

UNIVERSITY OF FLORIDA
PHI ALPHA DELTA



Spring 2026

LEGAL REVIEW

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**University of Florida Phi Alpha
Delta Legal Review**

Vol. II

Spring 2026

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**Environmental Health as a
Prerequisite to Life, Liberty, and Due
Process**

Riley Brinser '28

Spring 2026

Abstract

This article addresses the constitutional rights of life and liberty and how environmental harm, specifically when created by governing bodies, increasingly threatens both. The introduction examines the overall relationship between the rights to liberty and life and environmental conditions, while providing background on the constitutional foundations of these rights. Section I presents the doctrinal framework, defining life, liberty, and bodily autonomy according to constitutional doctrine and legal scholarship. Section II then looks at the doctrine surrounding bodily integrity, citing cases such as *Rochin v. California* and *Washington v. Glucksberg*. Section III then goes on to assess cases that have dealt with state-created environmental harm, looking through the lenses of *Guertin v. Michigan*, *Helling v. McKinney*, and *Robinson Township v. Pennsylvania*. Finally, Section IV looks at both limitations and judicial roles in terms of how this may be defined. In conclusion, these sections will support the argument that environmental health is not necessarily a freestanding entitlement but instead a necessary prerequisite for a meaningful exercise of life, liberty, and the pursuit of happiness.

I Introduction

As established in the United States' Declaration of Independence, the unalienable rights of life, liberty, and the pursuit of happiness have been the guiding principle of American constitutional thought since the U.S.'s conception.¹ However, these rights are only applicable if people are able to live in a safe and free environment, defined here as conditions that ensure clean air and water, and protection from harmful or toxic conditions. Environmental health, such as clean air, water, and protection from toxic exposure, is a key component to the realization of these rights. Severe environmental harm, created by government actors under the law, which will be referred to as the "state," may constitute a deprivation of liberty without due process. There is no need to argue for new rights that specifically target environmental situations, but instead to apply a doctrinal perspective to modern circumstances, to allow the government to respond to high-threat, state-caused harms.

The scope of this discussion includes a particular view of what could be

¹U.S. Continental Congress, Declaration of Independence, July 4, 1776, National Archives, <https://www.archives.gov/founding-docs/declaration>.

considered constitutionally relevant. When thinking about these actions, it is important to distinguish between those of private harm, natural disasters, unavoidable risks, and what is being discussed in this article. The harm discussed in this article refers to that deliberately perpetrated by the state, with severe consequences for its people. In a review of Leonard O. Gostin's second edition of his book on public health law, Elizabeth Weeks Leonard echoes this sentiment, "...law can be an essential tool for creating conditions for people to live healthier and safer lives."² This article looks to explore how courts may become involved with these issues, staying within their judicial boundaries, while still continuing to protect and serve the people.

Additionally, this article considers that environmental regulations of any scale did not exist at the time of the Constitution's publication in America. This is a problem that often evolves, and thus legislation around specific cases will have to as well. In terms of judicial restraint, there are a few qualifications that harm must reach. This article turns to the Constitution when the state deliberately creates or knowingly maintains severe, prolonged environmental conditions that pose a risk to bodily integrity.

II Framework

The definition of life has been actively debated by philosophers and scientists alike. For the sake of this argument, the concept of life can be divided into two basic but distinct categories. The first being the act of survival. In its most basic concept, life is the straightforward avoidance of death, the ability to preserve.³ This would include tangible, physical needs of the body, such as food, water, and rest. The other is a meaningful existence that supports both personal sovereignty and autonomy. This ties to liberty, which has been interpreted by the judicial system as protection of certain fundamental interests. Following this definition, bodily integrity is inherently a fundamental part of both life and liberty. One may not be able to fulfill any of the previously stated requirements if they lack autonomy over their own physical body. For example, the Fourteenth Amendment was officially ratified in 1868 to guarantee all people equal protection and the right to due process under the law.⁴ The due process clause of the Fourteenth Amendment applied the Constitution to

²Leonard, "Book Review: Lawrence O. Gostin, *Public Health Law: Power Duty, Restraint.*" *Public Health Law For A Brave New World*, 2009

³John Locke, *Second Treatise Of Government*, (1689), chapter 2, section 6.

⁴U.S. Constitution, Amendment XIV

the concepts of "life" and "liberty," offering protection from state overreaching. One may not exercise life and liberty the way it was envisioned in the 1700s without the protection from the state established in the 1800s.

The Supreme Court has interpreted liberty to include the protection of certain fundamental interests, particularly those involving personal autonomy and bodily integrity. Under this framework, bodily liberty is not merely a component of liberty, but a necessary condition for both life and liberty to be fully realized. Without control over one's own physical body, an individual cannot secure basic survival in a fundamental sense or exercise the autonomy for a meaningful existence. Specific examples of this include the decision in *Rochin* and *Glucksberg*.

In the Fourteenth Amendment, the doctrine of substantive due process established that the government may not infringe upon fundamental rights without sufficient justification.⁵ At the same time, the Court has been cautious in expanding these protections, emphasizing judicial restraint and the need for careful recognition of new rights. For example, the case of *Glucksberg* is a turning point as the court resulted in a unanimous refusal of expanding due process. The question, however, is not whether a new environmental right should be recognized, but whether state-created environmental harm can be understood as an infringement on bodily integrity and the fundamental rights of life and liberty. The evolution of concepts such as substantive due process finds continuity in the prolonged prioritization of judicial restraint. Over time, there have been similar standards needed in order for courts to step in, such as a high bar when it comes to the level of harm being presented. This standard reinforces the claim that bodily integrity has always been a priority for the courts, regardless of the decade in which cases were being held.

III Bodily Integrity Doctrine

The concept of bodily autonomy was explicitly approached in 1952 in the case of *Rochin v. California*.⁶ Three state officers, with an assumption that the petitioner was selling narcotics, forced their way into the Rochins' home. When asked about two pill capsules, Rochin ingested them, leading to a struggle between himself and the officers. Rochin was eventually taken to the hospital, where the officers had his stomach pumped against his consent, leading to the

⁵U.S. Const. amend. XIV, § 1.

⁶*Rochin v. California*, 342 U.S. 165, 172 (1952).

vomiting of two morphine capsules. At the state level, Rochin was convicted of possession of morphine. However, when the case was eventually granted a certiorari by the U.S. Supreme Court, it ultimately reversed the conviction. The Supreme Court unanimously reversed the decision eight to zero, with Justice Sherman Minton not participating. The unanimous decision was rooted in the idea that what happened to Rochin was “conduct that shocks the conscience,” interpreting that personal protections are foundational for the concept of liberty. Conduct that falls under this jurisdiction is that which is considered grossly unjust to the observer. In the example of *Rochin*, it is a due process violation; one that took away Rochin’s autonomy and integrity. The ruling of *Rochin* protects against “conscience-shocking” state-inflicted bodily harm, creating fundamental fairness in how the state and its people may interact. Severe, intentional, state-created harm implicates the same constitutional interest in bodily integrity.

There is then the question of what the limits are in terms of fundamental rights. This is where the case of *Washington v. Glucksberg* comes into conversation.⁷ In 1997, the Supreme Court unanimously decided that a right to assisted suicide was not protected through due process. The key argument for this decision is found through a test: the examination of whether a right is based on the nation’s history and tradition, as well as the court requiring a detailed description of the asserted fundamental interest. The requirement for the right to be based on such things is particularly relevant here, as it limits the recognition of emerging claims, such as those related to environmental harm. Due to the modernity of environmental issues, courts may hesitate to acknowledge them as fundamental rights. The Court’s decision to exercise judicial restraint and uphold preexisting decisions demonstrates the reluctance to extend constitutional protections beyond established doctrine. The court also made the decision to practice judicial restraint, choosing to uphold preexisting Washington laws. When taking these principles in the context of environmental harm, the critical question becomes whether the right of protection against deliberate state-caused bodily intrusion is deeply rooted.

This framework is particularly relevant to this article because it illustrates the constraints placed on emerging constitutional claims. Rights related to environmental harm may struggle to meet the *Glucksberg* standard if present as new rights. The Court’s emphasis on history, tradition, and judicial restraint reflects a broader reluctance to extend constitutional protections beyond those

⁷*Washington v. Glucksberg*, 521 U.S. (1997)

already established.

However, *Glucksberg* does not foreclose the argument advanced here. Rather than asserting a new environmental right, this analysis instead asks whether existing, historically grounded rights, specifically the rights to life, liberty, and bodily integrity, are infringed when the state deliberately creates or maintains harmful environmental conditions. Framed in this way, the claim aligns with recognized constitutional protections, suggesting that environmental harm may be understood not as a new category of rights, but as a modern violation of long-established constitutional principles.

IV State-Created Harm

As seen in *Rochin*, due process protects against conscience-shocking state-created bodily intrusion. Furthermore, *Glucksberg* gives guidelines for historical, tradition-based limitations. The question is now whether deliberate state-created environmental harms can be considered under the same constitutional protection.

Firstly, it is important to establish what harm can be considered as state-created. While the Court has not articulated a single, unified standard for such harm in the environmental context, this analysis draws from broader substantive due process principles concerning state action and bodily integrity. In particular, courts have distinguished between harm from private and state actors, often requiring some level of deliberate action or knowing exposure by the government. A specific case in which this practice was implemented was that of *Deshanney v. Winnebago County Department of Social Services*, in which it was explicitly stated that the state does not have a responsibility to protect the people from private harm, but when people are held in custody or if the harm directly stems from the state, it is then determined it is “state-created.”⁸

In 2019, during *Guertin v. Michigan*, the state’s role in the Flint water crisis was addressed through the Sixth Circuit Court of Appeals.⁹ Officials knowingly switched citizens’ drinking-water sources to lead-contaminated water. The city of Flint has a high population rate of Black and low-income residents who acted as the plaintiffs. These communities suffered a direct threat to physical health through deliberate government action and negligence. The aftershocks of the water contamination in Flint are still seen to this day, with

⁸*Deshanney v. Winnebago County Department of Social Services*, 489 U.S. (1989)

⁹*Guertin v. Michigan*, F.3d 907

many children having developmental issues, and the elderly running risks of cardiovascular issues. This forced exposure was recognized by the Sixth Circuit Court as an infringement on bodily integrity, recalling the principle established in *Rochin* of “shocking the conscience.” While *Rochin* lays out prohibited physical intrusion to an individual, *Guertin* demonstrates that inescapable exposure can infringe on the same interest. *Guertin* is a direct example of how state-created environmental harm, for example, the contaminated drinking water found in Flint, is more than just a policy failure, but a violation of liberty.

Helling v. McKinney also reflects on how inescapable exposure infringes upon the right to due process.¹⁰ In 1993, a Nevada state prisoner sued his warden and other prison staff for a violation of the Eighth Amendment, arguing that his involuntary exposure to high levels of secondhand smoke constituted cruel and unusual punishment. The Court, recognizing McKinney’s claim, held that constitutional protections extend to future health risks, even where there is no immediate threat present. Therefore, the court interprets the Eighth Amendment to prohibit not only physical punishment, but also conditions that pose an unreasonable risk to an individual’s health or safety. This reflects a broader principle that the state may not knowingly subject individuals to conditions that pose serious harm, particularly when there is no opportunity for an individual to avoid.

While *Helling* rises under the Eighth Amendment rather than the Fourteenth, its reasoning is necessary for analysis. Both provisions are concerned with limits on state power and the protection of bodily integrity. *Helling* extends the concern of state intrusion under due process to environmental conditions that, even indirectly, are state-created, prolonged, and unavoidable.

Lastly, the 2013 case *Robinson Township v. Commonwealth* in Pennsylvania provides a significant example of how constitutional provisions may be used to enforce environmental protections. At issue was the scope of the state’s Environmental Rights Amendment, which guarantees the people’s right to clean air, pure water, and the preservation of natural resources. The Pennsylvania Supreme Court interpreted this provision as imposing an affirmative constitutional duty on the state to act as a trustee of public natural resources. In striking down portions of the challenged legislation, the Court held that the state could not override local zoning laws to permit industrial activities, such as hydraulic fracturing, in residential areas without violating its con-

¹⁰*Helling v. McKinney*, U.S. 25 (1993)

stitutional obligations. This decision reflects the principle that constitutional protections may impose structural limits on state action, particularly where government decisions expose communities to environmental harm.

Although *Robinson Township* arises under a state constitution rather than the federal Constitution, its reasoning is highly instructive. It demonstrates that courts are willing to interpret constitutional provisions as imposing enforceable limits on the state's ability to create or permit harmful environmental conditions. In doing so, the case reinforces the idea that environmental harm is not merely a matter of policy, but one with constitutional significance. This supports the present analysis by illustrating that environmental protection can be grounded in constitutional principles, even where those principles must be enforced through judicial review. While the federal Constitution does not contain an explicit environmental rights provision, *Robinson Township* suggests that similar reasoning may be applied through doctrines such as substantive due process when environmental harm implicates fundamental interests like bodily integrity, health, and the ability to safely inhabit one's environment.

V Limits and Judicial Roles

The court's role in this context is to enforce substantive rights, not to dictate broad policy outcomes. Judicial intervention is justified when fundamental rights are threatened by deliberate or unmanaged environmental conditions. The limiting principle of paternalism, or the concern that the state may overstep to prevent self-harm, serves as a natural check on judicial action.

Within these constraints, judicial action can still be meaningful. Through recognizing state-created environmental harm as a violation of substantive due process, courts can hold the federal and state governments accountable while respecting institutional boundaries. As seen in the previously mentioned cases, courts may protect bodily integrity and fundamental rights without creating new policy. Judicial review is able to serve as both a protective tool for the people and a check on governmental authority. As the decade progresses, it has become apparent that the conversation around environmental rights and legislation is still in a state of evolution. As recently as February of 2026, there were repeals made to the Mercury and Air Toxics Standards (MATS). The current administration has prioritized cost-effectiveness when approaching matters of quality of care, leaving out the human element.

VI Conclusion

Environmental health is constitutionally relevant as a prerequisite to liberty and life. Whenever the state is deliberately infringing on this, it is infringing on a promise to its people. Bodily integrity and due process both protect against state-harm, ensuring that the people are given the proper legal infrastructure to defend themselves. To continue, environmental justice highlights disparity in impacts, as seen in the case of the city of Flint, Michigan. Each case regarding environmental justice requires careful enforcement, as each case pertains to different regions and demographics.

Internationally, there is major legal progress being made as the U.N. and other governing bodies routinely meet to discuss environmental challenges, signaling a growing acknowledgement of the importance of environmental protection as a human right.¹¹ For example, throughout Western Europe, the EU has established doctrines such as the Zero Pollution Action Plan, which aims to address all major pollution concerns by 2030, and the Environmental Crime Directive, enforcing strict criminal laws on member states that perform acts such as waste dumping.¹² With these doctrines, among others, the EU has made substantial steps in improving both its citizens' quality of life and the quality of the physical world. In conclusion, the protection of people from state-created harm is not a new entitlement but instead a requirement for a proper exercise of life, liberty, and the true pursuit of happiness.

¹¹GA, UN. *UNGA Resolution on the Human Right to a Clean, Healthy and Sustainable Environment*. Resolution. United Nations General Assembly, 2024.

¹²EU, *European Commission on Energy, Climate Change, Environment. Environment Strategy*. European Union, 2021

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VARA and the Restriction of Destruction Rights in American Property Law

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Spring 2026

Abstract

The Visual Artists Rights Act of 1990 (VARA) represents one of the most significant departures from traditional United States property doctrine in modern statutory law. Historically, American law has privileged the rights of property owners to use, alter, transfer, or destroy their property with minimal interference. VARA partially withdraws those rights for certain works of visual art, yet it does so without articulating a coherent theory explaining when artistic integrity should supersede owner autonomy.

This article advances two claims. First, that VARA destabilizes traditional American property law by constraining the traditional right to destroy without reconstructing the doctrinal framework that gives property rights their coherence. Second, that graffiti and mural litigation most clearly exposes this instability since those disputes force courts to determine whether cultural valuation can condition private ownership. The statute ingrains a moral-rights logic within a dominion-based property system without clarifying how the two are to be reconciled. This article argues that clearer limits are necessary, particularly through judicial clarification of when protection attaches and more defined doctrinal standards for evaluating “recognized stature.” It supports this argument through analysis of case law, including *Serra*, *Phillips*, *Castillo*, and *Canilao*, as well as statutory interpretation of VARA and critiques of moral and property rights.

I The Right to Destroy as a Core Incident of Ownership

American property law has long treated destruction as a fundamental incident of ownership. John Henry Merryman’s seminal article, “The Refrigerator of Bernard Buffet”, highlights how U.S. law has prioritized owner autonomy even where artistic value was implicated.¹ The law’s reluctance to recognize preservation claims emulates a past commitment to property as dominion rather than stewardship.

Richard Serra vs. General Services Administration exhibits the pre-VARA

¹John Henry Merryman, “The Refrigerator of Bernard Buffet,” *UC Law SF Scholarship Repository*, 1976, https://repository.uclawsf.edu/hastings_law_journal/vol27/iss5/3/.

order.² Serra's claim rested on how the removal of Titled Arc, his large-scale sculpture, from its location would alter the work's integrity. The court's refusal emphasized the government's authority as property owner. The decision shows how before VARA, artistic meaning yielded to ownership unless contract provided otherwise. Destruction and relocation were incidents of dominion.

This background is critical. VARA does not operate against neutral terrain; it instead limits a historically protected incident of property. When Congress withdrew destruction authority in certain cases, it altered a core component of ownership.

II Moral Rights without Doctrinal Reconstruction

Edward Damich is a legal scholar and former Chief Judge of the United States Court of Federal Claims, known for his work in intellectual property and art law. When writing contemporaneously with VARA's enactment, he describes the statute as an effort to incorporate elements of European moral rights into federal law while preserving American property principles.³ VARA grants artists rights of attribution and integrity, including protection against intentional destruction of works of "recognized stature."

The theoretical difficulty is that moral rights doctrine rests on assumptions that conflict with American ownership theory. Amy Adler, a prominent scholar of art law and constitutional theory, argues that moral rights presuppose a continuing bond between artist and work, relying on notions of permanence and stable authorship.⁴ American property doctrine, by contrast, treats transfer of title as severing personal claims over the object. Once ownership passes, the prior owner's connection to the property is ordinarily extinguished absent contractual reservations. VARA adopts the language of moral rights without redefining how those personality-based interests relate to owner dominion, reinforcing the tension that Adler identifies while showing how it produces uncertainty when applied within existing ownership principles.

²*Serra v. U.S. General Services Admin.*, 667 F. Supp. 1042 (S.D.N.Y. 1987)

³Damich, Edward J. "The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art." Catholic Law Scholarship Repository, 1990. <https://scholarship.law.edu/lawreview/vol139/iss4/3/>.

⁴Adler, Amy. "Against Moral Rights." *California Law Review*, 2009. <https://www.yumpu.com/en/document/view/4071510/against-moral-rights-california-law-review>

Christine Farley, a professor at American University Washington College of Law specializing in intellectual property and art law, further demonstrates that courts applying VARA engage in cultural classification.⁵ Determining whether a work has “recognized stature” requires judicial evaluation of artistic significance. That evaluation becomes legally dispositive. Judicial aesthetic valuation functions as the mechanism that restricts destruction rights.

III Vesting and Owner Expectations

The question of when VARA rights vest is not procedural. It directly affects the scope and predictability of ownership. Elizabeth Bock, writing in the *Michigan Law Review*, critiques the prevailing approach of tying VARA protection to the moment of creation and proposes a public-disclosure standard.⁶ If integrity rights attach at creation, owners may acquire property already subject to statutory limitations based on claims that have not yet entered public discourse. Under this approach, an owner may acquire property already burdened by statutory restrictions that are not culturally established. The limitation arises from the act of authorship itself rather than from public recognition. This model effectively prioritizes the artist’s personal bond to the work over the owner’s expectation of control. If protection attaches at public disclosure, integrity protection aligns more closely with public recognition and reliance. A work’s protection corresponds more closely to social investment in it and provides a clearer notice. Once a work is publicly exhibited or otherwise introduced into cultural discourse, its protected status becomes more ascertainable. Owners can assess potential restrictions with greater clarity.

VARA guidelines do not clearly resolve this issue. Courts have often treated protection as arising in creation, but the statute does not provide detailed guidance regarding the interaction between creation and recognition. This ambiguity generates layered uncertainty. First, owners may not know when integrity rights attach. Second, they may not know when a work will later be deemed to possess “recognized stature.” A work that appears minor at the time of acquisition may later be elevated through reassessment. This uncertainty

⁵Farley, Christine. “Imagining the Law: Art.” Cambridge Core, 2010. <https://www.cambridge.org/core/books/abs/law-and-the-humanities/imagining-the-law-art/2A2AD396442925923833AC7D1128F10A>.

⁶Bock, Elizabeth. “Using Public Disclosure as the Vesting Point for Moral Rights under the Visual Artists Rights Act.” *Michigan Law Review*, 2011. <https://repository.law.umich.edu/mlr/vol1110/iss1/4/>.

affects incentives and bargaining. In ordinary property transactions, parties can allocate risk through contract. However, if integrity protection attaches automatically at creation and later depends on judicial evaluation of stature, the scope of restriction cannot be fully anticipated *ex ante*. Owners must account for the possibility that destruction may later be deemed unlawful based on interpretation that develops over time.

The Second Circuit's decision in *Castillo vs. G&M Realty L.P* illustrates this dynamic.⁷ This case involved aerosol artworks created at the 5Pointz warehouse complex in Queens, New York. The building owner permitted artists to paint murals on the exterior walls over a period of years. When the owner decided to demolish the complex for redevelopment, he whitewashed the murals before demolition. The artists brought suit under VARA, alleging that certain works possessed "recognized stature" and that their destruction violated the statute. The district court found that multiple works did meet the requirement, and the Second Circuit affirmed a substantial statutory damages award. The court indicated that expert testimony and evidence of artistic acclaim supported the conclusion that the works had attained "recognized stature." Once that threshold was satisfied, destruction became actionable under VARA. This outcome demonstrates that destruction rights are not determined solely by ownership or redevelopment interests. A court can later conclude that a work has sufficient artistic significance. Moreover, VARA's lack of clear limits is demonstrated since the recognized stature determination depends on litigation and expert evaluation. In these ways, *Castillo* validates the claim that VARA introduces uncertainty by conditioning ownership on judgment rather than fixed standards.

David Shipley's critique of VARA's application, published in the *Mississippi Law Journal*, helps explain how courts respond to this structure.⁸ He argues that, despite the statute's language, courts have often interpreted VARA narrowly and limited its reach. Shipley emphasizes that judges frequently prioritize property interests when balancing integrity claims against ownership authority. In practice, this has resulted in relatively few successful claims compared to the statute's theoretical breadth. However, he also acknowledges that where courts are persuaded that a work meets the requirement, they may enforce statute decisively. *Castillo* demonstrates this enforcement model.

⁷*Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020)

⁸Shipley, David. "The Empty Promise of Vara: The Restrictive Application of a Narrow Statute." *Mississippi Law Journal*, 2014. https://www.academia.edu/83065237/The_Empty_Promise_of_VARA_The_Restrictive_Application_of_a_Narrow_Statute.

Mary Daniel, a legal scholar writing in the *Southern California Law Review* whose work focuses on the intersection of property rights and street art, offers a partial response to this concern.⁹ She argues that moral rights and property rights can coexist without destabilizing ownership because VARA contains internal limits, particularly the notice provisions. In her view, these constraints prevent the statute from broadly interfering with redevelopment or land use. That argument, however, depends on the assumption that owners can reasonably anticipate when integrity protection will attach. Vesting ambiguity complicates that assumption. The statutory limits Daniel identifies do narrow liability, but they do not eliminate unpredictability regarding when destruction will be deemed unlawful. This interaction between vesting, stature, and judicial interpretation accentuates the tension between Daniel's coexistence model and Shipley's observation that courts move cautiously in some cases and assertively in others, showing that courts both limit and enforce VARA in ways that depend on subsequent evaluation rather than clear standards.

IV Site-Specific Art and Spatial Control

In *Phillips v. Pembroke Real Estate, Inc.*, the First Circuit provided an important example of how courts have limited the reach of VARA to preserve core incidents of ownership.¹⁰ The case involved sculptures installed in a public park pursuant to an agreement between the artist and the property owner. When the owner later sought to redesign the park and relocate the sculptures, the artist argued that removal would alter the works and violate VARA's integrity protections. The court rejected that argument and held that VARA does not protect site-specific art from removal. Although the statute prohibits intentional distortion, mutilation, or destruction of works of recognized stature, the court concluded that it does not grant artists the right to control the physical placement of their work on land owned by another. In reaching this conclusion, the court emphasized that extending integrity protection to location would interfere with landowner authority. This reasoning closely tracks the pre-VARA approach in *Serra* Artistic meaning, even when tied to location, did not override control over the land.

