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2023

# LAW, HISTORY, AND SOCIETY

JOURNAL OF THE FLORIDA PRE-LAW REVIEW

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2023

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# FLORIDA PRE-LAW REVIEW

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AT THE UNIVERSITY OF FLORIDA

Fall 2025 | VOLUME IV

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## LAW, HISTORY, AND SOCIETY

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Welcome to *Law, History, and Society*, the journal of the Florida Pre-Law Review. As the first of its kind at UF, our journal serves as a forum for undergraduate students passionate about legal research to engage in academic inquiry, debate contemporary legal issues, and contribute to the broader legal discourse. Published by the University of Florida Library Press, our journal stands apart as the only publication of its kind directly affiliated with UF. Established with the vision of fostering a community of aspiring legal minds, *Law, History, and Society* is entirely student-run and is designed to mimic the editorial and publication process of a law school journal. Through a diverse range of articles, case analyses, and commentary pieces, our journal explores a myriad of legal topics spanning all facets of law. By encouraging critical thinking and scholarly dialogue, we aim to cultivate a deeper understanding of legal principles and their real-world applications among our contributors and readers alike. We thank you for joining us for our second issue, as we embark on a quest to explore the ever-evolving landscape of law illustrated by the undergraduate pre-law community at the University of Florida.

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# OPENING REMARKS

Paula Franco

# Looking Outward, Writing Inward

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**Paula Franco**  
*Editor-in-Chief*

**T**he study of law demands close attention to the intimate relationship between shifting global developments and the evolution of legal systems. By observing the elements of daily life that surround us, we begin to question how systems around us impact our lived reality. Most importantly, this examination calls for a deeper scrutiny of the daily practices that impact the way we live, yet are so easily ignored.

In this spirit, we have chosen to dedicate Volume IV of *Law, History and Society* to an analysis of contemporary legal conflicts and the ethical questions that arise from them. Our collection of articles seeks to illuminate the complex legal intricacies embedded within ordinary practices and encourages readers to question the law's role in addressing modern challenges.

Among these contributions, Julianna Zucker's article examines the ethical implications of "fast fashion", and the ways in which overconsumption and pace of production outpace the limits of copyright law. Author Eva Gallezzi Bruno adds an insightful investigation into forced labor within global supply chains and the lack of legal accountability of multinational corporations. Together with the other works featured in this collection, these articles collectively underscore the tensions between global practices and the capacities of the current legal framework.

I would like to extend my sincere gratitude to the authors who have worked tirelessly all semester to produce incredible works, and to the editorial board, whose dedication and collaboration is essential every step of the way. Their commitment to providing a place at the University of Florida where pre-law students can come together and exchange ideas through thoughtful discourse continues to advance the mission of this journal. We are proud to present Volume IV.



# LAW and BUSINESS

# Balancing Disclosure and Competitive Advantage in Securities Law: Lessons from *Goldman Sachs v. Arkansas Teacher Retirement System*

GENEVIEVE ST. JACQUES

## ABSTRACT

As invested capital underpins financial markets and empowers promising firms to grow quickly, the protection of investors and their capital has long been an essential part of stable financial markets. This protection is part of the primary mission of investment protection agencies such as the Securities Exchange Commission and Financial Industry Regulatory Authority within the United States, and foreign organizations such as the European Securities and Markets Authority and Financial Conduct Authority. A myriad of laws, regulations, and court precedents stemming from these agencies require firms to issue accurate, but not always comprehensive, public statements concerning their products and the health of their operations. At the same time, corporate success is also often linked to confidential information, such as the exact makeup of a product, service, or financial instrument. Since this proprietary information gives firms a competitive advantage, it is within the firm's interest to maintain confidentiality. The right of investors to know the details of their investments and the opposing right of firms to maintain a competitive advantage often results in a gray area around what information should be released and in how much detail. The discrepancy tempts firms to publish misstatements that have the potential to seriously injure investors' financial positions. Similarly, since firms are not required to disclose all their operations to investors, it is easy for firms without strong guardrails to mask conflicts of interest that potentially endanger investors. For these reasons, it is imperative that both robust and precise legal guidelines be implemented to prevent divided loyalties, thus requiring firms to provide investors with relevant information while maintaining their competitive advantage.

