toll road access, motor vehicle enforcement, taxation, and other key issues have stalled.[43]

One of the most controversial facets of Governor Kevin Stitt's opposition to tribal sovereignty is the fact that he is a member of the Cherokee Nation. At first glance, one might

[40] Kirsten Matoy Carlson, "Oklahoma State Officials Resist Supreme Court Ruling Affirming Tribal Authority over American Indian Country," The Conversation (Feb. 2022).
[41] Oklahoma Voice, Oklahoma's Five Tribes Won't Join Gov. Kevin Stitt's New McGirt Task Force.
[42] Tres Savage, Stitt Asks OK Supreme Court to Stop Tulsa–Muscogee Nation Jurisdiction Settlement, NonDoc (Aug. 21, 2025).
[43] Oklahoma Voice, *Gov. Kevin Stitt Continues to Clash With Oklahoma's Tribes in Second Term* (Dec. 26, 2023).

assume that his Cherokee ancestry would foster trust and cooperation with the Five Tribes. Instead of drawing on his heritage to offer an informed perspective, Governor Stitt has invoked his background to publicly downplay and delegitimize tribal citizenship and sovereignty. During an appearance on Tucker Carlson's Fox News talk show, Stitt claimed that anyone with "blonde hair and blue eyes" could easily become a member of a tribe.[44] Doubling down, he later asserted that tribal membership functions as a 'get out of jail free card' and that his own success shows "how easy it is to cheat the system."[45] By using his Native ancestry to suggest that the system can be easily manipulated, Stitt is insinuating that Native Americans benefit from undue legal protections simply by virtue of their identity and that some tribal members are not truly Native Americans. These remarks are deeply troubling, especially in light of the centuries of systemic oppression, displacement, and genocide endured by Native American communities. Reducing tribal citizenship to a legal loophole ignores the cultural, historical, and legal significance of tribal identity. His comments also reflect an individualistic and opportunistic view of Native heritage, which prioritizes personal and political gain over the collective well-being of tribal nations. Ultimately, Governor Stitt has prioritized his personal political and business ambitions over the well-being of his tribe, a stance that stands in stark contrast to the traditionally communal values that have long guided Native governance. Yet in 2022, he received a partial vindication of his position through *Oklahoma v. Castro-Huerta*.

V. An Analysis of *Oklahoma v. Castro-Huerta* and its Impact on Tribal Jurisdiction

In 2015, Victor Castro-Huerta, a non-Native man, was arrested and convicted for child neglect while residing on the Cherokee Nation reservation. He was sentenced to 35 years in prison,

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[44] Native News Online, *Oklahoma Governor Faces Pushback from Native Americans for 'Indian Card' Comments Made on Fox News*.
[45] Native News Online, *Oklahoma Governor Faces Pushback from Native Americans for 'Indian Card' Comments Made on Fox News*.

but soon sought to challenge the legitimacy of his conviction by invoking the decisive *McGirt* ruling.[46] Unlike earlier cases involving Native defendants, Castro-Huerta argued that the State of Oklahoma lacked jurisdiction because the victim was a Native American child and the crime occurred within "Indian Country." Castro-Huerta's legal team contended that *McGirt* solely permitted federal prosecution of crimes involving Native victims on tribal land, regardless of the perpetrator's identity. Following his sentencing, Castro-Huerta appealed his conviction, which ultimately reached the Supreme Court in 2022.

In his appeal, Victor Castro-Huerta argued that under the General Crimes Act, jurisdiction over any criminal case involving a Native American in "Indian Country" rests with federal or tribal courts. Since Congress has never directly conferred jurisdiction over crimes committed by non-Natives against Native Americans in "Indian Territory" to state courts, he maintained that the State of Oklahoma lacked the legal authority to prosecute him. Similar to the legal reasoning employed in *McGirt v. Oklahoma*, Castro-Huerta closely examined the diction and intent of federal law. Specifically, Castro-Huerta emphasized that the General Crimes Act delegated "sole and exclusive jurisdiction" to federal and tribal authorities for crimes occurring in "Indian Territory," with the exception of cases in which both the perpetrator and victim are non-Native.[47] Thus, Castro-Huerta contended that his conviction was invalid and that he should've been originally prosecuted by the federal government.

On the contrary, the State of Oklahoma argued that the General Crimes Act never explicitly prohibited states from exercising jurisdiction over crimes involving non-Native defendants and victims. The State further contended that the General Crimes Act's grant of "sole and exclusive

[46] Savannah Sinclair, *Castro-Huerta Sentenced for Neglecting Child with Special Needs*, KTUL (Aug. 29, 2022).
[47] Oklahoma v. Castro-Huerta, 597 U.S. 629, 636 (2022).

jurisdiction" only applied to federal authority, not to tribal or state courts.[48] According to the State's interpretation, the statute merely extended federal criminal law into "Indian Country" rather than excluding state jurisdiction entirely. To support its position, Oklahoma cited the 1881 Supreme Court case *United States v. McBratney*.[49] In that case, McBratney, a non-Native man, was convicted in federal court for murdering Thomas Casey, another non-Native man, on the Ute reservation in Colorado. McBratney appealed the decision on the basis that the federal courts lacked jurisdiction because Congress had not explicitly conferred such authority in Colorado.[50] The Supreme Court agreed, declaring that the federal courts did not have the proper authority to prosecute McBratney. More importantly, the Court also held that due to the absence of specific congressional language bestowing jurisdiction to federal courts, the state retained authority over crimes between non-Native parties on tribal land.[51] Oklahoma emphasized that, like Colorado, its statehood laws did not provide federal courts jurisdiction over cases involving non-Natives defendants in "Indian Country." Relying on *McBratney*, Oklahoma asserted it retained jurisdiction over all crimes not involving Native defendants, including those with non-Native offenders and Native victims. By expanding on the logic of *McBratney*, Oklahoma sought to reclaim jurisdiction lost under *McGirt* and reassert control over a wide range of criminal cases on tribal lands.

Despite nearly two hundred years of legal precedent, the Supreme Court ruled 5-4 in favor of the State of Oklahoma. Writing for the majority, Justice Brett Kavanaugh delivered a significant blow to tribal sovereignty by declaring that *Worcester v. Georgia*, which had affirmed tribal legal authority over reservations, had effectively been "abandoned" in modern federal policy.[52]

[48] National Association of Attorneys General, *Supreme Court Report: Oklahoma v. Castro-Huerta, No. 21-429*.
[49] United States v. McBratney, 104 U.S. 621 (1881).
[50] S. 291, 38th Cong. (1864).
[51] *McBratney*, 104 U.S. 621, 623–24 (1881).
[52] *Castro-Huerta*, 597 U.S. at 655–57.

Rejecting Castro-Huerta's interpretation of the General Crimes Act, Kavanaugh argued that allowing states to prosecute non-Native offenders would not interfere with tribal governance. Accordingly, he held that Oklahoma had concurrent jurisdiction to prosecute non-Natives for crimes against Native victims on tribal land. His opinion reversed crucial elements of sovereignty restored in *McGirt v. Oklahoma* and greatly curtailed tribal legal authority. Before the ruling, tribes held broad jurisdiction over all cases involving Native Americans. For Governor Kevin Stitt and other opponents of tribal sovereignty, the outcome was a sweeping legal and political victory for state power.

Since the Supreme Court's ruling in O*klahoma v. Castro-Huerta*, the Court has not heard any new cases concerning tribal sovereignty. Nevertheless, many Oklahoma lawmakers remain outraged by the earlier decision in *McGirt v. Oklahoma*. Although Governor Kevin Stitt publicly labeled the *Castro-Huerta* ruling a "clear victory," he has continued to denounce *McGirt*, claiming it has caused a "criminal-justice crisis."[53] Even now, Stitt has persistently urged the Supreme Court to reverse the ruling and has grown increasingly hostile toward the Five Tribes. He routinely refuses tribal proposals and rarely engages in compromise. Yet, to Governor Stitt's dismay, the Five Tribes have strengthened their alliances, forging closer partnerships to defend their sovereignty.[54] While the governor has filed multiple legal challenges, he has faced significant setbacks in court. Most notably, after the Oklahoma Legislature negotiated and approved a compact with the Five Tribes regarding tobacco sales and motor vehicle registration, Stitt attempted to veto the agreement—an authority he does not possess. The Oklahoma Supreme Court ruled against him, confirming that the governor lacks the power to veto tribal compacts.[55]

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[53] Office of the Governor of Oklahoma, *Governor Stitt Celebrates Supreme Court Victory for Oklahoma* (June 2022).
[54] *Five Tribes Gather, Take Aim at Governor*, Cherokee Phoenix.
[55] KFOR News, *OK Supreme Court Rules Against Gov. Stitt in Tribal Compact Litigation*.

Overall, Governor Kevin Stitt's public statements reveal his lack of a comprehensive grasp of Native American law. While he has continuously labeled the Supreme Court's decision in *McGirt v. Oklahoma* a "public safety threat," he has largely ignored the Tenth Circuit Court of Appeals' ruling in *Sharp v. Murphy*, the very case that laid the legal groundwork for *McGirt*. His selective outrage underscores his shallow grasp of the broader legal framework. Even if *McGirt* were overturned, federal courts will still retain jurisdiction over major crimes committed by Native Americans on tribal land. Notably, *McGirt* and *Murphy* appeared on the same Supreme Court docket, yet Stitt has focused his attacks solely on *McGirt*. Although *McGirt* carries broader implications for state authority, it is hardly the sole pillar supporting tribal sovereignty. Native legal authority rests atop a strong foundation of treaties, legal precedents, and federal recognition. Cases such as *Williams v. Lee* and *Michigan v. Bay Mills Indian Community* have further affirmed tribal jurisdiction and the principle of sovereignty. In *Williams v. Lee*, the Court determined that the State of Arizona, or any state, lacks jurisdiction to adjudicate a civil court case between a non-Native individual and a Native American on reservation land. Meanwhile, in *Michigan v. Bay Mills Indian Community*, the Supreme Court held that states can not initiate litigation against tribes for commercial activities outside Indian territory due to tribal sovereign immunity. Both *Sharp v. Murphy* and *McGirt v. Oklahoma* recognized the reservation status of the Five Tribes. Thus, these precedents demonstrate that Stitt's effort to undermine tribal sovereignty would require a sweeping and unprecedented reversal of longstanding precedent by the Supreme Court.

VI. The Case Against Native American Birthright Citizenship: An Analysis of Executive Order 14160 and *Elk v. Wilkins*

Governor Kevin Stitt's views on tribal sovereignty are shared by many lawmakers within his party. Most notably, President Donald Trump not only agrees with Stitt but has pushed even further to dismantle Native authority. Following Murphy's victory in the Tenth Circuit Court of Appeals, Trump urged the Supreme Court to overturn the decision.[56] When the Court later concurred with the Tenth Circuit, Trump insisted that the reservations no longer exist.[57] Since then, the Trump administration has coordinated a systemic push targeting Native citizenship, sovereignty, and even basic living conditions. On multiple occasions, Trump has requested the Supreme Court to reverse previous decisions that protect tribal sovereignty. Beyond rhetoric, these efforts have taken shape in policy, particularly in attempts to redefine or restrict birthright citizenship.

During the 2024 presidential campaign, Donald Trump pledged to overhaul national security by securing borders and implementing mass deportations of undocumented immigrants. Once in the Oval Office, Trump signed an executive order aimed at ending birthright citizenship for children born to undocumented immigrants to deter illegal immigration. Critics quickly cited the Fourteenth Amendment and Supreme Court's decision in *United States v. Wong Kim Ark* as clear protections of birthright citizenship.[58] However, Trump is seeking to circumvent these legal protections by reinterpreting the Fourteenth Amendment itself. While Wong Kim Ark held that birthright citizenship applies broadly to nearly all individuals born on American soil, Trump is arguing the phrase "subject to the jurisdiction thereof" excludes children of parents who owe

[56] Nolan Clay, *Trump Administration Asks Supreme Court to Side with Oklahoma in Dispute Involving Muscogee (Creek) Nation*, The Oklahoman (Aug. 5, 2018).
[57] American Indian Policy Institute, *Supreme Court Decision McGirt v. Oklahoma Affirms Tribal Sovereignty, Upholds Treaty*, ASU AIPI Blog (July 2020).
[58] United States v. Wong Kim Ark, 169 U.S. 649 (1898).

allegiance to a foreign power.[59] [60] To bolster this position, Trump pointed to the Civil Rights Act of 1866, which conferred citizenship on "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed."[61] He contended that the phrase "not subject to any foreign power" supports the view that children of undocumented immigrants are excluded from birthright citizenship.[62] Trump further argued that Wong Kim Ark did not directly address this issue and is therefore inapplicable. Thus, Trump has insisted his executive order was constitutional and within his presidential authority.[63]

Within the language of the order, Trump challenges the validity of Native American birthright citizenship through the lens of tribal sovereignty. Since federally recognized tribes are considered sovereign nations, the Trump administration is arguing that tribal members are citizens of their respective nations first and of the United States secondarily. On that basis, Native Americans born into tribal nations, the administration claimed, owe allegiance to another sovereign nation at birth and therefore do not qualify for automatic citizenship.[64] To justify its position, the administration has invoked *Elk v. Wilkins* (1884), a Supreme Court decision holding that Native Americans are born under the jurisdiction of sovereign tribal governments and not entitled to birthright citizenship.[65] According to the ruling, Native Americans are only able to become citizens through naturalization. However, later legal mechanisms, such as the Dawes Act of 1887 and the 1924 Indian Citizenship Act, extended full citizenship, rights, and protections to Native Americans. Until the passage of the Dawes Act, Native Americans were predominantly not

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[59] U.S. CONST. amend. XIV, § 1.
[60] *"Excluding Indians": Trump admin questions Native Americans' birthright citizenship in court*, YAHOO NEWS (Jan. 23, 2025).
[61] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).
[62] U.S. CONST. amend. XIV, § 2.
[63] Exec. Order No. 14,160, 90 Fed. Reg. 8,449 (Jan. 29, 2025).
[64] *"Excluding Indians": Trump admin questions Native Americans' birthright citizenship in court*, YAHOO NEWS (Jan. 23, 2025).
[65] Elk v. Wilkins, 112 U.S. 94, 99–103 (1884).

recognized as citizens.[66] By 1924, nearly 40% of Native Americans were still excluded from the Dawes Rolls, underscoring the importance of the Indian Citizenship Act in finally securing citizenship.[67] Trump's order is grounded in outdated legal precedent, which reframes tribal allegiance as a barrier to citizenship and threatens to erode a century of progress in acknowledging Native Americans as full citizens of the United States.

In 1880, John Elk, a member of the Ho-Chunk Nation living in Omaha, Nebraska, attempted to register to vote in the presidential election. Although Elk had left tribal life, renounced his tribal affiliation, and lived among primarily non-Native citizens, his registration was denied on the grounds that he had been born on the Ho-Chunk reservation. Elk argued that he had been born within the territorial bounds of the United States and was entitled to birthright citizenship under the Fourteenth Amendment. Local courts rejected his claim and the dispute eventually reached the Supreme Court in 1884. At its core, the case was centered on whether a Native American born on a reservation was entitled to birthright citizenship, and if ties to a sovereign Native nation meant Native people were excluded from the Fourteenth Amendment's protections.

Elk began his argument by citing several Supreme Court cases to demonstrate that Native Americans could qualify for citizenship regardless of birthplace. He referenced the infamous *Dred Scott v. Sandford* (1857) case, in which Chief Justice Roger Taney distinguished the difference between enslaved African Americans and Native Americans. While Taney denied citizenship to enslaved individuals, he acknowledged that Native Americans could, under strict federal supervision, obtain citizenship.[68] Thus, Elk invoked the Civil Rights Act of 1866, believing he qualified under the strict standard set by Taney. The Supreme Court, however, rejected his claim

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[66] "19th Century Perceptions," Library of Congress, *Immigration and Relocation in U.S. History*, Native American.
[67] Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)).
[68] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857).

and maintained that Native Americans born into tribal nations were not citizens of the United States through birthright citizenship.[69] Wilkins countered Elk's argument by asserting that *Dred Scott v. Sandford* was not intended to provide a pathway for Native Americans to gain citizenship. He argued that Elk's primary allegiance remained with the Ho-Chunk Nation and that granting him citizenship posed a potential security risk. Wilkins also rejected Elk's interpretation of the Civil Rights Act of 1866, claiming that only those fully under the jurisdiction of the United States could be granted citizenship. Since Elk was a member of the Ho-Chunk Nation, Wilkins argued that he could not simultaneously be recognized as an American citizen.

Siding with Wilkins in a 7-2 decision, the Supreme Court declared that John Elk was not an American citizen and could not obtain citizenship through birthright. Writing for the majority, Justice Horace Gray concurred with Wilkins' assertion that Elk's allegiance to the Ho-Chunk Nation placed him outside the jurisdiction of the United States. Gray reasoned that Elk could not independently renounce his tribal allegiance or membership, which distinguished Native Americans from immigrants who could voluntarily abandon prior citizenship and undergo naturalization.[70] On this basis, Gray concluded that Native Americans lacked the ability to renounce tribal membership or obtain American citizenship through naturalization. According to the Court's ruling, Native Americans were bound by birth to their tribal nations and could only acquire American citizenship through explicit acts of Congress.

As a result of *Elk v. Wilkins*, the Court established a precedent declaring that Native Americans were not American citizens and could not obtain citizenship through birthright under the Fourteenth Amendment. Since enrolled tribal members were considered subjects of their sovereign nations, they were deemed outside of federal jurisdiction. Today, the Department of

[69] *Elk*, 112 U.S. at 94.
[70] *Elk*, 112 U.S. at 94.

Justice is defending Trump's executive order to terminate birthright citizenship, which extends this logic to strip Native Americans of their status as American citizens. However, Trump's attempt is both morally indefensible and legally flawed. Although *Elk v. Wilkins* initially excluded Native Americans from becoming American citizens, later congressional action overturned this precedent. Yet citizenship in law did not guarantee equal treatment. Many states continued to deny Native Americans the right to vote, own property, or access public services.[71] For example, in Virginia, Native Americans were classified as "legally Black" to justify the denial of rights under segregationist Jim Crow laws.[72] Only with the passage of the Civil Rights Act of 1964 did Native Americans gain complete legal protection and civil liberties.