⁹Daniel, Mary. "Not a VARA Big Deal: How Moral Rights, Property Rights, and Street Art Can Coexist." *Southern California Law Review*, 2022. <https://southerncalifornialawreview.com/2021/10/27/not-a-vara-big-deal-how-moral-rights-property-rights-and-street-art-can-coexist/>.

¹⁰*Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006)

The decision reflects concern about expanding integrity protection in ways that would directly constrain land-use decisions. If removal of site-specific art were treated as actionable destruction, property owners could face significant limitations on redevelopment, or even routine maintenance. The court's interpretation in *Phillips*, therefore, functions as a containment strategy by preserving owner control over spatial arrangement. However, the limitation raises a structural inconsistency. For site-specific works, meaning is inseparable from location with removal altering the work as fundamentally as physical damage. By excluding relocation from the scope of actionable harm, the court implicitly distinguished between physical integrity and contextual integrity. This decision demonstrates that courts are willing to narrow the practical reach of integrity protection when it threatens core aspects of ownership. Unlike *Castillo*, where courts enforced VARA once recognized stature was established and allowed integrity claims to override redevelopment interests, relocation of sculptures was not actionable because the court interpreted VARA as not extending to site-specific placement. These cases show that courts enforce integrity protection when destruction is direct but limit it when it interferes with land-use control. From the owner's perspective, the boundaries are not self-evident. VARA restricts destruction in some cases, but courts restrict its reach when it threatens broader control over real property. This selective approach reinforces the article's central claim that VARA constrains the traditional incident of ownership, yet courts continue to preserve foundational aspects of property control.

V Graffiti and Murals

Graffiti and mural disputes make the strain between integrity and ownership authority more pronounced than disputes involving traditional gallery works. Street art typically appears on privately owned buildings, often outdoors, and sometimes in connection with redevelopment. Unlike traditional artworks, these works are embedded in privately owned structures rather than separate, movable objects, forcing courts to directly confront whether artistic recognition can limit an owner's authority over their own property. Therefore, these cases require courts to address whether cultural recognition can restrict an owner's authority to alter or remove structures on their own property.

Alison Young, a scholar whose work focuses on graffiti and the law, explains

how street art derives meaning from its urban context and public visibility.¹¹ Unlike portable artworks, murals are generally tied to specific buildings and neighborhoods. Once courts recognize that such works can carry cultural significance independent of market value, destruction is no longer treated as a purely private decision. It becomes a statutory question under VARA.

Unlike *Castillo*, which involved a well-known site of aerosol art and resulted in substantial statutory damages after full litigation, *Canilao v. City Commercial Investments, LLC* presents a more routine redevelopment dispute.¹² This distinction matters because *Canilao* illustrates how VARA constrains destruction authority even before a final determination of artistic status. The artists alleged that murals painted on a commercial building were destroyed without compliance with VARA's statutory notice provisions. The significance of the case lies in how it forces courts to address a recurring reality: murals are often created with informal permission rather than formal contracts.

Many exterior murals occupy a space between authorization and yielding. Property owners may allow artists to paint walls to deter vandalism or enhance neighborhood character. These arrangements may not include written agreements allocating future control. When renovation later occurs, disputes arise because the surface has acquired cultural meaning. *Canilao* demonstrates that VARA can operate in this informal context. The court did not treat the lack of formal contract as dispositive. Nor did it assume that the owner's initial consent preserved unlimited future control. Instead, the case recognizes that once a mural exists and plausibly qualifies under VARA, its removal may implicate protections regardless of the informal nature of the original arrangement. As previously mentioned, Mary Daniel's argument that moral rights and property rights can coexist rests in part on the idea that owners retain ultimate control over their buildings. That is formally true since VARA does not transfer ownership. Mural cases, however, reveal that control over the physical structure does not always equate to control over the painting attached to it. The case, therefore, illustrates a development distinct from the large-scale damages analysis of *Castillo*. It shows how VARA inserts expressive considerations into everyday property management decisions.

¹¹Young, Alison. "Street Art, Public City: Law, Crime and the Urban Imagination." Routledge & CRC Press, 2013. <https://www.routledge.com/Street-Art-Public-City-Law-Crime-and-the-Urban-Imagination/Young/p/book/9780415729253>.

¹²*Canilao v. City Commercial Investments, LLC*, 2022 WL 17852676 (C.D. Cal. Dec. 22, 2022)

VI Conclusion

The Visual Artists Rights Act limits a traditional incident of ownership (right to destroy) without clearly defining the boundaries. Cases such as *Serra Phillips*, and *Canilao* demonstrate that artistic recognition can condition owner control in specific contexts. VARA does not eliminate ownership; it renders destruction rights contingent on statutory interpretation. As mural and redevelopment disputes become more common, courts will play an increasing role in defining when artistic recognition outweighs owner control (often on a case-by-case basis). Absent clearer legislative guidance, this area of law will likely continue to develop through inconsistent judicial standards.

The implications extend beyond immediate liability. Over time, uncertainty surrounding when protection applies may influence how owners approach the use and management of their property, particularly in urban environments where murals are common. Informal arrangements between artists and property owners may become more cautious and more formalized in response. At the same time, reliance on judicial evaluation places continued pressure on courts to define artistic significance without clear statutory direction. The lack of clearer boundaries will result in VARA continuing to operate as a variable constraint rather than a stable rule within property law. These tensions suggest that courts will continue to play a central role in shaping practical limits of destruction rights under VARA.

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Youth Mental Health Concerns and Big Tech Accountability

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Spring 2026

Abstract

Through the interpretation of relevant case law and statutory framework as applied to *K.G.M v. Meta et al.*, this article explores the justification and legality of increased social media regulations within platforms tailored to an adolescent audience. This article argues that Section 230 should not extend immunity to social media platforms when algorithmic systems actively promote harmful content to minors. Analysis on Section 230, product liability claims, and preceding claims filed argues the constitutionality of creating limitations on Big Tech companies. While Section 230 traditionally shields platforms from liability as third-party publishers, the rise of algorithmic recommendation systems challenges this framework by introducing active content promotion. In addition, this article examines possible legislative solutions addressing the negative mental health consequences claimed to be exacerbated in the United States by social media platforms. It also analyzes how courts are beginning to address the distinction between passive publishing and active algorithmic recommendation. Through interpretation of Section 230, this article evaluates negligence and product liability theories as viable mechanisms for holding social media platforms accountable without undermining statutory protections. Recent litigation, including *K.G.M. v. Meta et al.*, illustrates how courts are beginning to confront these issues.¹ This case serves as an early example of how courts may interpret liability in the context of algorithmic content promotion. This analysis highlights the need for courts to reconsider the scope of Section 230 in light of evolving algorithmic technologies and their impact on vulnerable users.

I Introduction

In January 2026, the court of California began the trial of *K.G.M v. Meta et al.*, a bellwether case that puts major social media companies at the forefront of growing youth mental health concerns in the United States. 20-year-old plaintiff Kaley Glenn-Mills claims that addictive material and exploitative content on various social media sites she was exposed to in her youth gave

¹Colin Lecher, “Meta and YouTube Lose Social Media Addiction Trial,” NPR, March 25, 2026, <https://www.npr.org/2026/03/25/nx-s1-5746125/meta-youtube-social-media-trial-verdict>.

her long term mental health complications.² Companies such as Youtube and Meta will appear in their first jury trial, serving as a landmark case concerning the limitations of big tech companies when targeting minor consumers. In 2023, K.G.M. filed a complaint in the Superior Court of California seeking damages and a jury trial.³ Defendants of this early action included companies associated with social media platforms, TikTok and Snapchat as well as Meta and Youtube.⁴ TikTok and Snapchat privately settled the matter before the trial began, leaving prominent figures such as Meta CEO Mark Zuckerberg set to testify.⁵ In K.G.M's short complaint against TikTok, Snapchat, Youtube and Meta, she states that "she suffered personal injury" and "emotional distress" from the "defective Social Media Products." She asserts various counts of negligence, design defect, wrongful death, and fraudulent concealment and misrepresentation. K.G.M's complaint against these companies focuses on targeting marketing to minors and using minors as their "core market." To reach this market, K.G.M claimed that developers intentionally designed features to attract minor consumers in order to earn revenue from advertising without warning. According to a courtroom analyst, Meta refuted these claims, citing that their role as a third-party publisher protects them under Section 230 of the Communications Decency Act of 1996.

This article argues that Section 230 should not extend immunity to social media platforms when algorithmic systems actively promote harmful content to minors, and that liability may instead be grounded in negligence and product design claims.⁶ The ruling of *K.G.M. v. Meta et al.* will set a precedent for succeeding cases in regards to the authority of social media platforms in having the ability to construct algorithms for minors. This precedent will allow lawmakers to better navigate providing legal ramifications to social media platforms to protect the physical and mental wellbeing of young consumers.

²Jamali, Lily. "TikTok settles just before social media addiction trial to begin" *BBC News*. January 2026. <https://www.bbc.com/news/articles/c24g8v6qr1mo>.

³Jamali, "TikTok settles."

⁴*K.G.M. v. Meta Platforms, Inc., et al.*, Second Amended Short Form Complaint for Damages and Demand for Jury Trial. Superior Court of California, County of Los Angeles. <https://www.aei.org/wp-content/uploads/2026/02/KGMSecondAmendedShortFormComplaint.pdf?x97961>

⁵Shamim, Sarah. "Jury Finds Meta and YouTube Liable in Landmark Social Media Addiction Trial." *BBC News*. March 26, 2026. <https://www.bbc.com/news/articles/c24g8v6qr1mo>

⁶"SUPERIOR COURT of CALIFORNIA, COUNTY of LOS ANGELES." <https://www.courthousenews.com/wp-content/uploads/2025/11/social-media-lawsuits-kgm-motion-denied.pdf>.

II Analysis on Section 230 of the Communication Decency Act of 1996

Section 230 of the Communication Decency Act was amended in 1996 to accommodate the unprecedented rapidly growing Internet usage of the decade. This act outlined protection of publishers of content under the subsection (c)(1) titled Treatment of Publisher or Speaker. The amended Section 230 stated, “No provider or user of an interactive computer service shall be treated as the publisher of any information provided by another information content provider.” Historically, Section 230 was interpreted as a means to prevent online platforms from being held accountable for the content published by users on their website, being treated as solely a third party that does not influence the media that is consumed.⁷

However, the implications of Section 230 have undergone questioning through the modernization of Internet and computer service usage. Through integration of this act into the defendant’s argument, they may perceive an inability to be held liable as they themselves are not creating content that could damage the mental health of the plaintiff. A contributor to the Yale Journal of Regulation Alan Z. Rozenshtein highlighted the ways in which Section 230 can be interpreted in application to regulation of social media platforms. Rozenshtein notes the many ambiguities of its interpretation, including a general perspective that would provide immunity from most lawsuits regarding consumer harm and a narrow perspective that would allow third-party consumer accountability when harmful content is knowingly permitted or recommended.⁸ In *K.G.M v. Meta et al.*, the plaintiff does not allege that the defendant created the harmful content itself, but instead challenges the way in which the defendant used user interaction data and algorithmic systems to promote and recommend harmful content.

In application of Rozenshetin’s narrow interpretation of Section 230, accountability regarding the promotion of content to minors could be legal upon solely viewing subsection (c)(1). In the Treatment of Publisher or Speaker subsection, social media platforms are not held responsible for content posted in most circumstances as they are recognized as a third party in publica-

⁷Communications Decency Act, 47 U.S.C. § 230 (1996). <https://www.law.cornell.edu/uscode/text/47/230>.

⁸Rozenshtein, Alan. 2024. “Interpreting the Ambiguities of Section 230.” *Yale Journal on Regulation*. April 17, 2024. <https://www.yalejreg.com/bulletin/interpreting-the-ambiguities-of-section-230/>.

tion. Through algorithmic recommendations, social media platforms no longer serve solely as passive publishers of content. Instead, user data may be utilized by the social media companies themselves to promote content to individual consumers that ensures continuous engagement. Application of Section 230 under a narrow interpretation does not shield social media platforms when they actively recommend harmful content. However, the ways in which accountability would occur is an unprecedented and complicated matter through the general language located in the various subsections of Section 230. Rozenshetin references the possible inability for social media platforms to moderate content without use of algorithmic data, prohibiting Big Tech companies from fulfilling their duty of deterring offensive content found in the Communication Decency Act. With acknowledgement of the defendant's claims in *K.G.M v. Meta et. al*, it is likely that an argument regarding the necessity of algorithms when monitoring content will arise if the assertion of its role as third party publisher does not withstand the claims of the plaintiff. To increase the understanding of how courts may address arguments concerning Section 230 and its protection over social media algorithms, it is critical to analyze prior cases that questioned the scope of the provision in similar contexts. Through interpretation of previous legal actions, it will be more viable to predict the way in which the Communications Decency Act of 1996 will be used in the Superior Court of California.

III Preceding Cases and Legal Actions Concerning Regulation of Social Media Platforms

Legal action against social media platforms regarding young consumers' mental health has been a pursuit from school districts across the nation. Seattle-based law firm Keller Rohrback represents school districts from various states and has been a leading force in filing numerous short-form complaints against Big Tech companies beginning in 2023. The attorneys claim that social media platforms exacerbate the youth mental health epidemic "through Defendant's algorithms, their marketing approach, and their business strategies".⁹ The claims brought by various public school plaintiffs against social media plat-

⁹Keller Rohrback L.L.P. "Social Media — A Youth Mental Health Crisis." <https://www.kellerrohrback.com/currentcases/social-media-a-youth-mental-health-crisis>.

forms are best reflected in the Complaint For Injunctive and Other Relief by the State of Arizona and 32 other states against Meta. In this request for injunction, the plaintiffs assert in paragraph 126 that the defendant “manipulates dopamine releases in its young users, inducing them to engage repeatedly with its platforms”.¹⁰ States and school districts across the nation recognize the addictive nature of the algorithms social media platforms create. These plaintiffs are not penalizing social media platforms for the publishing of content but instead the way in which platforms such as Meta use data to push and ensure dependency on their product.

Emphasis on algorithmic data in *K.G.M et. al.* and past injunctions towards social media platforms may falter despite perception regarding Section 230. In *Gonzalez v. Google L.L.C* (2023), plaintiff Reynaldo Gonzalez filed a complaint against the company of Google claiming they were responsible for a 2015 ISIS terrorist attack in Paris, France that resulted in the death of his son. The court declined to apply Section 230 due to the absence of a viable claim for relief.¹¹ This case demonstrates the remaining potential for analysis of Section 230 in the lower courts, a judgement that *K.G.M. v. Meta et. al.* has the ability to provide. By declining to decide the extent to which social media platforms can be held accountable for promotion of content, the question regarding accountability of algorithmic design remains pertinent. This decision to delay commentary regarding Section 230 is not a discouragement regarding the application of the court decision to *K.G.M. v. Meta et. al.* Instead, this decision leaves it to lower courts to determine how Section 230 should apply in cases involving algorithmic promotion of content to users. Immediate federal interpretation is not possible until reaching further courts and possible oversight by Congress due to its national standing; nevertheless, *K.G.M. v. Meta et. al.* serves as a pioneering trial that is likely to clarify the complexities of the Communications Decency Act of 1996 in a highly digitalized society.

IV Solution and Implications

K.G.M. v. Meta et. al. is a monumental case that is set to determine the legality of succeeding jurisdiction in application of Section 230 of the Communications Decency Act of 1996 to third-party services. The significant devel-

¹⁰*State of Arizona et al. v. Meta Platforms, Inc.* Complaint No. 4:23-cv-05448 (N.D. Cal. Oct. 24, 2023).

¹¹*Gonzalez v. Google LLC.* 598 U.S. 617 (2023). https://www.supremecourt.gov/opinions/22pdf/21-1333_6j7a.pdf.

opment of the trial sets a precedent that will end in a definitive interpretation of the section. There are methods suggested that call for further ramifications of social media platforms enacted in certain states across the nation to combat the youth mental health crisis. However, developing legislation that does not disrupt Section 230 nor infringe on First Amendment rights is a matter that must be solved to ensure the protection of youth consumers. Legislation barring knowingly harmful and addictive algorithmic design features tailored to minors is possible through the ruling of *K.G.M. v. Meta et. al.*. A legal strategy in which social media platforms may be held accountable through policy is by emphasizing product liability claims. Researchers of the American Journal of Law and Medicine suggest that under negligence theory, a plaintiff could accuse social media platforms of designing their product in a knowingly harmful manner. They acknowledged that this would be separate from Section 230 protections as social media platforms are holding a role that differs from their position as a third party publisher of content.¹² Product liability claims are distinct from Section 230 protections in the way in which it defines the responsibility of Big Tech companies. Product liability addresses whether a social media platform is designed in a manner that foreseeably harms its users.

¹²Costello, Nancy, Rebecca Sutton, Madeline Jones, Mackenzie Almassian, Amanda Raffoul, Oluwadunni Ojumu, Meg Salvia, Monique Santoso, Jill R. Kavanaugh, and S. Bryn Austin. "Algorithms, Addiction, and Adolescent Mental Health: An Interdisciplinary Study to Inform State-Level Policy Action to Protect Youth from the Dangers of Social Media," *American Journal of Law & Medicine*. Cambridge Core, February 12, 2024. <https://www.cambridge.org/core/journals/american-journal-of-law-and-medicine/article/algorithms-addiction-and-adolescent-mental-health-an-interdisciplinary-study-to-inform-state-level-policy-action-to-protect-youth-from-the-dangers-of-social-media/EC9754B533553BDD56827CD9E34DFC25>.

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Regulatory Silence: How Consumer Protection Laws and Radiation Standards Fall Behind Wireless Technology

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Spring 2026

Abstract

Wireless technology, like Bluetooth, smartphones, and MacBooks, has grown immensely over the past two decades, becoming crucial for connection and livelihood. These devices use radiofrequency radiation (RFR), an electromagnetic field of energy that transfers radio waves. As RFR research is new and limited, regulations struggle to protect consumers from unproven side effects, and federal agencies struggle to implement adequate safety standards. Therefore, this paper will argue that the present U.S. consumer law protections and framework that governs RFR exposure are structurally deficient in light of the underlying dangers of long-term exposure to Bluetooth and wireless technologies. It will do so by first examining the original and updated doctrinal framework of the federal RFR regulations, including those created by the Federal Communications Commission. Next, the paper will delve into the scientific limitations of low-intensity and long-term RFR exposure and explore how the lack of information shapes regulatory legislation. It will then examine specific relevant statutes in the failure to warn doctrine and consumer protection law to examine how companies use regulatory compliance to push products and prevent manufacturers from being held liable. Lastly, this paper will propose regulatory reforms, including new precautionary warning suggestions, disclosure requirements, and updated standards for RFR exposure limits, as efforts to create a more consumer-friendly legal process.

I Introduction

The advancement of technology over the past decade has been so rapid that researchers have not been able to keep up with the pace of radiofrequency radiation (RFR) and the underlying long-term consequences behind it. RFR refers to the electromagnetic frequency of waves that enable wireless phones, computers, and other Bluetooth-enabled devices to transmit and receive data. New wireless devices enable individuals to constantly wear them on or close to the body for extended periods of time. Consumers do not think twice about these decisions because these wireless devices are “federally regulated” and therefore perceived as safe. According to the Federal Communications Commission (FCC), the federal agency responsible for enforcing communication regulations in the U.S., RFR energy handled close to the body is below levels necessary to

produce significant heating and harmful exposure.¹ In other words, as long as radiation exposure remains within the federal limits, the RFR emitted is too low to cause harmful physical effects. Unfortunately, however, U.S. consumer protection standards on RFRs were created decades ago. They were adopted in the early 1990s, and reaffirmed in 2019 without material revision. As a result, consumer protection laws regarding RFR exposure have remained unchanged since the 1990s.² These laws are intended to protect consumers from short-term exposure to RFR, but fail to address the long-term adverse effects of RFR exposure.³

In addition, the rapid growth of wireless technology inhibits long-term research from being conducted, limiting the amount of scientific research on exposure. Therefore, a scientific limitation is created due to the lack of long-term, constant, and low levels of RFR exposure research, leading to a regulatory framework that neglects long-term consequences and safety of exposure standards. This gap in the scientific field complicates consumer protection laws and calls into question the accuracy of what is classified as “dangerous” regarding RFR exposure. In other words, if consumer protection laws rely on existing scientific findings about the adverse effects of RFR exposure to protect consumers, then the absence of correlational research on RFR enables technology manufacturers to avoid mandatory warning labels and regulations. Because science struggles to keep pace with the potential consequences of long-term exposure, companies are able to participate in deceptive practices and may fail to warn consumers about the risks of using wireless devices daily. The Consumer Product Safety Act is currently in place to regulate and mandate warnings for certain products; however, this act is founded on outdated scientific evidence of harm to consumers, rather than emerging scientific data on the potential risks of RFR exposure.⁴ Thus, laws that depend on outdated scientific correlations constrain precautionary regulations since established scientific connections regarding long-term consequences of consumer use re-

¹Federal Communications Center, “RF Safety FAQ,”<https://www.fcc.gov/engineering-technology/electromagnetic-compatibility-division/radio-frequency-safety/faq/rf-safety#Q7>.

²Federal Communications Commission, “47 CFR Part 15 – *Radio Frequency Devices*,” 2026, <https://www.ecfr.gov/current/title-47/chapter-I/subchapter-A/part-15>.

³Igor Belyaev, et al., “Scientific Evidence Invalidates Health Assumptions Underlying the FCC and ICNIRP Exposure Limit Determinations for Radiofrequency Radiation: Implications for 5G,” *Environmental Health*, Vol. 21, no. 1 (October 18, 2022), <https://doi.org/10.1186/s12940-022-00900-9>.

⁴Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972). https://www.cpsc.gov/s3fs-public/pdfs/blk_media_cpasa.pdf?epslanguage=en.

main limited.

II Background

Constant exposure to radiofrequency radiation from excessive daily use of wireless technologies like headphones or iPhones are overlooked in today's regulatory standards. Radiation protections focus on high-frequency RFR emissions, but have neglected consideration of long-term exposure to RFR and its consequences in a scientific context. Federal protections were introduced under the Communications Act of 1934, which focuses on the regulation of communication by wire or radio technology.⁵ This authority was subsequently transferred to the Federal Communications Commission (FCC), which enabled the FCC to institute safety standards for RFR exposure. The FCC adopted guidelines when evaluating exposure to Radiofrequency (RF) Emissions in 1985, as RF-emitting technologies started to create public health concerns. At the same time, the National Environmental Policy Act (NEPA) required federal agencies to consider environmental impacts.⁶ The exposure limits addressed in these guidelines are specifically based on thermal heating effects of RFR and implemented to create a basis for regulatory standards in a period of rapid technological innovation. During this era, the FCC's guidelines for evaluating exposure to RF emissions became the only formal regulations and framework for a growing and unknown industry, one that prioritized compliance structures and regulatory oversight over accuracy.⁷

In 1996, the FCC updated these standards and measured safety based on a short-term cellular telephone Specific Absorption Rate (SAR).⁸ SARs measure the amount of RF energy absorbed by body tissue, evaluated based on short-duration exposure.⁹ The exposure limits were measured in two separate situations. The first is controlled exposure and assumes that individuals are exposed to RFR based on their location and are aware of RF exposure. The second scenario applies to the public and assumes that people may not be

⁵Bureau of Justice Assistance, "The Communications Act of 1934," <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1288>.

⁶Theodora Scarato, "U.S. Policy on Wireless Technologies and Public Health Protection: Regulatory Gaps and Proposed Reforms," *Frontiers in Public Health*, Vol. 13 (December 18, 2025), <https://doi.org/10.3389/fpubh.2025.1677583>.

⁷Federal Communications Commission, "47 C.F.R."

⁸Theodora Scarato, "U.S. Policy on Wireless Technologies."