## Introduction

It is a well-known precept that investing personal assets in diversified securities is a safe method to potentially increase net worth and ensure a comfortable retirement. Pension funds, trusts, and other financial entities typically invest in diversified securities to ensure they have sufficient funds to pay beneficiaries. These investors rely heavily on statements from banks and other financial institutions when choosing assets in which to invest. However, there have been instances of firms releasing inaccurate or misleading statements that cause investors to overestimate the value of a security. This is done either to increase their stock price or to exploit conflicts of interest. In securities law, a conflict of interest occurs when a firm benefits from the success of either of two opposing parties. Regardless of the firm's size and economic influence, these misleading

statements pose a threat to the livelihoods of all investors in the market, including those who rely on investment profits for retirement income. In one such case, *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*<sup>1</sup>, the defendant alleged that Goldman Sachs had failed to disclose a conflict of interest regarding the marketing and sale of the Credit Default Obligations (CDOs), of which the defendant had been a buyer. The three main questions before the Supreme Court were whether defendants bore the burden of proof regarding whether the misrepresentations caused the change in stock price, if the inflation-maintenance theory was included under the *Basic* principle, and whether firms could be prosecuted for both generic and specific misrepresentation. The inflation-maintenance theory is the concept in which a firm makes a misrepresentation to prevent the stock price from decreasing to its proper value, as opposed to artificially causing a price increase.<sup>2</sup> A specific misstatement usually concerns a particular aspect of the business and is closely related to a change in the firm's stock price. A general misstatement is a broader statement about the firm's performance that is less clearly linked to a change in stock price. For example, Goldman Sachs's alleged general falsifications were that its clients "always came first" and that they had "extensive procedures and controls that are designed to identify and address conflicts of interest."<sup>3</sup> As the Supreme Court held Goldman Sachs Group liable for its misrepresentation and competing interests, the Goldman decision substantially increased protections for everyday investors and allowed firms to be prosecuted for a wide swath of misleading statements and conflicts of interest.

## Case Synopsis

*Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System* centered on allegations that Goldman misled investors during the Financial Crisis of 2008. Goldman did so by claiming that its financial products,

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- 1 *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 594 U.S., 20-222 (SCOTUS. 2021)
  - 2 Miguel A. Estrada, Mark A. Perry, and Kellam M. Conover. "High Court Should Review Goldman's Maintenance Theory." *Gibson Dunn & Crutcher LLP.*, June 24, 2020.
  - 3 Roger E. Barton. "Goldman Decision Wielded in Recent Securities Class Action Litigation." *Reuters*, February 24, 2025.

particularly Credit Default Obligations (CDOs) backed by risky subprime mortgages, were safe. Goldman failed to disclose a significant conflict of interest by allowing Paulson & Co. (Paulson) to select unpredictable assets for these CDOs and then bet against them using credit default swaps. Plaintiffs argued that these misstatements kept Goldman's stock price artificially high until the low-quality nature and opposing interests of these investments were revealed, which caused significant losses for investors. Goldman contended that the precedent set in *Basic Inc. v. Levinson*,<sup>4</sup> which held firms liable for their inaccuracy, did not apply to this situation, but the Court disagreed. In its ruling, the Court reaffirmed and extended the *Basic* principle, which presumes that investors rely on the integrity of a stock's market price and that public misstatements affecting that price can support a securities-fraud claim. In *Goldman*, the Court held that investors could sue companies based on the inflation-maintenance theory and that defendants, like Goldman, bear the burden of proving that their statements did not affect stock prices, even if those statements were quite general. The decision held Goldman liable for misleading disclosures and opened the door to broader investor protections throughout the financial sector.

## I. Technical Terms and Key Precedents

Due to the technical nature of the securities that led to the financial crisis, understanding *Goldman* and its effects requires comprehension of not only key legal precedents, including the *Basic* principle, but also multiple financial instruments, including collateralized debt obligations and credit-default swaps.

### A. Collateralized Debt Obligations (CDOs)

A CDO is a complex security composed entirely of loans. CDOs can include a variety of instruments, such as auto loans, student loans, and home equity lines of credit (HELOCs), but the majority are primarily made up of mortgages. Should the loans go into default, the underlying

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4 *Basic Inc. v. Levinson*, 485 U. S. 224 (SCOTUS. 1988) <https://tile.loc.gov/storage-services/service/l1/usrep/usrep485/usrep485224/usrep485224.pdf>

assets, such as houses or cars, serve as collateral,<sup>5</sup> helping investors recover at least some of their investment. CDOs differ from typical mortgage-backed securities because they are divided into tranches.<sup>6</sup> Tranches are sections of a CDO that contain loans with a certain credit rating. Typical CDOs have an AAA tranche, an AA tranche, a BBB tranche, a B tranche, and an equity tranche.<sup>7</sup> The AAA tranche is the least risky but experiences the lowest returns, while the equity tranche is the riskiest but can experience the highest returns. During the financial crisis, CDOs, including those involved in the *Goldman* case, were backed by loans to buyers who were more likely to default.<sup>8</sup> These loans are known as subprime loans and made CDOs more perilous than their classifications would indicate.<sup>9</sup>