Despite legislation protecting both Native American citizenship and tribal legal sovereignty, the Trump Administration and Republican leaders across the country, such as Oklahoma Governor Kevin Stitt, are waging a war to dismantle these crucial legal frameworks. At the heart of their argument lies a dangerous contradiction: if tribal nations are sovereign, then their members cannot be fully subject to state or federal jurisdiction. Yet if tribes are not sovereign, then Native Americans must be recognized as American citizens to ensure they remain subject to the federal legal system. However, Native Americans cannot be denied both citizenship and sovereignty without being rendered stateless. By attacking both sovereignty and citizenship simultaneously, Trump and his allies are attempting to leave Native peoples within the territorial boundaries of the United States but outside the protection of its laws. This false dichotomy is both legally incoherent and deeply dangerous as it threatens to deprive Native Americans of natural

[71] Dana Hedgpeth, *Native Americans' Right to Vote*, WASH. POST (Nov. 1, 2020), https://www.washingtonpost.com/history/2020/11/01/native-americans-right-to-vote-history/.
[72] LAURA J. FELLER, BEING INDIGENOUS IN JIM CROW VIRGINIA (2022).

rights, promised protections, and any access to justice. While many lawmakers focus their attacks solely on sovereignty, Trump has gone further to also target Native citizenship.

Currently, the Justice Department is entrenched in a legal battle over Native American citizenship with the frontline unfolding in a Seattle courtroom.[73] After President Trump signed Executive Order 14160, twenty-two different states, including Washington, filed lawsuits challenging its constitutionality.[74] In response, the Justice Department has revived *Elk v. Wilkins*, regurgitating its arguments to claim that Native Americans are not entitled to birthright citizenship. Citing the Fourteenth Amendment for "Indians not taxed," federal lawyers are arguing that this phrase reflects a broader historical exclusion of Native peoples from citizenship.[75] More troublingly, the Justice Department is leveraging this case to challenge the very principle of birthright citizenship altogether. Yet, their case lies on a very weak footing. In the decades following *Elk v. Wilkins*, both Congress and the Supreme Court have repeatedly reaffirmed Native citizenship and tribal sovereignty through legislation and precedent. While the stakes are high, the legal foundation protecting Native rights remains firmly established.

As part of a broader attack on Native sovereignty, the Department of Justice has presented an extremely weak and contradictory argument. On one hand, tribal nations clearly possess legal sovereignty and the right to operate their own courts, which have been guaranteed by binding treaties, reinforced by federal legislation, and upheld by landmark Supreme Court decisions such as *Worcester v. Georgia*, *Sharp v. Murphy*, *McGirt v. Oklahoma*, and many more. Even *Oklahoma v. Castro-Huerta*, a case notorious for limiting tribal jurisdiction, reaffirmed that states lack authority to prosecute Native defendants in "Indian Country." No credible legal foundation exists

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[73] *Native Citizenship in Montana & Trump-Era Debates*, The Pulp.
[74] Charlie Savage, Judge Blocks Birthright Citizenship, N.Y. Times (Jan. 23, 2025).
[75] *"Excluding Indians": Trump admin questions Native Americans' birthright citizenship in court*, YAHOO NEWS (Jan. 23, 2025).

for dismantling tribal courts. Alternatively, the claim that Native Americans should not possess American citizenship is even more baseless/ungrounded. The Indian Citizenship Act of 1924 explicitly granted citizenship to all Native Americans born within the United States. No executive order, including Trump's, can overrule that statute. Even if one were to entertain the outdated reasoning of *Elk v. Wilkins*, the Indian Citizenship Act and nearly a century of subsequent legal reinforcement render such arguments obsolete. Notably, the Justice Department and Trump Administration have yet to cite a single statue or Supreme Court ruling post-1924 to support their position.[76]

In essence, the attempt to revoke Native sovereignty and citizenship is strategically incoherent. Reversing centuries of treaty obligations, legislation, and judicial precedent would require dismantling an extensive legal framework embedded within the Constitution, federal statutes, and Supreme Court decisions. Their objective is not simple, but a tangled knot pulled tight by hundreds of years of legal precedent. Ironically, by contesting tribal sovereignty and Native American citizenship in federal court, the Justice Department itself is inadvertently affirming the existence of that very sovereignty. Moreover, the effort has wasted federal time, resources, and manpower. Rather than undermining tribal nations, this legal crusade underscores the strength and resilience of Native legal foundations, which continue to withstand the fiercest political assaults.

From a historical standpoint, claiming that North America's first people are not citizens reflects a continued expression of colonialism. Efforts to strip Native Americans of citizenship and sovereignty are modern acts of settler colonialism aimed at suppressing Native autonomy and erasing Native rights. Although legally baseless, these arguments are routinely propagated by politicians across the country. Since the nation's founding, the federal government has failed to

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[76] *Coeur d'Alene Tribe Rejects DOJ Use of 1884 Case in Birthright Citizenship Debate*, KREM.COM (Jan. 29, 2025).

establish a consistent or respectful approach to Native American diplomacy. Over time, the federal government has shifted through five distinct eras of policy, building a legacy of confusion, betrayal, and broken promises. Even the Founding Fathers, who are often considered wise and principled leaders, shared ambiguous and contradictory views on Native sovereignty.[77] From one presidential administration to the next, Native American policy has been marked by disagreement and the outright reversal of commitments. For example, President John Quincy Adams advocated for peaceful treaties, land purchases rather than seizure, and voluntary removal.[78] Notably, he clashed with Georgia governor George Troup, who sought to seize Cherokee lands by force.[79] In contrast, Adams' successor Andrew Jackson pursued a far more aggressive approach. Jackson oversaw and enacted policies that resulted in the forced removal, imprisonment, and deaths of thousands. Another example is the contrast between President Zachary Taylor and his successor Millard Fillmore. Taylor ordered the removal of the Wisconsin Ojibwe to Minnesota Territory despite an 1842 treaty guaranteeing their right to remain on their lands. However, Fillmore reversed Taylor's removal policy and established four reservations for the Ojibwe in Wisconsin.[80]

The federal government's inconsistency and disregard for precedent have profoundly damaged its relationship with Native nations. Time and time again, the inability and sometimes downright refusal to recognize Native tribes as sovereign equals has resulted in devastating consequences for Native tribes and their people. Federal policy has long resembled a pendulum, swinging between moments of limited support and outright hostility. Under the Trump administration, that pendulum has completely snapped. Trump's attempt to strip Native Americans of citizenship and dismantle tribal sovereignty is a dangerous escalation. His policies are openly

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[77] *Native American Roots in the U.S. Constitution*, WNYC Studios (The Takeaway).
[78] "The Presidency of John Quincy Adams," *Digital History*.
[79] Natalie D. Saba, *George Troup (1780–1856)*, NEW GEORGIA ENCYCLOPEDIA (Jan. 27, 2006).
[80] "Ojibwe Removal and the 1850 Sandy Lake Tragedy," *Milwaukee Public Museum*.

hostile toward Native peoples. These abhorrent tactics are chillingly reminiscent of the 18th and 19th centuries. In doing so, the Trump administration has attacked centuries of sharply contested legal recognition and the basic human dignity of Native communities.

VII. The Future: Optimistic or Pessimistic?

With court battles intensifying and public dissent toward the executive order rising, the Trump administration has pursued new strategies to erode Native American sovereignty and citizenship. Among the most alarming is a proposed $911 million cut to tribal programs nationwide that targets essential services such as education, affordable housing, welfare programs, law enforcement, disaster relief, and even access to clean drinking water.[81] These cuts would devastate tribal infrastructure and deepen the already massive disparities. Right now, the administration appears to be preemptively enforcing its disputed birthright citizenship policy. Immigration and Customs Enforcement (ICE) has increased its presence in and around Native communities, particularly within the Navajo Nation.[82] Tribal members are now being advised to carry passports, birth certificates, and other federally mandated documents to avoid potential detention. Reports of harassment and unlawful detainment by federal agents are rising, often without reasonable suspicion.[83] The growing federal pressure and looming legal uncertainty place Native Americans at significant risk. For the remainder of Trump's presidency, tribal nations face not only an existential threat to their sovereignty, but also to their very recognition as American citizens.

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[81] *Trump Budget Proposes Deep Cuts to Native American Programs*, Tribal Business News (May 2, 2025).
[82] *Trump Indigenous Birthright Commentary*, CBC.
[83] *Native Americans Say Tribal Members Harassed by Immigration Agents*, Reuters (Jan. 30, 2025).

Meanwhile, in Oklahoma, Governor Kevin Stitt has continued his campaign against Native American tribes. By refusing to negotiate in good faith and actively attempting to block communication between tribal leaders and the state legislature, Stitt has drawn mounting criticism. His repeated pleas for the Supreme Court to overturn *McGirt v. Oklahoma* have been widely dismissed as acts of desperation. Earlier this year, Stitt suffered a pair of setbacks when the Department of Justice announced it would proceed with charges against two Oklahoma district attorneys who attempted to prosecute Native defendants in state courts for crimes committed in "Indian Country."[84] Despite pressure from both Stitt and President Trump to drop the charges, the Justice Department has allowed the charges to move forward. These cases reaffirm that criminal jurisdiction over Native Americans in "Indian Country" rests with tribal or federal courts, not the state. Yet the Justice Department's handling of the case also exposes the federal government's own inconsistencies. While the Justice Department is defending Trump's executive order undermining Native citizenship and legal sovereignty in a Seattle courtroom, it is simultaneously upholding tribal sovereignty in Oklahoma. Ultimately, these contradictory actions leave tribes in a precarious legal limbo, uncertain whether federal support will endure or evaporate.

Nearing the end of his second and final term, Governor Kevin Stitt is running out of time. Yet uncertainty looms over what comes next. In his remaining months, tribes fear that Stitt may feel emboldened to escalate his attacks on tribal governments without fear of political consequences.[85] At the same time, the prospect of his successor raises new concerns. The next governor could prove to be even more hostile, deepening conflict rather than easing it. For tribes across Oklahoma, especially the Five Tribes, this uncertainty and volatility is as troubling as Governor Stitt's ongoing antagonism.

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[84] *DOJ Retains Lawsuits Against Oklahoma DAs Despite Switch to Trump Administration*, NonDoc (Mar. 18, 2025).
[85] *Oklahoma Tribes React to Gov. Kevin Stitt's Call for "One Oklahoma,"* KOCO NEWS (Feb. 8, 2026).

Looking at the nation at large, many tribes are terrified of the largely conservative makeup of the Supreme Court. So far, the Court has not ruled favorably in several recent cases impacting tribal sovereignty and Native rights such as *Oklahoma v. Castro-Huerta* and *Arizona v. Navajo Nation*.[86] Amid such uncertainty, Justice Neil Gorsuch has been a glimmering bright spot in such a dark area. Oftentimes, Justice Gorsuch joins the three liberal justices in support of Native American rights. While staunchly conservative in most areas of law, Gorsuch has become a champion of Native American rights. Since his appointment to the Supreme Court, Gorsuch has brought a fresh and principled perspective to Native American affairs. He has remained a faithful ally to Native American tribes, consistently ruling in favor of Native plights.[87] However, the same cannot be said for the Court as a whole. Each case presents the possibility of significant shifts in precedent or the diminishment of tribal sovereignty.

To this day, many people remain confused and torn on the Supreme Court's ruling in *McGirt v. Oklahoma*. Despite federal rhetoric labeling the present day the "self-determination era," that promise has proven hollow.[88] Sovereignty is only honored when it aligns with federal interests, which is seldom. The intricate relationship between Native nations and the United States has been forged through immense bloodshed, inhumane treatment, betrayal, and the steady erosion of sovereignty through legal maneuvering. Today, the war waged by the Trump administration and politicians, such as Oklahoma Governor Kevin Stitt, is not fought on battlefields, but in long, expensive, and litigious courtroom battles. However, collaboration does remain possible.

[86] Matthew L.M. Fletcher, *Supreme Court Rules 5-4 Against Navajo Nation in Water Rights Dispute*, SCOTUSBLOG (June 22, 2023), https://www.scotusblog.com/2023/06/supreme-court-rules-5-4-against-navajo-nation-in-water-rights-dispute/.
[87] Amy Davidson Sorkin, *Does It Matter That Neil Gorsuch Is Committed to Native American Rights?*, NEW YORKER (June 26, 2023), https://www.newyorker.com/news/daily-comment/does-it-matter-that-neil-gorsuch-is-committed-to-native-american-rights.
[88] *Self-Determination*, BUREAU OF INDIAN AFFAIRS, https://www.bia.gov/regional-offices/great-plains/self-determination.

Returning to the Okmulgee County Jail, the jailer who assaulted the Lighthorse police officer in 2023 was arrested after tribal and state governments managed to defuse the situation.[89] Yet, cooperation has proven to be an evolving and inconsistent principle. Unless these underlying tensions are addressed, self-determination, power, and citizenship remain uncertain. Unfortunately, it appears that Native nations will continue to navigate a legal landscape in which their authority is persistently questioned rather than recognized.

[89] Lex Rodriguez, *Tribal Law Expert Explains Jurisdiction Confusion Between Muscogee Lighthorse Police and Okmulgee Co. Jailer*, News on 6 (Dec. 22, 2023).

Weaponized Custody: How Parental Alienation Claims Harm Domestic Violence Survivors in Family Courts

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ABSTRACT:
In family court custody disputes involving domestic violence, parental alienation claims are increasingly used to discredit survivors and shift custody toward abusive parents. Although parental alienation lacks scientific consensus and originates from a discredited syndrome, courts across the United States continue to rely on these claims through vague statutory standards, discretionary judicial practices, and unregulated expert testimony. This piece argues that courts routinely fail to distinguish between coercive manipulation and protective parenting, allowing parental alienation allegations to override documented abuse. Drawing on case law, empirical research, and feminist legal theory, this paper demonstrates how parental alienation functions as a form of post-separation abuse that disproportionately impacts survivors, most often mothers, putting their children at risk. It concludes by proposing survivor-centered reforms, including stricter evidentiary standards for expert testimony, mandatory trauma-informed training for judges and evaluators, and legislative models such as Kayden's Law that prioritize child safety over forced reunification.

I. Introduction

In 2018, a Pennsylvania family court awarded unsupervised custody to a father with documented domestic violence allegations. Three months later, seven-year-old Kayden Mancuso was murdered by that same father during a court-ordered visit.[1] Kayden's death was not an isolated tragedy. It represents a systemic failure in how family courts handle custody disputes involving domestic violence. Courts intended to protect children increasingly do the opposite, particularly when parental alienation claims enter the equation.

Parental alienation claims are an increasingly common and dangerous tactic used in custody disputes involving domestic violence. Survivors—most often mothers—who report abuse are frequently accused of alienating their children from the other parent.[2] Rather than focusing on domestic violence allegations, courts frequently shift their attention to the alienation cross-claim, discounting mothers' credibility along the way.[3] Parental alienation claims are introduced through custody evaluations, guardian ad litem recommendations, and expert testimony, and despite the lack of scientific consensus supporting parental alienation, courts continue to give them significant weight.[4] The result is a recurring and harmful pattern where survivors are discredited for the abuse they report while courts reward their alleged abusers with custody. Vague legal standards, broad judicial discretion, and underregulated expert input normalize the mischaracterization of protective parenting as obstruction.

Existing legal and empirical scholarship has extensively critiqued the discredited origins of Parental Alienation Syndrome (PAS) and the gendered misuse of parental alienation claims in

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[1] Pa. State Senate, *Preventing Abuse in Child Custody Proceedings—Kayden's Law*, S. Co-Sponsorship Memo 40314 (2023–2024 Reg. Sess.), https://www.palegis.us/senate/co-sponsorship/memo?memoID=40314.
[2] Joan S. Meier et al., *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations*, GWU Law Sch. Pub. L. Rsch. Paper No. 2019-56, at 2 (2019), https://ssrn.com/abstract=3448062.
[3] *Id.* at 8.
[4] Alyssa G. Rao, *Rejecting 'Unjustified' Rejection: Why Family Courts Should Exclude Parental Alienation Experts*, 62 B.C. L. REV. 1759, 1776–77, 1782–83 (2021).

family court. However, such scholarship has paid less attention to how courts weigh alienation allegations against documented domestic violence and the evidentiary frameworks, or lack thereof, used to assess these competing claims. This paper argues that family courts routinely fail to distinguish between coercive manipulation and justified protective behavior, allowing parental alienation claims to override evidence of abuse. By analyzing case law, statutory standards, and empirical research, this paper demonstrates how parental alienation operates as a form of post-separation abuse that disproportionately harms survivors and endangers children. It concludes by advancing trauma-informed, survivor-centered legal reforms that reorient custody decisions toward safety, evidentiary rigor, and the best interests of the child.

II. Literature Review

Parental alienation claims have become a highly contested issue in family law, particularly in custody disputes involving allegations of domestic violence. Although parents often present these claims as neutral tools for assessing parent-child relationships, existing scholarship demonstrates that using them in custody litigation reinforces gendered assumptions that mothers should be cooperative and deferential, even toward abusive ex-partners, and endangers survivors. Empirical research suggests that when mothers allege domestic violence and the other parent responds with a parental alienation claim, courts are significantly more likely to award custody to the alleged abuser.[5] These outcomes reflect deeper structural problems in how parental alienation claims are defined, interpreted, and applied within family courts.

These disparities are compounded by how courts interpret the "best interests of the child" standard—a vague but dominant legal doctrine in family law—in ways that provide judges with

[5] Meier et al., *supra* note 2, at 8.

broad discretion. Legal scholars like Elizabeth Schneider argue that this flexibility lets courts rely on gendered expectations of maternal behavior. Courts penalize mothers who act assertively to protect their children, viewing such protective actions as hostile or uncooperative rather than as reasonable responses to abuse.[6] Feminist legal theory and scholarship on coercive control, particularly Evan Stark's work, further reveal how U.S. family law fails to recognize domestic violence as an ongoing pattern of abuse rather than a discrete, past event.[7] When abuse is framed as historical rather than continuing, courts are more likely to characterize protective behavior as obstruction, reframing survivors as alienators rather than caregivers responding to risk.