⁹Federal Communications Center, "RF Safety FAQ,"

aware of their exposure.¹⁰ Another characteristic of these guidelines is averaging the duration before a device exceeds its continuous exposure limit: the first tier is measured within a 6-minute averaging period, while the second tier is measured within a 30-minute averaging period.¹¹ These rules were developed using laboratory models that measured short exposures, indicating the framework did not account for prolonged or constant exposure thresholds and instead relied on temporary assessment periods, usually under 30 minutes of testing.¹² These updated guidelines were set only two years after the first smartphone came out in 1994, when wireless technology was in an early stage of development.¹³ At that time, smartphones were not as ubiquitous as they are today and were limited to simple email, calendar, and call functions. Consequently, the SAR testing procedures that contributed to the development of exposure standards do not accurately reflect modern, real-world exposure to RFR in 2026, and fail to account for the everyday and constant usage of wireless, even when devices are not being used. The SAR framework then evaluates wireless technology and distinguishes between mobile and portable devices based on their distance from the body and the body's absorption rate. As established in OET Bulletin 65 for the FCC guidelines, a portable device is any device used within 20 cm of the body.¹⁴ They must be evaluated using SAR testing based on short absorption measurements. The testing for portable devices replicates the same SAR framework used for other RFR-producing devices;¹⁵ yet, the usage of these technologies is significantly different and should be evaluated separately.¹⁶ As a result, testing guidelines for portable devices may fail to reflect the reality of RFR exposure to the body.

By 2019, the combination of the FCC guidelines and the advancement of technology usage in the modern world compelled the FCC to review and restate its framework and procedure for RFR exposure testing.¹⁷ As wireless technology usage increased by 28% between December 2008 and June 2017, the FCC issued a reaffirmation to address existing regulations through the

¹⁰Federal Communications Center, "RF Safety FAQ."

¹¹Robert F Cleveland, et al., "Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields,"(Edition: 97-01), August 1997, <https://transition.fcc.gov/oet/info/documents/bulletins/oet65/oet65a.pdf>.

¹²Robert F Cleveland et al., "Evaluating Compliance."

¹³BBC Bitesize, "Electromagnetic Waves," <https://www.bbc.co.uk/bitesize/articles/z62gjfr>.

¹⁴Robert F Cleveland et al., "Evaluating Compliance."

¹⁵Federal Communications Center, "RF Safety FAQ."

¹⁶Robert F. Cleveland et al., "Evaluating Compliance."

¹⁷Theodora Scarato, "U.S Policy on Wireless Technologies."

“Memorandum Opinion and Order” published on August 2, 2019.¹⁸ The FCC recognized the technological transition and market evolution and stated a need for market regulation; however, the FCC did not state a need for standard updates and claimed that current exposure testing procedures are sufficient.¹⁹ The outcome is paradoxical: despite the acknowledgment of technological development from 1996 to 2019, the FCC continued to maintain an outdated regulatory framework and testing methods. In early 2020, the Environmental Health Trust (EHT) argued against the FCC’s current framework and claimed that wireless technology poses significant negative health effects that were inaccurately measured by the FCC’s outdated standards.²⁰ These allegations sought judicial review in the *Environmental Health Trust v. Federal Communications Commission*, 942 F.3d 1025.²¹ The U.S. Court of Appeals for the D.C. Circuit ruled that the FCC did not analyze the long-term consequences of RFR exposure, specifically physical and mental impacts on children and the environment.²² The D.C. Circuit mandated that the FCC provide adequate guidelines that provide adequate reasoning for the effects of RFR exposure. Since then, as of February 2026, the FCC has failed to do so.²³

This ruling illustrates how the government has adopted regulations without scientific reasoning and revisions, and that this issue remains unaddressed. While the FCC refuses to provide further scientific updates, research continues to examine the consequences of RFR exposure. The Environmental Health Trust’s recent research states that children under the age of five have thinner skulls, which causes their bodies to absorb ten times more radiation in

¹⁸Federal Communications Commission, “FCC Grants Relief from Outdated, Burdensome Phone Industry Regulations,” August 2, 2019, <https://www.fcc.gov/document/fcc-grant-s-relief-outdated-burdensome-phone-industry-regulations>.

¹⁹Federal Communications Commission, “Report and Order: Human Exposure to Radiofrequency Electromagnetic Fields (FCC 19-126),” 2019, <https://docs.fcc.gov/public/attachments/fcc-19-126a1.pdf>.

²⁰*Environmental Health Trust v. Federal Communications Commission*, 942 F. 3d 1025 (D.C. Cir. 2021).

²¹Federal Communications Commission, “D.C. Circuit Decision - Environmental Health Trust v. FCC,” August 16, 2021, <https://www.fcc.gov/document/dc-circuit-decision-environmental-health-trust-v-fcc>.

²²*Environmental Health Trust v. Federal Communications Commission and United States of America*, 942 (D. C. Cir 2021), <https://www.fcc.gov/document/dc-circuit-decision-environmental-health-trust-v-fcc>.

²³“Federal Communications Commission”, “D.C. Circuit.”

their bone marrow compared to adults.²⁴ Other studies from the International Agency for Research on Cancer reveal that the RFR emitted from wireless phones is associated with an increased risk of glioma, a type of brain cancer.²⁵ It is further classified as a Group 2B, meaning the RFR can be carcinogenic to humans.²⁶ However, there is a lack of scientific evidence and studies that track low-intensity and long-term RFR exposure. Ultimately, the emerging scientific findings reveal that the FCC's framework relies on outdated evidence, yet the agency continues to dismiss data indicating potential risks. Recognizing this discrepancy is crucial when evaluating how wireless technology usage influences regulatory doctrines and consumer protections.

III Consumer Protection

Consumer protection laws are meant to safeguard goods and services and prevent deceptive practices from occurring.²⁷ However, these laws are limited by scientific uncertainty and dated standards. Companies easily exploit outdated rules and avoid liability when their products fail to keep consumers informed about the risks of a product. Failure-to-warn doctrines, disclosure standards, and consumer protection laws collectively influence the safety of the consumer and the legal accountability in wireless technology.

III.1 The Consumer Standard and the Federal Trade Commission

The consumer protection doctrine, as applied to wireless technology products, is strongly influenced by Section 5 of the Federal Trade Commission Act (FTC).²⁸ The FTC's foundational statute grants the authority to investigate and penalize companies for deceptive marketing practices and consumer

²⁴International Agency for Research on Cancer, "IARC Monographs on the Evaluation of Carcinogenic Risks to Humans," *IARC Working Group on the Evaluation of Carcinogenic Risks to Humans* Vol. 102, no. 7, 1988, <https://publications.iarc.who.int/Book-And-Report-Series/Iarc-Monographs-On-The-Identification-Of-Carcinogenic-Hazards-To-Humans/Non-ionizing-Radiation-Part-2-Radiofrequency-Electromagnetic-Fields-2013>.

²⁵International Agency for Research on Cancer, "PRESS RELEASE N° 208," 2011, https://www.iarc.who.int/wp-content/uploads/2018/07/pr208_E.pdf

²⁶"International Agency for Research on Cancer," Press Release No. 208.

²⁷Legal Information Institute, "Consumer Protection Laws," June 2021, https://www.law.cornell.edu/wex/consumer_protection_laws.

²⁸Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

harm.²⁹ Section 5 of the FTC Act states that public policy and government regulations may “be considered with all other evidence in determining whether an act or practice is unfair” when evaluating a potential court case.³⁰ Government regulations may include the FCC exposure standards; however, such standards should not be treated as benchmarks, because they remain stagnant and rely on decades-old data.³¹ Compliance with the FCC’s exposure standards should not automatically, but currently does, protect and defend a company from a case under the consumer protection law.

The FTC’s Policy Statement on Deception (1983) remains the most logical explanation of the material disclosure requirements of the consumer protection doctrine.³² This statement explains whether a deceptive practice has taken place by analyzing the perspective of a consumer, the representations of the product, and its influence on purchasing. As applied to wireless technology, this standard holds evidentiary limitations because smartphones and Bluetooth headphones are obligated to comply with the FCC exposure guidelines and Specific Absorption Rate (SAR) testing requirements.³³ When companies comply with these standards, courts see their compliance as evidence that the product is safe. Thus, because these standards remain outdated, products may appear to protect consumers, while in actuality, they do not.

In summary, the implementation of the Statement on Deception that is used today assumes that regulation of RFR exposure complies with new scientific research. However, current testing limits are outdated and were designed based on a short-duration effect on the body, without accounting for low-intensity and long-term exposure. If the standard governing RFR exposure only measures one type of exposure, then the standard fails to reflect RFR risks in their entirety. As a result, the current regulatory framework has not recognized the long-term exposure risks as a legal basis for harm, leaving most risks legally undisclosed. Although consumer protection law does not reevaluate based on uncertain scientific research, it can address product representations and their influence on consumer purchasing decisions.

²⁹Federal Register, “Human Exposure to Radiofrequency Electromagnetic Fields and Reassessment of FCC Radiofrequency Exposure Limits and Policies,” April 1, 2020, <https://www.federalregister.gov/documents/2020/04/01/2020-02745/human-exposure-to-radiofrequency-electromagnetic-fields-and-reassessment-of-fcc-radiofrequency>.

³⁰Federal Reserve, “Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices Background,” 2008, <https://www.federalreserve.gov/boarddocs/supmanual/cch/200806/ftca.pdf>.

³¹Robert F Cleveland et al., “Evaluating Compliance.”

³²FTC Policy Statement on Deception, 103 F.T.C. 110, 174 (1984).

³³Federal Communications Commission, “47 CFR Part 15.”

III.2 Failure to Warn Doctrine and Product Liability

part from FTC regulatory authority, product liability law is another way that plaintiffs can seek justice for safety violations, specifically through the failure to warn doctrine. A violation of this doctrine occurs when a plaintiff claims a product lacked sufficient warnings to minimize potential risks associated with it.³⁴ Product liability laws require manufacturers to list risks that have been scientifically established at the time of release, and when adequate warnings are not provided, the manufacturer can be held liable because the product becomes dangerous without reason. The Restatement (Third) of Torts: Product Liability, an updated version of the U.S. product liability doctrine, ties in the principle of foreseeable risks of avoidable harm posed by the product.³⁵ “Foreseeable risks” refer to the potential dangers based on available scientific knowledge. In the context of wireless technology, such considerations should, but currently do not, include emerging scientific research that examines the long-term effects a product has on the body. Nonetheless, it is important to note that the manufacturer still relies on FCC exposure standards, and when those standards are outdated, evidentiary barriers are created that limit plaintiffs, in this case, consumers. Existing research that establishes scientific risks and hazards must be demonstrably reliable and established within FCC exposure standards; in the absence of such recognition, manufacturers can avoid liability for failing to fulfill these “foreseeable risk” warnings, while avoiding scrutiny if risks are not incorporated into regulatory standards and legal frameworks.

Overall, courts favor defendants if they comply with federal safety standards, weakening plaintiffs’ arguments and creating disadvantages within the legal system. Foreseeable risks can be disregarded due to courts’ reliance on existing regulatory standards, despite emerging scientific evidence.³⁶ Regulatory compliance is further illustrated by preemption laws, which occur when federal law overrides state and local law based on the Constitution’s Supremacy

³⁴Simon Law Group, “What Is the Legal Definition of Failure to Warn?” July 19, 2023, <https://simonlawpc.com/blog/defective-products/what-is-the-legal-definition-of-failure-to-warn/>.

³⁵The Florida Bar Journal, “The Restatement (Third) of Torts Products Liability: The Tension Between Product Design and Product Warnings,” <https://www.floridabar.org/the-florida-bar-journal/the-restatement-third-of-torts-products-liability-the-tension-between-product-design-and-product-warnings/>.

³⁶Aaron D. Twerski, and James A. Henderson Jr., “Fixing Failure to Warn,” *Indiana Law Journal* 90, no. 1, 2015: 237–56, <https://heinonline.org/HOL/P?h=hein.journals/indana90&i=249>.

Clause.³⁷ In the context of wireless technology, the FCC's exposure standards are regulations that manufacturers must comply with.³⁸ These compliance requirements limit claims under state consumer protection laws, especially during trials that involve scientific or technical standards. As a result, manufacturers often prioritize compliance with legal standards rather than focus on the potential safety hazards related to their products.

III.3 Consumer Disclosure and Exposure

The third layer of the reasonable consumer standard requires consumers to be aware of the potential consequences of a product they purchase. Courts evaluate whether the consumer was aware of any issues and presume that consumers recognize the dangers that come with products like phones or other wireless devices; however, this presumption becomes unrealistic when warnings are buried within manuals and hidden from the plain eye, as is currently the case.

An Assistant Professor of Infrastructure Engineering at the Indian Institute of Technology, Monika Dubey, conducted a study that demonstrated that only 31% of consumers were aware of how wireless products are measured through SAR tests.³⁹ Consumers also rate SAR as the least important factor in a purchasing decision.⁴⁰ Similarly, a cross-sectional survey revealed that only 12 out of 738 respondents who actively used cell phones were aware of SAR values.⁴¹ If the law assumes consumers can act reasonably and evaluate the risks of RFR when, in reality, consumers do not understand what SAR standards are or the consequences of radiation exposure to the body, then the assumption courts use in connection with the reasonable consumer doctrine may be impractical.

Additionally, the information about the dangers of SAR is often hidden deep within the fine print of cell phone manuals.⁴² The cumulative consequence of

³⁷Congressional Research Service, "Federal Preemption: A Legal Primer," 2025, <https://www.congress.gov/crs-product/R45825>.

³⁸Federal Communications Commission. "47 CFR Part 15."

³⁹Monika Dubey, "A Study of Factors Affecting Awareness of SAR Value of Mobile Phone," *A Study of Factors Affecting Awareness of SAR Value of Mobile Phone* 3, no. 3 (2013): 355–64. https://www.ripublication.com/aeer/46_pp%20%20%20355-364.pdf.

⁴⁰Monika Dubey, "A Study of Factors."

⁴¹Saurabh Varshney et al., "Specific Absorption Rate (SAR) Value of Mobile Phones: An Awareness Study among Mobile Users." *Indian Journal of Community Health*, June 2018, <https://www.cabidigitallibrary.org/doi/pdf/10.5555/20193073860>.

⁴²Lake County News Reports. "STATE: Cell Phone Disclosure Bill Headed for State Senate

hidden information and consumers' expectations regarding the understanding of RFR exposure effects is the concept of informational asymmetry. Essentially, the manufacturers' intentional actions of placing minimal SAR information within indistinguishable text give the manufacturer greater material knowledge than the consumer. This pattern further limits the fairness of traditional consumer protection doctrines, which often assume plaintiffs are able to understand SAR limits not only in relation to the product but also in their full scientific context. Thus, when minimal SAR information is required under FCC regulations, consumers face challenges interpreting potential exposure risks.

III.4 Regulatory Entrenchment and Limitation

The Chevron doctrine, combined with the lack of judicial understanding regarding regulatory rulings, gave agencies such as the FCC significant authority over regulatory benchmarks in litigation. As previously mentioned, when agencies fail to update their standards because they are viewed as the final authority in a court's decision, it can have a spiraling effect on the strength of the legal foundation of cases. However, on June 28, 2024, the Supreme Court's decisions in *Loper Bright Enterprises v. Raimondo*⁴³ and *Relentless, Inc. v. Department of Commerce*⁴⁴ overturned the 1984 Chevron doctrine and required courts to independently interpret legal standards.⁴⁵ This shift is a step forward in diminishing the authority of administrative agencies in interpreting legislative challenges. This change also weakens the long-standing judicial reliance on agency interpretation in regulatory cases. Despite this step forward, long-term RFR exposure risks have not been fully evaluated, causing this area of litigation to remain limited. These limitations arise from the lack of clear evidence required to correlate RFR exposure with the alleged consequences.

When a plaintiff challenges the safety of a product, their claim must adhere to the general causation concept. Under this concept, they must prove that a product is capable of causing the alleged harm.⁴⁶ The struggle to address

Hearing." *Lake County News*, May 23, 2011, <https://lakeconews.com/19837-state-cell-phone-disclosure-bill-headed-for-state-senate-hearing>.

⁴³*Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

⁴⁴*Relentless, Inc v. Department of Commerce*, 603 U.S. (2024).

⁴⁵Woods Rogers, "Supreme Court Ends Judicial Deference to Agencies' Regulatory Interpretation," July 3, 2024, <https://www.woodsrogers.com/insights/publications/supreme-court-ends-judicial-deference-to-agencies-regulatory-interpretation>.

⁴⁶William R. Ginsberg and Lois Weiss, "Common Law Liability for Toxic Torts: A Phantom

emerging technological and scientific risks can be seen in Ginsberg's study of the Love Canal disaster. During the 1940s, the Love Canal hazardous waste disposal site in New York had toxic materials buried underground by the Occidental Chemical Corporation, and in the early 1950s these toxic materials began to reach the basements of nearby homes.⁴⁷ The plaintiffs claimed chemicals leaked into homes, which exposed residents and caused carcinogenic effects and miscarriages.⁴⁸ However, the central challenge was correlating the chemicals to the plaintiffs' health consequences, which required extensive scientific proof. Ultimately, the federal district court ruled that the Occidental Chemical Corporation should be held responsible under the Superfund Act, and the company agreed to pay \$129 million to cover cleanup costs.⁴⁹ Such cases are evaluated through tort law, which addresses compensation for injuries from "wrongful conduct".⁵⁰ Tort law has historically been used in short-term cases, but health consequences did not appear until 10 to 20 years later in the Love Canal case.⁵¹ The prolonged duration of the case created doctrinal limitations that delayed the final ruling. Extended durations become problematic in exposure cases because they create a financial burden of litigation that many plaintiffs cannot afford combined with the prolonged difficulty of establishing causation only after health consequences have emerged. As a result, exposure-related cases like wireless devices that emit RFR face significant challenges within traditional tort law, especially when the alleged harm has not yet been scientifically proven, and therefore may not be an ideal solution for RFR cases.

IV RFR Policy Recommendations

Regulatory standards regarding RFR exposure are based on short-term and unrealistic usage assumptions about wireless technology. If testing pro-

Remedy," *Hofstra Law Review* 9, no. 3 (1981): 1-85, <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1397&context=hlr>.

⁴⁷U.S. Environmental Protection Agency, "Love Canal, Niagara Falls, NY," 2025, <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0201290>.

⁴⁸U.S. Environmental Protection Agency, "Love Canal Niagara Falls."

⁴⁹U.S. Department of Justice, "Occidental to Pay \$129 Million in Love Canal Settlement," 2019, https://www.justice.gov/archive/opa/pr/Pre_96/December95/638.txt.html.

⁵⁰Andreas Kuersten, "Introduction to Tort Law," *Congress.gov*, May 26, 2023, <https://www.congress.gov/crs-product/IF11291>.

⁵¹University of Michigan Law School, "University of Michigan Law School Scholarship Repository," 1984, <https://repository.law.umich.edu>.

cedures were updated, consumer protection laws were strengthened, and judicial standards were modernized, this regulatory gap could begin to close. Under these reforms, consumers would have greater protection as evaluation processes become increasingly reliable and modern when assessing the risks associated with wireless technology.

IV.1 RFR Update on Testing Standards

First, testing standards cannot be made accurate without confronting outdated procedures and impractical approaches. Current procedures rely on a framework that evaluates the practicality of RF testing. The FCC has reviewed emerging scientific findings, such as Benjamin Elsner's research showing how low doses of long-term radiation exposure can reduce cognitive performance.⁵² This data suggests that the FCC continues to allow outdated standards to remain, while measuring devices based on their power and distance from the body during short-duration SAR testing periods.⁵³ However, these standards are outdated and fail to reflect the possible consequences associated with how wireless technologies are used. These standards are built on insufficient evidence, especially as radiation exposure is now considered constant and directly in contact with the average human body.

Evidently, the effects of long-term RFR exposure measured through SAR need to be better studied and consumer protection standards must be updated. Plausible standards would require researchers to move beyond SAR testing requirements and develop adaptable testing operations that measure long-term and real-world exposure to the body over extended periods. These testing operations can include wearable exposure monitors that track RFR levels throughout daily activities, environments, and how much radiation gets absorbed into the body.

Based on previous research published by the National Library of Medicine, updated testing measurements could be required to:⁵⁴

- Use volunteers to wear personal exposure monitors during multiple 24-

⁵²Benjamin Elsner and Florian Wozny, "Long-Run Exposure to Low-Dose Radiation Reduces Cognitive Performance," *Journal of Environmental Economics and Management* 118 (March 2023), <https://doi.org/10.1016/j.jeem.2023.102785>.

⁵³Federal Register, "Human Exposure."

⁵⁴Raquel Ramirez-Vazquez et al., "Measurement Studies of Personal Exposure to Radiofrequency Electromagnetic Fields: A Systematic Review," *Environmental Research* 218 (February 2023), <https://doi.org/10.1016/j.envres.2022.114979>.

hour periods within their homes and while traveling or during daily activities.

- Gather data across environments and analyze variations of RFR exposure levels during different periods throughout the day to develop research based on real-world data.
- Determine whether a product emits dangerous levels of RFR that could have adverse health effects, such as impacts on memory, attention, and cognitive performance.⁵⁵

An average person is exposed to various overlapping RF transmissions that are not accounted for in SAR testing.⁵⁶ With this updated testing model, research could more accurately reflect long-term exposure conditions rather than short-term exposure. In turn, legal reliability would be strengthened, as new standards would make it more difficult for manufacturers to rely on short-duration tests when attempting to prove their product is legally safe.

Skeptics may argue that updated testing procedures are unnecessary and could slow the development of advanced technologies, especially as FCC guidelines are quite broad. These concerns are valid, but do not outweigh the need for policy reform. Even small changes to FCC standards can help protect consumers from the disproportionate impact of RFR exposure to the body, such as the potential absorption of carcinogens. Collectively, improved testing reforms would rely on updated long-term and full-body contact exposure research to determine the minimum and maximum levels of RF exposure and establish clearer safety limits, ultimately strengthening the legal foundation of consumer protection laws.

IV.2 Revise Consumer Disclosure Laws

Second, consumer disclosure laws must be revised to ensure that warning labels are visible and clear so consumers understand the potential RFR consequences associated with wireless technologies. Consumer disclosure laws

⁵⁵Geza Benke et al., “The Effects of Radiofrequency Exposure on Cognition: A Systematic Review and Meta-Analysis of Human Observational Studies,” *Environment International* 188 (June 2024): 108779, <https://doi.org/10.1016/j.envint.2024.108779>.

⁵⁶International Agency for Research on Cancer, *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans*, vol. 102 (Lyon: International Agency for Research on Cancer, 1988), <https://publications.iarc.who.int/Book-And-Report-Series/Iarc-Monographs-0-n-The-Identification-Of-Carcinogenic-Hazards-To-Humans/Non-ionizing-Radiation-Part-2-Radiofrequency-Electromagnetic-Fields-2013>.

cannot be considered fair without consumers' full understanding of a product's consequences. One issue, however, with requiring visible labels is that if the product is too small, warning labels and information are placed within the user manual, either digitally or physically.⁵⁷ In this way, manufacturers can bury important information within manuals while still complying with FCC requirements. To address this limitation, critical information, such as safety warnings, should include clear, large, and accessible information directly on the product. FCC disclosure requirements currently focus on manufacturing compliance rather than consumer understanding. So, a separate disclosure section for consumer understanding could improve transparency by ensuring consumers understand the full risks of wireless technology products. This reform would allow users to make informed decisions about using these products at their own risk.

Adopting manageable disclosure requirements that address exposure limits and potential consequences is achievable. Consumer disclosure standards could follow the example of food product labeling, where industries provide clear information about ingredients, warnings, and how a product was manufactured. Similar standards could include explanatory sections on the safety and production of wireless devices, like SAR testing conditions and recommended usage practices for the device. If implemented, consumers could better understand how current wireless technology devices can be appropriately used throughout the day to avoid or reduce potential RFR consequences.

Critics may argue that some products are too small to ensure that warning labels can properly fit. However, all products come with packaging, and each package could be required to meet minimum size standards to ensure warning labels remain clear and accessible.

IV.3 Modernization of Legal Standards

Additionally, legal standards in courtrooms need to be reevaluated in order to ensure fair trials in cases involving emerging technologies and RFR exposure. As stated previously, courts rely on tort doctrines to evaluate a case that requires a clear link between a product and the alleged injury. However, because RFR research is still limited and wireless technology continues to develop, these requirements can be difficult to satisfy, as clear and accurate warnings may be difficult to establish. In legal disputes, judges often rely on general causation to determine whether a product is capable of causing the

⁵⁷Federal Communications Commission, "47 CFR Part 15."

alleged harm. Conversely, in some cases, judges may be uninformed about a product and can be easily influenced by information asymmetry, which often occurs in RFR lawsuits when manufacturers possess greater knowledge about the product than consumers. Because the negative effects of technology have long-term and delayed consequences, it can be difficult to satisfy the general causation requirements as scientific findings remain limited.