Origin and Critique of Parental Alienation

Psychiatrist Richard Gardner first introduced Parental Alienation Syndrome (PAS) in the 1980s, describing a situation where one parent, typically the mother, manipulates and brainwashes the child to reject the other parent, usually the father.[8] PAS has been widely discredited and is not recognized by the American Psychiatric Association (APA), the World Health Organization (WHO), and the American Medical Association. Legal and psychological scholars have consistently rejected PAS as lacking empirical validity and scientific rigor.[9]

Joan S. Meier's foundational critique characterizes PAS as devoid of empirical basis or objective merit, highlighting that it is rooted in deeply troubling assumptions about gender and family dynamics.[10] Building on this critique, Alyssa Rao argues that both PAS and contemporary parental alienation testimony frequently fail to meet evidentiary standards such as *Daubert* or *Frye*—legal tests requiring expert testimony to be scientifically reliable and use generally accepted

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[6] ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 148–80 (2000).
[7] EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 206–10 (2007).
[8] Richard A. Gardner, *Parental Alienation Syndrome vs. Parental Alienation: Which Diagnosis Should Evaluators Use in Child-Custody Disputes?*, 30 AM. J. FAM. THERAPY 93, 95 (2002).
[9] Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 239 (2009); Rao, *supra* note 4, at 1760.
[10] Meier, *supra* note 9, at 237–39.

methodology—rendering their continued use in court proceedings legally unsound.[11] Although courts tend to avoid the term "Parental Alienation Syndrome," the rebranding of the theory as "parental alienation" has preserved its core logic. As a result, courts continue to rely on alienation claims that disproportionately undermine mothers, particularly those who raise concerns about abuse.

Gendered Use Against Domestic Violence Survivors

A substantial body of feminist legal scholarship demonstrates that courts apply parental alienation claims in a gendered manner that systematically disadvantages mothers. One of the most groundbreaking studies on this issue comes from legal scholar Joan S. Meier and her research team at George Washington University Law School. Analyzing over 4,000 family court cases, the study found that mothers who allege domestic violence are significantly more likely to lose custody when the accused parent raises a parental alienation claim.[12] Fathers who allege abuse do not face custody loss at similar rates when accused of alienation, revealing a clear gender disparity in how courts treat protective parenting. This gender disparity is not incidental but systemic, reflecting broader institutional biases within family courts.[13]

Nina Jaffe-Geffner documents how the "friendly parent" framework operationalizes the bias: a mother who legitimately tries to protect herself and her child from an abusive partner is deemed uncooperative and unfriendly, directly harming her custody prospects.[14] The same framework allows an abusive father to push for shared parenting, thereby preserving his access to

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[11] Rao, *supra* note 4, at 1788–91.
[12] Samantha Schmidt, *A Gendered Trap: When Mothers Allege Child Abuse by Fathers, the Mothers Often Lose Custody, Study Shows*, WASH. POST (July 28, 2019), https://www.washingtonpost.com/local/social-issues/a-gendered-trap-when-mothers-allege-child-abuse-by-fathers-the-mothers-often-lose-custody-study-shows/2019/07/28/8f811220-af1d-11e9-bc5c-e73b603e7f38_story.html; Meier et al., *supra* note 2, at 6.
[13] Schmidt, *supra* note 12.
[14] Nina Jaffe-Geffner, *Gender Bias in Cross-Allegation Domestic Violence–Parental Alienation Custody Cases: Can States Legislate the Fix?*, 42 COLUM. J. GENDER & L. 56, 76 (2022).

his former partner while credited as the more cooperative parent. In these cases, the sole act of trying to protect one's child is recharacterized as "alienating behavior," allowing courts to sidestep meaningful investigation of abuse allegations. Collectively, this scholarship reveals that parental alienation has evolved into a powerful legal strategy used by abusers, disproportionately impacting mothers during child custody battles. Instead of being seen as survivors escaping an abusive marriage or protecting their children's safety, courts label these mothers as the problem while positioning fathers as victims of parental alienation.[15]

Scholarly Gaps and Contributions

While existing scholarship has thoroughly researched and documented the gendered misuse of alienation and offered critiques of PAS's pseudoscientific roots, significant gaps remain. In particular, scholars have paid comparatively little attention to how courts weigh alienation claims against documented histories of domestic violence and the evidentiary standards, or lack thereof, governing these determinations. Most notably, there is a lack of intersectional analysis. Questions of gender, race, class, immigration status, and disability are still absent from mainstream conversation, despite their profound impact on how alienation claims are interpreted and adjudicated.

This paper builds on this existing scholarship by examining how family courts apply parental alienation claims in practice, with particular attention to evidentiary frameworks, judicial discretion, and the failure to account for coercive control and post-separation abuse. By situating these practices within broader critiques of family court systems, this paper advances survivor-centered, trauma-informed legal reforms that reorient custody decisions around safety rather than forced reunification.

[15] *Id.*

III. Legal Context and Application of Parental Alienation

Although the terms *parental alienation* and *parental alienation syndrome* (PAS) are used interchangeably in family court proceedings, they carry distinct legal implications. Parental alienation generally refers to alleged conduct by one parent that interferes with a child's relationship with the other parent, while PAS describes a set of psychological symptoms exhibited by a child who has been programmed to reject a parent.[16] Although PAS has been widely discredited, the broader concept of alienation is frequently raised during custody disputes, including in cases involving allegations of domestic violence.[17] This distinction has allowed courts to distance themselves from the discredited syndrome while continuing to apply its underlying logic.

Custody determinations in the United States are guided by the "best interests of the child," a dominant but notoriously vague legal framework that grants judges substantial discretion, creating room for subjective interpretation. Many state statutes explicitly instruct courts to consider if one parent is interfering with the child's relationship with the other parent. While such provisions appear neutral, in practice they often allow protective behavior in domestic violence situations to be reframed as alienation.[18] When courts prioritize perceived cooperation over safety, survivors' efforts to limit contact with an abusive parent are frequently interpreted as obstruction rather than protection.

State custody statutes illustrate how this discretion operates in practice. California law directs courts, in awarding custody, to weigh which parent is more likely to allow the child "the

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[16] Meier, *supra* note 9, at 232–57.
[17] Gardner, *supra* note 8, at 95.
[18] Daniel G. Saunders, Kathleen C. Faller & Richard M. Tolman, *Beliefs and Recommendations Regarding Child Custody and Visitation in Cases Involving Domestic Violence: A Comparison of Professionals in Different Roles*, 22 VIOLENCE AGAINST WOMEN 722, 723–25 (2016), https://doi.org/10.1177/1077801215608845.

frequent and continuing contact" with the other parent—a contact-promoting factor that has been used to validate adverse custody decisions against the reporting parent without clear evidentiary findings of alienating behavior.[19] Illinois similarly directs courts to weigh the "willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child," a factor that is easily misapplied to survivors responding to abuse.[20] South Carolina's best-interest factors include both "manipulation or coercive behavior to involve the child in the parents' dispute" and "any effort to disparage the other parent in front of the child," while Florida, despite having no statute that names parental alienation, directs courts to "weigh each parent's demonstrated capacity to facilitate a close and continuing parent-child relationship."[21] Across jurisdictions, these provisions function less as precise legal standards and more as flexible tools that enable courts to discount abuse allegations in favor of preserving parental access and perceived cooperation.

Evidentiary standards further magnify these problems. Many courts allow testimony from so-called "parental alienation experts" without requiring a scientific basis. As Alyssa Rao argues, such testimony often fails to meet the *Daubert* or *Frye* standards for expert admissibility.[22] Yet family courts rarely apply these evidentiary safeguards, granting custody evaluators and guardians ad litem broad discretion even when their assessments rely on theories that lack empirical evidence or trauma-informed training.[23] Washington is a notable exception. Its parenting-plan statute permits courts to penalize a parent for the "abusive use of conflict" or for withholding access to a

[19] CAL. FAM. CODE § 3040(a)(1) (West 2024).
[20] 750 ILL. COMP. STAT. 5/602.7(b)(13) (2024).
[21] S.C. CODE ANN. § 63-15-240(B)(7)–(8); FLA. STAT. § 61.13(3)(a).
[22] Rao, *supra* note 4, at 1788–91.
[23] ELLEN PENCE, GABRIELLE DAVIS, CHERYL BEARDSLEE & DENISE GAMACHE, MIND THE GAP: ACCOUNTING FOR DOMESTIC ABUSE IN CHILD CUSTODY EVALUATIONS 31–33 (2012), https://bwjp.org/assets/documents/pdfs/mind_the_gap_accounting_for_domestic_abuse_in_child_custody_evaluations.pdf.

child "for a protracted period without good cause," the two findings most often turned against mothers protecting their children. But the same statute names the acts that cannot count as either: reporting abuse to law enforcement or child protective services, seeking changes to residential time, and petitioning for protection orders. Most states offer no comparable guidance for distinguishing alienation from justified estrangement due to abuse.[24] In the absence of clear evidentiary criteria, courts often rely on surface-level assessments of parental behavior while ignoring the context of coercive control.

This uneven legal landscape creates a dangerous precedent for children and survivors. In jurisdictions where alienation is weighed heavily, courts may prioritize repairing the child's relationship with the accused parent rather than addressing the abuse allegations. Survivors are often left to defend themselves against vague accusations of alienation without proper legal tools to challenge unreliable expert testimony. As a result, custody outcomes vary dramatically due to judicial discretion rather than consistent legal standards. These inconsistencies shape the experience of survivors in the courtroom and set the stage for the weaponization of parental alienation claims, discussed in the following section.

One legislative response to these systemic failures is Kayden's Law, which was enacted in Colorado and Pennsylvania following the murder of seven-year-old Kayden Mancuso. Despite documented evidence of the father's history of domestic violence, a family court awarded him unsupervised visitation, and he killed Kayden during a court-ordered visit. This statute requires courts to prioritize abuse allegations in custody determinations and imposes additional regulations on custody evaluators.[25] Similar legislative efforts have been introduced in New York, Maryland,

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[24] WASH. REV. CODE § 26.09.191(3)(a), (e), (4)(c)(v)–(vi) (2025).

[25] National Safe Parents Organization, *Kayden's Law*, https://www.nationalsafeparents.org/kaydens-law (last visited Jan. 13, 2026).

Tennessee, and Utah. While these reforms represent meaningful progress, their limited adoption underscores the need for broader structural change to prevent parental alienation claims from overriding child safety.

IV. Parental Alienation as a Weapon Against Domestic Violence Survivors

In family courtrooms across the United States, abusers routinely accuse survivors of domestic violence, most often mothers, not of being overly protective but of being alienators. This shift in framing is deliberate, not incidental. Scholarship and advocacy research demonstrate that this is often the result of a deliberate litigation strategy through which abusers discredit the survivor, flip the narrative, and reassert control under the guise of concern for the parent-child relationship. Although the term "parental alienation" seems neutral, in practice, it has become a powerful legal weapon in cases of post-separation abuse.

Parental alienation allegations frequently arise when a survivor tries to limit contact between the child and the abusive parent, whether that is through supervised visitation, protective orders, or informal safety boundaries. Rather than evaluating underlying child safety concerns, courts and custody evaluators often presume the child's resistance to contact must be the result of manipulation by the other parent. As documented in the *Mind the Gap* report, a study on domestic abuse in custody evaluations, custody evaluators frequently assume that a child's fear of an abusive parent is evidence of maternal influence, even in cases involving documented histories of violence. This presumption disregards the child's trauma and well-documented effects of abuse on parent-child relationships.[26]

Abusers have learned to weaponize this logic. By claiming alienation, they cast themselves as the victims of emotional manipulation rather than the perpetrators of violence. Meanwhile, the

[26] PENCE et al., *supra* note 23, at 15–16.

survivor becomes the one on trial, judged not on the merits of their abuse claims, but on how cooperative and 'friendly' they appear toward their abuser. Spearman et al.'s comprehensive review of forty-eight studies highlights how parental alienation accusations often function as legal retaliation when survivors request boundaries about visitation or child safety.[27] Through these claims, alleged abusers recast themselves as victims of emotional manipulation, while survivors are placed on trial for their perceived lack of cooperation rather than the substance of their abuse allegations.

Family courts often discount evidence of abuse by questioning the credibility of the parent raising it rather than investigating the allegation itself. Nina Jaffe-Geffner documents this dynamic in her review of custody evaluations: mothers advocating for their children's safety were frequently pathologized as not credible, with evaluators treating abuse allegations as evidence of fabrication rather than genuine safety concerns.[28] Within this framework, expressions of legitimate fear or trauma are perceived as manipulation, and survivors are penalized for prioritizing the safety of their children.[29]

Parental alienation is more than a theory; it is a narrative tool that reshapes how courts interpret abuse, credibility, and parental fitness. When courts fail to distinguish between alienation and justified estrangement, survivors' experiences are invalidated, abuse allegations are sidelined, and children may be forced back into contact with a parent they fear. In the hands of abusers and with the complicity of a court system that fails to understand coercive control, parental alienation becomes a weapon. Without meaningful legal distinctions and trauma-informed analysis, the use

[27] Kathryn J. Spearman, Viola Vaughan-Eden, Jennifer L. Hardesty & Jacquelyn Campbell, *Post-Separation Abuse: A Literature Review Connecting Tactics to Harm*, 21 J. FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. 145, 151 (2024), https://pmc.ncbi.nlm.nih.gov/articles/PMC11114442.
[28] Jaffe-Geffner, *supra* note 14, at 78.
[29] *Id.*

of parental alienation claims will continue to endanger survivors and undermine the very child-protective goals family courts purport to serve.

V. Case Law: Judicial Trends and Illustrative Failures

Over the past two decades, family courts across the United States have developed disturbing patterns in how they adjudicate custody disputes where parental alienation is alleged alongside domestic violence. Although individual cases are often framed as "he said, she said" conflicts, the decisions themselves frequently reflect deeper systemic issues: skepticism toward survivors, prioritization of parental rights over child safety, and the legitimization of alienation claims despite questionable evidentiary support.

The clearest evidence for this pattern is the aggregate outcome data: courts nationwide remove custody from mothers in 26% of abuse-reporting cases where no alienation claim is raised—a rate that roughly doubles to 50% once the accused parent cross-claims parental alienation, a disparity not observed in reverse.[30] These are not the product of a handful of outlier rulings; they reflect how consistently courts operating under the same vague standards discussed above allow a parent's demonstrated cooperation with continuing contact to substitute for a rigorous examination of safety.

The risk this creates is not hypothetical. In *Montoya v. Davis,* a New York family court adopted a forensic evaluator's recommendation to strip a mother of primary physical custody and suspend her parenting time for no less than six months, so that the child could be "deprogrammed and reunified with his loving father."[31] The child, diagnosed with ADHD and autism, had lived his entire life with his mother, and had seen his out-of-state father for a total of three therapeutic visits over the preceding years. The Appellate Division modified the order, finding that the evaluator

[30] Meier et al., *supra* note 2, at 6, 8.
[31] Matter of Montoya v. Davis, 156 A.D.3d 132, 135 (App. Div. 2017).

"abdicated her role as a neutral evaluator," that her recommendations were "afflicted by a pervasive and manifest bias against the mother," and that Family Court had "improperly delegated its fact-finding role" by adopting them wholesale.[32] The court further noted its concern that the evaluator had "been deemed an expert in 'parental alienation,' which is not a diagnosis included in" the DSM-5.[33] The same theory had been adopted a year earlier in *Zakariah SS. v. Tara TT.,* where the Appellate Division let the determination stand. Jaffe-Geffner reports that the mother in that case and her attorney believed the resulting custody change contributed to the child's hospitalization for an eating disorder.[34]

This was not an isolated lapse. The *Mind the Gap* report documented identical patterns across other evaluations it reviewed, including a case of two pre-teen daughters who refused to see their father due to past allegations of child sexual abuse, but the responsibility was placed on the mother's "coaching" to villainize their father, and concluded they should be placed in full-time care of their father. Children's resistance to a parent was blamed on the other parent's influence rather than examined as a response to documented abuse, highlighting how parental alienation frameworks repeatedly work to obscure the actual violence occurring in families.[35]

More broadly, the report found that evaluators lack reliable screening mechanisms as a result of the lack of guidelines to assess parenting behaviors and the impact of violence on children. Most assessments lacked a standardized approach to identifying, contextualizing, and accounting for domestic violence, with "impressionistic assessments," based on the evaluator's own gut

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[32] *Id.*
[33] *Id.* at 135 n.5.
[34] Matter of Zakariah SS. v. Tara TT., 143 A.D.3d 1103, 39 N.Y.S.3d 278, 279–80 (App. Div. 2016) (as discussed in Jaffe-Geffner, *supra* note 14, at 99–100).
[35] PENCE et al., *supra* note 23, at 15–17.

feelings or character judgments, which raises the question of courts relying upon custody evaluators who lack the qualification to make judgments.[36]

The legislative response to precisely this pattern—laws like Kayden's Law, discussed above—exists because case-by-case discretion under vague statutory standards has proven insufficient to protect children from it.

VI. Systemic Challenges Faced by Survivors

For survivors of domestic violence, the family courtroom can become just another site of control, fear, and invalidation. Although family courts are tasked with protecting the best interests of children, the reality for many survivors, especially mothers, is that the system is often stacked against them. One of the most persistent challenges survivors face is the burden of proof. Domestic violence is inherently difficult to prove, as much of it occurs behind closed doors or takes the form of coercive control rather than visible physical abuse. Despite this reality, courts often require clear, immediate, and recent evidence to substantiate abuse claims, while treating allegations of parental alienation with far less scrutiny.

This imbalance extends to how courts interpret trauma responses themselves. Ellen Pence et al. argue that trauma is consistently overlooked in custody evaluations, noting that negative feelings about a parent must be evaluated within the context of the violence that has occurred rather than treated as a sign of alienation or obstruction. Nevertheless, many custody evaluations focus on surface-level behaviors while disregarding the underlying dynamics of trauma and control.[37]

Custody evaluators and guardians ad litem (GALs) play a pivotal role in reinforcing these dynamics. Although their evaluations carry substantial weight in custody determinations, qualifications and training vary widely across jurisdictions. In many states, there are no consistent

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[36] PENCE et al., *supra* note 23, at 31–33, 35–36.
[37] PENCE et al., *supra* note 23, at 35.

requirements for evaluators to have trauma-informed training and expertise in domestic violence. As a result, evaluation reports often misinterpret and minimize abuse, relying on outdated notions of parental fitness, cooperation, or friendliness. Pence et al. document how evaluators often default to shared parenting, even in cases where the parents pose a serious safety risk, leaving survivors to defend their credibility while abusers benefit from institutional deference.[38]

These systemic challenges are likely to intensify along other axes of marginalization that this empirical literature has not yet measured. It stands to reason that Black and Brown mothers face the same credibility discounting documented above, compounded by racialized assumptions about anger or aggression; immigrant survivors face an added barrier, since reporting abuse in family court carries the risk of language barriers and immigration consequences that non-immigrant survivors do not face. Family courts rarely build any of this into custody evaluations, applying a one-size-fits-all framework that the existing empirical research—focused on gender—was never designed to capture.