To resolve this problem, courts must modify the judicial decision-making process in regard to precautionary measures. A recent journal article proposes a mathematical framework in which, rather than requiring a complete scientific causation link, judges evaluate factors such as the probability of harm, the severity of potential effects, and the cost of intervention when determining whether precautionary reasoning is appropriate.⁵⁸ This approach would allow judges to follow clearer guidelines and evaluate cases more fairly when scientific certainty is limited.

In summary, judges are often required to evaluate cases where scientific certainty and research are incomplete, which can allow manufacturers to influence outcomes because they hold critical information about the product. As a result, courts struggle to accurately assess the product's potential long-term risks. Applying precautionary reasoning to cases involving RFR exposure would allow courts to evaluate claims more equitably, rather than relying only on definitive proof of causation.

V Conclusion

Technology is rapidly evolving and cannot be ignored, and radiofrequency radiation's emerging effects should not be overlooked by regulatory laws. As wireless technology becomes more ubiquitous, consumers may assume that government benchmarks are current enough to adequately protect them. However, FCC standards rely on outdated scientific research and often fail to account for long-term safety concerns. Judicial procedures are also not fully adaptable to long, inconclusive cases where scientific research is still emerging. To address this regulatory gap, multiple reforms are necessary. First, current testing procedures should be updated to include personal, constant, and long-term research that can more accurately predict harmful exposure conditions. Second, consumer disclosure requirements must be revised to clearly

⁵⁸Massimiliano Marletta, "Probabilities, Costs, and Justice: Rethinking Precautionary Measures in Civil and Criminal Law," *Law, Probability and Risk* 24, no. 1 (2025), <https://doi.org/10.1093/lpr/mgaf007>.

educate and protect consumers from unknowingly using products without understanding their potential consequences. Lastly, courts and judicial authorities must reconsider how they make final decisions, and should incorporate real-world legal analysis instead of relying on general causation standards. Collectively, these reforms can reshape consumer protection laws and federal standards as technology continues to outpace the dated legal doctrines designed to regulate it.

Ultimately, radiofrequency radiation raises a broader issue that goes beyond wireless technology. It raises questions about how the law regulates scientific uncertainty during periods of rapid innovation and technological growth. Currently, legal reasoning often relies on simple cause-and-effect frameworks. However, by updating regulatory standards, strengthening disclosure doctrines, and adapting judicial reasoning to emerging scientific evidence, federal agencies and policymakers can improve the way consumer protections are applied in real-world situations. By adopting these reforms, policymakers can ensure that technological innovation continues to evolve safely, keeping consumers informed and protected.

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The Longstanding Consequences of the COVID-19 Emergency Rule

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Spring 2026

I Introduction

COVID-19 changed the world forever. Aside from the lethal physical symptoms the virus caused in individuals, it made drastic changes to normal societal functions. People changed what they wore, how they shopped, and the way they interacted with others. Mask mandates, toilet paper and water bottle shortages, remote employment, and social distancing effectively changed lifestyles. Even so, the virus changed society in more ways than is typically thought. There are numerous long-standing, often unspoken about, consequences of the pandemic. The initial outbreak of the virus was followed by mass panic. Citizens sought fast-acting action by the government in response to the rapid onset of the pandemic. On March 13, 2020, President Trump declared a national emergency. The executive imposed mask mandates, curfews, and in-person school shutdowns to mitigate the virus's harmful effects.¹ The state of emergency lasted more than three years, officially ending in April 2023 under President Biden.²

In the US, the increased power of the executive under COVID-19 emergency rule became the norm, even years after the pandemic's cessation. This article will show how COVID-19 exposed a structural failure in US constitutional law: a lack of effective legal guidance on exiting an emergent phase. Without effective, accountable means to end emergency rule, presidents can take advantage of the increased power emergencies provide. This leads to a concentration of power in the executive's hands well after the real emergency is over. Due to this and President Biden's strong response to the pandemic, a new precedent was set for presidential power, paving the way for an even more powerful successor. This article will draw on academic articles, executive orders, and news reports to demonstrate the executive's growing power in the post-COVID era.

II Background

History has witnessed the immense risks of emergency ruling throughout human civilization. In its most extreme form, an emergency ruling can

¹Centers for Disease Control and Prevention, "CDC Museum COVID-19 Timeline," *CDC Museum*, <https://www.cdc.gov/museum/timeline/covid19.html>.

²Centers for Disease Control and Prevention, "CDC Museum COVID-19 Timeline."

be used to centralize power in a single executive under martial law.³ This is seen empirically when Ferdinand Marcos of the Philippines declared martial law under the “threat” of communist guerrillas. He ruled as a dictator for nearly a decade—freedoms were suspended, people were wrongfully incarcerated, debt rose to unsustainable levels, and many lives were lost.⁴ Although an extreme form of emergency rule, martial law is also legally justified through the exploitation of emergencies.⁵ Emergency rule—and its extreme relative, martial law—have been known as powerful tactics to centralize power in the hands of the executive. The dangers of an emergency rule are clearly evident in history. Given its extraordinary strength, the use of emergency rule must be thoroughly analyzed, even in the United States.

To understand emergency ruling in the context of this article, it must first be understood what emergency ruling is, why it is used, and its origins in US history. The government’s authority to govern under emergency rule extends from Article 1, Section 8 of the Constitution. This clause burdens the government with “providing for the common defense and general welfare.”⁶ In addition, the Necessary and Proper clause of the Constitution is sometimes used to justify an emergency ruling. Although the original Constitutional framework intended for Congress to lead under emergency rule, the president has assumed the authority to declare it.

An emergency is an “unforeseen combination of circumstances that calls for immediate action.”⁷ Under US law, the National Emergencies Act does not specifically define an emergency. The law allows for executive discretion in declaring a state of emergency.⁸ Furthermore, the Stafford Act defines an emergency as a situation in which federal assistance is needed to supplement local authorities in saving lives, protecting infrastructure, or countering a serious threat within US territory.⁹ The vague definitions of emergencies in US

³Anya Stewart, “Defining Martial Law: Introducing the EmPower Dataset,” *Conflict Management and Peace Science* (2026), <https://doi.org/10.1177/07388942251410770>.

⁴Mark R. Thompson, “The Marcos Regime in the Philippines,” in *Sultanistic Regimes*, ed. H. E. Chehabi and Juan J. Linz (Baltimore: Johns Hopkins University Press, 1998), 206–29.

⁵Stewart, “Defining Martial Law: Introducing the EmPower Dataset.”

⁶Congress.gov, “National Emergency Powers,” February 10, 2026, <https://www.congress.gov/crs-product/98-505>.

⁷Merriam-Webster, s.v. “Emergency,” accessed April 7, 2026, <https://www.merriam-webster.com/dictionary/emergency>.

⁸Congress.gov, “National Emergency Powers.”

⁹U.S. Congress, *Robert T. Stafford Disaster Relief and Emergency Assistance Act*, Public Law 93–288, as amended, 42 U.S.C. § 5121 et seq., accessed April 7, 2026, https://www.doi.gov/sites/doi.gov/files/uploads/Stafford_Act_pdf.pdf.

law gives the president a tremendous amount, if not all, power in defining and declaring an emergency.

United States law has shown a dedication to placing restraints on the President's power during emergency rule in light of a gradually more powerful executive. The president is not permitted to suspend any provision or clause of the US Constitution during an emergency ruling, except for habeas corpus.¹⁰ Any action by the president during an emergency ruling is susceptible to judicial review by the Supreme Court. Public opinion also places major constraints on the executive under emergency rule.¹¹ Poor public opinion reflects dissatisfaction with the executive and could swiftly end the emergency ruling.¹² Under the National Emergencies Act, the president is further constrained in officially declaring a national emergency, as it requires specifying which authorities would be activated under emergency rule.

Despite these protections, the president still has ample room to increase power. As many as 123 powers become available to the president under emergency conditions. These include, but are not limited to, control over citizens' bank accounts, control over national communications, and the ability to deploy the military to any nation.¹³ Scholars argue that the National Emergencies Act, in its current state, is unequipped to prevent abuse of power and democratic backsliding because it gives the president.¹⁴ The current constitutional and legal framework regarding emergency rule lacks one important aspect: effective guidelines on the exit of emergency rule. The termination of an emergency rule is, also, left to the discretion of the president. Although the emergency rule legally ends after one year, the President can easily renew it. In addition, Congress can pass a joint resolution to end emergency rule. However, this is subject to presidential veto.¹⁵ Due to this, it can be concluded that the President effectively decides when to exit a state of emergency. It is evident that the existing US guidelines readily allow the executive to declare an emergency rule but provide no meaningful legal guidance on ending it. This has contributed to the ever-growing power of the presidential office and the

¹⁰Congress.gov, "National Emergency Powers."

¹¹Congress.gov, "National Emergency Powers."

¹²Pippa Norris, ed., *Critical Citizens: Global Support for Democratic Government* (Oxford: Oxford University Press, 1999).

¹³Brennan Center for Justice, "Emergency Powers," June 9, 2025, <https://www.brennancenter.org/topics/government-power/executive-power/emergency-powers>.

¹⁴Brennan Center for Justice, "Emergency Powers."

¹⁵50 U.S.C. § 1622, "National Emergencies," *Legal Information Institute*, accessed April 7, 2026, <https://www.law.cornell.edu/uscode/text/50/1622>.

exponential increase in power following the COVID-19 emergency ruling.

III The Initial Response

America has seen exponential growth in power at the White House, especially over the past five years following the pandemic. On January 20, 2021, President Biden, on his first day of office, signed Executive Order 13987 titled “Organizing and Mobilizing the United States Government to Provide a Unified and Effective Response to Combat COVID-19.” Under this order, the White House COVID-19 Response Coordinator position was created, establishing a COVID-19 Response Office within the White House itself.¹⁶ This executive is relevant as it marked one of the first major attempts to shift toward centralized power in response to the outbreak. Executive power grew even more on September 9, 2021 when President Biden signed Executive Order 14043. This mandated COVID-19 vaccination for all federal employees and employees of businesses with more than 100 people. Although revoked in 2023, this marked a significant expansion of Presidential authority.¹⁷ It is evident that, in response to the pandemic, the executive branch grew tremendously in power, sometimes at the expense of individual freedom.

Federalist No. 47 warns of the dangers that arise from concentrating power in a single branch of government—exactly what Biden’s emergency ruling resulted in. President Biden’s response to the pandemic was unlike any other in history. Qualitative analysis suggests that Biden’s 2021 response exceeded the original constitutional authority of the U.S. presidency.¹⁸ Article II of the Constitution implies that the President’s pandemic powers should be limited to those explicitly delegated by the Constitution. In 2021, President Biden’s complete disregard for Constitutional boundaries by attempting to mandate vaccinations and testing. This order was a clear delineation from the explicit

¹⁶Joseph Biden, “Executive Order 13987—Organizing and Mobilizing the United States Government to Provide a Unified and Effective Response to Combat COVID-19 and to Provide United States Leadership on Global Health and Security,” *The American Presidency Project* (University of California, Santa Barbara), January 20, 2021.

¹⁷Ilya Somin, “A Major Question of Power: The Vaccine Mandate Cases and the Limits of Executive Authority” (George Mason University Antonin Scalia Law School, 2022).

¹⁸Haley Denler, “Presidential Pandemic Powers: The President the Founders Gave Us for the Era of COVID-19,” *The Georgetown Journal of Law & Public Policy* (2022), <https://www.law.georgetown.edu/public-policy-journal/in-print-2/volume-20-issue-2-summer-2022-2/presidential-pandemic-powers-the-president-the-founders-gave-us-for-the-era-of-covid-19/>.

powers delegated to the president during emergencies.¹⁹ In contrast, George Washington carefully consulted with his cabinet to ensure no constitutional boundaries were crossed in response to the 1793 yellow fever outbreak.²⁰ It is clear that Biden's response to the pandemic was unprecedented and concentrated immense power within the executive branch.

IV Shift in Executive Order Patterns

In addition to the content of executive orders, the strength of the pandemic response can be alternatively measured by the number of executive orders signed, both under the Biden administration and the current Trump administration. Since the establishment of the United States, there has been a growing trend in the president's authority. Slowly, with each president, the number of executive orders signed increased (with some slight deviations). George Washington signed 8 orders in his 8 years in office. FDR, unsurprisingly, signed 3,726 executive orders—the most in American history—in response to the Great Depression. FDR averaged around 307 executive orders per year, remaining in power for 12 years. In President Biden's term, 162 executive orders were signed, mostly in response to the pandemic. Biden averaged 41 orders signed per year. Within President Trump's second term, 243 executive orders have been signed. So far, Trump is averaging 225 executive orders per year. This is nearly 150 points higher than his first-term average and one of the highest averages ever recorded, rivaling FDR's.²¹

Not only is the number of executive orders signed under the current administration concerning, but the issues they address are also worth noting. Under Biden, many executive orders were signed under a state of emergency and addressed that issue. The state of emergency ended in 2023, a year before Trump took office again. Even so, the scope of issues addressed by executive orders has increased. Trump has been able to frame a wide variety of executive orders as emergency measures. For example, illegal immigration has been rhetorically framed as an existential crisis that warranted his swift action against it. In addition, conflicts in the Middle East have also been framed

¹⁹Denler, "Presidential Pandemic Powers: The President the Founders Gave Us for the Era of COVID-19."

²⁰Denler, "Presidential Pandemic Powers."

²¹The American Presidency Project, "Executive Orders," *University of California, Santa Barbara*, February 7, 2026, <https://www.presidency.ucsb.edu/statistics/data/executive-orders>.

as emergencies that call for swift action by the president.²² So, not only has the number of executive orders passed increased exponentially, but so has the variety of topics that they address. This heightens concern about the executive's growing power and raises questions about the future of the separation of powers.

V Uncoordinated Responses

The constitution's inability to effectively end emergency rule is further demonstrated in the uncoordinated response to the end of emergency rule by the 50 states. Without a strong constitutional guideline, states acted in their own interests, leading to conflict and fragmentation after COVID-19. At least 26 states have enacted laws restricting the emergency powers of public health agencies.²³ For example, Florida and Ohio severely curtailed the federal government's power by prohibiting vaccine and mask mandates during health crises, while other states have done nothing.²⁴ The disunified response by states is an obvious consequence of the absence of an effective constitutional framework to guide the end of an emergency period. If there were strong, effective guidelines and constraints ending emergency rule, states wouldn't feel the urge to push back on growing executive power. Consequently, the uneven clash between state and federal authorities raises serious concerns. In the event of another urgent health crisis, a fragmented and uncoordinated response can lead to even more deaths and the spread of the illness. Constitutional grey areas have serious consequences. In sum, the ambiguous guidelines on existing emergent times can initially increase the executive branch's power but also leave room for local authorities to push back, causing greater dissonance between state and federal governance in a federalist system.

Biden's powerful response to the pandemic, the continued increase in power under the Trump administration, and the division between the federal and state governments can all be traced to Constitutional ambiguity. Furthermore, the lack of constitutional guidelines continues to have consequences today under President Trump's rule. President Trump has been able to use his

²²The White House, "Presidential Actions: Executive Orders," February 6, 2026, <https://www.whitehouse.gov/presidential-actions/executive-orders/>.

²³Gloria Lyu, Connor Henderson, and Matthew Spero, "Emergency Powers in Pandemic Response," *The Regulatory Review* (Penn Program on Regulation), March 22, 2025, <https://www.theregreview.org/2025/03/22/seminar-emergency-powers-in-pandemic-response/>.

²⁴Lyu, Henderson, and Spero, "Emergency Powers in Pandemic Response."

power, unprecedentedly, to enforce his agenda. This can be seen overseas in Venezuela, conflicts in the Middle East, and other national security-related issues.²⁵ It can also be seen domestically in the immigration and ICE raids.²⁶ The consequences of Constitutional ambiguity are seen here again. The lack of legal direction at the end of the COVID emergency period has allowed Trump to maintain some emergency-like powers and to justify his unprecedented actions as responses to new emergencies, even years after the emergency rule was lifted, despite major opposition. According to a survey conducted by the Pew Research Center, 70% of Americans believe Trump is trying to exercise more power than previous executives. Around half of Americans believe this is bad for the country.²⁷

VI Conclusion

History has seen the dangers that emergency rule can bring to democratic rule. However, this article does not argue that an emergency rule is unnecessary. Without Biden's swift and powerful response to the coronavirus outbreak, it is unknown how many could have lost their lives. Despite this, the consequences of emergency rule must be taken into account. Biden's response to the pandemic helped set a new precedent for powerful executive rule. Without the appropriate Constitutional framework to end at an emergent time, Biden was allowed to hold increased power for an extended amount of time. The increased power and time under the Biden administration set a new standard of presidential power, as seen under the current administration.

In essence, all these issues together contribute to what is seen in the Oval Office today and will help determine the future of American politics. If the trend continues, increased power concentration within the executive branch is expected. Executive power would delegitimize any legislative and judicial decisions, ignoring the system of checks and balances. Regardless of the outcome,

²⁵Brookings Institution, "Breaking Down Trump's 2025 National Security Strategy," 2025, <https://www.brookings.edu/articles/breaking-down-trumps-2025-national-security-strategy/>.

²⁶Michael Williams and Priscilla Alvarez, "How Trump Is Intensifying His Crackdown on Every Form of Immigration to the US," *CNN Politics* (CNN), December 3, 2025, <https://www.cnn.com/2025/12/03/politics/trump-immigration-crackdown-asylum-green-cards>.

²⁷Andy Cerda and Steven Shepherd, "Most Americans Think Trump Is Trying to Exercise More Power than Previous Presidents," *Pew Research Center*, October 8, 2025, <https://www.pewresearch.org/short-reads/2025/10/08/most-americans-think-trump-is-trying-to-exercise-more-power-than-previous-presidents/>.

the future will undoubtedly test the strength of this nation's Constitution and its commitment to democracy.

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The First Amendment in the Digital Age

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Spring 2026

I Introduction

With the emergence of social media and its development into a critical pillar of our society, people are more connected than ever before. Although social platforms such as Facebook, X (formerly known as Twitter), and Instagram began as casual tools for digital interaction with friends and family, they have become much more; society relies on them for critical news updates, civic organization, and the exchange of political grievances. This creates a realm for democracy to thrive in the truest sense, as it has far expanded our nation's reach of expression. However, with these benefits come a novel and complex host of challenges.

Naturally, the First Amendment is a crucial part of the conversation. The ever-growing ability of people to freely speak and express themselves online raises many questions. Should there be limits to what we can say online? If so, who can regulate this online discourse, and how? Can users assert their First Amendment rights on social platforms, or is it lawful for these platforms to decide what users can say? These questions remain unclear, with no clear governmental framework outlining how constitutional free speech principles should operate in a digital environment.¹ The First Amendment was designed to protect against censorship, but with the rise of social media, the main arena for public discourse is now dominated by private companies. This shift has created a constitutional tension that courts struggle to define—one between federal authority and that of corporations with their own policies, algorithms, and moderation systems.

When privately owned social media platforms serve as the primary forum for democratic participation, courts must recognize them as more than merely private companies. Although the concept of labeling such platforms as quasi-public is novel, a formal structure that acknowledges their role in modern speech would create a necessary foundation for subjecting them to constitutional limits and thus protecting against unchecked corporate control.

¹Ira P. Robbins. "What is the Meaning of Like: The First Amendment Implications of Social Media Expression." *Federal Courts Law Review* 7, no. 1 (2014): 124. HeinOnline.

II The Doctrinal Baseline - State Action and Public Forum Theory

The First Amendment provides a fundamental right to freedom of speech. Ratified in 1791, it states that “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.”² Ever since its introduction, it has been designed to limit government actors from restraining U.S. citizens’ right to express themselves freely.³

The main caveat to this all-encompassing protection is the state action doctrine.⁴ The state action doctrine holds that the Constitution only protects individual rights against state interference; “state” in the context of the doctrine is used in reference to every level of government, from the local level all the way up the federal totem pole.⁵ This establishes that before a First Amendment violation claim can be considered, there must be government involvement. Therefore, private individuals and corporations are generally entitled to regulate speech within their own realm, as they are not state figures and thus are not bound by constitutional free speech obligations.

Closely intertwined with the state action doctrine is the public forum doctrine. While not in the text of the First Amendment, this idea was developed during the twentieth century through an expanded interpretation of the Constitution by the Supreme Court.⁶ The foundation of the public forum doctrine is that the government cannot impose any regulations on speech “in places which by long tradition or by government fiat have been devoted to assembly and debate.”⁷ These places are federally recognized as traditional public fo-

²U.S. Const. amend. I

³E. L. Andersen, “The State Action Doctrine and Resurrection of Marsh,” *Mitchell Hamline Law Review* 50, no. 1 (2024): 47.

⁴E.L. Andersen., “The State Action Doctrine and Resurrection of Marsh,” 48.

⁵“Chapter One: An Introduction to Constitutional Law and the Issue of State Action,” in *Liberty, Equality, and Due Process: Cases, Controversies, and Contexts in Constitutional Law*, ed. Ruthann Robson (CALI eLangdell Press, 2021), accessed February 28, 2026, https://liberty.lawbooks.cali.org/chapter/an-introduction-to-constitutional-law-and-the-issue-of-state-action/#:~:text=II,-*%20*%20*%20*%20%5B&text=The%20short%20of%20the%20matter,branch%20of%20the%20state%20government.

⁶EBSCO Information Services. “Public Forum Doctrine.” [https://www.ebsco.com/research-starters/law/public-forum-doctrine.](https://www.ebsco.com/research-starters/law/public-forum-doctrine)

⁷*United States v. Kokinda*, 497 U.S. 720 (1990).

rum.⁸ In addition, the public forum doctrine recognizes three other types of public forums: designated public forums, limited public forums, and nonpublic forums.⁹ These additional categorizations allow exceptions to the otherwise expansive protections afforded by the most traditional sense of the rule. When evaluating a governmental restriction on speech occurring on public property, courts first determine which forum category the space falls into.¹⁰ Traditional public forums, for example, streets and parks, receive the highest level of protection; any content-based restriction must survive severe scrutiny before being permitted in these spaces.¹¹ Designated public forums are spaces the government has intentionally opened for broad public expression, such as municipal theaters or community meeting rooms. While open, they are subject to the same strict standards as traditional public forums.¹² By contrast, limited public forums and nonpublic forums open the door for more discretion. The former are spaces opened only for certain speakers or subjects, allowing for some restrictions on speech. Finally, nonpublic forums are government spaces not traditionally or intentionally opened for public communication, creating the most regulatory flexibility of all.¹³

For decades, this doctrinal structure functioned with relative coherence because public discourse predominantly occurred in physical environments, whether that be protests in city squares or controlled gatherings in municipal buildings. Meanwhile, the predominant private actors were newspapers and broadcasters, and these were clearly recognized as separate, non-governmental organizations. There was a very clean-cut distinction: these institutions were free to exercise their own editorial discretion.

That said, the emergence of social media as a primary venue for public debate has created unprecedented conflict. Because social media platforms are privately owned, they, in theory, should be recognized as private property with full jurisdiction over their own media. However, the same platforms also resemble traditional public forums in their role as places for expression, which the government intended to regulate via the First Amendment.¹⁴ The inher-

⁸E. L. Andersen, “The State Action Doctrine and Resurrection of Marsh,” 48.

⁹E. L. Andersen, “The State Action Doctrine and Resurrection of Marsh,” 48.

¹⁰Kristi Nickodem and Kristina Wilson, “Responding to First Amendment Audits: What is a ‘Forum’ and Why Does It Matter?,” *Coates’ Canons: NC Local Government Law Blog*, November 15, 2022, <https://canons.sog.unc.edu/blog/2022/11/15/responding-to-first-amendment-audits-what-is-a-forum-and-why-does-it-matter/>.

¹¹Nickodem and Wilson, “Responding to First Amendment Audits.”

¹²Nickodem and Wilson, “Responding to First Amendment Audits.”

¹³Nickodem and Wilson, “Responding to First Amendment Audits.”

¹⁴E. L. Andersen, “The State Action Doctrine and Resurrection of Marsh,” 46.

ent dual identity of social media platforms blurs the once-clear line between public and private regulation of speech, creating a convoluted stream of issues as contemporary free speech disputes continue to unfold. This tension ultimately reveals a flaw within the traditional public forum framework itself: it is structurally outdated. Public discourse has grown twofold through the development of the digital world, and it no longer takes place predominantly within the physical limits of parks and town squares.¹⁵ The migration of debate and news dissemination to online platforms has rendered the concept of the traditional public forum obsolete, and constitutional doctrine must adapt.

III Packingham and the Recognition of the Modern Public Square

In 2008, social media's ever-materializing role in public discourse came sharply into focus. In *Packingham v. North Carolina*, an ex-prisoner who served time for a sexual offense posted a thank you message on Facebook after being dismissed from a parking ticket.¹⁶ The only stipulation of his release was to "remain away" from the minor, and the content of the post had nothing to do with his conviction, yet he was arrested by the state of North Carolina.¹⁷ He was charged under their laws regarding sex offenders, specifically one particular law restricting convicted sex offenders from social media use. Ultimately, the Supreme Court overturned this, ruling that the provision was unconstitutional. Writing for the majority, Justice Anthony M. Kennedy held that "regulation of speech must be narrowly tailored to serve a significant government interest," and that, in this case, it was too broad to ban sex offenders entirely from social media use.¹⁸ The basis of the Court's decision was dependent on the assertion that social media was equivalent to the traditional public square and thus could not be regulated without careful scrutiny; Justice Kennedy argued that social media platforms were "modern public square[s]," and that cyberspace and social media had become one of the "most important places for the exchange of views."¹⁹

The language Kennedy used in his conclusion was significant, and opened

¹⁵E. L. Andersen, "The State Action Doctrine and Resurrection of Marsh," 59.

¹⁶"*Packingham v. North Carolina*." Oyez. Accessed March 1, 2026. <https://www.oyez.org/cases/2016/15-1194>.

¹⁷"*Packingham v. North Carolina*." Oyez.

¹⁸*Packingham v. North Carolina*, 582 U.S. (2017).

¹⁹*Packingham v. North Carolina*, 582 U.S. (2017).

a Pandora's Box in its wake.²⁰ By characterizing social media as the “modern public square,” the decision implied that the public forum doctrine could be applicable to cyberspace as a whole.²¹ This meant that because of their status as public forums, social media websites should be recognized under the logic of public forum protections, thus introducing heightened First Amendment expectations and scrutiny of speech restrictions.²² However, these organizations' private status had not changed, and the court failed to elaborate on specific criteria for the balance of power between social media's autonomy and the government. The Court did not declare social media companies to be public forums subject to constitutional obligations, and only invalidated a government restriction on access to those platforms.

This incompleteness highlights the core of the conflict. *Packingham* demonstrated that the functional realities of speech have changed dramatically, but constitutional doctrine has not kept pace. By introducing the idea that social media could be recognized as a public space while simultaneously failing to acknowledge its private nature, the case is a clear example of just how unclear and inconclusive the government's regulation of digital speech is, and how much work remains.

IV Halleck and the Private Platform's Right to Autonomy

Contrary to the *Packingham* decision's steps towards modernization of constitutional doctrine, *Manhattan Community Access Corp. v. Halleck* worked in regression. In *Halleck*, public access television producers DeeDee Halleck and Jesus Melendez aired a program criticizing the Manhattan Neighborhood Network (MNN), a private nonprofit corporation that oversees public access channels.²³ After the segment was broadcast, MNN suspended the producers from airing future programs, and Halleck and Melendez were subsequently sued on First Amendment grounds. They argued that because public access channels are a place for open expression, MNN, as an operator, creates a public

²⁰*Packingham v. North Carolina*, 131 *Harvard Law Review* 233 (Nov. 2017), <https://harvardlawreview.org/print/vol-131/packingham-v-north-carolina/>.

²¹*Packingham v. North Carolina*, 131 *Harvard Law Review* 233 (Nov. 2017).

²²*Packingham v. North Carolina*, 131 *Harvard Law Review* 233.

²³*Manhattan Community Access Corp. v. Halleck*, 133 *Harvard Law Review* 282 (Nov. 2019), <https://harvardlawreview.org/print/vol-133/manhattan-community-access-corp-v-halleck/>.

forum and operates as a state actor.²⁴ Because of this, banning their viewpoint violated the First Amendment.

However, the Supreme Court ultimately held otherwise. Justice Brett Kavanaugh, writing for the majority, argued that MNN was not a state actor and therefore was not bound by the First Amendment. Entities are declared state actors in limited circumstances; when it performs traditional and exclusive governmental functions, when it is compelled by the government to act, and when it acts jointly with the government.²⁵ In this case, because MNN was privately owned and operating public access television channels did not constitute a traditional and exclusive governmental function, the Court concluded that constitutional obligations did not apply. In other words, the First Amendment focused on who owned the property and what it did in a very meticulous sense, rather than examining how the platform functioned in practice. As a result, MNN was found to be a private nonprofit corporation, and its decisions about what to release on its channels could be made at its discretion; its choices were treated as private conduct, not governmental action.

On the surface, this decision resolves the dilemma between the amendment and private forces in favor of the latter. However, when applied to social media, it becomes much more unstable.²⁶ Social media platforms serve as the primary infrastructure of public discourse, and applying *Halleck's* rigid, property-centered analysis to digital platforms ignores the realities of modern speech. If private companies have full jurisdiction over the content they publish, and social media is the primary mode of communication, these companies effectively control the central highways of expression in the United States. As a result, their personal opinions decide which ideas gain visibility and which are quietly suppressed. Furthermore, because large corporations are susceptible to government pressure, it's not unlikely that our direct media sources are vulnerable to indirect government interference.²⁷

Ultimately, *Halleck* made the dynamic between the First Amendment and

²⁴"Manhattan Community Access Corp. v. Halleck." Oyez. Accessed March 1, 2026. <https://www.oyez.org/cases/2018/17-1702>.

²⁵Bernard Bell, "Manhattan Community Access Corp. v. Halleck: 'State Action,' Traditional Government Functions, and Government-Created Public Fora," *Yale Journal on Regulation*, June 21, 2019, <https://www.yalejreg.com/nc/manhattan-community-access-corp-v-halleck-state-action-traditional-government-functions-and-government-created-public-fora/>.

²⁶*Manhattan Community Access Corp. v. Halleck*, 133 *Harvard Law Review* 282.

²⁷Insight Forward, "Corporations Targeted Over Politics," accessed March 22, 2026, <https://www.insightforward.co.uk/corporations-targeted-over-politics/#:~:text=The%20boundary%20between%20government%20and,each%20illustrate%20a%20broader%20shift.>

social media rights more convoluted than ever before. The decision sought to prevent the expansion of government through loose state action theories, but may actually limit the scope of constitutional protection available to individuals in the very places where they speak most. When compared to the *Packingham* case, there is a clear contradiction: while *Packingham* argues that social media is essential to democratic participation, *Halleck* accentuates the separation between media sources and constitutional oversight. Together, these cases show the government's ongoing struggle to create an adequate framework in the digital age, while simultaneously emphasizing the importance of having one.

V Murthy and the Unresolved Boundary

The importance of creating firm government guidelines for protection in the digital sphere is further illuminated by *Murthy v. Missouri*.²⁸ In this case, seven plaintiffs, including the states of Louisiana and Missouri among other private individuals, accused federal officials of coercing social media platforms to remove content from their platforms.²⁹ They testified that this pressure qualified as censorship, and thus, that there was unconstitutional government involvement in the alleged "private moderation" companies are entitled to.

Although there was valid reasoning foregrounding these allegations, the court dismissed this suit on the basis of Article III of the Constitution.³⁰ Article III states that plaintiffs must establish "standings to sue," meaning there must be "concrete, particularized, and actual or imminent (injury) fairly traceable to the challenged action."³¹ Because no plaintiff established the required injury, the case transformed from a broad, pressing legal issue into a strictly procedural debacle. As it follows, the substantive matters were left unregulated, and the constitutional question the case raised to begin with was left unexplored.

The core issue of *Murthy* was to address when government influence crosses the line from encouragement to coercion and undue influence.³² Yet instead of

²⁸"*Murthy v. Missouri*." Oyez. Accessed March 1, 2026. <https://www.oyez.org/cases/2023/23-411>.

²⁹*Murthy v. Missouri*, No. 23-411, U.S. June 26, 2024, 1, https://www.supremecourt.gov/opinions/23pdf/23-411_3dq3.pdf.

³⁰*Murthy v. Missouri*, No. 23-411, U.S. June 26, 2024, 2.

³¹*Murthy v. Missouri*, No. 23-411, U.S. June 26, 2024, 2.

³²Greene, David. "Supreme Court Dodges Key Question in *Murthy v. Missouri* and Dismisses Case for Failing to Connect The Government's Communication to Specific Plat-

clarifying that constitutional boundary, the Court carefully nitpicked its way around it; the tension between private platform moderation and government involvement was not resolved, but instead thrown further into the limelight. The tactic of focusing on specific details from case to case instead of creating a solid framework that underscored this taboo topic avoids the larger issues, postponing resolution. Without clearer constitutional guidelines for digital spaces, it is difficult to prevent the government from influencing private entities and manipulating what the media releases.

VI Implications

As of early 2025, there were 253 million active social media users in the United States, accounting for 73% of our total population; this demonstrates just how dominant the internet has become in connecting people with one another and producing a stream of expression.³³ However, with this overwhelming use presents a paradox: our country recognizes the critical importance of social media in democratic participation, yet the entities that control it remain largely insulated from constitutional jurisdiction. The complex and conflicting trajectories of the *Packingham*, *Halleck*, and *Murthy* decisions illustrate this unsolved issue.

Because of this, First Amendment rights are more vulnerable than ever. When it comes down to it, only a handful of people with private power control the primary flow of ideas throughout our country. This gives them the ability to amplify or suppress political speech at their own discretion, creating a filter that fundamentally alters the integrity of public discourse as we know it. Therefore, despite the Constitution's caveats, the First Amendment restricts itself.

The danger becomes even more pronounced when government influence enters the equation. As seen in *Murthy*, it is not uncommon for government officials to use public statements or regulatory threats to influence media companies. Additionally, if these actions are public enough to warrant lawsuits at

form Moderation," *Deeplinks Blog*, Electronic Frontier Foundation, July 22, 2024, <https://www.eff.org/deeplinks/2024/07/supreme-court-dodges-key-question-murthy-v-missouri-and-dismisses-case-failing>.

³³Kemp, Simon. 2025. *Digital 2025: The United States of America*. DataReportal. <https://datareportal.com/reports/digital-2025-united-states-of-america#:~:text=Social%20media%20statistics%20for%20the,at%20the%20start%20of%202025.&text=And%20on%20that%20note%2C%20Kepios,media%20platform%20in%20January%202025>.

both the state and individual levels, who is to say what corruption is happening behind closed doors? Left unchecked, the current U.S. structure may allow subtle government interference in our media without direct constitutional checks.

It is precisely because of these realities that the recognition of a quasi-public forum is necessary. Private entities are performing the same functions as traditional public forums, and they should be treated as such under the law. If the First Amendment's purpose is to safeguard open discourse, the Constitution should extend heightened security to those facilitating it in today's digital age. While the complex legal network of the United States makes it hard to say exactly what a quasi-public framework would entail, at its core it would allow the First Amendment to protect speech from most regulation unless deemed necessary under strict guidelines. This in combination with the recognition of the companies' private rights for other functions would form a new, quasi structure of public forum.

The guiding principle is clear: constitutional protections should follow the platforms on which the speech prevails, not merely traditional titles of what is public. Without doctrinal evolution, the First Amendment risks becoming disconnected from the realities of modern communication, protecting expression in theory while failing to secure it where it actually occurs.

VII Conclusion

The evolution of public discourse from physical public forums to privately owned digital platforms has made it clear that our current constitutional framework can no longer keep pace with technological reality. *Packingham* acknowledged that social media now functions as the modern public square, yet failed to redefine any obligations that should accompany that recognition; *Halleck* reinforced a rigid, property-based conception of state action that insulates powerful private intermediaries from constitutional scrutiny; and *Murthy* demonstrated how indirect government influence over those intermediaries can corrupt the First Amendment altogether. In amalgamation, it's clear how Supreme Court decisions have been made cautiously and inconsistently, without any certainty on how speech should be safeguarded in the place it now thrives.

Recognizing dominant social media platforms as quasi-public forums does not require taking corporate power or personal authority away from private enterprise. Instead, it acknowledges that when private companies assume

the functional role of facilitating national communication and debate, there is constitutional significance that accompanies that. Constitutional protections must evolve to follow the realities of speech, not remain tethered to eighteenth-century assumptions about property and place. If courts fail to adapt, the First Amendment risks becoming strongest where speech is least relevant and weakest where it matters most. In a democracy that increasingly lives online, constitutional safeguards must apply to the platforms that shape public thought, political participation, and collective understanding, and only through a modernized framework will that happen in the digital age.

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U.S. Constitution, Amendment I.

Conditional Citizenship: Structural Paternalism and the Constitutional Hierarchy of Women's Bodily Autonomy

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Spring 2026

Abstract

The Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* returned primary regulatory authority to the states, significantly narrowing constitutional protection for reproductive decision-making. Yet the decision did more than overturn federal abortion protections. It also reallocated regulatory authority over reproductive autonomy from patients and physicians to state legislatures. While constitutional protection for reproductive autonomy has narrowed, First Amendment doctrine continues to protect bodily expression under established free speech jurisprudence. Through a comparative analysis of constitutional doctrine, this paper argues that this doctrinal asymmetry reflects a system of structural paternalism, a recurring pattern in which legal rules transfer decision-making authority from individuals to the state under ostensibly protective rationals, even as certain forms of bodily autonomy receive heightened constitutional protection when framed as expression under the First Amendment. This asymmetry appears across multiple legal contexts, including abortion regulation, pregnancy-specific medical decision-making, and statutory pregnancy exclusions in advance directives, where courts permit heightened state regulation of bodily autonomy. By contrast, expressive autonomy often receives expansive constitutional protection, revealing an implicit hierarchy of constitutional liberties. This paper contends that these doctrinal distinctions reflect a framework in which women function as conditional citizens: full constitutional subjects only when their decisions do not challenge state moral interests or hierarchical structures embedded in constitutional law. Recognizing this pattern helps illustrate how constitutional doctrine continues to structure liberty and equality along gendered lines.

I Introduction: Constitutional Hierarchy and Structural Paternalism

At its core, constitutional doctrine answers a foundational question: who holds ultimate decision-making authority? Constitutional law operates not only as a system of rights, but also as a structure for allocating authority. It determines whether individuals retain primary control over their bodies and identities or whether the state may substitute its judgment for theirs. This allocation is neither uniform nor neutral. Instead, it produces differentiated

tiers of autonomy that structure constitutional liberty. This paper argues that these differentiated tiers reflect a system of structural paternalism. Structural paternalism describes a recurring doctrinal pattern in which legal rules and institutions reallocate decisional authority from individuals to the state under ostensibly protective rationales, particularly in contexts involving bodily decision-making. Rather than prohibiting autonomy outright, structural paternalism operates through authority substitution, replacing individual judgment with legislative determination. The result is a hierarchy of constitutional liberties in which some personal decisions receive heightened protection while others remain subject to legislative discretion and rational basis review. The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* makes this hierarchy especially visible in the context of reproductive autonomy.¹ Framed as a restoration of state sovereignty, the ruling did more than overturn precedent. It reclassified reproductive decision-making as a domain governed primarily by legislative judgement rather than individual constitutional right. By subjecting abortion regulation to rational basis review, the Court transferred primary decisional authority from patients and physicians to state governments, redefining who functions as the constitutional decision-maker in matters of pregnancy and reproduction.² The shift was structural as much as substantive: it altered the constitutional architecture of bodily autonomy.

That reallocation stands in tension with the Court's protection of expressive autonomy under the First Amendment. When bodily conduct is framed as expressive activity, constitutional doctrine often preserves the individual as the primary constitutional actor, even where the conduct is controversial or morally contested. This is not to suggest that reproductive decisions and expressive conduct are morally or doctrinally identical. Rather, the Court's methods of constitutional classification reveal an asymmetry in how decisional authority is distributed. Understanding that asymmetry requires attention to levels of scrutiny as mechanisms of authority allocation. Some liberties trigger heightened judicial review, preserving individual judgement as constitutionally paramount. Others are subjected to rational basis review, where courts defer to legislative interests and permit the state to displace individual decision-making authority. The central constitutional question, therefore, is not simply whether the state may assert legitimate interests, but whether those interests justify transferring decisional authority from a competent in-

¹*Dobbs v. Jackson Women's Health Organization*. 597 U.S. 215 (2022).

²*Dobbs*, 597 U.S. 215 (2022).

dividual to the state.

In practice, this hierarchy disproportionately affects women. Because reproductive capacity and many contested medical decisions uniquely implicate women, reallocating authority in these contexts functions as a systemic conditioning of women's autonomy. In expressive domains, women may appear as full constitutional actors; in reproductive domains, their judgment may be subordinated to legislative interests. This doctrinal asymmetry suggests a constitutional framework in which women function as conditional citizens, recognized as autonomous decision-makers only so long as their choices do not contradict state-defined moral or structural interests. By examining the contrast between reproductive regulation and expressive protection, this paper demonstrates how constitutional doctrine continues to structure liberty and equality along gendered lines.

II The Doctrinal Foundations of Bodily Autonomy

Modern constitutional protection for reproductive autonomy developed under the doctrine of substantive due process. In *Roe v. Wade*, the Supreme Court held that the Constitution protects a woman's decision to terminate a pregnancy prior to visibility, grounding that right primarily in a broader constitutional interest in privacy.³ Although *Roe* structured this protection through a trimester framework, the decision established a foundational principle: the state's authority to regulate intimate bodily decisions is constitutionally limited. Approximately two decades later, *Planned Parenthood of Southeastern Pennsylvania v. Casey* reaffirmed what it described as *Roe*'s "essential holding" while reformulating the right in terms of liberty and autonomy rather than privacy.⁴ The plurality famously observed that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁵ Although *Casey* replaced *Roe*'s trimester framework with the undue burden standard, it preserved the core structural principle that the Constitution constrains the state's ability to substitute its judgement for that of the individual in matters of reproductive decision-making.

³*Roe v. Wade*. 410 U.S. 113 (1973).

⁴*Planned Parenthood of Southeastern Pennsylvania v. Casey*. 505 U.S. 833 (1992).

⁵*Casey*. 505 U.S. 833 (1992).

The Court's commitment to bodily autonomy was not confined to abortion jurisprudence. In *Cruzan v. Director, Missouri Department of Health*, the Court recognized that competent individuals possess constitutionally protected liberty in refusing life-sustaining medical treatment.⁶ In distinguishing between competent and incompetent individuals, the Court emphasized that decisional authority rests with the competent person rather than the state. Taken together, *Roe*, *Casey*, and *Cruzan* reflected a broader constitutional understanding of medical self-determination. Decisions concerning pregnancy, life-sustaining treatment, and bodily intrusion were understood to occupy a protected sphere in which individual autonomy was presumptively paramount. For nearly five decades, reproductive autonomy was therefore treated as a constitutionally protected domain of individual decision-making.⁷

This framework shifted with *Dobbs*.¹⁰ The decision marked not only the overruling of precedent but a reallocation of constitutional authority. By removing reproductive autonomy from substantive due process and subjecting abortion regulation to rational basis review, the Court shifted authority from the individual to the state legislature. In doing so, the Court departed from the model reflected in *Casey* and *Cruzan*, where individual competence anchored constitutional protection. The shift in *Dobbs* therefore altered the structural principle governing who counts as the primary constitutional decision-maker in matters of bodily autonomy.

III Structural Paternalism in Medical Contexts

Authority substitution does not appear solely in abortion law. It is also evident in end-of-life care and particularly in state laws limiting the enforcement of advance directives when a patient is pregnant. These laws demonstrate that decisional authority, which would normally remain protected, may be displaced during pregnancy— even when the individual is competent and has clearly expressed their wishes in advance.

Congress enacted the Patient Self-Determination Act (PSDA) to strengthen patient autonomy in medical decision-making.¹¹ This statute requires health-

⁶*Cruzan v. Director, Missouri Department of Health*. 497 U.S. 261 (1990).

⁷⁸, 410 U.S. 113 (1973); ⁹, 505 U.S. 833 (1992).

¹⁰*Dobbs*, 597 U.S. 215 (2022).

¹¹Krause, Joan H. "Pregnancy Advance Directives." California Law Scholarship Repository, University of North Carolina School of Law, 2023. https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1635&context=faculty_publications

care providers to inform patients of their rights to make decisions concerning medical treatment, including the right to refuse life-sustaining care and to execute advance directives. Federal law thus reflects a strong commitment to medical self-determination: competent individuals retain authority over their bodies, even when their decisions conflict with state interests or prevailing moral views. Yet this commitment is not applied uniformly. As of 2026, approximately thirty states restrict a pregnant patient's ability to refuse life-sustaining treatment.¹² In some jurisdictions, advance directives are automatically invalidated during pregnancy, regardless of the patient's previously expressed wishes.¹³ In others, directives are significantly limited, and life-sustaining treatment must continue if doing so could preserve fetal development. In these contexts, pregnancy triggers a reallocation of authority from the patient to the state.

The justifications for these pregnancy restrictions are typically framed in protective terms. Legislatures often argue that individuals drafting advance directives may not have fully anticipated how their wishes might change if pregnant. States also invoke an asserted interest in potential life as sufficient grounds to override previously expressed decisions.¹⁴ These rationals assume either that a woman's prior decision was insufficiently informed or that it must yield to the state's asserted interest in fetal preservation.

This reasoning exposes the structural paternalism embedded within such laws. The state presumes that a competent woman either failed to adequately consider pregnancy or would revise her wishes if confronted with it. In effect, her judgment is displaced by legislative determination even when she has explicitly directed otherwise. The underlying question recurs: does pregnancy alone justify the nullification of a competent individual's medical decision-making?

The implications are significant. Advance directives are often typically drafted in anticipation of unforeseen medical crises, and individuals may not know they are pregnant when such directives are executed. Some women may never have contemplated that pregnancy could automatically suspend their expressed medical decisions. Where statutory overrides operate without clear disclosure, individuals may reasonably believe they have secured control over end-of-life choices, only to have that authority revoked under circumstances they neither anticipated nor consented to.

¹²Krause, "Pregnancy Advance Directives."

¹³Krause, "Pregnancy Advance Directives."

¹⁴Krause, "Pregnancy Advance Directives."

Such laws risk reducing pregnant patients to instruments of fetal gestation. A body that constitutional doctrine otherwise treats as protected becomes subject to mandatory biological preservation.¹⁵ The result is a selective override: medical self-determination is honored in general but conditionally revoked when pregnancy is present. In non-pregnancy contexts, competent individuals retain authority over bodily decisions. In pregnancy contexts, that authority may be displaced. This differential allocation of decisional authority reinforces the hierarchy identified earlier and illustrates structural paternalism in operation.

IV Expressive Autonomy

The Court has long recognized a constitutional commitment to protecting bodily expression, even when that expression is morally controversial. In *Miller v. California*, the Court held that obscene material may be regulated using the Miller test.¹⁶ Yet the very existence of that doctrinal framework reflects a broader constitutional principle: sexual expression is not categorically excluded from First Amendment protection. Even sexually explicit materials may trigger constitutional safeguards.¹⁷ The state does not automatically acquire authority simply because the subject matter is morally contested.

This principle extends beyond pornography. Nude and sexualized performance art, along with other forms of bodily expression, receive constitutional protection. Physical acts conveying political meaning—including sit-ins and other types of symbolic protest—are likewise protected, even when they provoke public moral disapproval. In expressive contexts, the Court consistently treats the individual as the primary constitutional decision-maker.

Although the state often frames its interest as neutral, those interests frequently reflect moral judgements. There is no purely scientific or objective explanation for why fetal potential life must override the autonomy of a competent pregnant individual. Rather, the state’s asserted interest often reflects socially and morally grounded beliefs about the sanctity of life and the proper role of women. These beliefs function to justify transferring authority away

¹⁵Waters, Jessica L., and Madelyn Adams. “Pregnancy Exclusions in Advance Directives: A Post-Dobbs Equal Protection Argument.” *Georgetown Journal of Gender and Law* 27 (2025). <https://www.law.georgetown.edu/gender-journal/in-print/volume-xxvii-issue-1-fal-1-2025/pregnancy-exclusions/>.

¹⁶*Miller v. California*. 413 U.S. 15 (1973).

¹⁷*Miller*, 413 U.S. 15 (1973).

from competent citizens.