Finally, family courts remain ill-equipped to recognize and address the circumstances of post-separation abuse. The end of a relationship does not mean the end of abuse. Abusers utilize legal systems to their advantage, through repeated court filings, custody battles, and alienation claims, to stay in control. As Spearman et al. explain, post-separation abuse frequently poses as much damage, if not greater, than the abuse that occurred during the relationship, especially when children are used as instruments of control.[39] Until courts adopt a nuanced, trauma-informed, survivor-centered approach that recognizes the lived realities and varied experiences of survivors, these systemic challenges will persist. Survivors deserve more than legal neutrality—they deserve a system that protects their right to safety, dignity, and healing.

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[38] *Id.* at 30–36.

[39] Spearman et al., *supra* note 27, at 149.

VII. Policy and Legal Reform Proposals

To meaningfully serve the best interests of children and protect survivors of domestic violence, family courts must fundamentally shift how they evaluate parental alienation claims. As demonstrated throughout this paper, the unchecked use of alienation allegations creates predictable and harmful outcomes for survivors and children through vague legal standards, discretionary decision-making and unreliable expert testimony. Addressing these failures requires systemic reforms that strengthen evidentiary safeguards, prioritize survivor safety, and recognize post-separation abuse as a continuing form of coercive control rather than isolated conflict.

1. Strengthen Evidentiary Standards for Expert Testimony

Courts must require stricter evidentiary standards governing expert testimony related to parental alienation. As Alyssa Rao argues, family courts routinely admit testimony from self-proclaimed alienation experts without ensuring that their methods meet the *Daubert* or *Frye* standards. This allows pseudoscientific theories to influence custody determinations and lends legal legitimacy to claims that lack empirical support.[40] Without rigorous scrutiny, courts risk legitimizing parental alienation claims that lack empirical support and are used strategically against survivors. Courts should apply these standards uniformly and exclude testimony that does not demonstrate scientific reliability, particularly where such testimony is used to override documented evidence of domestic violence.

2. Mandate Trauma-Informed Training for Judges and Custody Evaluators

Judges, custody evaluators, and guardians ad litem should be required to undergo comprehensive training in domestic violence, coercive control, and trauma-informed practices. The current failure to distinguish between protective parenting and alienation stems from a lack of understanding

[40] Rao, *supra* note 4, at 1782–85, 1788–91.

about how abuse shapes survivor and child behavior.[41] Mandatory training should address implicit gender bias and dynamics of post-separation abuse, ensuring that decision-makers accurately depict parental conduct within its full relational and safety context rather than relying on surface-level indicators of cooperation.

3. Adopt and Expand Legislation Similar to Kayden's Law

Legislative reform offers an additional mechanism for curbing the misuse of parental alienation claims. Adopting laws modeled on Kayden's Law, which requires courts to prioritize abuse allegations and consider the parents' history of violence when making custody decisions, would be a significant step toward centering child safety. Although states like Colorado and Pennsylvania have adopted similar provisions, broader legislative adoption is essential. Kayden's Law imposes oversight and regulation on court-appointed custody evaluators, whose assessments carry decisive weight despite inconsistent qualifications and training.

4. Incorporate Comparative Legal Frameworks Recognizing Coercive Control

The United States can draw from international legal models that explicitly recognize coercive control within family law. In Canada, amendments to the Divorce Act require courts to consider a broader definition of family violence, including emotional abuse and coercive control.[42] Similarly, the United Kingdom's Domestic Abuse Act 2021 requires facilities used for contact orders to be investigated for effectiveness at preventing abuse.[43] These international models offer tangible frameworks that provide concrete examples of how legal systems can integrate a more nuanced understanding of abuse into custody determinations while maintaining judicial discretion.

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[41] PENCE et al., *supra* note 23, at 30–36.
[42] Department of Justice Canada, *Strengthening Canada's Approach to Addressing Family Violence,* https://www.justice.gc.ca/eng/cj-jp/fv-vf/index.html (last visited Jan. 13, 2026).
[43] Domestic Abuse Act 2021, c. 17, § 83 (UK).

5. *Ensure Access to Survivor-Centered Legal Support*

Finally, family courts must ensure that survivors can access adequate trauma-informed legal representation and support services throughout custody proceedings. Given the patterns already documented—courts discounting credibility once alienation is cross-claimed, and evaluators relying on impressionistic judgments untethered to any standardized protocol—survivors without informed legal advocacy are especially vulnerable to having valid claims misconstrued or dismissed.[44] Courts should also incorporate child impact assessments that evaluate a child's fear or reluctance to engage with a parent within the context of past abuse, rather than presuming alienation. Meaningful participation in custody proceedings requires not only formal access to a courtroom, but legal support that makes that access count.

VIII. Conclusion

The misuse of parental alienation claims in family court represents one of the most critical yet underexamined threats to child welfare and survivor safety within contemporary family law. Although originally presented as a neutral framework to preserve the child's relationship with both parents, in practice, parental alienation is frequently weaponized against survivors of domestic violence who are portrayed as manipulators rather than protectors. This misrepresentation is furthered by vague statutory language, pseudoscientific expert testimony, and widespread judicial failure to distinguish true obstruction from coercive control.

As this paper demonstrates, addressing these systemic failures requires more than gradual reforms that lack enforcement. Family courts must mandate domestic violence and trauma-informed training for all custody evaluators and judges, adopt stricter evidentiary standards for expert testimony, and pass laws like Kayden's Law that prioritize abuse allegations and regulate

[44] PENCE et al., *supra* note 23, at 35–36.

evaluator conduct.[45] Comparative legal models recognizing coercive control as a serious form of family violence offer a clear path forward.[46] Without bold legal and policy shifts, family courts will continue undermining their own stated commitment to child welfare, retraumatize survivors, and reinforce a status quo where survivors' experiences are too easily overlooked in the name of reunification. When family courts prioritize evidence over assumption, safety over forced reunification, and trauma-informed analysis over outdated stereotypes, they can fulfill their foundational mandate: protecting children while ensuring survivors' path to dignity, justice, and healing.

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[45] National Safe Parents Organization, *The Debunked Concept of Parental Alienation* (Nov. 2022), https://www.nationalsafeparents.org/the-debunked-concept-of-parental-alienation.html.
[46] Divorce Act, R.S.C. 1985, c. 3 (Can.); Domestic Abuse Act 2021, c. 17 (U.K.).

The Double Helix of Rights: Privacy and Property in Assisted Reproduction and Genetic Testing

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ABSTRACT:

This paper explores the intersection of privacy and property rights in the commercializing field of assisted reproductive technology (ART). As medical technologies and testing rapidly advance, embryo screenings now extend beyond medical conditions to include subjective traits like personality or intelligence, raising significant legal and ethical questions. Through a comparative analysis of state and federal-level embryo definitions, U.S. Supreme Court jurisprudence, and the expansion of commercial medical technology, this paper argues that the existing property-based approach fails to account for the autonomy essential to reproductive health. Drawing on legal scholarship and jurisprudence from *Griswold v. Connecticut* to *Dobbs v. Jackson Women's Health Organization*, it offers a privacy-centered framework to guide ART regulation. This framework ensures that ART regulations protect reproductive choices, encourage ethical medical innovation, and strengthen public confidence in emerging reproductive technologies.

I. Introduction

Advancing medical technology presents immense commercial and innovative potential for the healthcare sector. However, the intrinsic intimacy of a person's medical decision-making, bodily integrity, and medical information presents several ethical questions to consider in light of this new technology. These questions manifest at both the individual and societal levels: advancing technology poses a dilemma to prospective parents' family planning decisions, and the public's trust of emerging health technology in turn shapes trust in the healthcare system. The careful balancing of privacy and innovation manifests nowhere as clearly as it does in the context of reproductive technologies, specifically assisted reproductive technology (ART).[1] Reproductive health lies at the intersection of privacy and property issues, as the field is uniquely intertwined with questions about genetic modification, selection, and parental preferences.

The Food and Drug Administration (FDA) has issued some guidance on ART in recent years, which has primarily manifested in regulating devices (embryo incubators, for example), outlining the proper steps of cryopreservation protocols, and screening prospective gamete/embryo donors.[2] The latter has almost exclusively focused on donors' physiological attributes, such as their medical history or probability of disease transmission. Keeping with the theme of biomedical testing, the Clinical Laboratory Improvement Act in 1988 issued relevant guidance on the extent to which human specimens can be assessed to diagnose, prevent, and treat diseases.[3] Regulations have also focused on administrative issues, as indicated by the passage of the Fertility Clinic

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[1] Logan McEwen, *IVG and the Role of Patents in Assisted Reproductive Technology*, MARKS GRAY (Sept. 12, 2023), https://marksgray.com/intellectual-property-law/ivg-and-the-role-of-patents-in-assisted-reproductive-technology/.
[2] *Oversight of ART*, AM. SOC'Y FOR REPROD. MED., https://www.asrm.org/advocacy-and-policy/media-and-public-affairs/oversite-of-art/ (last visited Dec. 9, 2024).
[3] *CLIA Laboratory Oversight: About*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 10, 2023), https://www.cdc.gov/clia/php/about/index.html.

Success Rate and Certification Act in 1992, which issued guidance on fertility clinics' logistical operations.[4] Evidently, ART-related embryo screenings have historically been designed to determine the potential child's future biomedical attributes. However, this more robust body of regulations has not extended to evaluating non-medical traits, such as personality, that new genetic screenings seek to evaluate.

Although screenings for severe disease and other medical conditions have long been recognized as part of embryo donations and transfers, the evolving capability of ART introduces two key perspectives, specifically in the context of in-vitro fertilization (IVF).[5] Novel technology offers the opportunity to screen non-biomedical traits, like personality and IQ, effectively enabling someone to implant an embryo that fits their desired dispositional and intelligence profile. This prospect raises questions about potentially eugenic practices, a concern that robust regulations (which embryo screenings currently lack) could help alleviate. A well-defined regulatory landscape can implement patient safety protections and bar eugenic practices or practices that can hinder the rights of a future child. Otherwise, ART risks being swept up in advancing technological capacity and remaining unregulated in a free, profit-driven market.

Therefore, in the context of IVF and embryo donations, it is crucial to consider the privacy and property interests that must be a part of any prospective regulation over this emerging field.

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[4] *National ART Surveillance System (NASS) Policy*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/nass/policy.html (last visited Dec. 9, 2024).
[5] McEwen, *supra* note 1.

II. Assisted reproductive health technologies are rapidly evolving, presenting the field with an uptick in commercialization that is highly unregulated.

A. A core aspect of advancing assisted reproductive technology is the proliferation of in-vitro fertilization, which introduces the question of embryo ownership and transfers.

Assisted reproductive technology (ART) has grown exponentially over the past decade, expanding individuals' ability to pursue parenthood.[6] The widespread integration of new technology lies at the center of this shift, which enhanced existing diagnostic capabilities, screening techniques, and biomedical treatment – a trend particularly noticeable with the surge of IVF.[7] IVF consists of the implantation of embryos created outside the body using donated sperm and egg cells. While it is common for a couple or person who pursues IVF to use their own gametes for the procedure, this scenario is not always the case. Instead, a donated embryo may be used, since many people cryogenically preserve more embryos than are required for a single round of IVF. In the event that IVF works early on and all developed and preserved embryos are not required, the process yields excess embryos. This increasingly common reality presents the choice of whether the person or couple might discard them, cryogenically freeze them indefinitely, donate them to research, or donate them to another couple trying to have a child.[8]

The last issue in particular—embryo transfers between parties—demands intense scrutiny, as it not only consists of transferring biological material between two parties, but also poses key ethical questions. Unlike other donations of biological material, like organs, embryos and

[6] *Id.*
[7] *Id.*
[8] *Paths to Parenthood: Receiving an Embryo Donation*, HARV. HEALTH PUBL'G (Feb. 3, 2022), https://www.health.harvard.edu/blog/paths-to-parenthood-receiving-an-embryo-donation-202202032682.

reproductive care are intertwined with privacy rights in a way that other transfers are not: there is widespread societal and legal recognition of the uniquely personal nature of issues related to reproduction. This offers a novel perspective to consider for a commercialized market that involves influential, profit-driven corporations with interests that may be at odds with privacy interests.[9]

B. New technologies pose the opportunity for innovative companies to commercialize ART, particularly embryo donations, with few regulations in the U.S.

Embryo donations have immense lucrative potential for innovative ART companies, particularly as they relate to pre-implantation embryo screenings. Previously, embryo screenings focused on prenatal genetic testing (PGT) to a) identify conditions that could compromise the embryo's medical viability and b) screen for life-threatening conditions, specifically sex-linked diseases.[10] As a result, the regulations and legislation issued by the FDA and Congress have examined screenings' capacity to inform people of these purely biomedical attributes. In particular, screenings have focused on detecting serious diseases, like Down syndrome, muscular dystrophy, fragile-X syndrome, and cystic fibrosis, to help expecting parents ensure that they have the proper resources to devise family planning and treatment.[11]

As novel technology has emerged, however, the scientific potential of pre-implantation screenings has expanded. In particular, companies have begun to look beyond an exclusively biomedical assessment and advertise that they test softer (non-physical) traits, like personality or intelligence. This growing industry offers the private sector a compelling opportunity to develop new tools, and innovative window enterprises like Life View™ are buying in. Established in 2017,

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[9] McEwen, *supra* note 1.
[10] Josephine Johnston & Lucas J. Matthews, *Polygenic Embryo Testing: Understated Ethics, Unclear Utility*, 28 NATURE MED. 446, 447 (2022), https://pmc.ncbi.nlm.nih.gov/articles/PMC9208380/.
[11] *Preimplantation Genetic Testing*, WOMEN & INFANTS HOSP., https://fertility.womenandinfants.org/treatment/preimplantation-genetic-testing (last visited Dec. 9, 2024).

Life View™ offers "the most comprehensive genetic analysis of the preimplantation embryo available today," a promising message illustrative of innovative potential.[12] The company specifically advertises how it uses genetic data and processing to screen embryos for personality traits, like narcissism and Machiavellianism.[13] Other similar companies, such as Heliospect Genomics, also claim to have the capacity to conduct screenings that predict an embryo's IQ. Heliospect employees advertise that it supports couples who wish to screen embryos by screening for "IQ and the other naughty traits that everybody wants," like the projected height, probability of a mental condition, etc of the child.[14]

By likening the process of assessing IQ to more conventional tests like biomedical conditions, the company attempts to equate an objective physiological trait (i.e. psychological disorder) and with a subjective attribute (i.e. IQ). The latter, however, is in fact subjective and shaped by several external factors beyond genetics, including one's education and income level, that a medical test overlooks, a shortcoming that misconstrues IQ's potential accuracy. Furthermore, an in-depth investigation revealed that the company uses "polygenic scoring" that relies on algorithms and the embryo's genetic material to predict its anticipated soft traits, including intelligence and personality traits.[15] It is worth scrutinizing what algorithm the company uses to score different traits and how it determines which attributes are inferior or superior—an eerily eugenic process. This presents a novel situation to the American regulatory, legislative, medical, and ethical landscapes about how to 'objectively' evaluate soft, malleable traits like personality based on genetic makeup.

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[12] *Our Story*, LIFEVIEW, https://www.lifeview.com/our_story.html (last visited Sep. 18, 2024).
[13] *Id.*
[14] Hannah Devlin, Tom Burgis, David Pegg & Jason Wilson, *U.S. Startup Charging Couples to "Screen Embryos for IQ,"* THE GUARDIAN (Oct. 18, 2024), https://www.theguardian.com/science/2024/oct/18/us-startup-charging-couples-to-screen-embryos-for-iq.
[15] *Id.*

Several countries, such as the United Kingdom, France, and Italy, have a highly regulated ART industry and subsequently limit highly selective screening practices, in contrast to the largely unregulated American industry.[16] Although ART can be covered through other countries' insurance systems, such as the United Kingdom's National Health Service, the U.S. provides no such nationwide coverage for ART. The subsequent lack of government regulation manifests itself in limited oversight of ART and fortifies private corporations' influence and ability to engage in "direct to consumer" marketing.[17] For example, it makes it easier for companies to make broad, sweeping claims about their technological capabilities that may misconstrue their accuracy or downplay the potential pitfalls of an algorithm. This tendency is certainly evident in the claims made by Heliospect Genomics, which reduces attributes like IQ to quantifiable measures that can be fully determined by genetic material.[18] As a result, patients seeking IVF may come to clinics with an inaccurate perception of the service's potential, leading companies to potentially exploit individuals seeking ART. This lens frames embryo transfers as an exchange of biological property and embryo screenings as an evaluation of the 'quality' of that property.[19]

As a result, the existing focus on property as a means through which embryos are defined is reinforced by the growing commercial market, which neglects the ethical questions intertwined with embryo screenings, ART, and IVF in pursuit of profits.

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[16] Hannah Rahim, *Designer Babies? The Ethical and Regulatory Implications of Polygenic Embryo Screening*, BILL OF HEALTH (Mar. 11, 2024), https://petrieflom.law.harvard.edu/2024/03/11/designer-babies-the-ethical-and-regulatory-implications-of-polygenic-embryo-screening/.
[17] *Id.*
[18] Devlin et al., *supra* note 14.
[19] Igor A. Brusil, *Fifty Shades of Gray Area: Are Cryopreserved Embryos "Property?" or Persons?*, 30 PROB. & PROP. 50 (2016), https://www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v30/01/2016_aba_rpte_pp_v30_1_article_brusil_50_shades_of_gray_area_cryopreserved_embryos_property.pdf.

C. The commercialized focus of embryo donations and screening technology raises tensions between commercial and ethical interests in the field of 'reprogenetics.'

a. States' varied legal definitions of embryos reflect the ongoing debate around the dueling commercial and ethical priorities within embryo ownership.

The evolving field of reprogenetics, or the "use of genetic information and technology to ensure or prevent the inheritance of particular genes in a child," presents novel legislative questions that states generally diverge on.[20] Only a handful of states have passed legislation that issues guidance on embryo transfers, illustrative of the field's relatively novel relevance, including Louisiana, Florida, Oklahoma, and Georgia. However, each of these states define embryos slightly differently, reflecting the uncertainty that currently permeates embryo donations.

A Louisiana statute, for example, describes embryos as people with explicit rights to be considered during embryo transfers, particularly when attempting to balance the "rights and well-being of the child."[21] Although Louisiana does take a more extreme approach compared to other states, the statute captures how embryos may be granted personhood status, which presents a novel set of concerns about managing cryogenically preserved embryos and the act of IVF itself. Other states, including Tennessee, resist the notion that an embryo is a full person, yet note that describing embryos as pure objects neglects their intrinsic significance and human value. For example, in *Davis v. Davis*, the Supreme Court of Tennessee determined that embryos should be placed in a unique category that grants "special respect" to the potential life.[22] That said, federal

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[20] Reprogenetics refers to the use of genetic technology to select or alter particular genes in a child. Lee M. Silver, *Reprogenetics: Third Millennium Speculation: The Consequences for Humanity When Reproductive Biology and Genetics Are Combined*, 1 EMBO REPORTS 375, 375 (2000), https://pmc.ncbi.nlm.nih.gov/articles/PMC1084251/.
[21] Polina M. Dostalik, *Embryo "Adoption"? The Rhetoric, the Law, and the Legal Consequences*, 55 N.Y.L. SCH. L. REV. 867 (2010–2011), https://digitalcommons.nyls.edu/nyls_law_review/vol55/iss3/9/.
[22] *Id.*

courts have drawn a stricter line and clearly describe cryogenically preserved embryos more like property, which bolsters the position of novel companies looking to appeal to the lucrative potential of ART. *Doe v. Obama*, decided in 2009, notably determined that "human embryos are not persons under the law" after plaintiff Mary Doe[23] maintained that the removal of some of her stem cells from a culture would destroy cryogenically preserved embryos.[24] However, the District Court determined that Doe did not have standing because the cryopreserved embryos were not people and, thus, did not constitute a "legally protected interest."[25]

The mixed approaches that state and federal courts have historically pursued are manifestations of limited regulatory guidance on embryo donations, as there are notably different responses to screening a person, denying a potential life the ability to materialize, or evaluating the quality of biological material. Taken together, the varied perspectives pose several ethical questions for regulators to consider and illustrate the diversity with which embryo screenings can be understood. In particular, several concerns emerge about the extent to which property rights should mold embryo screenings and protections, as this interest seems to be at odds with the need for personal autonomy.

At its core, the diversity of legislation demonstrates the need for a clearer definition of how property and privacy rights can be properly balanced in regard to embryo protections, donations, and IVF.

b. Uncertainty about how to most appropriately define embryos raises similar concerns about embryo screening technologies' potentially eugenic nature, also known as reprogenetics.

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[23] This is a pseudonym.
[24] Igor A. Brusil, *Fifty Shades of Gray Area: Are Cryopreserved Embryos "Property?" or Persons?*, 30 PROB. & PROP. 50 (2016).
[25] *Id.*

Debates about an embryo's personhood and property value at the statutory level similarly shape conversations about evolving ART technology and pre-implantation screenings.[26] While embryo screenings for biomedical conditions are widely accepted, screenings for personality and intelligence raise dual concerns, the first being how it deems some traits inferior or superior. This subjugation frames certain traits as preferable over others, leading to the false modification of the population's traits, despite the fact that genetics have limited predictive power in determining intelligence and personality. In fact, over-reliance on genetic makeup neglects the social and environmental factors that shape behavioral characteristics such as personality.[27] Especially at the population level, this approach can harmfully overlook systemic influences that call for crucial policy shifts. Despite this sentiment, however, advocates of polygenic testing (i.e. embryo screenings) have largely brushed these concerns aside, instead highlighting the field's immense potential for novel technology and profits.[28] Perhaps what is most compelling, however, are claims that expansive screenings can help improve society's health and evolutionary potential.

Ethical justifications for screenings have emerged in tandem with the commercialization of the field; one of the most notable pieces is Jonathan Anomaly's description of "liberal eugenics."[29] Anomaly asserts that genetically selective practices, depending on their intent, can be framed as positive or negative eugenics. For instance, he acknowledges that race-based eugenics is indisputably negative because of the societal inequalities it yields and social harm it inflicts. However, he claims that eugenics targeted to yield children with greater "fitness"—based on physical traits, IQ, etc—is evolutionarily beneficial and thus positive.[30] He, along with other

[26] Roberto Coco, *Reprogenetics: Preimplantational Genetics Diagnosis*, 37 GENET. & MOLECULAR BIOLOGY 271, 271 (2014).
[27] *Id.*
[28] Jonathan Anomaly, *Defending Eugenics: From Cryptic Choice to Conscious Selection*, 35 MONASH BIOETHICS REV. 24, 24 (2018).
[29] *Id.*
[30] *Id.*

advocates of embryo screening, claim that there is a "moral obligation to produce children with the best chance of the best life," a unique ethical framing of eugenics.[31]

Anomaly's framing conflates a person's soft traits, like personality, with biomedical attributes that fundamentally shape survival, an attempt to extend historical approaches to genetic testing to technologies' novel capacity. Presenting the work as a "moral obligation" encapsulates Anomaly's discussion of how genetically selective practices yield immense societal benefits, a somewhat inaccurate depiction of genetic technology as purely positive.[32] While research does demonstrate that personality traits like conscientiousness may enhance a person's longevity, these traits are not purely the product of genetic makeup but are also influenced by environmental factors and a person's upbringing.[33] Thus, screening tools that claim to be able to detect these personality traits—at least at this point—largely rely on assumptions about individuals, potentially based on correlations between personality traits and gender, for example.[34] This presents a dangerous situation in which screening tools select embryos based on proxies that unfairly favor certain groups of people with insufficient evidence. The approach overlooks the slew of ethical questions that arguably also pose obligations about treating some traits as superior or inferior. The lack of decisive government oversight or acknowledgement of the ethical concerns also enables the private sector to dominate ART, intensifying the emphasis on property interests that may easily overlook privacy issues.

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[31] *Id.*
[32] *Id.*
[33] Stephanie Baxter, *These Personality Traits Were Associated With Longevity: Study*, NICE NEWS (Oct. 5, 2025), https://nicenews.com/health-and-wellness/personality-traits-longevity/; Liisa Keltikangas-Järvinen & Markus Jokela, *Nature and Nurture in Personality*, 8 FOCUS (AM. PSYCHIATRIC PUBL'G) 180 (2010), https://doi.org/10.1176/foc.8.2.foc180.
[34] Robert A. Wilson, *Eugenics Undefended*, 37 MONASH BIOETHICS REV. 68 (2019), https://philarchive.org/archive/WILEU-3.

While emerging ART-focused genetic testing companies elevate property interests, a commercialized sector can easily disregard privacy concerns—more specifically, aspiring parents' reproductive and parental privacy—that center individual dignity and autonomy. Practically, this may also lead policymakers to overemphasize ART and genetic screening as a profit-yielding industry instead of a sector that deeply shapes the most intimate parts of people's lives.

Thus, a privacy-focused framework could certainly help shed light on the principles that should guide ethical uncertainty and help to balance burgeoning profit-based motivations with a focus on the welfare of individuals and broader population.

D. Centering privacy rights provides a meaningful framework through which the needs of donors, recipients, and the embryo can be balanced while preserving individual autonomy and dignity.

a. Privacy must be the centerpiece of reproductive rights conversations, which carries strong legal precedent and would prioritize a balancing of societal interests with individual rights.

The late 20th century marked an inflection point in the United States Supreme Court's jurisprudence on privacy and familial autonomy. *Griswold v. Connecticut* was a landmark case that recognized individuals' autonomy in deciding to have a child.[35] The Court's reasoning in *Griswold* was grounded in what became known as the penumbra theory, or the notion that several Amendments to the U.S. Constitution collectively create "zones of privacy."[36] These zones, established by the First, Third, Fourth, Fifth, and Ninth Amendments, assert implicit rights that extend beyond the text of the Constitution but are fundamental to protecting individual rights.

[35] KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., LSB10820, PRIVACY RIGHTS UNDER THE CONSTITUTION: PROCREATION, CHILD REARING, CONTRACEPTION, MARRIAGE, AND SEXUAL ACTIVITY (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10820.
[36] CORNELL LAW SCH., *Penumbra*, https://www.law.cornell.edu/wex/penumbra (last visited Dec. 9, 2024).

Griswold applied this right to privacy to personal relationships and contraception for a married couple, a framework that was extended to single people in *Eisenstadt v. Baird*.[37]

The Supreme Court's ruling in *Eisenstadt* marked its recognition of the autonomy and choice every person has as it relates to childbearing, regardless of their marital status. In other words, privacy was recognized as something intrinsic to being a person, a principle that the Court has continued to strengthen. The Court built upon the penumbra theory in *Roe v. Wade*, which established the right for a person to terminate a pregnancy.[38] The Court's protection of parental and familial autonomy also has long-standing roots, extending beyond decisions of childbearing to broader choices about how to raise a child.[39] Despite the overturning of *Roe v. Wade* in the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*, parental and familial rights are still recognized at the federal level.[40] The Supreme Court's privacy jurisprudence can also be applied to the right of expecting parents to make decisions about embryo donations, ART, and genetic testing. Yet, the implicit consideration of privacy and intimacy that drives the penumbra theory is somewhat neglected by a pursuit of profits. As a result, there is substantial uncertainty about the extent to which property and privacy rights should shape legal frameworks of the human body, especially in the context of reproduction.

Radhika Rao, a legal scholar who analyzes topics related to the human body, draws attention to how the legal uncertainty surrounding privacy and property rights most clearly manifests in conversations about reproductive material. Employing a privacy framework, Rao asserts that the "personal relationship" of an individual to their body is crucial to consider,

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[37] Santamaria, *supra* note 35.
[38] *Id.*
[39] PARENTALRIGHTS.ORG, *Supreme Court*, https://parentalrights.org/understand_the_issue/supreme-court/ (last visited Dec. 9, 2024).
[40] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 290 (2022).

especially given the property-centric approach often employed in the medical field.[41] A property-focused lens views the body as a source of commercial success, a perspective that can incentivize entities to operate in a way that diminishes safety and efficacy in pursuit of efficiency. Embryo screenings and selections may seem to present future parents with more information and autonomy to guide them in their path to parenthood. However, they also treat children like manufactured items that can impose pressure on children to live up to these curated standards. The process also makes the future child's health data far more publicly available, as all of their genetic data would be in the hands of the screening tools and any entity/person that uses it. The embryo screening companies could exploit the genetic information or sell it to other entities, which could easily violate the Genetic Information Nondiscrimination Act.[42] Furthermore, on a broader scale, parents selecting certain types of embryos would limit the diversity of future generations and could even exacerbate social inequalities, since these expensive screenings are mostly accessible to people of a higher socioeconomic status. However, Rao argues that the human body does not only carry physiological significance but is also intertwined with one's dignity and humanity. Yet, in light of the property-based approach that permeates perceptions of donating bodily material, it is easy to overlook the intimate relationship between an individual and their body. This shortcoming, Rao contends, is especially consequential given the implicit intimacy that undergirds reproductive health, which calls for a privacy-focused approach.[43]

A privacy-based paradigm, as opposed to one centered on property, is also more likely to enable a balance between individual rights and societal welfare. The profit-driven nature of commercialized ART may easily lend itself to focus more on biomedical innovation and

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[41] Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359 (2000), https://repository.uclawsf.edu/faculty_scholarship/660/.
[42] Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881.
[43] *Id.*

development, especially in the unregulated U.S. market with limited accountability. In pursuit of corporate growth, companies focus on making their genetic tests more appealing to consumers, which may come at the expense of providing full transparency about the product's benefits and risks.[44] In contrast, a privacy framework's constitutional roots can lend itself to more of a balancing act between individual rights and social benefits. A privacy perspective can lend itself to a more holistic consideration of the personal priorities and public dynamics that influence genetic screenings. For example, as previously outlined, companies like Heliospect Genomics may overemphasize the role of genetics in shaping individual attributes, a detrimental framing that undervalues environmental factors and can hinder policy proposals that address systemic issues.[45] A dignity-focused privacy framework, however, can yield a more objective standard to evaluate advancing genetic tests to ensure that people and populations alike are aware of the tests' medical, ethical, and social implications.

Ultimately, the legal system's longstanding recognition of the privacy rights underscores the value of applying a privacy lens to untangle the complex property-privacy tension that underlies reproductive health technology.

b. A privacy-rights based framework can help navigate concerns about the reemergence of eugenic practices as embryo screening technology advances.

A property-based framework treats embryos, embryo ownership, and embryo transfers no different from other biological material. However, likening embryos to any other part of the body—such as a spleen or a limb—overlooks the harm that novel genetic tests can inflict,

[44] Devlin et al., *supra* note 14.
[45] *Id.*

especially as they depart from the conventional screening for medical conditions. Predicting personality traits or evaluating IQ to score an embryo's potential to do well exposes information that the Genetic Information Nondiscrimination Act prohibits, as embryos' potential would be discussed, recommended, and ultimately dictated by their information, despite these screening tools' weak nature. Further, assigning different traits feels eerily eugenic, especially since the scores could be used to determine if a couple wishes to use the embryos. The tests, no matter how technologically advanced, are unlikely to be foolproof because there is no way to predict the environmental factors that are going to impact the future child's upbringing, intelligence, and personality. Yet, a property-focused perspective generally neglects some of these shortcomings and broader ethical concerns, as the primary focus is profit maximization. The more embryos are viewed as material objects, the easier it is to justify screenings and overlook how the results of the test could intimately impact prospective parents. And while one could argue that embryos and gametes are objectively like any other part of the body, and thus should be treated the same, the long line of jurisprudence about the intrinsic privacy that comes with issues related to family planning challenges this assumption.

Even in a post-*Dobbs* landscape, constitutional privacy protections in family planning must extend to embryo preservation and donations. *Dobbs* responded to the specific issue of abortions and heavily weighed the rights of the future children, a line of legal reasoning that can be taken to support a future child's interest in controlling access to their genetic information. If that principle applies, embryo screening tools pose concerns: the tools allow parents to make decisions based on the future child's genetic information and can make that information available to others without the child's consent. Given the reasoning in *Dobbs*, the Court would likely view these practices with skepticism and take issue with the situation given its desire to protect unborn children's autonomy.

At the core of these longstanding legal rights is the notion that individuals retain a certain level of personal choice and autonomy to determine how they experience the prospect of parenthood, which should also drive conversations as novel testing techniques gain ground. Otherwise, the reproductive health sector risks curtailing individual rights and placing them at the mercy of evolving technology, which the Supreme Court has consistently warned against. Elevating a privacy-centered approach better accounts for the fact that embryos are more than just objects and cannot be exclusively relegated to the commodified private market. More specifically, it enables policy makers to consider the ethical questions embryo screenings compel in light of the technology's potentially eugenic nature. Embedding human dignity at the heart of conversations can help highlight the detrimental effects of labeling some personality traits or attributes as superior or inferior, as a privacy lens serves as a reminder that embryos, although not full people, still carry a unique potential for life requiring scrutiny. Practically, the prospect of potential parents using novel genetic screening technology to determine which embryos they wish to adopt and which they wish to overlook draws parallels to eugenics.

Incorporating a privacy rights lens can ensure that the ethical implications of advancing genetic technology are publicized and clear to anyone looking to use (or for providers, conduct) the tests for embryo donations. The humanity-focused principles of privacy rights serve to guide any actor involved in the use of novel genetic screening technologies, including providers, counselors, prospective parents, and policymakers. This approach ensures that prospective parents are both emotionally supported when considering an embryo donation and guided by policies that account for the deeply personal and ethical questions entangled with ART. Further, it can help obstruct eugenic practices that reinforce societal biases and perpetuate inequalities through selective practices.

Consequently, a privacy lens can compel regulators to look beyond profit motivations that permeates the reproductive technology sector and considers the ethical implications of something so intimate becoming so commercialized.

E. The successful, sustainable use of assisted reproductive technology depends on the ability of the regulatory system to preserve and elevate privacy rights.

a. Concerns about infringement on parental and reproductive autonomy have undermined some trust in reproductive health procedures, reinforcing the importance of privacy rights amidst advancing technology.

A privacy-focused lens is also crucial to strengthen public trust in the future of reproductive health and autonomy. The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* marked an inflection point in public consciousness about individuals' freedom to retain autonomy over their family planning and parenthood.[46] The *Women's Health Journal* published an article about these renewed concerns about the right to contraception, a novel post-*Dobbs* question that has emerged in light of fear that existing privacy protections are deteriorating.[47] Although the majority opinion in *Dobbs* did not attempt to undermine the landmark privacy framework established in *Griswold v. Connecticut* decades ago, Justice Clarence Thomas's concurrence called for the reevaluation of "substantive due process" outlined by the Court.[48] At its core, substantive due process establishes that there are some fundamental rights implicit in the

[46] *Dobbs*, 597 U.S. at 215.
[47] Alina Salganicoff & Usha Ranji, *A Focus on Contraception in the Wake of Dobbs*, 33 WOMEN'S HEALTH ISSUES 341 (2023), https://doi.org/10.1016/j.whi.2023.04.002.
[48] *Dobbs*, 597 U.S. at 330 (Thomas, J., concurring).

constitution, much like the principles in *Griswold* that protect familial autonomy and personal privacy.[49] Although Thomas's outlook is highly unlikely to take shape in any meaningful way, the text of the concurrence quickly circulated and instilled intense public fear about the future of familial privacy and reproduction. This fear has manifested at both the state and federal levels as it relates to the right to use contraception, as several lawmakers swiftly introduced legislation to fortify privacy protections.