This stands in contrast to expressive autonomy, where moral disagreement alone rarely justifies transferring individual judgement to the state. If moral disagreement does not eliminate constitutional protection in expressive contexts, it is worth asking why it does so in the context of reproductive autonomy. This doctrinal contrast reveals an important point: deeply contested moral harm does not automatically eliminate constitutional protection. Expression that many view as offensive or degrading may still receive protection because the Court prioritizes the individual's role as constitutional decision-maker. If moral disagreement does not dissolve protection there, it raises serious questions about why it eliminates protection in reproductive contexts.

V Conclusion and Implications

At its core, this analysis demonstrates that United States constitutional law often treats women's reproductive autonomy as conditional rather than fully inherent. The Constitution consistently protects morally controversial forms of bodily expression because it recognizes competent individuals as the ultimate constitutional decision-makers. Yet in reproductive contexts, the state may displace that authority by invoking morally infused interests in protecting potential life. By granting states expanded authority over reproductive and pregnancy-related decision-making, constitutional doctrine allows moral and ideological considerations to shape outcomes in ways that reallocate decisional authority away from women. *Waters, Jessica L., and Madelyn Adams. "Pregnancy Exclusions in Advance Directives: A Post-Dobbs Equal Protection Argument."* This conditional approach exposes structural paternalism embedded within constitutional doctrine. When moral disagreement justifies transferring authority from competent individuals to the state only in gendered contexts, constitutional equality itself becomes unevenly distributed.

Understanding this doctrinal pattern is essential. Women are treated as conditional constitutional actors: their autonomy secure in some domains but subject to displacement in others. Recognizing this hierarchy is necessary for understanding contemporary reproductive law and for evaluating future claims involving bodily autonomy, equality, and state authority.

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The Gold Card Visa and the Integrity of Merit-Based Immigration

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Spring 2026

I Introduction

The structure of American immigration law reflects deliberate congressional judgment about who should be admitted into the United States and why. For decades, Congress has organized immigration pathways around family reunification, humanitarian protection, and employment-based merit. These categories are codified in the 1952 Immigration and Nationality Act (INA), which establishes detailed definitions, numerical limitations, evidentiary requirements, and procedural safeguards for lawful permanent residence. For instance, the INA defines an individual who is “lawfully admitted for permanent residence” as one granted the privilege of residing permanently in the U.S. It also organizes visa allocation through numerically capped preference categories.¹ The INA represents Congress’s exercise of constitutional authority to create a uniform rule of naturalization and to regulate immigration policy at the federal level. It is not an open-ended framework, but rather a structured statutory code that reflects legislative compromise and national prioritization. It functions as an organizing blueprint precisely because it allows discretion through categories, eligibility standards, and numerical limits.

The INA recognized the need for extraordinary ability and accordingly structured employment-based immigration through categories such as EB-1 and EB-2. EB-1 applicants must demonstrate sustained national or international acclaim through specific evidentiary criteria, such as receipt of major awards, authorship of scholarly articles, original contributions of major significance, or performance in leading roles within distinguished organizations. EB-2 applicants must demonstrate advanced degrees or exceptional ability, and, in certain cases, establish that their work serves the national interest.² These standards are individualized and merit-based, requiring documentation, peer recognition, and comparative evaluation, reflecting that visa categories are not loosely defined. Taken together, these criteria emphasize demonstrated achievement and professional distinction as what lays the foundation for eligibility.

In contrast, the INA distinguishes between categories based on merit (EB-1 and EB-2) and investment-based categories such as EB-5. Congress explicitly created the EB-5 investor visa program, a category within the employment-

¹*Immigration and Nationality Act*, 8 U.S.C. §§ 1151–1153 (2022).

²U.S. Citizenship and Immigration Services, “Employment-Based Immigration: First Preference EB-1,” <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1>.

based immigration system, to allow foreign nationals to obtain permanent residency through a substantial capital investment in U.S. enterprises, subject to job-creation requirements and regulatory oversight. The EB-5 category requires that investments create at least ten full-time jobs for U.S. workers and that capital be placed at risk in a commercial enterprise. It is defined by statute and embedded within the broader employment-based visa structure.

Kazarian v. USCIS in 2010 serves as a testament to the court’s efforts to reinforce the rigor of immigration standards. The Ninth Circuit reviewed the denial of an EB-1 petition and clarified that merely satisfying the threshold evidentiary criteria—such as providing documentation that appears to meet several listed categories—is not, on its own, sufficient to establish eligibility. The court endorsed a two-step evaluation process: first, applicants must present evidence that falls within the regulatory categories; second, adjudicators must conduct a “final merits determination” to assess whether the individual truly demonstrates sustained national or international acclaim. This second step requires a qualitative, comparative evaluation of the applicant’s achievements, ensuring that the designation of “extraordinary ability” is reserved only for those who have risen to the very top of their field.

By requiring not just formal compliance but substantive excellence, the decision underscores that EB-1 status is intentionally narrow and highly selective. *Kazarian* illustrates that immigration adjudication under the INA is not a mechanical process, but one that demands careful judgment, verification, and comparison against the highest standards of professional achievement. In this way, *Kazarian* reinforces that employment-based visa categories are structured to privilege demonstrable merit, further highlighting the precision and intentionality embedded within the statutory scheme.³

II The Gold Card Program

The 2025 introduction of the “Gold Card” visa program, created by Executive Order No. 14351, more directly challenges the statutory design established by the INA. The program requires applicants to pay a \$15,000 processing fee and, following background vetting, provide a \$1 million “gift” to the federal government. Agencies are directed to treat that financial contribution as “evidence of eligibility” under 8 U.S.C. § 1153(b), the statutory provision gov-

³*Kazarian v. U.S. Citizenship & Immigration Services*, 596 F.3d 1115 (9th Cir. 2010).

erning employment-based immigrant visas.⁴ That move is not only novel, but it operates within categories that Congress constructed around professional distinction rather than financial capacity.

The controversy surrounding this program illustrates what is at stake when executive action reframes these legal categories. The initiative, created by President Donald Trump via executive order, requires applicants to pay more than \$1 million to expedite U.S. visas within existing employment-based categories—particularly EB-1 and EB-2, which are reserved for individuals of skill. Public reporting described the program as one that “prioritizes wealth over ability.”⁵

The program changes the eligibility criteria and their determination for EB-1 and EB-2 by allowing monetary contributions to serve as evidence of eligibility. Therefore, instead of relying solely on demonstrated achievement, adjudicators may recognize wealth as probative of extraordinary ability—shifting the evaluation from merit to financial capacity.

This legal design—separating merit and investment-based immigration pathways—is significant for understanding the limits of the Trump Administration’s executive authority. Congress knew how to authorize wealth-based immigration and did so explicitly when crafting the INA, with conditions that connect investment to measurable economic outcomes such as job creation and the growth of commercial activity. Importantly, this structure demonstrates that when Congress intends for wealth to serve as a basis for immigration preference, it clearly states so and builds a regulatory framework around it.

Article I of the Constitution vests legislative power in Congress. Although immigration has long been described as an area of broad authority across the branches of government, the separation of powers does not dissolve within that sphere. When the Executive overlays a new wealth-based pathway onto these categories without legislative amendment, it risks intruding upon Congress’s policymaking function. The issue is not whether the President may influence immigration policy; modern governance recognizes substantial executive influence. The issue is whether executive action may effectively create new substantive criteria for permanent residency through directive rather than congressional action—especially given that Congress has already created a distinct wealth-based category (EB-5), which requires significant investment and

⁴*The Gold Card*, Exec. Order No. 14351 § 2(b) (September 19, 2025), <https://www.whitehouse.gov/presidential-actions/2025/09/the-gold-card/>.

⁵Jeff Mason, “Trump Launches Gold Card Program for Expedited Visas with \$1 Million Price Tag,” *Reuters*, December 10, 2025.

job creation and is subject to detailed limitations and oversight.

Immigration law scholarship acknowledges that the President wields significant influence in this domain. Adam B. Cox, the Robert A. Kindler Professor of Law at New York University, and Cristina M. Rodríguez, Dean of Yale Law School, describe how presidential power in immigration has expanded through enforcement discretion and administrative prioritization.⁶ Modern immigration governance often reflects executive choices about whom to remove, whom to defer, and how to allocate limited enforcement resources. However, this influence typically operates at the enforcement stage. It concerns removal priorities and prosecutorial discretion. The Gold Card program, by contrast, operates at the admissions stage by altering the interpretation of statutory eligibility. Enforcement discretion concerns how to allocate resources within a statutory framework; admissions criteria concern who qualifies as a matter of law. The President may set enforcement priorities, but that does not include authority to alter the meaning of substantive eligibility in numerically capped admissions categories.

The Gold Card program is inconsistent with existing immigration law because it alters congressionally defined eligibility standards by treating wealth as a substitute for merit within visa categories. To evaluate whether the program is consistent with existing immigration laws, it is critical to consider the relevant legal doctrines and claims raised in its ongoing litigation.

III Legal Doctrines

Beyond statutory concerns, the program raises constitutional issues. Beyond statutory and separation-of-powers concerns, the Gold Card program raises equal protection implications embedded within the Fifth Amendment's Due Process Clause. While immigration classifications are generally subject to deferential review, policies that overtly privilege wealth over merit challenge foundational commitments to fairness. Employment-based visas are numerically limited. Researchers, scientists, physicians, and academics often wait years for adjudication.⁷ By creating an expedited pathway for those who can afford a \$1 million contribution, the program creates a hierarchy based on financial capacity. Conditioning access to a scarce legal benefit on the ability to

⁶Adam B. Cox and Cristina M. Rodríguez, *The President and Immigration Law* (Oxford: Oxford University Press, 2020).

⁷*American Association of University Professors et al. v. U.S. Department of Homeland Security et al.*, No. 1:26-cv-00300 (D.D.C. 2026).

pay raises serious normative concerns, particularly when the statutory framework was designed to reward demonstrated excellence rather than liquidity.

Under the Administrative Procedure Act (APA), agencies must act within the scope of authority delegated by statute and may not adopt policies inconsistent with the governing framework. The INA authorizes the Executive Branch to administer immigration laws and adjudicate petitions, but does not authorize the Executive to redefine substantive eligibility standards. While agencies often interpret ambiguous statutory language, interpretation cannot function as an indirect method of amendment. Here, treating a large financial contribution as evidence of eligibility effectively substitutes wealth for the merit-based criteria Congress established, such as extraordinary ability and national importance. In doing so, the policy does not merely interpret the statute but expands eligibility in a way Congress did not explicitly authorize. This shift gives rise to a potential APA violation: the agency is creating a new path to eligibility that conflicts with the statutory design. Under the equal protection doctrine, wealth is not a suspect classification, as the Court made clear in *San Antonio Independent School District v. Rodriguez*, which instead reserves heightened scrutiny for classifications such as race, origin, and alienage.⁸

IV Case Law

A coalition of immigrant plaintiffs, together with the American Association of University Professors (AAUP), filed a federal lawsuit in 2026, *American Association of University Professors et al. v. U.S. Department of Homeland Security et al.*, challenging the Gold Card initiative.⁹ The suit asserts that the program offers visas for cash and, in doing so, makes fewer visas available for scientists, doctors, researchers, and other highly skilled applicants for whom these categories were originally designed. The complaint argues that the program fundamentally alters the distribution of a limited number of visas and bypasses Congress’s authority over immigration policy, concluding that the policy converts visas into “revenue-generating commodities sold to the highest bidder,” raising broader questions about how legal immigration should be allocated when visas are scarce.¹⁰ Because employment-based visas are sub-

⁸*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

⁹*American Association of University Professors et al. v. U.S. Department of Homeland Security et al.*, No. 1:26-cv-00300 (D.D.C. 2026).

¹⁰*American Association of University Professors et al. v. U.S. Department of Homeland Security et al.*, No. 1:26-cv-00300 (D.D.C. 2026).

ject to numerical caps and priority queues, expedited pathways for a subset of applicants affect the distribution of visas among others within the same legal categories.

American Association of University Professors argues that the Gold Card program exceeds executive authority and violates the APA by creating a pathway not authorized by Congress.¹¹ The plaintiffs contend that by treating a \$1 million payment method as evidence of eligibility and expediting those applications, the program unlawfully prioritizes wealth over criteria of extraordinary ability and national importance, displacing qualified applicants in an already strict, numerically-limited system.

V Legal Analysis

Under this legal framework, as reinforced by the APA and in *Kazarian*, the INA is not an open-ended system that invites executive revision whenever policy priorities shift. Instead, it imposes defined limits on how EB-1 and EB-2 categories may be interpreted and applied. The core issue is not how the program operates, but whether it is considered consistent with the structure and limitations that Congress set in the INA. The Executive Branch has instructed adjudicators to treat wealth as sufficient proof of extraordinary ability or national benefit. The executive order does not purport to create a new visa classification through legislation; instead, it attempts to operate inside existing categories by altering what counts as evidence.

The use of wealth-based immigration policies undermines existing merit-based visa systems and the legislative branch's intentions and oversight, raising concerns regarding overreach under the APA and the erosion of merit-based eligibility standards embedded in the INA. Congress did not define extraordinary ability as financial capacity; it defined it as sustained acclaim and measurable achievement. As was emphasized in *Kazarian*, eligibility requires a qualitative and comparative evaluation of an applicant's achievements, not merely satisfying threshold criteria. The statutory language of the INA does not authorize agencies to equate a \$1 million contribution with documented excellence. By instructing agencies to treat a monetary "gift" as evidence of eligibility, the Executive risks collapsing the boundary between merit-based and investment-based immigration. This separation is central to how Congress

¹¹Complaint, *American Association of University Professors v. U.S. Department of Homeland Security*, No. 1:26-cv-00300 (D.D.C. February 3, 2026).

structured the employment-based system: different categories serve different policy goals, and the system's integrity depends on maintaining those boundaries.

The Gold Card program does not amend the EB-5 category. Instead, it imposes a wealth requirement on the EB-1 and EB-2 categories that Congress deliberately constructed around merit and professional distinction. This structural move is significant because EB-1 and EB-2 are designed to evaluate professional achievement and expertise, whereas EB-5 evaluates capital investment tied to job creation. It does not simply expand investment immigration; it applies a wealth-centered standard to categories that Congress structured around merit. That interpretation stretches the statutory framework beyond its text and beyond the logic Congress embedded into the employment-based categories. The INA's categories reflect judgments about what kind of "contribution" should count. In EB-1 and EB-2, contributions are measured through statutory criteria such as "extraordinary ability," "exceptional ability," and work deemed to be in the "national interest," all of which are tied to sustained achievement and demonstrated impact rather than financial capacity. In EB-5, contribution is measured through investment tied to job creation. The Gold Card concept blends those frameworks by treating money itself as evidence of merit in merit-based categories, without adopting the statutory guardrails Congress required for investment immigration under 8 U.S.C. § 1153(b)(5), which governs the EB-5 investor visa program and requires capital investment tied to job creation and at-risk commercial activity, including requirements related to job creation and at-risk capital investment.

This issue becomes clearer when considered in light of the realities of adjudication. Under 8 U.S.C. § 1153(b), which governs employment-based visas, EB-1 and EB-2 decisions require comparative judgment. Evidence such as major awards, scholarly publications, original contributions, leadership roles, or judging responsibilities functions as a proxy for distinction within a defined field.¹² Compensation evidence within these categories is not about net worth; it is about being paid more than peers because the market values the applicant's professional output. The coherence of this evidentiary framework depends on comparability: an award is assessed for prestige; a publication is assessed against disciplinary norms; a contribution is evaluated relative to its impact within a professional ecosystem. A direct payment to the government is

¹²8 U.S.C. § 1153(b)(1)(A); U.S. Citizenship and Immigration Services, "Employment-Based Immigration: First Preference EB-1," <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1>.

none of the above. It originates outside the merit-based evaluative ecosystem and is repurposed as proof of eligibility.

VI Counterargument

The Gold Card program’s defenders frame wealth as a proxy for positive attributes. The Trump Administration’s counterargument contends that access to visas can justifiably be based on an applicant’s financial capacity rather than expertise. By emphasizing financial success as a “track record,” this argument suggests that affluent immigrants are less likely to become burdens on public resources and are more likely to contribute economically. On this view, the program advances U.S. interests by attracting individuals with substantial assets and generating revenue that, in theory, could be used for public benefit. This framing treats wealth as a proxy for likely economic contribution and self-sufficiency, making financial capacity a relevant indicator of how an applicant will perform within the U.S. economy.

However, this argument mixes monetary capacity with societal value and overlooks the original purpose of the categories it seeks to reshape. While economic contributions matter, Congress has created a separate EB-5 visa for investment-based immigration, showing wealth was never intended to substitute for expertise in EB-1 and EB-2. EB-5 does not treat money as an abstract virtue; it ties capital to specific statutory conditions, including job creation and enterprise investment. In contrast, the Gold Card program does not require similar outcomes. It channels money to the Treasury without the same statutory safeguards that Congress imposed when it decided investment should warrant immigration preference. Treating financial success as evidence of “merit” in EB-1 and EB-2 risks excluding individuals whose skills generate broader public benefits that cannot be reduced to a direct payment, and undermines the comparative and peer-recognition logic Congress embedded in those categories.

The INA’s merit-based categories were designed to prioritize expertise, exceptional ability, and demonstrated contribution. This is why it is separate from EB-5, which prioritizes investment. If wealth becomes a substitute credential, the practical effect is a shift away from the public-good orientation of merit categories and toward private advantage. In a scarcity framework, prioritizing wealth pushes other applicants back, increases wait times, and changes which applicants are most likely to receive the limited allotment. That shift is

especially significant for applicants who have structured careers, credentials, and professional trajectories around established evidentiary standards.

The program also raises a deeper concern regarding procedural fairness. A merit-based immigration system emphasizes contribution over capital, and introducing a wealth-based pathway risks inconsistent application of statutory standards and differential treatment of similarly situated applicants. The legitimacy of the system thus not only depends on outcomes but on procedural fairness—maintaining the consistent and fair application of the criteria Congress established under the INA.¹³

Systems that privilege wealth over merit risk are eroding public confidence in the fairness and legitimacy of the statutory structure. The Gold Card’s introduction of financial capacity as an eligibility indicator moves away from the original criteria Congress established for employment-based visas and alters how those standards are applied in practice. Embedding a wealth-based pathway within merit-based categories structurally shifts how eligibility is determined and risks undermining the consistent application of legal requirements.

VII Implications

The practical consequences of the Gold Card program further demonstrate the extent of its impact on the immigration system. Treating a \$1 million “gift” as evidence changes the axis of evaluation. The adjudicator is asked to treat financial capacity as probative in the same analytical space as professional distinction. The EB categories exist to identify individuals at the top of their field, yet the evidence introduced by the Gold Card program is not evidence of field-specific accomplishment. Even if agencies claim that payment is “supplemental,” administrative practice can evolve quickly. In a system that relies on training, internal memos, institutional priorities, and informal precedent, supplemental evidence can assume central weight. Once officers perceive that certain filings receive favorable outcomes or expedited treatment, patterns emerge. Applicants and counsel adapt accordingly, and over time, those patterns can reshape the baseline against which all applicants are evaluated, transforming an optional pathway into a de facto standard. In practice, evidentiary expectations in employment-based immigration have evolved in similar ways, and materials, including extensive expert recommendation let-

¹³ 5 U.S.C. § 706(2)(A); see also *Mathews v. Eldridge*, 424 U.S. 319 (1976).

ters or detailed citation records (though not formally required), have become expected as adjudication patterns change the way applicants are evaluated.

Visa allocation mechanics intensify the consequences of the Gold Card program's shift from merit-based evaluation to wealth-based prioritization. Employment-based visas are numerically capped and subject to per-country limits under 8 U.S.C. §§ 1151 and 1152(a)(2). When demand exceeds supply, the system relies on priority dates and queuing. In categories with significant demand, backlogs persist for years, with some applicants facing delays of a decade or more before visa availability.¹⁴ Given that visa availability is limited, prioritization is necessarily exclusionary. If Gold Card applicants receive expedited consideration and occupy EB-1 or EB-2 numbers, those numbers are not available to other applicants who satisfy the INA's intended criteria. Even if the number of Gold Card approvals is comparatively modest, scarce public benefits are redistributed based on financial contribution rather than on the statutory proxies for excellence Congress specified in the INA.

This distributional effect is not simply a policy concern; it implicates the statutory design itself. Congress structured employment-based immigration to balance multiple interests: economic demand, labor protections, fairness across countries, and a preference system organized around specific types of contributions. When the Executive introduces an expedited, wealth-based mechanism within capped categories, it changes who benefits from Congress's allocation choices without changing the statutory caps. They are not merely administrative preferences; they are decisions about who gains access to permanent residency under categories Congress created for particular purposes.

Public reporting further underscores the program's transactional orientation. White House correspondent Jeff Mason reported that administration officials projected billions of dollars in revenue and described the Gold Card as a means of raising funds for the Treasury in 2025.¹⁵ The Gold Card's official website invites applicants to "unlock life in America" for a fee, emphasizing financial benefit over statutory merit.¹⁶ Immigration status in these categories was designed to recognize extraordinary contributions, defined by achievement and expertise, rather than serving as a fiscal instrument. This disconnect suggests a shift in governmental purpose: the program uses visas

¹⁴*American Association of University Professors et al. v. U.S. Department of Homeland Security et al.*, No. 1:26-cv-00300 (D.D.C. 2026).

¹⁵Jeff Mason, "Trump Launches Gold Card Program for Expedited Visas with \$1 Million Price Tag," *Reuters*, December 10, 2025.

¹⁶Gold Card Official Website, "Unlock Life in America," *trumpcard.gov*.

to raise money by granting access to a scarce, valuable legal status rather than using EB-1 and EB-2 categories to attract exceptional talent—the very individuals who contribute to the U.S. as leading researchers, physicians, engineers, and professors whose work drives economic growth, scientific advancement, and public welfare.

In addition to these distributional consequences, the program also raises broader concerns about the allocation of fiscal authority. Transactional framing also raises structural concerns about fiscal authority. Congress holds the power to tax and spend and controls appropriations. When the Executive conditions access to a scarce legal benefit on large payments and directs those funds into designated accounts, the program begins to resemble revenue generation through executive action rather than legislative enactment. Despite being framed as voluntary gifts, the functional reality is an exchange: payment serves as evidence of eligibility, unlocking expedited processing and enhancing eligibility prospects. Administrative fees are common in immigration, but are generally tied to adjudication costs. A \$1 million transfer is far beyond cost recovery and instead functions as a price. When the Executive attaches a price to a capped public benefit, the constitutional concerns implicate the allocation of policymaking authority between the branches.

Beyond statutory and separation-of-powers concerns, the Gold Card program raises equal protection implications embedded within the Fifth Amendment's Due Process Clause. While immigration classifications are generally subject to deferential review, policies that overtly privilege wealth over merit challenge foundational commitments to fairness. Employment-based visas are numerically limited. Researchers, scientists, physicians, and academics often wait years for adjudication.¹⁷ By creating an expedited pathway for those who can afford a \$1 million contribution, the program creates a hierarchy based on financial capacity. Wealth is not a suspect classification under the traditional equal protection doctrine, as the Court made clear in *San Antonio Independent School District v. Rodriguez*, which instead reserves heightened scrutiny for classifications such as race, origin, and alienage.¹⁸ Conditioning access to a scarce legal benefit on the ability to pay raises serious normative concerns, particularly when the statutory framework was designed to reward demonstrated excellence rather than liquidity.

The Gold Card program's effects illustrate how it does not merely intro-

¹⁷*American Association of University Professors et al. v. U.S. Department of Homeland Security et al.*, No. 1:26-cv-00300 (D.D.C. 2026).

¹⁸*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

duce a new immigration pathway within the system. Instead, it reshapes how existing categories actually function in practice. By altering both the criteria used to evaluate applicants and the distribution of limited visas, the program changes not only the outcomes but the logic that undergirds the system itself.

VIII Conclusion

Legality and legitimacy are not interchangeable with fiscal potential. At a structural level, the Gold Card program risks commodifying permanent residency. And, in addition to distributional harms, it creates uncertainty about what the government values. It reframes lawful permanent resident status as something that may be purchased through financial contribution rather than earned through merit. Immigration status confers the right to live and work indefinitely in the United States, to sponsor family members, and eventually to pursue citizenship. Treating this status as exchangeable for payment changes how eligibility is determined in practice by shifting the focus away from statutory criteria based on demonstrated achievement and toward financial capacity, introducing a factor that Congress did not include in the design of these categories. Immigration policy is governed by statutory authority, constitutional structure, and foundational principles of fairness.