Post-*Dobbs*, privacy concerns have also tangibly emerged in the context of heightened surveillance of reproductive health technology.[50] For example, apps that track menstrual cycles and collect data on the menstrual cycle of users are widely criticized for selling data to third parties: companies developing novel reproductive technology, advertising agencies looking to enhance marketing practices, insurance companies, and researchers.[51] The situation is illustrative of the broader ease with which privacy rights may be swiftly undermined to bolster commodification and the private sector. Some people have also expressed concerns about apps selling data to use as part of criminal investigations in states where abortions were criminalized post-*Dobbs,* a sentiment reflective of widespread fear of how new technology may curtail reproductive autonomy. Unfortunately, these concerns are well-founded, as even lawmakers began to take intrusive steps post-*Dobbs* to intensify surveillance. In fact, in 2023, Senator Joni Ernst introduced the Ensuring Accurate and Complete Abortion Data Reporting Act to fix "incomplete data regarding abortions and survivors of abortion attempts."[52] Although the bill is unlikely to pass, like Justice Thomas's

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[49] *See generally* Washington v. Glucksberg, 521 U.S. 702 (1997).
[50] Bridget G. Kelly & Maniza Habib, *Missed period? The significance of period-tracking applications in a post-Roe America,* 31 SEXUAL AND REPRODUCTIVE HEALTH MATTERS 1-4 (2023).
[51] Kelly et al., *Period-Tracking Applications*, *supra* note 50.
[52] O'Neill Inst. of Nat'l & Glob. Health L., *Emerging Threats to Data Privacy Post-Dobbs*, https://oneill.law.georgetown.edu/emerging-threats-to-data-privacy-post-dobbs/ (last visited Dec. 9, 2024).

concurrence, it serves as a source of public distrust of the future of privacy and reproductive autonomy.

Despite the ethical questions that evolving ART and genetic testing poses, especially post-*Dobbs*, the industry has immense potential to support expecting parents and make parenthood available to people who otherwise may not have had the opportunity to have a child. However, in order to take advantage of these immense benefits and mitigate potential misinformation, public trust must be prioritized and strengthened. As demonstrated by companies' selling of reproductive health data, a property-centered perspective that prioritizes profits will likely erode trust and fuel narratives about companies neglecting individual rights for their corporate gain.[53] A privacy framework, however, can bolster individual rights and privacy in regulations, thus mitigating ethical concerns and fostering public support for novel technology.

If policymakers and regulatory agencies take actionable steps to account for privacy concerns and individual autonomy, they can help build public trust in institutions that convey a commitment to patient welfare. Perhaps this can also convey a broader commitment to equity and support for marginalized populations that have historically been harmed by the misuse of data and potentially exploitative corporate practices.

Practically, a focus on privacy can also underscore the need for regulations that outline robust transparency and consent processes, which novel genetic screenings and evolving ART currently lack.

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[53] Kelly et al., *supra* note 50.

b. The likely surge in ART commercialization that is expected to strike the market calls for more regulatory oversight than the industry has previously enacted.

The evolving technological capacity of reproductive technology and genetic screenings compels a level of unprecedented regulatory insight. Although ethical questions have certainly been a consideration in the context of organ donations and the transfer of bodily material, ART's uniquely intimate nature requires a novel regulatory framework. A privacy lens provides a meaningful foundation on which the growing ART industry can gain more regulatory guidance grounded in building trust, mitigating unethical eugenic practices, emphasizing safe methods, and promoting equitable access to clinical options. Thus, swift action is imperative to develop regulations that effectively balance property and rights to both promote innovation and acknowledge that novel embryo screenings, at their core, are fundamentally connected to a person's humanity and dignity.

Regulatory oversight of advanced ART is crucial, especially for embryo transfers. The U.S. ART market is expected to continue growing over the next several years: while the industry was valued at $5.76B in 2023, it is expected to grow at a compound annual growth rate of 5.1% through 2030, amounting to over $8B.[54] Given the slew of ethical questions about genetic testing and ART, swift action is imperative to ensure the commercial market does not have free rein over embryo screenings and transfers, especially as technology continues to advance.[55]

Looking forward, regulations may also consider both what information is extracted and how that information is used, which may help mitigate unethical practices. There is a stark

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[54] Grand View Research, *U.S. Assisted Reproductive Technology Market Report, 2022–2030* (2023), https://www.grandviewresearch.com/industry-analysis/us-assisted-reproductive-technology-market-report.
[55] *Id.*

difference between collecting information and applying it in a tangible way, which paves the way for regulations that focus on how prospective parents *use* embryo screening data. For example, embryo-derived information about IQ could be used for research studies that examine how dispositive and/or accurate the information is in determining a person's IQ over time. Notably, since embryos are not considered children, parents considering an embryo donation or transfer are not granted parental rights, which presents an unprecedented gray area for regulations. However, the entire field of evolving ART and technology is plagued with gray areas. Focusing on a privacy framework can help navigate some of this uncertainty and ensure that the principles of autonomy and dignity guide questions about emerging ART.

III. Conclusion

As policymakers navigate the evolving landscape of ART and embryo screenings, it is imperative to integrate privacy and property lenses to develop balanced legislation that respects innovation and recognizes the inherently intimate nature of family planning. The current lack of regulatory guidance enables profit-centered motivations to proliferate and endanger fundamental individual rights. This prospect is simply unsustainable as the ART industry continues to grow and has the capacity to shape the lives of millions of people.

The regulatory landscape is quite fragmented, as indicated by states pursuing divergent interpretations of privacy rights, property rights, and embryo donations themselves. Establishing a unified federal standard can create a consistent baseline of reproductive health for all individuals, a framework that bolsters equitable reproductive health access and rights across the country. By placing privacy at the forefront of these conversations, policymakers also acknowledge that embryo donations, and reproductive health as a whole, disrupts the traditionally commercialized, biomedical models of genetic testing.

Therefore, a privacy lens can underscore individual autonomy, bolstering legal frameworks that protect reproductive rights. This can help ensure ART and related genetic testing are not a source of public distrust but rather a way of rebuilding the relationship with the state. Further, it can help to define the pervasive gray areas at the intersection of ART and novel technology. Ultimately, this perspective can guide the development of reproductive health protocols that are safe and meaningful for prospective parents, bolstering their fundamental right to an autonomous reproductive future.

Patents, Power, and the Climate Commons: A Comparative Analysis of Intellectual Property Models and Governance in Geoengineering Technologies for Climate Change Mitigation

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ABSTRACT:

This paper begins by outlining the relevant foundations of patent law before examining analogous sectors—atomic energy and space law—both of which have significant implications for national security and technological development. These sectors offer potential insights into governance mechanisms capable of balancing innovation incentives with national security concerns, issues that are increasingly central to the emerging field of geoengineering. In the first phase of the comparison, this article examines the regulatory and legal frameworks governing atomic energy and space law, including the policies and international agreements that shape patenting practices, intellectual property regimes, and governmental oversight. This analysis evaluates the strengths and weaknesses of these frameworks in promoting technological advancement while safeguarding national security interests. Drawing on these insights, the article explores lessons for the governance of geoengineering technologies, particularly Carbon Dioxide Removal (CDR) and Solar Radiation Management (SRM). Ultimately, this paper proposes governance strategies and intellectual property frameworks that protect public interests while supporting responsible innovation in addressing the climate crisis.

Introduction

In the realm of climate change mitigation, the concept of geoengineering, or the "intentional manipulation of the climate system to counteract global climate change," has emerged as a pivotal arena where science, politics, and the law intersect.[1] Geoengineering is conventionally split into two broad categories. The first is carbon geoengineering, often called Carbon Dioxide Removal (CDR).[2] Distinguishing itself from simple reduction, CDR involves extracting carbon dioxide from the atmosphere and oceans, as outlined in the Aspen Institute's report on "Carbon Dioxide Removal & Utilization."[3] The other main category of geoengineering is solar geoengineering, often also called solar radiation management (SRM), albedo modification, or sunlight reflection.[4] This technology could include implementing incredibly large mirrors positioned to reflect sunlight back into space.[5]

A specific technology that shows promise but also presents challenges is Carbon Capture and Storage (CCS), which encompasses the chemical separation and capture of CO2 from combustion or industrial processes, followed by the transportation and injection of the usually liquefied gas into a geological formation, such as underground saline aquifers or oil and gas fields, preventing its release into the atmosphere via pipelines, trucks, or ships.[6] As the global focus

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[1] Dane Scott, *Geoengineering and Environmental Ethics*, NATURE EDUCATION KNOWLEDGE (2012), https://www.nature.com/scitable/knowledge/library/geoengineering-and-environmental-ethics-80061230/.
[2] *The Harvard Solar Geoengineering Research Program*, THE SALATA INSTITUTE FOR CLIMATE AND SUSTAINABILITY AT HARVARD UNIVERSITY, https://salatainstitute.harvard.edu/research-initiatives/the-harvard-solar-geoengineering-research-program/ (last visited Aug. 9, 2026).
[3] ASPEN INSTITUTE, BUILDING A CLEAN ENERGY SOCIETY: DEPLOYING & SCALING A ZERO-CARBON FUTURE 22–25 (Cheryl LaFleur et al. eds., 2020), https://www.aspeninstitute.org/wp-content/uploads/2021/03/2020-Aspen-Energy-Week-image.pdf.
[4] The Harvard Solar Geoengineering Research Program, *supra* note 2.
[5] Anthony Cuthbertson, *We May Need Giant Mirrors to Reflect Sunlight Away from Earth, UN Says*, THE INDEPENDENT (Feb. 28, 2023), https://www.independent.co.uk/tech/climate-change-solar-radiation-mirrors-geoengineering-b2291183.html.
[6] Annika Varnäs, *Carbon Capture and Storage*, *in* DRIVING TECHNOLOGICAL INNOVATION FOR A LOW-CARBON SOCIETY: CASE STUDIES FOR SOLAR PHOTOVOLTAICS AND CARBON CAPTURE AND STORAGE 70 (Stockholm Env't

intensifies on mitigating climate change, the transition to CCS technology becomes pivotal in curbing carbon emissions. However, it is imperative to understand that the actors currently driving technology development and demonstration projects in the United States are not utilities but instead oil and gas companies.[7] Indeed, British Petroleum (BP) is the most centrally placed actor in the U.S. CCS network.[8] This nature of leadership raises questions about the potential influence of the fossil fuel industry in shaping the trajectory of carbon capture initiatives, introducing complexities in the pursuit of sustainable and independent climate solutions. Additionally, ambient air capture, commonly referred to as Direct Air Carbon Capture and Storage (DACCS), removes carbon dioxide directly from the atmosphere, but because CO_2 exists in ambient air at extremely low concentrations, separating and capturing it requires substantial heat and energy.[9] Captured CO_2 may be stored underground through geologic sequestration in deep saline formations and other subsurface reservoirs, such as depleted oil and gas fields.[10] Thus, the discourse on geoengineering technologies, specifically CDR and SRM, raises critical questions not only about their scientific efficacy, but also about the ethical implications surrounding their development and deployment.

The commercialization of geoengineering, driven by economically powerful entities, may pose dual threats: environmental risks and heightened national security concerns. Thus, addressing these challenges necessitates the development of transparent, inclusive, and

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Inst. 2012), https://www.sei.org/mediamanager/documents/Publications/SEI-ResearchReport-Varnas-DrivingTechnologicalInnovationForALowCarbonSociety-2012.pdf.

[7] J.C. Stevens, *Technology Leader, Policy Laggard: CCS Development for Climate Mitigation in the US Political Context*, *in* CACHING THE CARBON: THE POLITICS AND POLICY OF CARBON CAPTURE AND STORAGE (James Meadowcroft & Oluf Langhelle eds., 2009).

[8] Klaas van Alphen et al., *Evaluating the Development of Carbon Capture and Storage Technologies in the United States*, 14 RENEW. SUSTAIN. ENERGY REV. 971, 971–77 (2010).

[9] Giulia Realmonte et al., *An Inter-Model Assessment of the Role of Direct Air Capture in Deep Mitigation Pathways*, 10 NATURE COMMC'NS 3277 (2019), https://www.nature.com/articles/s41467-019-10842-5.

[10] U.S. ENV'T PROT. AGENCY, GEOLOGIC SEQUESTRATION OF CARBON DIOXIDE IN DEEP SALINE FORMATIONS (Jan. 2025), https://www.epa.gov/system/files/documents/2025-01/deepsalineformation_rtc_jan2025.pdf.

accountable governance mechanisms to safeguard humanity's collective interests and prevent the undue concentration of power.

While existing international and domestic frameworks offer avenues for shaping a responsible trajectory for the development, patenting, and deployment of geoengineering technologies, there remains a pressing need for clearer governance structures that can safeguard collective interests, prevent undue concentrations of power, and address environmental and national security concerns.[11] Accordingly, this paper examines the governance challenges surrounding geoengineering through the lens of intellectual property law and comparative regulatory frameworks.

Specifically, this article argues that the governance challenges posed by geoengineering patents can be better understood by examining analogous sectors—particularly atomic energy and commercial space activities—that have historically required legal regimes capable of balancing technological innovation with national security and public oversight. The choice of these sectors is not arbitrary; rather, it stems from their historical significance, potential for disruptive innovation, and their dual-use nature, making them pertinent analogies for examining the regulatory challenges posed by emerging technologies. These sectors provide instructive examples of how legal frameworks can promote technological innovation while simultaneously addressing national security and public governance concerns.[12] Because these sectors share similar sentiments to concerns surrounding CDR technology and other climate engineering ventures, this paper will measure the regulatory success of attempts at governance within atomic

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[11] Sara Stefanini, *Switzerland Puts Geoengineering Governance on UN Environment Agenda*, CLIMATE HOME NEWS (Feb. 26, 2019), http://www.climatechangenews.com/2019/02/26/swiss-push-talk-geoengineering-goes-sci-fi-reality/.
[12] Gregory C. Allen, *Advanced Technology: Examining Threats to National Security*, CSIS (Sept. 19, 2023), https://www.csis.org/analysis/advanced-technology-examining-threats-national-security.

energy and the commercialization of outer space ventures as each framework's cultivation of research and development within the United States. By analyzing the patent frameworks and governance structures developed in these sectors, this article seeks to identify lessons that may inform more transparent and accountable governance models for emerging geoengineering technologies.

The article proceeds in two parts. Part I provides an objective overview of the technological, legal, and regulatory landscape surrounding geoengineering, including the role of patent law and the governance structures developed in atomic energy and space law. Part II then offers a normative analysis, drawing lessons from these sectors to propose governance strategies and intellectual property approaches capable of balancing innovation incentives with the protection of public and environmental interests in addressing the climate crisis.

PART I

A. Risks and Governance Challenges of Geoengineering

Although there is optimism surrounding emerging geoengineering technologies, their development and potential deployment raise a range of environmental, political, and governance considerations. A recent UNESCO report identifies several risks associated with climate engineering, noting that reliance on such technologies could undermine existing climate policies and divert funding away from emissions reduction and climate adaptation efforts.[13] Geoengineering tools have also been discussed in the context of potential geopolitical and security implications, highlighting the importance of international coordination in the governance of

[13] *New UNESCO Report Warns of Ethical Risks of Climate Engineering*, UNESCO (Nov. 29, 2023), https://www.unesco.org/en/articles/cop28-new-unesco-report-warns-ethical-risks-climate-engineering.

technologies capable of altering the global climate system.[14]

In response to these concerns, a number of international organizations, research initiatives, and policy bodies have begun examining potential governance mechanisms for geoengineering technologies. For example, initiatives such as the Degrees Initiative emphasize the importance of incorporating perspectives from developing countries into discussions surrounding SRM research and governance.[15] At the international level, geoengineering governance has also appeared on the agenda of global environmental policy discussions, including proposals to incorporate geoengineering oversight within broader international climate governance frameworks.[16]

International climate agreements have likewise begun to acknowledge the need for transparency and coordination in the development of emerging climate mitigation technologies. The Paris Agreement framework, for example, includes provisions encouraging information sharing and cooperative approaches among states addressing climate change mitigation technologies.[17] As scientific research and technological development continue to expand in this field, questions regarding governance structures and regulatory oversight remain central to ongoing international discussions surrounding geoengineering.

B. Growth of Geoengineering Research and Patent Activity

Interest in geoengineering technologies has expanded significantly over the past two decades, reflected in both the volume of academic research and the growth of patent filings

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[14] *Id.*
[15] *Putting Developing Countries at the Centre of the SRM Conversation*, THE DEGREES INITIATIVE, https://www.srmgi.org/ (last visited Aug. 9, 2026).
[16] Sara Stefanini, *Switzerland Puts Geoengineering Governance on UN Environment Agenda*, CLIMATE HOME NEWS (Feb. 26, 2019), http://www.climatechangenews.com/2019/02/26/swiss-push-talk-geoengineering-goes-sci-fi-reality/.
[17] Decision 18/CMA.1, *Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement*, U.N. Doc. FCCC/PA/CMA/2018/3/Add.2 (Dec. 15, 2018), https://unfccc.int/sites/default/files/resource/cma2018_3_add2_new_advance.pdf.

associated with climate intervention technologies. One study examining the landscape of climate engineering research found CDR technologies account for the largest share of geoengineering-related publications. In the dataset analyzed, CDR records totaled 404 publications, followed by general geoengineering research with 228 publications and SRM with 193.[18]

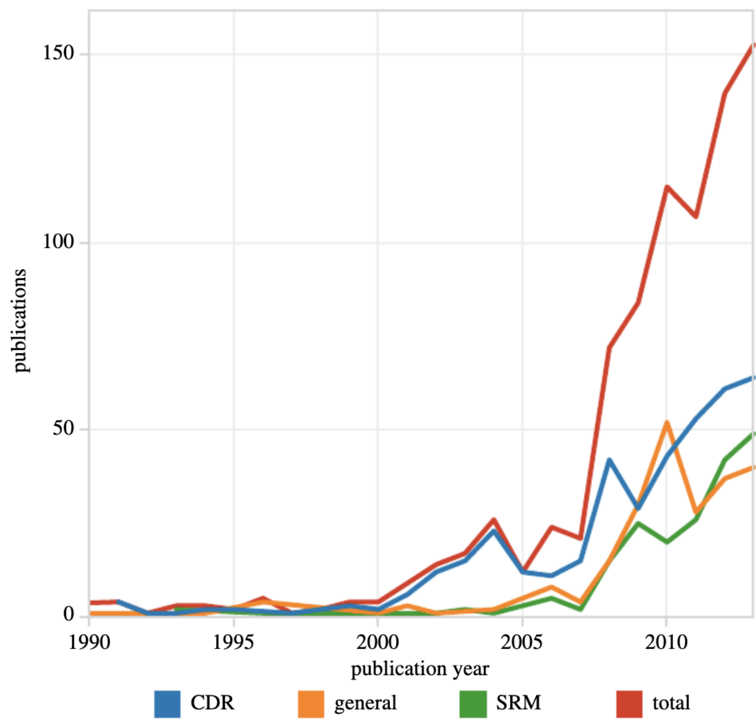


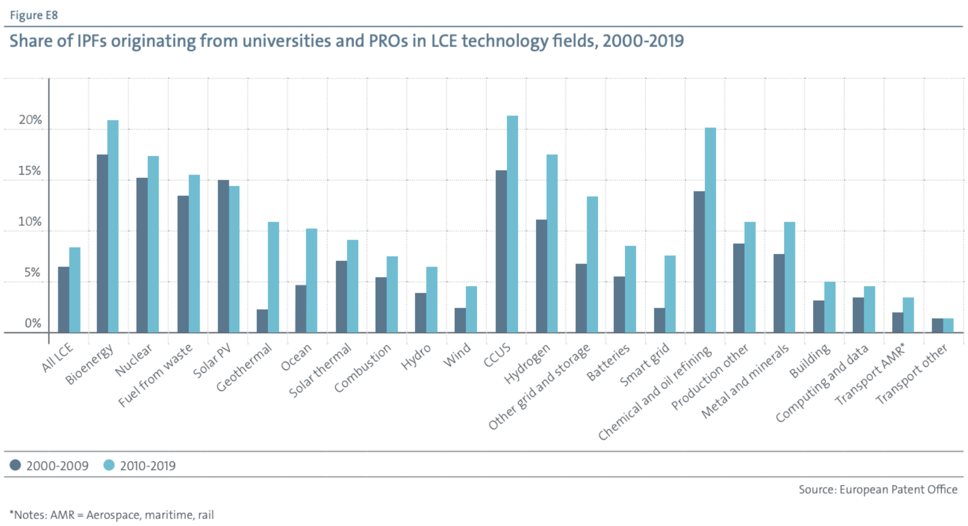
Figure 1. Main trends in scientific publications (Web of Science).

These trends illustrate the increasing scholarly attention directed toward technologies designed to intervene in the Earth's climate system.

As research and development activity has expanded, patent filings related to geoengineering and climate mitigation technologies have also increased. A report by the European Patent Office examining innovation trends in low-carbon energy technologies found that

[18] Peter Oldham et al., *Mapping the Landscape of Climate Engineering*, 372 PHIL. TRANS. ROYAL SOC'Y A 20140065 (2014).

inventions related to carbon capture, utilization, and storage represent a significant portion of international patent filings originating from universities and public research organizations in this field.[19]



The report highlights the growing role of academic and research institutions in developing technologies aimed at addressing climate change.

Despite the rapid growth of research and patent activity surrounding geoengineering technologies, scholars and policymakers have yet to reach a clear consensus regarding the appropriate intellectual property framework governing these innovations.[20]

C. Patent Law and Intellectual Property Frameworks

The authority to grant patents in the United States is rooted in the Constitution, which empowers Congress to promote the progress of science and the useful arts by securing, for limited

[19] EUROPEAN PATENT OFFICE & INTERNATIONAL ENERGY AGENCY, PATENTS AND THE ENERGY TRANSITION 45 (2021), https://iea.blob.core.windows.net/assets/b327e6b8-9e5e-451d-b6f4-cbba6b1d90d8/Patents_and_the_energy_transiton.pdf.
[20] Shobita Parthasarathy, *Geoengineering Patents Could Follow the U.S. Atomic Energy Model*, FORD SCHOOL OF PUBLIC POLICY (May 23, 2012), https://fordschool.umich.edu/news/2012/parthasarathy-geoengineering-patents-could-follow-us-atomic-energy-model.

times, exclusive rights to inventors for their discoveries.[21] The first U.S. patent statute was enacted in 1790, and the system has since undergone significant revisions, including the major reform introduced by the America Invents Act of 2011.[22] The AIA marked a shift from a "first-to-invent" to a "first-to-file" system, introducing prioritized examination procedures aimed at streamlining the patent process and reducing the backlog of applications.[23] The patent application process begins when an inventor submits an application to the U.S. Patent and Trademark Office (USPTO); the application must describe the invention in sufficient detail so that a person skilled in the art could replicate it.[24] A USPTO examiner, who specializes in the relevant field, conducts a thorough search of prior art—existing patents, publications, and other relevant disclosures—to determine if the invention is novel, non-obvious, and useful.[25] If, after potentially several rounds of evaluation, interviews with the applicant, and possibly appeals, the examiner finds that the invention meets these criteria, then the patent is granted.[26]

Obtaining a patent can be a lengthy and costly process. The average pendency—the time from filing to the patent's grant—is roughly thirty months, though it can vary depending on the complexity of the invention and the examination process.[27] Inventions that combine knowledge from multiple technological domains, such as many environmental and energy technologies, may face longer processing times because their complexity increases the information-processing

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[21] U.S. CONST. art. I, § 8, cl. 8.
[22] U.S. Patent & Trademark Off., *Milestones in U.S. Patenting*, https://www.uspto.gov/patents/milestones (last visited Aug. 9, 2026).
[23] Michael A. Carrier, *Post-Grant Opposition: A Proposal and a Comparison to the America Invents Act*, 45 U.C. DAVIS L. REV. 103, 107 (2011); U.S. Patent & Trademark Off., *First Inventor to File (FITF) Resources*, U.S. PATENT AND TRADEMARK OFFICE, https://www.uspto.gov/patents/first-inventor-file-fitf-resources (last visited Aug. 9, 2026).
[24] 35 U.S.C. § 112(a) (2012); *see also* Gregory N. Mandel, *Promoting Environmental Innovation with Intellectual Property Innovation: A New Basis for Patent Rewards*, 24 TEMP. ENVTL. L. & TECH. J. 51 (2005).
[25] Mandel, *supra* note 24, at 54.
[26] *Id.* at 61.
[27] U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-465, INTELLECTUAL PROPERTY: ASSESSING FACTORS THAT AFFECT PATENT INFRINGEMENT LITIGATION COULD HELP IMPROVE PATENT QUALITY (2013).

challenges for patent examiners.[28] The financial burden on applicants is also substantial, with total costs often exceeding $20,000, including attorney fees, pre-filing searches, drawing fees, and filing fees.[29] The primary benefit of a granted patent is the exclusive right it provides the inventor to exclude others from making, using, selling, or importing the patented invention for a period of twenty years from the filing date.[30] This exclusivity allows the patentee to recover the costs of research and development by licensing the patent or commercializing the invention, while also preventing others from free-riding on the innovation.[31] However, in exchange for this temporary monopoly, the patentee must fully disclose the invention to the public, contributing to the broader knowledge base and facilitating further innovation.[32]

Despite the benefits, the patent system is not without its costs and criticisms. The monopoly power granted by patents can lead to higher prices and restricted access to new technologies during the patent term. Additionally, the patent system can sometimes lead to "patent thickets," in which overlapping patent rights held by multiple owners require innovators to obtain licenses from numerous patentees before commercializing new technology, potentially creating barriers to innovation.[33] This can be problematic in fields like biotechnology and clean energy, where multiple patents might cover different aspects of a single technology, requiring innovators to navigate a complex web of licensing agreements.[34] Moreover, delays and inefficiencies in the patent application process can diminish incentives for inventors to seek patent

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[28] Kejia Zhu, Shavin Malhotra & Yaohan Li, *Technological Diversity of Patent Applications and Decision Pendency*, 51 RSCH. POL'Y 104364 (2022).
[29] Emilie Winckel, *Hardly a Black-and-White Matter: Analyzing the Validity and Protection of Single-Color Trademarks Within the Fashion Industry*, 66 VAND. L. REV. 1015, 1018 (2013).
[30] 35 U.S.C. §§ 154(a)(2), 271(a) (2012).
[31] Niels J. Melius, *Trolling for Standards: How Courts and the Administrative State Can Help Deter Patent Holdup and Promote Innovation*, 15 VAND. J. ENT. & TECH. L. 169 (2012).
[32] 35 U.S.C. § 112(a) (2012).
[33] Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, 1 INNOVATION POL'Y & ECON. 119, 119–20 (2001).
[34] Joseph A. Yosick, *Compulsory Patent Licensing for Efficient Use of Inventions*, 2001 U. ILL. L. REV. 1275, 1293.

protection, potentially slowing innovation.[35] While the patent system is designed to encourage innovation by providing inventors with a period of exclusivity, it is necessary to ensure that such exclusivity does not hinder further technological advancement or access to new technologies.

To support innovation and investment, the U.S. government has prioritized intellectual property protection for carbon capture and storage technologies. In fact, in 2022 the USPTO announced its new Climate Change Mitigation Pilot Program, which provides accelerated examination for patent applications "involving technologies that mitigate climate change by reducing greenhouse gas emissions."[36] Starting June 6, 2023, the program's eligibility requirements broadened to include innovations across various economic sectors to achieve net-zero greenhouse gas emissions.[37] Thus, tech companies developing carbon capture, utilization, and storage technologies may utilize the USPTO's new pilot program to accelerate their patent portfolios and obtain an exclusive edge in this increasingly growing field.

Some multilateral environmental regimes may contain provisions that are relevant to regulating or restricting aspects of geoengineering. For example, the Convention on Biological Diversity has adopted a broad *de facto* moratorium on most geoengineering technologies, while the London Convention/London Protocol has restricted marine geoengineering.[38] This gap in terms of multilateral governance concerning geoengineering has prompted some initiatives, such as the Carnegie Climate Governance Initiative,[39] the Solar Radiation Management Governance

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[35] Sarah Tran, *Prioritizing Innovation*, 30 WIS. INT'L L.J. 520 (2012).
[36] *USPTO Announces Launch of Climate Change Mitigation Pilot Program*, USPTO (June 3, 2022), https://www.uspto.gov/about-us/news-updates/uspto-announces-launch-climate-change-mitigation-pilot-program.
[37] *USPTO Expands and Extends Climate Change Mitigation Pilot Program*, USPTO (May 31, 2023), https://www.uspto.gov/about-us/news-updates/uspto-expands-and-extends-climate-change-mitigation-pilot-program.
[38] *Decision X/33: Biodiversity and Climate Change,* Convention on Biological Diversity (2010), https://www.cbd.int/decision/cop/?id=12299.
[39] *An Initiative of Carnegie Council for Ethics in International Affairs*, CARNEGIE COUNCIL FOR ETHICS IN INTERNATIONAL AFFAIRS (2026), https://www.c2g2.net/.

Initiative,[40] and an ongoing initiative beginning in 2019 by Switzerland and several other countries in the United Nations Environment Assembly for a resolution on geoengineering governance.[41]

Furthermore, a critical gap in the multilateral governance of geoengineering ventures is the absence of robust mechanisms to ensure public accountability and oversight over their research, development, patenting, and deployment. Nevertheless, existing international frameworks provide limited insights into how such oversight might be structured. The enhanced transparency framework of the Paris Agreement plays a crucial role in government-private sector engagement, particularly concerning industrial CCS or potential geoengineering-related activities. Developed countries must provide information on their policies, efforts to incentivize private climate financing, and technology development and transfer activities involving the private sector.[42] Interestingly, developing countries are not subject to the same reporting requirements for private sector involvement in their climate actions because they do not have mandatory obligations under the UNFCCC and its Paris Agreement to provide climate finance and technology to other developing countries.[43] However, the reporting requirements of the Paris Agreement do not currently cover information about private sector lobbying and advocacy efforts related specifically to geoengineering, both nationally and internationally.

While frameworks offer avenues for shaping a responsible trajectory for the development, patenting, and deployment of geoengineering solutions, there is a pressing need for more

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[40] *Putting Developing Countries at the Centre of the SRM Conversation*, THE DEGREES INITIATIVE (2022), https://www.srmgi.org/.
[41] Sara Stefanini, *Switzerland Puts Geoengineering Governance on UN Environment Agenda*, CLIMATE HOME NEWS (Feb. 26, 2019), http://www.climatechangenews.com/2019/02/26/swiss-push-talk-geoengineering-goes-sci-fi-reality/.
[42] Decision 18/CMA.1, *Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement*, U.N. Doc. FCCC/PA/CMA/2018/3/Add.2 (Dec. 15, 2018), https://unfccc.int/sites/default/files/resource/cma2018_3_add2_new_advance.pdf.
[43] *Id.*

transparent and accountable governance structures to safeguard collective interests, prevent undue concentrations of power, and address environmental and national security concerns. One way to evaluate potential governance models for geoengineering is to examine how other technologies with significant societal and security implications have been regulated. Both atomic energy and commercial space activities required legal regimes capable of balancing innovation incentives with public oversight and national security protections. Among these analogous sectors, atomic energy offers a particularly instructive case study, as its development has historically required robust governance frameworks to manage the dual-use risks, national security implications, and commercialization challenges inherent in the technology.

D. Atomic Energy Regulation and Patent Restrictions

Nuclear power, which provides about 10% of global electricity (and nearly 20% in advanced economies), has long been a major source of carbon-free energy that supports grid stability and decarbonization, but it faces challenges from high upfront costs, long construction timelines, competition from faster-to-deploy options like natural gas and renewables, and public opposition, all of which risk increasing carbon emissions.[44] Since the mid-1950s, the United States has increasingly relied on private industry for nuclear power generation, and most commercial reactors today are privately owned, producing a more decentralized nuclear sector than in many other countries.[45]

The U.S. Department of Energy (DOE), established in 1977 amid an energy crisis, consolidated various agencies such as the Atomic Energy Commission and the Energy Research

[44] Brent Wanner & Ryota Taniguchi, *Nuclear Power*, INTERNATIONAL ENERGY AGENCY (July 11, 2023), https://www.iea.org/energy-system/electricity/nuclear-power.
[45] *US Nuclear Power Policy*, WORLD NUCLEAR ASSOCIATION (Feb. 2023), https://world-nuclear.org/information-library/country-profiles/countries-t-z/usa-nuclear-power-policy.aspx.

and Development Administration to enhance policy coordination.[46] It oversees programs on nuclear energy, fossil fuels, hydropower, wind, and solar power, and manages national laboratories, notably the Idaho National Laboratory.[47] Additionally, the DOE sponsors extensive basic and applied research, including civilian nuclear energy initiatives, with a focus on energy independence, emission reduction, and meeting electricity demand.[48] Within the DOE, the Office of Nuclear Energy administers federal initiatives supporting civilian nuclear power, including research on advanced reactor designs, fuel cycle innovations, and public/private partnerships to develop new nuclear facilities.[49] Additionally, established in 1999 as energy concerns resurfaced, the Nuclear Energy Research Initiative (NERI) aimed to address key challenges to nuclear power expansion, including capital costs, waste disposal, and proliferation risks.[50] These comprehensive initiatives reflect a government commitment to addressing these barriers in expanding nuclear energy, indicating a willingness to collaborate with the private sector to overcome challenges.

As the atomic energy sector became increasingly commercialized, the complex issue of patenting arose as an attempt to find a balance between public and private interests. The intersection of patents and atomic energy is salient in the context of the Atomic Energy Act of 1946.[51] The key conflict arises between the concepts of national security and the protection of private property rights through the patent system. The patent system, which requires detailed disclosure of inventions, collided with the need for secrecy in certain atomic energy-related inventions during the early stages of the atomic age.[52] During World War II, private patent

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[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] U.S. Envtl. Prot. Agency, *Summary of the Atomic Energy Act*, INTERNET ARCHIVE (Mar. 20, 2025), https://web.archive.org/web/20250320191046/https://www.epa.gov/laws-regulations/summary-atomic-energy-act.
[52] James R. Newman & Byron S. Miller, *Patents and Atomic Energy*, 12 LAW & CONTEMP. PROBS. 746 (1947).

applications relevant to national security were held secret, but this approach was only a temporary and partial solution.[53] Congress was therefore confronted with a difficult policy choice: whether to prioritize the protection of patent property rights or to limit those rights in order to safeguard national security.[54]

The Atomic Energy Act includes extensive provisions governing patents; among the most significant are restrictions barring patents for inventions whose sole use is in the production of fissionable material or the application of atomic energy to military weapons, as well as provisions requiring the revocation of previously granted patents in these areas with payment of just compensation to affected patent holders.[55] The Act granted the Atomic Energy Commission exclusive property rights over all fissionable materials, regardless of their origin, and prohibited private ownership or transactions involving such materials.[56] The Act further prohibited any person from manufacturing, acquiring, or dealing in devices that used fissionable material or atomic energy for military weapons unless authorized by the Atomic Energy Commission, which was tasked with conducting research, experimentation, and development related to military applications under the direction of the President and the armed forces.[57]

Oversight of the U.S. nuclear industry is carried out by the NRC, an independent federal agency that regulates nuclear reactors, fuel-cycle facilities, and the transport, storage, and disposal of spent nuclear fuel.[58] Established in 1974, the NRC assumed regulatory responsibilities from the abolished Atomic Energy Commission (AEC), while the AEC's promotional activities were

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[53] Laurent Belsie, *WWII Policy Kept Patents Secret, Slowed Innovation*, NATIONAL BUREAU OF ECONOMIC RESEARCH (July 2019), https://www.nber.org/digest/jul19/wwii-policy-kept-patents-secret-slowed-innovation.
[54] Newman & Miller, *supra* note 52, at 747.
[55] Casper W. Ooms, *The Patent Provisions of the Atomic Energy Act*, 15 U. CHI. L. REV. 822, 823 (1948).
[56] *Id.* at 825.
[57] *Id.*
[58] *US Nuclear Power Policy*, WORLD NUCLEAR ASSOCIATION (Feb. 2023), https://world-nuclear.org/information-library/country-profiles/countries-t-z/usa-nuclear-power-policy.aspx.

transferred to the Energy Research and Development Administration (later the U.S. DOE).[59] The NRC plays a crucial role in licensing operating nuclear plants and reviewing proposals for new ones, employing expedited procedures within a strict regulatory framework.[60] The commission encourages the use of combined construction and operating licenses (COL) and early site permits (ESPs) to facilitate the approval process for new capacity.[61] Thus, while the regulatory framework ensures safety, security, and adherence to non-proliferation measures, the private sector contributes to the growth and development of nuclear energy within the boundaries set by the Atomic Energy Act and regulatory bodies like the NRC. Collaboration between the government and private industry is crucial for addressing challenges, promoting technological advancements, and meeting energy demands.