If the United States begins to equate financial capacity with extraordinary ability, it alters not only its immigration framework but also its broader commitment to merit-based advancement. Congress deliberately created EB-1 and EB-2 to reward expertise and exceptional accomplishment, and created EB-5 to accommodate investment under explicit legal conditions. A wealth-based overlay that treats money as “evidence” inside merit categories risks undermining both congressional authority and the very purposes of these categories.

When visas are scarce, the integrity of the system depends on allocating access based on the collective benefits Congress identified, rather than allowing private financial capacity to redefine eligibility standards through executive action. If the United States intends to preserve its identity as a nation grounded in opportunity and contribution rather than financial leverage, immigration policy must remain faithful to the original statutory design and resist the transformation of merit-based admissions into a market transaction.

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Government Speech and the Chilling of Immigrant Communities

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Spring 2026

I Introduction

Words spoken by government officials do more than communicate policy positions; they hold the power of shaping the social environment in which citizens decide whether it is safe to participate in public. Political rhetoric has always shaped public opinion, but in the modern media landscape, its influence is amplified by emotionally charged narratives, viral messaging, and constant repetition. Fear generated by political messaging can discourage individuals from engaging with public institutions, participating in civic life, and even speaking openly about political issues. Although the government speech doctrine typically shields state messaging from First Amendment review, fear-based political campaigns can produce chilling effects that suppress expression as effectively as formal censorship. When government rhetoric creates measurable chilling effects, it operates as indirect regulation of speech. This paper argues that when government speech produces demonstrable chilling effects, courts should treat it as a form of indirect regulation and impose doctrinal limits on the government speech doctrine.

II The Government Speech Doctrine

The First Amendment prohibits government abridgment of speech, but the question becomes more complex when the government itself is the speaker.¹ When state messaging influences behavior, it raises concerns about whether such speech can indirectly suppress expression. The Court developed the “government speech doctrine” to address this issue, recognizing that government entities are entitled to articulate their own messages.² Regardless, this does not mean government speech goes entirely without limits. Other constitutional provisions, such as the Equal Protection Clause of the Fourteenth Amendment, still constrain how the government communicates.³

The Court has justified this doctrine on functional grounds. Governments are responsible for communicating policies and administering programs; these require viewpoints to present the state’s position. If every government statement were treated as a public forum open to all viewpoints, the state would be unable to articulate coherent policy positions. Therefore, the Court has held

¹U.S. Const. amend. I.

²*Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967).

³“Equal Protection,” Legal Information Institute, Cornell Law School, accessed February 20, 2026, https://www.law.cornell.edu/wex/equal_protection.

that political accountability—rather than judicial intervention—as the primary check on government speech. This functional justification, however, assumes that government speech is constrained by public oversight, an assumption that becomes less convincing when government messaging produces deterrent effects without formal regulation.

Although the term “government speech doctrine” was not explicitly used in early cases, *Rust v. Sullivan* laid its foundation by affirming that the government may control the content of programs it funds. In this context, the Court treats the speech as part of a specific government program, in which the state is entitled to define the scope of its message. However, this reasoning is limited to programmatic messaging and does not easily extend to broader efforts aimed at shaping public behavior outside of those government programs. When applied beyond its original setting, *Rust* enables the government to present policy issues in ways that discourage disfavored viewpoints. This calls into question constitutional concerns because it moves from defining a program’s message to shaping public discourse more generally, increasing the risk that government speech functions not just as expression.

Taken together, this shows that the doctrine broadly shields state messaging from First Amendment review. As Strasser notes, it is not always clear what qualifies as government speech.⁴ Regardless, this expansive protection is overly broad and enables harm by allowing the government to engage in messaging that can produce chilling effects without constitutional scrutiny.

III Chilling Effects as a Constitutional Harm

Governments regularly enact laws and regulations to address political and social concerns. Although traditionally associated with regulations or vague laws, chilling effects can also arise from government actions that signal potential consequences without formal enforcement. When regulations are too vague or unclear, people may refrain from engaging in permissible actions as they are unsure whether they will be sanctioned. This is commonly referred to as a “chilling effect,” a law’s effect on activity outside its intended target.⁵

The First Amendment is not limited to situations where the government

⁴Mark Strasser, “Government Speech and Circumvention of the First Amendment,” *UC Law Constitutional Quarterly* 44 (2016).

⁵“The Establishment Clause and the Chilling Effect,” *Harvard Law Review*, February 10, 2020, <https://harvardlawreview.org/print/vol-133/the-establishment-clause-and-the-chilling-effect/>.

explicitly bans freedom of speech. It also protects the conditions necessary for people to exercise their right to free speech. A chilling effect occurs when someone voluntarily silences themselves due to fear of consequences. For example, a person might avoid joining protests, researching specific topics, or even criticizing the government, not because those actions are illegal, but due to worry about potential repercussions. This kind of self-censorship undermines democratic participation, even when the First Amendment is meant to protect it. When government actions create a fear of retaliation or scrutiny, individuals may avoid engaging with institutions altogether in ways that resemble direct censorship.

Historical examples demonstrate that government political campaigns can chill expression. One of the most notorious examples includes the McCarthy era, where regulations aimed at suspected communist infiltration created an environment of accusations and distrust among Americans. In *Keyishian v. Board of Regents*, the Court struck down laws targeting "subversive" individuals, showing that vague restrictions create pervasive anxiety that discourages protected expression. Given that the rules were broadly defined, individuals could not confidently determine what was allowed, making them more likely to avoid controversial speech altogether. The court warned that such policies cast a "pall of orthodoxy" over the classroom, highlighting how fear can pressure individuals to avoid engaging in lawful speech.[6] Their reasoning is significant because it recognizes that constitutional concerns arise even before enforcement takes place. Earlier, in *Adler v. Board of Education*, the Court had upheld similar restrictions, allowing the exclusion of individuals from employment based on perceived subversive affiliations.[7] Despite this, the Court's later rejection of this approach in *Keyishian* reflects a recognition that even indirect pressures—like fear of professional consequences—can impermissibly burden First Amendment rights. This doctrinal shift underscores the principle that government actions do not impose explicit penalties to produce constitutional harm; the deterrent effect on speech alone may be sufficient.

While the chilling effects in these examples were largely tied to formal investigations and regulatory actions, similar deterrent effects can arise from government rhetoric that signals hostility towards particular groups. Political messaging from government officials can shape perceptions of risk and signal potential enforcement priorities, leading individuals to withdraw from public participation even in the absence of direct regulation[a]. Once individuals alter their behavior in response to perceived risks, the result is functionally similar to formal restrictions on speech. Through this, the govern-

ment rhetoric can produce the same kind of self-censorship the Court warned against in *Keyishian v. Board of Regents*, transforming an expressive activity that is nominally protected into conduct that is effectively suppressed.

IV Fear-Based Political Campaigns as Indirect Speech Regulation

Government rhetoric surrounding immigration plays a crucial role in shaping public perception and policy, mainly when political leaders frame immigrants as a threat to public safety. In 2016, President Trump laid out his immigration policy proposals through a political campaign focused on anti-immigration rhetoric, and these proposals continued through much of his presidency. Political messaging frequently portrayed undocumented immigrants as illegal monsters, killers, and gang members.⁶ By repeatedly associating immigrants with criminality, government rhetoric contributes to an environment that justifies heightened enforcement and surveillance, increasing the likelihood that individuals will avoid expressive practices. When repeated by government officials, this messaging does not merely communicate policy positions; it influences how individuals assess risk and adjust their behavior. When messaging is repeated and authoritative, it can contribute to conditions in which individuals alter their conduct in response to perceived risk. According to The Marshall Project, Trump has made at least 560 statements connecting immigrants to criminality. The scale and repetition of these statements contribute to a broader narrative that frames immigration as a social security issue rather than an economic or humanitarian crisis. Over time, repeated associations can not only reinforce stereotypes, but they can also increase support for aggressive enforcement measures.⁷ Statements that use rhetorical devices such as repetition and emotional language often serve as a guide for the public in interpreting policy issues. While these techniques can help clarify policy goals, they can also amplify fear when used to associate a specific group with criminal activity.

⁶Anna Flagg, Andrew Rodriguez Calderón, and Geoff Hing, “Trump Often Repeats These False, Misleading Immigration Claims. Here Are the Facts,” *The Marshall Project*, October 24, 2024, <https://www.themarshallproject.org/2024/10/24/fact-check-trump-statement-s-immigrants-takeaways>.

⁷Flagg, Rodriguez Calderón, and Hing, “Trump Often Repeats These False, Misleading Immigration Claims.”

IV.1 Healthcare Avoidance as Evidence of Chilling Effects

Empirical evidence suggests that anti-immigration rhetoric can function as more than a political expression by producing measurable behavioral withdrawal from public institutions. One study examining healthcare usage in Baltimore found the decline in the frequency of primary care visits and increased emergency department (ED) visits among Hispanic/Latino undocumented immigrants.⁸ Researchers found that following the rise of anti-immigration rhetoric during the 2016 campaign, emergency departments saw a 34.4 percent decline in primary care visits, and a 43.3 percent decrease among children.⁹ Researchers attribute this shift to a reduction of medical care among immigrant communities, but also to the fear of exposure and discrimination that heavily discourages them from engaging with public institutions. Immigrant parents reported heightened anxiety when interacting with healthcare providers and expressed concerns that seeking medical care could expose their immigration status. While it could be argued that this behavioral shift only affects undocumented populations, research has also found reduced Medicaid participation among children of non-citizens, even when the children themselves are non-citizens.¹⁰ This pattern closely resembles the type of deterrence recognized in *NAACP v. Alabama*, where fear of exposure discouraged individuals from exercising associational rights.¹¹

This behavioral withdrawal reflects more than a policy consequence; it proves how government rhetoric can deter populations from participating in public life. Once individuals avoid activities or institutions, the resulting suppression of engagement parallels chilling effects traditionally recognized as constitutionally significant under the First Amendment.

⁸Juan Bao, Leon Sun, Phuong Nguyen-Hoang, and Elizabeth T. Momany, “Exploring the Effect of Anti-Immigration Rhetoric on Emergency Department Use by Undocumented Adults,” *Journal of Immigrant and Minority Health* 26, no. 1 (2024): 114, <https://doi.org/10.1007/s10903-023-01531-z>.

⁹Joseph Nwadiuko et al., “Changes in Health Care Use Among Undocumented Patients, 2014–2018,” *JAMA Network Open* 4, no. 3 (2021).

¹⁰Jennifer M. Haley, Genevieve M. Kenney, Robin Wang, and Clare Wang Pan, *Citizen Children with Noncitizen Parents Experienced Health Insurance Coverage Losses between 2016 and 2019* (Washington, DC: Urban Institute, August 12, 2021), <https://www.urban.org/research/publication/citizen-children-noncitizen-parents-experienced-health-insurance-coverage-losses-between-2016-and-2019>.

¹¹*NAACP*, 357 U.S. at 461–463

IV.2 Effects on Religious and Associational Activity

Government practices that signal surveillance or target particular communities can produce First Amendment–recognizable chilling effects even in the absence of formal legal restrictions. When individuals perceive that participation in religious associational, or expressive spaces may subject them to scrutiny, they may self-censor or withdraw from those spaces altogether. Under the chilling effects doctrine, such behavioral deterrence is constitutionally relevant because the First Amendment protects not only against direct restrictions on speech or association, but also against government action that foreseeably burdens the exercise of those rights.

Following the expansion of national security after September 11, surveillance practices associated with the “War on Terror” altered how individuals engaged in both online and associational activity.¹² More specifically, individuals from Arab, South Asian, and Afghan American backgrounds reported increased self-awareness about producing statements or internet postings that could later be used as evidence of suspicion or wrongdoing.¹³ This anticipatory self-censorship demonstrates how perceived scrutiny can deter expressive activity even without formal prohibition.

A similar dynamic emerged under the Obama administration’s Countering Violent Extremism (CVE) strategy, which identified community and religious spaces—such as mosques— as potential sites of radicalization.¹⁴ By associating ordinary social and religious institutions with security threats, these policies signaled that participation in such spaces could invite monitoring or investigation. Reports on CVE policies suggest that identifying mosques and community spaces as potential sites of radicalization contributed to concerns within affected communities about participation in those spaces, as such framing associated ordinary religious and social activity with potential scrutiny.¹⁵ By reducing participation in religious and community spaces, these policies demonstrate how government signaling alone can burden associational rights.

¹²Hina Shamsi and Alex Abdo, “Privacy and Surveillance Post-9/11,” *Human Rights* 38, no. 1 (2011): 5–17.

¹³Sunaina Marr Maira, *Youth, Rights, and Solidarity in the War on Terror* (New York: NYU Press, 2016), 207.

¹⁴U.S. Department of Homeland Security, “*Fact Sheet: A Comprehensive U.S. Government Approach to Countering Violent Extremism*”, n.d., https://www.dhs.gov/sites/default/files/publications/US%20Government%20Approach%20to%20CVE-Fact%20Sheet_0.pdf.

¹⁵Faiza Patel and Meghan Koushik, *Countering Violent Extremism* (New York: Brennan Center for Justice, 2017), <https://www.brennancenter.org/our-work/research-reports/countering-violent-extremism>.

Reports on NYPD monitoring of Muslim communities found that individuals avoided mosques and student organizations and reported fear surrounding civic and community engagement.¹⁶ These behavioral changes are legally significant as they mirror the type of deterrence recognized in *NAACP v. Alabama*, where the Court held that government action infringing associational privacy can impermissibly burden First Amendment rights by discouraging membership and participation. In both contexts, the constitutional harm arises not from enforcement, but from the reasonably foreseeable deterrent effect of government surveillance practices. This dynamic is not limited to formal surveillance practices. Rather, surveillance illustrates a broader constitutional principle: when government action signals potential consequences, individuals may withdraw from protected activity out of fear. Fear-based political campaigns operate through the same mechanism. By repeatedly framing immigrants or specific communities as threats, such rhetoric signals risk and discourages participation in religious, civic, and institutional life.

IV.3 Doctrinal Implications of Behavioral Withdrawal

Although no law prohibits immigrants from accessing healthcare or other public services, empirical evidence suggests that political framing generates fear of interacting with public institutions. Courts have long recognized that First Amendment harms may arise not only from direct penalties, but also from government actions that deter individuals from exercising protected rights through fear of adverse consequences.¹⁷ This behavioral withdrawal resembles the type described in the chilling effects doctrine, in which individuals refrain from engaging in protected activity out of fear rather than due to formal prohibition.

Under the government speech doctrine, however, such rhetoric would be classified as protected government expression and insulated from First Amendment scrutiny.¹⁸ Yet when political messaging repeatedly frames immigrants or specific communities as threats, it can signal risk in ways that discourage participation in civic life and institutional life. In such circumstances, government rhetoric does more than communicate a viewpoint; it functions as indirect regulation, producing the same deterrent effects traditionally associated

¹⁶American Civil Liberties Union, *Fact Sheet: The NYPD Muslim Surveillance Program* (New York: American Civil Liberties Union, 2013), https://www.aclu.org/files/assets/nypd_muslim_surveillance_program_0.pdf.

¹⁷*Keyishian*, 385 U.S. at 604.

¹⁸*Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200, 207–08 (2015).

with unconstitutional burdens on speech and association.

IV.4 Counterarguments: Democratic Accountability

A significant counterargument to limiting the government speech doctrine is that it restricts the government's ability to communicate its position on policy issues. As previously mentioned, the doctrine exists to ensure that elected officials can advocate for policies, frame public issues, and respond to social concerns without constant judicial interference. If courts regularly treat government rhetoric as a form of regulation, officials may hesitate to speak openly, fearing constitutional challenges based on the perceived effects of their messaging.

The Supreme Court has emphasized that political accountability, not judicial review, is the primary safeguard against harmful government speech. In cases such as *Walker v. Texas Division, Sons of Confederate Veterans*, the Court reasoned that the proper remedy for objectionable government expression is through electoral processes, not the courts.¹⁹ Under this view, expanding First Amendment scrutiny to include government rhetoric would improperly shift responsibility from voters to judges, raising concerns about judicial overreach.

Moreover, critics may argue that recognizing chilling effects based on political messaging creates an unworkable standard. Unlike formal regulations, the effects of rhetoric are often diffuse, difficult to measure, and influenced by external factors. As a result, courts may struggle to determine when government speech crosses the line from persuasion to coercion, creating uncertainty. This concern is especially pronounced in politically charged contexts, where strong language and persuasive messaging are common features of democratic discourse.

However, these concerns, while substantial, do not justify maintaining an unlimited conception of the government speech doctrine. The argument for political accountability assumes that those affected by harmful government rhetoric are equally able to participate in the political process, not considering when fear-based messaging itself discourages engagement. Further, the difficulty of measuring chilling effects does not negate their constitutional significance. Courts have long recognized that indirect burdens of speech, such as those identified in *NAACP v. Alabama*, can be sufficient to warrant First Amendment protection when supported by evidence.

¹⁹*Walker*, 576 U.S. at 200.

Instead of abandoning judicial oversight entirely, a more limited approach can address these concerns presented while preserving the government's ability to engage in ordinary political advocacy. Therefore, by focusing on measurable harm and clearly defined criteria, courts can avoid overreach while preventing the use of government speech as a tool of indirect censorship.

V Narrowing the Government Speech Doctrine

Government rhetoric that portrays immigrants as criminals or threats does more than shape public debate; it can create a climate of fear that limits immigrants and certain demographic groups from exercising their First Amendment rights. To address this gap, Courts should adopt a limiting principle that distinguishes between ordinary political advocacy and government speech that functions as a deterrent to protected activity. Instead of requiring evidence of suppression, courts should consider if government messaging foreseeably discourages participation in public life. Setting this standard ensures that the doctrine's original purpose is preserved—protecting citizens from laws that truly threaten free expression—while avoiding using it to challenge regulations that indirectly change how individuals respond to public life.

The following standard would require courts to evaluate three factors: (1) whether the government's message targets a specific group, (2) whether this evokes fear of legal, social, or economic consequences, and (3) whether there exists empirical evidence of withdrawal as a result of political messaging. Once these conditions are met, government speech should be subject to First Amendment scrutiny as indirect regulation.

In turn, this framework preserves the core purpose of the government speech doctrine by permitting the state to advocate for policies and engage in public discourse, while preventing it from using its platform to produce effects that undermine constitutional protections. Therefore, by focusing on demonstrable harm, courts can maintain doctrinal consistency while also addressing the genuine consequences of fear-based political messaging.

VI Conclusion

Government rhetoric does more than shape public perception; it can structure the conditions under which individuals decide whether participation in

civic and institutional life is safe. When political messaging frames particular communities as threats, it does not merely contribute to public debate; it can alter how those communities assess risk in their interactions with government and society. In a media environment where official speech is constant and highly visible, repeated associations between identity groups and criminality or danger can take on a regulatory effect, shaping behavior even in the absence of formal legal constraints.

These concerns are not triggered by government expression alone, but by a more specific set of conditions. As this Article proposes, courts should evaluate government rhetoric through a three-part inquiry: (1) whether the message targets a specific group, (2) whether it evokes a reasonable fear of legal, social, or economic consequences, and (3) whether there is empirical evidence of resulting withdrawal from protected activity. When all three factors are satisfied, government speech should no longer be treated as an insulated form of expression, but as a functionally regulatory effect.

This framework preserves the core of the government speech doctrine by allowing the state broad latitude to communicate policy positions and participate in democratic debate. At the same time, it recognizes that government messaging can cross a constitutional threshold once it becomes foreseeably coercive in its effects. By anchoring scrutiny in targeted messaging, fear-based response, and demonstrated behavioral withdrawal, courts can distinguish ordinary political advocacy from speech that operates as indirect regulation.

Once properly applied, this approach ensures that the government speech doctrine does not become a mechanism by which the state may indirectly erode First Amendment freedoms. Instead, it preserves a consistent doctrinal line: government expression remains protected unless it can be shown, under a structured evidentiary test, to function as a substitute for regulation by suppressing participation in protected civic life.

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**Political Polarization and
Constitutional Change: Ideological
Alignment and Doctrinal Development
in the Supreme Court**

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Spring 2026

Abstract

This article examines how political polarization shapes the development of constitutional doctrine in the United States Supreme Court. Although the Court is institutionally designed to function independently from direct political pressure, its decisions in highly contested policy domains can reveal patterns of ideological alignment. Examining *Dobbs v. Jackson Women’s Health Organization*, *Citizens United v. Federal Election Commission*, and *Shelby County v. Holder*, this article argues that polarization is most visible in cases involving politically salient disputes rather than evenly distributed across the Court’s docket. Across these cases, ideological alignment corresponds with significant doctrinal change, including the overruling of precedent, reinterpretation of congressional authority, and shifts in federal power. Rather than attributing these developments to overt partisanship, this analysis situates doctrinal change within a constitutional landscape increasingly dominated by structural political polarization. Viewed in this way, polarization functions less as evidence of individual judicial bias and more as a broader structural condition that shapes the environment in which constitutional doctrine evolves.

I Introduction

The United States Supreme Court possesses the authority to interpret legislation in accordance with constitutional doctrine and is institutionally designed to function as the most politically independent branch of the federal government. The Constitution’s “Good Behavior Clause” has substantially shaped the Court’s institutional character by granting justices lifetime appointments, allowing them to exercise authority independent of electoral pressures. Despite these structural protections, the Court has become increasingly politically contested in recent decades.¹

As politicization has intensified, political conflict has increasingly informed public perception of the Court’s impartiality. Public favorability toward the Supreme Court declined 29% between 1987 and 2024.² While politicization

¹Roger Cramton, “Reforming the Supreme Court,” *California Law Review* 95 (2007): 1313–34, <https://www.jstor.org/stable/20439154>.

²Joseph Copeland, “Favorable Views of Supreme Court Remain near Historic Low,” Pew Research Center, September 3, 2025, <https://www.pewresearch.org/short-reads/2025/09/03/favorable-views-of-supreme-court-remain-near-historic-low/>.

may be one contributing factor, it does not fully explain how constitutional doctrine develops in highly contested areas. Existing scholarship has examined ideological influences on judicial decision-making, but less attention has been given to how broader political polarization may shape the development and stability of constitutional doctrine itself.

This article therefore examines political polarization as a structural condition that influences constitutional development, arguing that persistent ideological voting patterns are most visible in disputes involving politically salient areas.³ Polarization is defined here as the expanding ideological and institutional divide that structures political conflict and shapes the conditions under which public decisions are made. Given that this issue is most apparent in constitutional disputes where judicial decisions reflect ideological divisions among the justices—particularly in areas that are highly contested, publicly contentious, and politically significant—this paper examines cases within that sphere: *Dobbs v. Jackson Women’s Health Organization*, *Citizens United v. Federal Election Commission*, and *Shelby County v. Holder*. Together, these cases demonstrate how constitutional doctrine may evolve across distinct areas of law within a broader environment conditioned by ideological conflict rather than purely internal doctrinal considerations.

II Case Studies in Constitutional Polarization

To identify areas of significant ideological conflict, this article draws on Gallup polling data measuring partisan divides across major policy issues, using those divides as an indicator of political salience. These findings indicate that the most significant partisan divisions concern the scope of federal authority, abortion rights, and gun regulation.⁴ These same areas also frequently appear in the Supreme Court’s most consequential constitutional disputes. Building on this observation, this article argues that polarization is not evenly distributed across the Court’s docket but instead concentrates in disputes involving highly contested policy questions. Within these cases, ideological alignment among justices often corresponds with doctrinal change,

³Tom Clark, Pablo Montagnes, and Jörg Spenkuch, “Politics from the Bench? Ideology and Strategic Voting in the U.S. Supreme Court,” *Journal of Public Economics* 214 (October 2022): 104726, <https://doi.org/10.1016/j.jpubeco.2022.104726>.

⁴Frank Newport, “Partisan Gaps Expand Most on Government Power, Climate,” Gallup.com, August 7, 2023, <https://news.gallup.com/poll/509129/update-partisan-gaps-expand-government-power-climate.aspx>.

suggesting that constitutional rulings may increasingly reflect ideological divisions alongside traditional legal reasoning.

Each case study therefore examines how patterns of ideologically aligned voting contribute either to the overruling of precedent or to other forms of far-reaching doctrinal transformation. Rather than suggesting simple partisan motivation, these case studies instead illustrate how constitutional doctrine may evolve within a structurally polarized political environment.