E. Space Law and Commercialization

The launch of Sputnik in 1957 represented humanity's first venture beyond Earth's atmosphere, and for many years afterward space activity was dominated primarily by nation-states.[62] During the early years of space activity, commercial participation was largely limited to satellite communications.[63] Remote sensing technologies have existed in various forms since the mid-twentieth century, with satellite-based applications emerging in the early space age and expanding significantly in scope and capability in the decades that followed.[64] In recent decades, the space sector has experienced increased globalisation, with a growing number of public and

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[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Joshua Hampson, *The Future of Space Commercialization*, House Science Committee (Jan. 2017), https://www.niskanencenter.org/wp-content/uploads/old_uploads/2017/01/TheFutureofSpaceCommercializationFinal.pdf.
[63] David J. Whalen, *Communications Satellites: Making the Global Village Possible*, NASA (Nov. 30, 2010), http://history.nasa.gov/satcomhistory.html.
[64] Nat'l Aeronautics & Space Admin., *Remote Sensing*, NASA EARTH OBSERVATORY (Sept. 17, 1999), https://science.nasa.gov/earth/earth-observatory/remote-sensing/ (last updated Nov. 14, 2025).

private actors entering space-related activities and expanding commercial applications beyond their historically state-dominated origins.[65] Around the same time, the U.S. government ended the intentional degradation of Global Positioning System (GPS) signals available to civilian users.[66] Removing this restriction allowed precise navigation and timing data to be widely used across many industries,[67] ultimately enabling the development of modern personal navigation technologies.[68]

As outer space becomes more congested and commercially active, and as more nations develop space capabilities, the existing U.S. regulatory and security framework is increasingly ill-suited to manage the challenges posed by expanding private launch services and commercial satellite operations.[69] Finding an appropriate model for regulation in this sector is essential, especially considering the immense size of the space economy, as in 2015 alone, the global market amounted to $323 billion.[70]

Perhaps the most important legacy application of outer space for Americans is national security. The United States relies heavily on satellites to support global power projection and deterrence, as they provide real-time intelligence, enable worldwide communications between

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[65] ORG. FOR ECON. COOP. & DEV., THE SPACE ECONOMY AT A GLANCE 2014 18 (2014), https://doi.org/10.1787/9789264217294-en.
[66] *Selective Availability*, GPS.GOV (Sept. 23, 2016), http://www.gps.gov/systems/gps/modernization/sa/.
[67] U.S. Department of Commerce, *U.S. Secretary of Commerce William M. Daley Applauds Decision to Make Global Positioning System More Accurate for Civilian Users*, GPS.GOV (May 1, 2000), http://www.gps.gov/systems/gps/modernization/sa/daley/.
[68] Glenn Fleishman, *How the iPhone Knows Where You Are*, MACWORLD (Apr. 28, 2011), http://www.macworld.com/article/1159528/smartphones/how-iphone-location-works.html.
[69] Joshua Hampson, *The Future of Space Commercialization*, House Science Committee (Jan. 2017), https://www.niskanencenter.org/wp-content/uploads/old_uploads/2017/01/TheFutureofSpaceCommercializationFinal.pdf.
[70] SPACE FOUND., THE SPACE REPORT 2016: THE AUTHORITATIVE GUIDE TO GLOBAL SPACE ACTIVITY (2016), https://www.spacefoundation.org/2016/06/22/space-foundation-report-reveals-global-space-economy-at-323-billion-in-2015/.

forces and bases, and support highly accurate navigation systems across land, sea, and air.[71] Military capabilities that the United States has come to rely on, from remotely piloted drones to precision weaponry, all rely on satellites.[72] To manage this, the U.S. Command has 38,000 airmen based around the world working to secure access to national security space assets.[73] Thus, prioritizing national security in this sector is highly important.

Additionally, there have been shifts in who can participate in the market. There is an ability to fit more capability into a smaller satellite that opens outer space to actors that previously were priced out of the market, which is why small, affordable satellites are increasingly pursued by companies or organizations that cannot afford to launch larger traditional satellites.[74] Today, the commercial space sector includes services such as satellite communications, broadcasting, and data transmission, which support a wide range of civilian, commercial, and government activities.[75] The growth of the space market has sparked growing interest in regulation. With private companies desiring to launch hundreds of new satellites, the U.S. government is looking at how best to undertake space traffic management.[76] This growth in the outer space industry emphasizes the importance of an effective patent law system for outer space.

Since the 1980s, commentators have prophesized that a new era of human space exploration was imminent and have forecasted that the role of government agencies in space operations was set to diminish and private enterprises would fill the resultant void, at least

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[71] DEF. INTEL. AGENCY, CHALLENGES TO SECURITY IN SPACE 41–43 (2022), https://www.dia.mil/Portals/110/Documents/News/Military_Power_Publications/Challenges_Security_Space_2022.pdf.
[72] DEF. INTEL. AGENCY, *supra* note 71.
[73] *Id.*
[74] Mark Betancourt, *Rise of the CubeSats*, AIR & SPACE SMITHSONIAN (Jan. 20, 2016), http://www.airspacemag.com/space/rise-cubesats-180957827/?no-ist.
[75] DEF. INTEL. AGENCY, *supra* note 71.
[76] Mike Gruss, *Washington Weighs an FAA Role in Managing Space Traffic*, SPACE NEWS (Dec. 3, 2015), http://spacenews.com/might-the-faa-inherit-the-space-traffic-management-role/.

regarding activities in Low-Earth Orbit ("LEO").[77] This is becoming a reality. On June 4, 2010, Space Exploration Technologies Corporation ("SpaceX") successfully launched the Falcon 9 rocket for the first time from Cape Canaveral Air Force Station in Florida.[78] On June 28, 2010, the Obama administration unveiled the United States' new space policy, which indicates that NASA no longer plans to send humans to the Moon.[79] The new space policy effectively halted NASA's planned return to the Moon (known as the Constellation Program) and instead put a substantial emphasis on procuring commercial launch services to meet NASA's needs, including crew and cargo missions to the International Space Station.[80]

PART II

A. Patent Governance Challenges in Geoengineering

Drawing on these comparative insights, the analysis now shifts to the governance challenges posed by geoengineering, with particular attention to how patent regimes and commercialization may reshape the risks and incentives surrounding climate intervention technologies. These risks are further exacerbated by the rise of patenting and the commercialization of geoengineering ventures. Patents provide inventors and companies with exclusive rights to use, make, sell, and license their innovations, thereby introducing powerful economic incentives into the development and potential deployment of climate intervention technologies. Wealthy individuals or corporations holding patents related to CDR technologies could profit not only from patent royalties but also by selling carbon removal units in carbon

[77] Barbara Luxenberg, *Protecting Intellectual Property in Space*, *in* PROCEEDINGS OF THE TWENTY-SEVENTH COLLOQUIUM ON THE LAW OF OUTER SPACE 172, 172 (1985), https://digitalcommons.unl.edu/spacelawdocs/6/.
[78] Kevin Bullis, *Successful Launch of SpaceX Rocket,* MIT TECH. REV. (June 4, 2010), https://www.technologyreview.com/2010/06/04/203030/successful-launch-of-spacex-rocket/.
[79] NAT'L AERONAUTICS & SPACE ADMIN., THE VISION FOR SPACE EXPLORATION (Feb. 2004), https://www.nasa.gov/wp-content/uploads/2023/01/55583main_vision_space_exploration2.pdf.
[80] Jacqui Goddard, *Nasa Reduced to 'Pipe Dreams' as Obama Cancels Moon Flights*, THE TIMES (Feb. 2, 2010), https://www.thetimes.co.uk/article/nasa-reduced-to-pipe-dreams-as-obama-cancels-moon-flights-2hlw29txvrf.

trading markets.[81] Consequently, decisions regarding permitting, intellectual property rights, and environmental regulations may directly influence the viability and profitability of geoengineering ventures.

If geoengineering techniques move toward actual deployment, the presence of patents held by individuals and private companies could mean that decisions over the climate commons are increasingly influenced by private actors. For example, one geoengineering patent granted to Professor Ian S. F. Jones, founder and CEO of Ocean Nourishment Corporation, includes a provision within his "ocean nourishment" method—the introduction of urea into seawater to stimulate marine ecosystems—that asserts legal ownership over fish harvested from an ocean region treated through the fertilization process.[82] This example illustrates how intellectual property claims in geoengineering technologies may extend beyond technological processes and into broader environmental resources.

Thus, as geoengineering ventures continue to expand alongside the growing urgency of the climate crisis, establishing clear governance structures and regulatory frameworks will become increasingly necessary to safeguard both public and private interests. Despite efforts to streamline patent processes for emerging climate technologies, a single set of internationally binding treaty rules specifically governing geoengineering activities and the corruption risks they may pose does not currently exist.[83] The absence of such a framework creates uncertainty surrounding the patenting process and the potential implementation of technologies that may play a role in addressing global climate risks.

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[81] TRANSPARENCY INT'L, CLIMATE GEOENGINEERING TECHNOLOGIES: CORRUPTION AND INTEGRITY GAPS (June 3, 2022), https://www.transparency.org/en/publications/climate-geoengineering-technologies-corruption-integrity-gaps.
[82] ETC GRP., GEOPIRACY: THE CASE AGAINST GEOENGINEERING 29 (2010), https://www.cbd.int/doc/emerging-issues/etcgroup-geopiracy-2011-013-en.pdf.
[83] TRANSPARENCY INT'L, *supra* note 81.

B. Lessons from Atomic Energy

The regulatory frameworks and strategies applied to the atomic energy sector could offer valuable insights for the governance of CDR technologies or SRM technologies. The decentralized structure with substantial private participation seen in the ownership and operation of nuclear reactors in the United States could inform considerations for involving the private sector in the deployment of climate engineering technologies. The role of the U.S. DOE in overseeing programs and initiatives aligns with the need for comprehensive governance structures for emerging technologies. Additionally, the NRC's balance between industry needs and strict regulatory oversight, including streamlined approval processes, could provide a model for addressing the challenges of balancing innovation incentives with effective oversight in the context of CDR or SRM technologies. Moreover, the meticulous focus on protecting national security and property rights through patent provisions, as seen in the Atomic Energy Act, could inspire considerations for intellectual property and regulatory measures in the development and deployment of climate engineering solutions. However, the specific characteristics and risks associated with CDR and SRM technologies would necessitate careful adaptation of these frameworks to ensure they adequately address the unique challenges posed by climate engineering.

Additionally, there are some differences between the sectors to consider. For example, unlike the more established nuclear industry, CDR and SRM technologies are relatively novel, and public perception plays a crucial role. Engaging the public in decision-making processes, addressing concerns, and ensuring transparency present unique challenges.[84] Public engagement in climate adaptation is the overarching process of involving the public in collective decision making around adapting to climate change, and the acts of consultation, participation, communication, and involvement are but each one method or means to that process.[85] Thus, while it provides some valuable insights, the atomic energy sector's experiences may not fully capture the need for proactive public engagement in the context of climate engineering.

C. Lessons from Space Commercialization

The private space industry is projected to increase to more than US$1 trillion by 2040, attracting both private and public investment.[86] Low Earth orbit (LEO) hosts the largest share of satellites currently in operation, with roughly 7,932 satellites globally, many of which support commercial activities.[87] With these rapid increases in funding and activity, private space companies can look to patents to protect their technologies. The United States' patent system, in particular, anticipates some of the challenges that arise with inventions that are used in outer space.

In the context of patent infringement, where jurisdictional norms typically require the infringing product to be made, used, or sold within a specific territory, 35 U.S.C. § 105 provides a distinctive solution by treating inventions made, used, or sold in outer space on U.S.-controlled space objects as if they occurred within the United States for patent law purposes.[88] Thus, this

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[84] Christopher L. Cummings et al., *Public Perceptions of Climate Geoengineering: A Systematic Review of the Literature*, 73 CLIMATE RSCH. 247, 247–64 (2017).
[85] Susanne C. Moser & Courtney Pike, *Community Engagement on Adaptation: Meeting a Growing Capacity Need*, 14 URB. CLIMATE 111, 111–15 (2015), https://doi.org/10.1016/j.uclim.2015.06.006.
[86] *Investing in Space Exploration*, MORGAN STANLEY (July 2020), https://www.morganstanley.com/ideas/investing-in-space.
[87] Charles E. Maurer, *Private Space Activity and the Advantages of U.S. Patents for Protecting Space Inventions,* FOLEY & LARDNER LLP (Oct. 24, 2023), https://www.foley.com/insights/publications/2023/10/private-space-activity-advantages-us-patents/.
[88] 35 U.S.C. § 105 (2022).

statute enables infringement claims for U.S. patents related to space inventions, even if manufacturing or use occurs in space. While it excludes space objects registered in foreign states, the U.S., with its active space industry, remains a strategic focus for developing patent portfolios. To navigate international differences, robust patent strategies should include U.S. filings and adhere to standard drafting practices, ensuring claims are not solely dependent on space-based use. In the expanding era of private space endeavors, securing patents becomes crucial for businesses aiming to distinguish themselves, safeguard technology investments, and achieve success in this competitive space race.

Additionally, there are several key regulations to explore. Under the 1975 Convention on the Registration of Objects Launched into Outer Space (hereinafter the "Registration Convention"), which implements the Outer Space Treaty's registration requirements, the "launching state" is responsible for registering a space object.[89] The Outer Space Treaty underscores that States bear international responsibility for both governmental and non-governmental activities in outer space.[90] Additionally, activities by non-governmental entities in outer space necessitate authorization and supervision by the relevant State Party to the Treaty.[91] The combined framework of the Registration Convention and the Outer Space Treaty establishes a model of State responsibility encompassing actions by both States and non-governmental entities. According to the concept of "direct responsibility" outlined in the Outer Space Treaty, States are answerable for the activities of their non-governmental entities in outer space. In instances where private enterprises secure launch services abroad while adhering to their home

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[89] Convention on Registration of Objects Launched into Outer Space art. II(1), Jan. 14, 1975, 28 U.S.T. 695, T.I.A.S. No. 8480, https://www.faa.gov/about/office_org/headquarters_offices/ast/media/Conv_Regi_Objects_Launched.pdf.
[90] *Id.*
[91] *Id.*

State's regulations, a persuasive argument arises that the State effectively assumes the role of the private enterprise in procuring launch services, notwithstanding the private enterprise's execution of contracts and management of financial transactions.[92]

Fundamental aspects of international space law, including treaties like the UN Outer Space Treaty and the UN Space Object Registration Convention, could potentially apply to the deployment of sun-deflecting mirrors in space for SRM. The Outer Space Treaty, which establishes the principles governing the exploration and use of outer space, emphasizes the peaceful use of space and prevents the appropriation of celestial bodies by any one nation. Regarding the Treaty's relevance to major geoengineering ventures, if the deployment of sun-deflecting mirrors involves activities in outer space, such as placing objects in orbit, the Outer Space Treaty could apply, and it might ensure that such activities are conducted for peaceful purposes and do not result in national appropriation of outer space. This principle could be adapted to prevent any nation or entity from asserting exclusive control over land-based geoengineering projects. It promotes shared responsibility and international cooperation in addressing climate challenges. Additionally, The UN Space Object Registration Convention, which establishes an international registry for space objects, requiring States to register the objects they launch, could be relevant if sun-deflecting mirrors are considered space objects. States deploying these mirrors might be obligated to register them, promoting transparency and facilitating the identification of responsible parties. Furthermore, these principles and conventions could serve as a foundation for developing regulatory frameworks applicable to land-based geoengineering projects, drawing insights from analogous considerations in the governance of atomic energy, while necessitating specific provisions tailored to address the distinct

[92] *Id.*

challenges posed by terrestrial interventions.

CONCLUSION

In examining the regulatory frameworks of atomic energy and the commercialization of outer space ventures, valuable insights emerge for addressing the challenges posed by emerging technologies like CDR and SRM. Both sectors, marked by historical significance, disruptive potential, and dual-use nature, have undergone regulatory evolution. In the atomic energy sector, the United States has demonstrated a decentralized structure with significant private participation in nuclear reactors, fostering collaboration between the government and private industry. The regulatory role of the U.S. DOE and the NRC offer a model for comprehensive governance, balancing industry needs with strict oversight. The Atomic Energy Act's patent provisions, emphasizing national security, provide a precedent for addressing intellectual property concerns. In the realm of outer space commercialization, the United States, faced with a growing space economy, has adapted its policies to include private enterprises. The U.S. patent system uniquely addresses infringements related to inventions used in outer space, offering insights for protecting technologies in the competitive space race. Lessons from international space law, including the Outer Space Treaty and related conventions, provide a framework for addressing liability and registration concerns in space activities.

Comparatively, both sectors showcase the importance of collaboration between the government and private industry, regulatory adaptability to technological advancements, and the need for balancing innovation incentives with effective oversight. Lessons from atomic energy, such as the balance between security and private property rights, and the strategic use of patent provisions, can inform the governance of geoengineering technologies. However, unique challenges in geoengineering, such as public perception and proactive engagement, emphasize the need for tailored regulatory approaches. Thus, while the analogous sectors chosen in this research paper provide historical examples of approaches to similarly complex ethical and regulatory concerns, the sector of geoengineering poses a novel set of challenges. A specialized patent system for geoengineering should include an expedited review process and separate application procedures managed by experts in the field. This would accelerate review times and allow the USPTO to develop the expertise needed to assess these complex patents. Given the broad and evolving nature of geoengineering technologies, a dedicated office would streamline approvals and help prevent overly broad patents, reducing the risk of patent thickets.

In conclusion, a comprehensive approach at the national level is crucial to address the challenges posed by geoengineering. This involves implementing measures such as patent revocation and compulsory licensing to mitigate market dominance and profit incentives, thus safeguarding the public interest. The research on analogous sectors suggests that governments should establish stringent criteria for the inclusion of geoengineering in their Nationally Determined Contributions (NDC), ensuring compliance with public access and participation rules rooted in international environmental and human rights law. Additionally, emphasizing free and prior informed consent from affected communities is paramount, serving as a foundational requirement for official authorization. Moreover, establishing public accountability remedies, including access to administrative and judicial avenues and robust stakeholder participation, will be essential for comprehensive and efficient oversight of geoengineering endeavors. While promising, geoengineering ventures will require careful governance and regulation to ensure needs from the private and public sectors are met.