II.1 *Dobbs v. Jackson Women’s Health Organization*

In 1973, *Roe v. Wade* recognized a woman’s constitutional right to obtain an abortion, grounding that right in the privacy principles previously articulated in *Griswold v. Connecticut*.⁵ The Court held that the liberty protected by the Fourteenth Amendment’s Due Process Clause encompassed a woman’s decision whether to terminate a pregnancy.⁶ For nearly fifty years, this framework structured constitutional protection for reproductive decision-making.

In 2022, however, the Supreme Court in *Dobbs v. Jackson Women’s Health Organization* overturned both *Roe* and *Planned Parenthood v. Casey*. The majority concluded that the Fourteenth Amendment does not extend constitutional protection to abortion and reasoned that recognizing abortion as a fundamental right conflicted with the nation’s historic traditions.⁷ The Court further characterized abortion as a contested policy issue more appropriately resolved through democratic processes.

The decision raises an important structural question: under what political and institutional conditions does the reversal of long-standing precedent become possible? Legal scholar Reva Siegel observes that constitutional disputes often develop within broader political conflict rather than purely doctrinal evolution.⁸ At the time *Roe* was decided, abortion was not strongly sorted along partisan lines and was more often considered a cross-party issue. Over subsequent decades, however, political actors increasingly mobilized around the issue, transforming it from a contested moral issue into a central marker of partisan identity.

By the time the Court issued its ruling in *Dobbs*, the constitutional debate over abortion reflected a deeply polarized political environment. When

⁵*Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973)

⁶U.S. Const. amend. XIV, § 1.

⁷*Dobbs v. Jackson Women’s Health Organization*, 597 U.S. (2022)

⁸Reva B. Siegal, “The Supreme Court, 2012 Term - Foreword: Equality Divided,” *Harvard Law Review* 127 (2013): 1-94

situated within this context, the overruling of *Roe* can be understood not only as a doctrinal reinterpretation but also as a development occurring within a constitutional environment influenced by decades of ideological conflict. This decision thus illustrates how constitutional change may occur where doctrinal reconsideration intersects with sustained political polarization.

II.2 *Citizens United v. Federal Election Commission*

Corporate spending in support of both federal and state elections has long sparked controversy, particularly with respect to its treatment under the First Amendment. In 1990, the Supreme Court upheld Section 54(1) of the Michigan Campaign Finance Act, prohibiting corporations from using general treasury funds to make independent expenditures for state candidate elections.⁹ In *Austin v. Michigan Chamber of Commerce*, the Court sustained this restriction under the Free Speech Clause, concluding that corporate independent expenditures could be limited due to their potential to distort the political process.¹⁰ Two decades later, *Citizens United v. Federal Election Commission* overruled *Austin* in its entirety and invalidated Section 203 of the Bipartisan Campaign Reform Act of 2002, which had prohibited corporations from using general treasury funds for electioneering communications.¹¹ The Court held that limitations on independent campaign expenditures violate the Free Speech Clause because such restrictions function as restraints on political speech.¹² This reasoning builds upon *Buckley v. Valeo* (1976), which affirmed limits on direct contributions to candidates but invalidated limits on independent expenditures.¹³ Although doctrinally grounded in First Amendment principles, *Citizens United* reflects a broader constitutional tension concerning the scope of federal authority to regulate political participation. The case thus occurred within an increasingly polarized electoral environment in which campaign finance regulation intertwined with debates over political power and democratic legitimacy.

Deep partisan polarization has intensified electoral competition, making campaign finance regulation an increasingly prominent arena for constitu-

⁹*Austin v. Michigan State Chamber of Commerce*, 597 U.S. 652 (1990)

¹⁰*Austin*, 494 U.S. at 660.

¹¹Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), § 203.

¹²*Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)

¹³*Buckley v. Valeo*, 424 U.S. 1 (1976).

tional dispute.¹⁴ Election law scholars observe that polarized environments amplify incentives for political spending and deregulation.¹⁵ Highly consequential elections have reinforced this dynamic. The 2000 presidential election, resulting in *Bush v. Gore* (2000), illustrates how deeply polarized contests can escalate into constitutional crises.¹⁶ More recently, scholarship surrounding the 2016 election cycle similarly underscores the entanglement of modern electoral politics with heightened polarization and increasing judicial entanglement in election governance.¹⁷ Within this framework, *Citizens United* can be understood not merely as a doctrinal clarification of the Free Speech Clause, but as a decision unfolding within a constitutional landscape structured by escalating partisan conflict. In such an environment, disputes over campaign finance regulation became entangled with broader struggles over political power and electoral legitimacy. *Citizens United* therefore illustrates how constitutional doctrine may evolve not only through doctrinal reasoning but also within institutional environments framed by sustained political polarization.

II.3 Shelby County v. Holder

The Voting Rights Act of 1965 was enacted to address racial discrimination in voting. While Section 2 applies nationwide, prohibiting any practice or procedure resulting in the denial of a citizen's right to vote on account of race or color, Sections 4 and 5 applied only to certain jurisdictions with histories of maintaining discriminatory tests or devices as prerequisites to voting.¹⁸ In response to these discriminatory prerequisites, Section 5 required covered jurisdictions to obtain federal approval before implementing changes to their voting laws, a mechanism known as preclearance.¹⁹ In 2013, The Supreme Court in *Shelby County v. Holder* invalidated the coverage formula contained in Section 4(b), which determined which jurisdictions were subject to preclearance under Section 5. The majority held that Congress had exceeded its authority under the Fifteenth Amendment by failing to sufficiently justify continued

¹⁴Samuel Issacharoff, Pamela Karlan, and Richard Pildes, *The Law of Democracy: Legal Structure of the Political Process*, 6th ed. (Foundation Press, 2022).

¹⁵Richard Hasen, *The Voting Wars: From Florida 2000 to the next Election Meltdown* (New Haven: Yale University Press, 2012).

¹⁶*Bush v. Gore*, 531 U.S. 98 (2000)

¹⁷Richard Hasen, "Reining in the Purcell Principle," *Florida State Law Review*(2016).

¹⁸Voting Rights Act of 1965, 52 U.S.C. § 10301 (2018).

¹⁹52 U.S.C. § 10304.

federal oversight of state voting regulations.²⁰ The Court further reasoned that the coverage formula relied on outdated data that no longer carried a meaningful relationship to the present day. Unlike *Dobbs* and *Citizens United*, which directly overruled prior precedent, *Shelby County* reflects a doctrinal change through a reinterpretation of Congress' enforcement authority rather than through formal overruling. The case addressed a fundamental constitutional question concerning the scope of federal authority over state voting practices.

Heightened political polarization is closely associated with increased racial polarization in voting, including declining levels of cross-racial support on salient policy issues.²¹ Moreover, legal scholar Samuel Issacharoff characterizes racially polarized voting as structurally embedded within voting-rights jurisprudence, underscoring that doctrinal development responds to patterns of racial factionalization—a form of political polarization—rather than simply reflecting individual justice preferences.²² This relationship is evident in *Thornburg v. Gingles*, where the Court treated racial polarization as central to vote-dilution analysis under Section 2 of the Voting Rights Act.²³ Plaintiffs were required to demonstrate both minority political cohesion and white bloc voting, thereby formalizing polarization as a doctrinal precondition for a successful claim.²⁴ The 1986 decision thus illustrates that the Court acknowledged polarization as a structural feature of voting behavior that justified federal oversight under the Voting Rights Act. By contrast, *Shelby County v. Holder* recalibrated that configuration by limiting Congress's authority to address such polarized conditions through Sections 4(b) and 5 preclearance. In doing so, the Court shifted the constitutional balance toward principles of state sovereignty amid growing contestation over federal enforcement of voting protections. Accordingly, *Shelby County* demonstrates how shifts in federalism can occur within a constitutional landscape in which polarization had already been recognized as a structural feature of voting-rights disputes.

²⁰*Shelby County v. Holder*, 570 U.S. 529 (2013).

²¹Christopher Elmendorf, Kevin Quinn, and Marisa Abrajano, "Racially Polarized Voting," *The University of Chicago Law Review* 83, no. 2 (2016): 587.

²²Samuel Issacharoff, "Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence," *Michigan Law Review* 90, no. 7 (1992).

²³*Thornburg v. Gingles*, 478 U.S. 30 (1986)

²⁴*Gingles*, 478 U.S. 30

III Conclusion and Implications

Although *Shelby County v. Holder* represents the only instance among the three cases in which doctrinal change occurred through reinterpretation of legislation rather than precedent, *Shelby County*, *Dobbs*, and *Citizens United* each illustrate significant doctrinal developments occurring within an increasingly polarized political environment. Furthermore, each case involves a highly contested policy domain—abortion, campaign finance, and voting rights—demonstrating how constitutional doctrine evolves within politically charged contexts.

Taken together, the case studies suggest that polarization may increase the vulnerability of constitutional precedent in highly contested policy areas. Rather than viewing doctrinal change solely as a function of legal reasoning, these developments suggest that broader political conditions may shape the environment in which constitutional interpretation occurs. Importantly, this article does not contend that justices simply act as partisan actors. Rather, it suggests that judges operate within institutional environments shaped by political conflict, which may influence the conditions under which doctrinal change becomes possible. In this sense, polarization functions as a structural condition shaping constitutional development rather than merely reflecting individual ideological preferences.

If polarization remains a defining feature of American political life, the Supreme Court may face increasing challenges in maintaining doctrinal stability and institutional legitimacy. Future scholarship should therefore continue examining how structural political forces shape constitutional interpretation and whether existing institutional safeguards remain sufficient to preserve judicial independence.

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U.S. Const. amend. XIV, § 1.

Voting Rights Act of 1965, 52 U.S.C. § 10301 (2018).

**From Trusts to Family LLCs: Elite
Wealth Preservation Strategies and
Their Accessibility to Everyday
Americans**

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Spring 2026

Abstract

Advanced estate planning strategies, such as trusts and family-oriented limited liability companies (LLCs), are often perceived as financial tools exclusive to ultra-wealthy families. In reality, however, the legal principles underlying these strategies are broadly accessible and applicable to individuals at all levels of wealth. By challenging the common perception of exclusivity, addressing the core legal framework utilized, and exploring the coordination of complex planning techniques, this article illustrates how these mechanisms function in practice and argues that they can be adapted to meet the needs of everyday Americans. Adaptation begins by prioritizing instruments such as revocable trusts and family LLCs over complex dynasty trusts and family partnerships, which offer comparable benefits at a fraction of the cost and administrative burden. With thoughtful planning and flexible drafting, these scaled strategies offer meaningful protection, control, and continuity regardless of the size of one's financial circumstances.

I Introduction

American estate planning discourse often frames tools such as dynasty trusts and family limited liability companies (LLCs) as instruments reserved for entrenched wealth.¹ Often associated with perpetual control, generation-skipping tax minimization, and sophisticated valuation strategies, these devices are frequently portrayed as mechanisms employed exclusively by ultra-wealthy families to preserve and transfer capital across generations.² Yet this perception obscures two foundational truths regarding estate planning. First, basic planning is relevant to every American household. A mere 30% of Americans engage in formal estate planning. Although assets such as a home, retirement accounts, and life insurance can form the foundation of long-term financial stability, they are not, in and of themselves, enough to guarantee it.³ If left unstructured or organized inefficiently, these assets may be subject to

¹Ohio State University Extension, "Basic Estate Planning: Miscellaneous Issues (EP-12)," *Ohionline*, <https://ohionline.osu.edu/factsheet/EP-12>.

²Fidelity Investments, "Generation-Skipping Transfer Tax (GSTT): What You Need to Know," *Fidelity Viewpoints*, <https://www.fidelity.com/viewpoints/wealth-management/insights/generation-skipping-transfer-tax>.

³Consumer Financial Protection Bureau, "What Is a Revocable Living Trust?" May 14, 2024, <https://www.consumerfinance.gov/ask-cfpb/what-is-a-revocable-living-trust-en-1775/>.

various penalties, including tax-related violations. Establishing a will, power of attorney, and a revocable trust can provide structure to a person's portfolio and prevent the application of state intestacy defaults in the absence of a will.⁴ A revocable living trust allows a person to manage and distribute assets during life and at death while retaining the ability to change or revoke it, and intestacy default statutory rules are the state laws that determine how assets are distributed when no valid estate plan exists. Second, foundational estate planning tools rest on legal principles available to all citizens, not exclusively high-net-worth individuals.⁵ These two principles, the universal relevance and broad accessibility of estate planning tools, position advanced wealth preservation strategies not as exclusive instruments reserved for the ultra-wealthy but as scalable extensions of legal mechanisms available to households across the economic structure.

II The Architecture of Modern Estate Planning

Modern estate planning is not defined by a single piece of legislation, but by the interaction of several foundational bodies of law. The combined use of property law, trust and fiduciary principles, business entities, and federal and state tax law allows individuals to structure ownership, manage risk, and coordinate the transfer of assets across generations.⁶ These tools serve distinct but complementary purposes.⁷

II.1 Property Law and the Structure of Ownership

Property law determines how assets are titled, transferred, and inherited, influencing whether they trigger a taxable event. Mechanisms such as joint tenancy, tenancy by the entirety, payable-on-death accounts, and retirement account beneficiary designations operate within established legal frameworks

⁴Ohio State University Extension, "Basic Estate Planning: Miscellaneous Issues."

⁵Robert Andrew Brenan, "Limited Liability Companies: Operating Agreement Components and Sample Language," *NC State Extension Publications*, 2022, <https://content.ces.ncsu.edu/limited-liability-companies-operating-agreement-components-and-sample-language>.

⁶Ohio State University Extension, "Basic Estate Planning: Miscellaneous Issues."

⁷John H. Langbein, "The Nonprobate Revolution and the Future of the Law of Succession," *Harvard Law Review* 97 (1984): 1108–68, https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Langbein_Nonprobate_Revolution.pdf.

and are broadly accessible, not limited to high-net-worth individuals.⁸ Joint tenancy ensures co-owners automatically inherit a deceased owner's share; tenancy by the entirety is similar, but limited to married couples and offers added protections. Payable-on-death accounts transfer directly to a named beneficiary at death, and retirement account beneficiary designations direct those account assets to named individuals. In the absence of a valid will, property law, specifically intestate succession law, determines the distribution of one's estate, often producing undesirable outcomes.⁹ Careful estate planning is foundational to wealth preservation as it prevents these negative outcomes, ensuring that asset distribution properly reflects individual intent.¹⁰

II.2 Trusts

Alongside universal property law, trusts increase flexibility, separating legal and equitable ownership. Trustees manage assets subject to fiduciary duties for the benefit of designated beneficiaries, enabling continuity of management, conditional distributions, and long-term preservation. While often associated with dynastic wealth and considered complex, irrevocable trusts operate under doctrines, court supervision, enforceable beneficiary rights, and fiduciary duties that apply equally to both large and modest trusts.¹¹ Because differences between basic and advanced trusts lie primarily in duration, conditional provisions, scale, and tax planning objectives, rather than access to financial benefits, they are useful to preserve generational wealth for people of all means.¹²

II.3 Business Entities

Aside from trusts, business entities provide liability protection and structural governance benefits.¹³ Limited liability companies (LLCs) and partnerships allow families to centralize management, define voting rights, and re-

⁸Consumer Financial Protection Bureau, "What Is a Revocable Living Trust?"

⁹John H. Langbein, "The Nonprobate Revolution."

¹⁰Cornell Law School, "Dynasty Trust," https://www.law.cornell.edu/wex/dynasty_trust?utm_

¹¹American Bar Association, "Revocable Trusts." *Real Property, Trust and Estate Law Section*, https://www.americanbar.org/groups/real_property_trust_estate/resources/estate-planning/revocable-trusts/.

¹²Kiplinger, "Everyone Needs an Estate Plan—Even You." January 9, 2026, <https://www.kiplinger.com/retirement/estate-planning/everyone-needs-an-estate-plan-even-you>.

¹³Robert Andrew Brenan, "Limited Liability Companies:"

strict the transferability of ownership interests to avoid assets falling into the hands of unwanted individuals. These structures can facilitate succession planning, insulate personal assets from business liabilities, consolidate family wealth, and coordinate long-term intergenerational transfers. While wealthy families may layer entities to enhance valuation planning, consolidate control, and increase asset protection, every American state permits entity formation at minimal cost and without wealth-based restrictions, making these tools broadly accessible.¹⁴ Even small business owners can utilize these entities to structure ownership transitions, allocate decision-making authority, and protect family assets. For example, real estate can be placed into an LLC with a trust as the LLC member. This structure allows families to utilize the management and liability protection offered by LLCs, while maintaining the continuity of control and desired distribution among heirs provided by the trust.¹⁵

II.4 Federal Transfer Tax Framework

The federal transfer tax system, including estate, gift, and generation-skipping transfer taxes, operates according to statutory exemption thresholds, annual exclusion limits, and valuation principles applicable to all Americans. Estate tax is a tax on assets transferred at death; gift tax applies to transfers made during life.¹⁶ The generation-skipping transfer tax applies to transfers to beneficiaries two or more generations below the donor.¹⁷ Statutory exemption thresholds are the amounts that can be transferred tax-free under federal law; annual exclusion limits allow a set amount to be given each year without triggering gift tax; and valuation principles are the rules used to determine the fair market value of transferred assets. Strategic use of lifetime gifts, beneficiary designations, and structured ownership transfers can minimize administrative burdens, reduce unnecessary taxation, and ensure assets pass according to intent. Beneficiary designations specify who receives particular assets at death, while structured ownership transfers are planned arrangements for conveying property interests in a deliberate and tax-efficient manner. Although the scale of wealth may affect the magnitude of tax exposure,

¹⁴Kiplinger, "Everyone Needs an Estate Plan."

¹⁵Brian Layman, "Perpetual Dynasty Trusts: One of the Most Powerful Tools in the Estate Planner's Arsenal," *Akron Law Review*: Vol. 32: Iss. 4, Article 5, 1992, <https://www.uakron.edu/law/lawreview/volumes/v32/docs/layman324.pdf>.

¹⁶John H. Langbein, "The Nonprobate Revolution."

¹⁷Fidelity Investments, "Generation-Skipping Transfer Tax."

in other words, the potential tax owed, the legal mechanisms used to mitigate such exposure remain available to all. Even families below the federal exemption threshold benefit from thoughtful titling, which determines how assets are legally owned; coordinated transfer, or aligning multiple transfer methods; and lifetime planning, which involves organizing asset management and distribution during life.

III Elite Wealth Preservation Strategies

High-net-worth estate planning relies not on novel legal doctrines, but on strategic layering of accessible mechanisms to best achieve tax efficiency, asset protection, and long-term control. One common feature of elite estate planning is trusts that serve to minimize transfer taxation across generations.¹⁸ By leveraging federal estate and generation-skipping transfer (GST) tax exemptions, affluent families fund irrevocable trusts, removing appreciating assets from the taxable estate while allocating GST exemptions to shield future distributions from additional transfer tax. In many states, such trusts may continue indefinitely, allowing compounded growth outside successive estates.¹⁹ Advanced techniques also include the strategic valuation and transfer of private business ownership. Both family limited partnerships (FLPs) and manager-managed LLCs allow the separation of voting control from economic ownership.²⁰ FLPs divide ownership between general partners who maintain control and management authority and limited partners who hold economic interests without decision-making authority. Similarly, manager-managed LLCs divide control among designated managers, while non-managing members retain economic rights without direct operational control.²¹

Using these mechanisms, senior family members can retain managerial authority while transferring non-controlling membership interests directly to descendants or indirectly through the use of a trust, allowing families to shift substantial appreciation to younger generations while freezing the transferor's taxable estate. Other tools include grantor retained annuity trusts (GRATs), qualified personal residence trusts (QPRTs), and split-interest trusts.

¹⁸Fidelity Investments, "Generation-Skipping Transfer Tax."

¹⁹John H. Langbein, "The Nonprobate Revolution."

²⁰Scott Tansey, "Family Limited Partnerships and Family Limited Liability Companies," *Tansey Estate Planning*. 2010, <https://tanseyestateplanning.com/flp-llc.html>.

²¹Virginia Cooperative Extension, "Family Business Entities," <https://www.pubs.ext.vt.edu/CNRE/CNRE-121/CNRE-121.html>.

If structured properly, GRATs permit the transfer of future asset appreciation with minimal gift tax cost.²² QPRTs allow a residence to be transferred at a discounted present value while permitting continued occupancy. Split-interest trusts reward philanthropic endeavors, reducing estate size while preserving income streams and succession goals. The effectiveness of these strategies is determined by careful drafting, actuarial calculation, compliance with local and federal regulations, and proper administration.²³ The complexity of elite planning stems not from the exclusivity of doctrine, but from the coordination of multiple instruments to reduce tax exposure, manage appreciation, and retain structured control over family wealth.

IV Scalable Applications for Everyday Americans

Although ultra-wealthy families may deploy these doctrines with greater sophistication and optimization, the underlying mechanisms allow for application among people of all classes. For middle-class households, estate planning often prioritizes probate avoidance, ensuring assets pass directly to beneficiaries without court supervision, planning for incapacity, securing management of one's affairs in the event of physical or mental disability, asset protection, and tax efficiency within more modest estates.²⁴ Revocable living trusts provide a prime example of doctrinal scalability. Unlike irrevocable trusts, which typically remove assets from the taxable estate but cannot be easily modified, revocable trusts can be changed or revoked during life, enabling continuity of asset management while ensuring the intended post-death distribution is observed. For families whose primary assets consist of a residence, retirement accounts, and life insurance, beneficiary designations may accomplish similar planning objectives without exposure to federal estate tax. Similarly, business entities may serve practical succession functions even when valuation discounts are not the primary objective. A family-owned LLC can centralize management of rental property, establish a clear organizational structure among heirs, including voting rights, and prevent the forced partition or frag-

²²Cohen & Wolf, P.C., "How to Reduce Taxes with Grantor Retained Annuity Trusts," *Cummings & Lockwood LLC*, 2017, <https://www.cl-law.com/news-events/how-to-reduce-taxes-with-grantor-retained-annuity-trusts>.

²³Internal Revenue Service, "Split-interest trusts." <https://www.irs.gov/charities-non-profits/private-foundations/split-interest-trusts>.

²⁴Consumer Financial Protection Bureau, "What Is a Revocable Living Trust?"

mentation of ownership.²⁵ In this context, the entity operates less as a tax shelter and more as a tool to streamline governance. Another scalable instrument, irrevocable life insurance trusts (ILITs), assist in preventing insurance proceeds from inflating the taxable estate. Particularly pertinent to illiquid assets such as real estate or businesses, ILITs ensure funds are available and reduce probate exposure, protecting proceeds from creditors.²⁶ Aside from various trusts and LLCs, various gifting strategies can also help transfer wealth without initiating a taxable event. However, many middle-class families fall below federal estate tax exemption thresholds, shifting the utility from tax avoidance to administrative efficiency, asset protection, and intentional distribution planning.²⁷ The most appropriate estate plan is unique to each individual, dependent on the degree of customization, magnitude of wealth, and specific asset combination involved, rather than on access to the legal tools themselves. Scalable estate planning reinforces the broader principle that the legal architecture supporting complex multigenerational strategies can, when appropriately tailored, provide stability and long-term security for households across the economic spectrum.

V Conclusion

Estate planning serves as a mechanism to preserve individual control over property and its transfer. Its value extends beyond the exclusive manipulation by the elite, enabling individuals of all wealth levels to direct the management, protection, and disposition of assets. Absent planning, these assets face default governmental regulations, including court-supervised administration and tax structures, with little regard to personal preference. Proper structuring, through the use of trusts, business entities, and coordinated transfer techniques, allows individuals to reduce external involvement and ensure that private property remains subject to private direction. Ultimately, estate planning functions as an assertion of control, safeguarding one's assets, restricting external claims, and ensuring that the transfer of wealth reflects individual intent rather than default legal mandates. The strategies explored in this article demonstrate that this assertion of control is not contingent upon ex-

²⁵Robert Andrew Brenan, "Limited Liability Companies:"

²⁶Cornell Law School, "Irrevocable life insurance trust (ILIT)," [https://www.law.cornell.edu/wex/irrevocable_life_insurance_trust_\(ilit\)](https://www.law.cornell.edu/wex/irrevocable_life_insurance_trust_(ilit)).

²⁷Internal Revenue Service, "Estate and Gift Taxes," April 10, 2025, <https://www.irs.gov/businesses/small-businesses-self-employed/estate-and-gift-taxes>.

traordinary wealth. Trusts, LLCs, and coordinated transfer mechanisms are scalable instruments that serve the same foundational purpose across all economic conditions. Accessible, properly structured estate planning is not a luxury; it is a practical and necessary exercise of legal autonomy.

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