## B. Credit Default Swaps (CDS)

A credit-default swap (CDS) is a tool used to bet against CDOs. In a CDS, the buyer pays an ongoing premium to the seller for the CDO.<sup>10</sup> In exchange, the “seller agrees to pay the security’s value and interest payments” should the loans default.<sup>11</sup>

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5 Carla Tardi. “Collateralized Debt Obligation (CDOs): What It Is, How It Works,” Investopedia, October 1, 2024, <https://www.investopedia.com/terms/c/cdo.asp>

6 *Basic Inc. v. Levinson*, 485 U. S. 224 (SCOTUS. 1988)

7 *Basic Inc. v. Levinson*, 485 U. S. 224 (SCOTUS. 1988)

8 Carol Kopp. “What Is a Subprime Mortgage? Credit Scores, Interest Rates,” Investopedia, November 02, 2024,

9 Kopp “What is a Subprime Mortgage?”

10 Adam Hayes, “What Is a Credit Default Swap and How Does It Work?” *Investopedia*, August 26, 2025, <https://www.investopedia.com/terms/c/creditdefaultswap.asp>.

11 Hayes “What is a Credit Default Swap And How Does it Work?” *Investopedia*

### C. The Basic Principle

During *Basic Inc. v. Levinson*,<sup>12</sup> the Court held that investors could sue companies over investment decisions that rely on material misstatements if the distortions were available to the public, the defendant's shares were traded publicly, and the investors purchased the shares between the time the misrepresentations occurred and the correct knowledge was made public. The precedent set by this case is referred to as the Basic principle.

## II. Background

During the Great Recession of 2008, the gross domestic product, a measure of economic growth, fell 4.3 percent, the most significant decrease since the end of World War II.<sup>13</sup> Unemployment doubled from five to ten percent, while major stock indexes lost twenty percent of their value. The Dow Jones Industrial Average, for example, which tracks the stock prices of particularly capital-intensive firms, had fallen by 54% at its lowest point in March of 2009. A significant cause of the 2008 crash was the proliferation of subprime mortgages, which led to a surge in home foreclosures. In the aftermath of this recession, a group of plaintiffs, primarily pension funds led by the Arkansas Teacher Retirement System, filed a class-action lawsuit against Goldman Sachs Group, Inc. In *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, the plaintiffs alleged that Goldman had made material misstatements regarding its fixed-income products, particularly its CDOs, falsely portraying the assets as extremely safe. This raised a conflict of interest, which they failed to disclose by claiming that they employed systems to prevent divided loyalties.<sup>14</sup> In 2006, Goldman began creating CDOs, known as Abacus CDOs,

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12 Shay Dvoretzky, et al., "Supreme Court Clarifies Basic Presumption Burden and Holds Courts Should Consider All Price Impact Evidence," Skadden, Arps, Slate, Meagher & Flom LLP, accessed September 14, 2025

13 Rich, Robert. "The Great Recession (December 2007–June 2009)." Federal Reserve History.

14 Shay Dvoretzky et al, "Supreme Court."

which they marketed as “ordinary asset-backed [securities]”<sup>15</sup> despite composing them from subprime mortgages and other risky investments. Additionally, Goldman allowed Paulson to choose the mortgages that would comprise the CDOs.<sup>16</sup> Paulson then bet against these CDOs by buying credit-default swaps. This situation created a significant conflict of interest for Goldman since Paulson was motivated to select loans with a higher chance of default, thus increasing the chance of loan defaults<sup>17</sup> and gains for those holding Paulson CDSs. Further, Goldman failed to disclose this situation to investors, despite claiming only that “they had extensive procedures and controls that are designed to identify and address conflicts of interest.”<sup>18</sup> Goldman’s failure to disclose its conflict of interest with Paulson was a primary reason for the *Goldman* lawsuit.

The plaintiffs in *Goldman* further contended that Goldman’s misstatements regarding the unpredictability of CDOs and failure to disclose the opposing loyalty with Paulson caused Goldman’s stock price to remain artificially high, leading to material losses of \$13 billion when the truth was later revealed.<sup>19</sup> This precept is known as the inflation-maintenance theory and occurs when a firm’s misrepresentations cause its security prices to remain artificially high until the eventual public revelation causes the price of the security to fall.<sup>20</sup> Goldman argued that the *Basic* precedent, which allows investors to sue over public companies’ public statements, did not include the inflation-maintenance theory; however, the plaintiffs asserted that because investors rely on a variety of public statements to allocate capital, the theory was included in *Basic*.<sup>21</sup>

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15 William Kwon and Christine Yuan, “Goldman Sachs Group”

16 William Kwon and Christine Yuan, “Goldman Sachs Group”

17 William Kwon and Christine Yuan, “Goldman Sachs Group”

18 U.S. Supreme Court. “*Goldman Sachs*”

19 William Kwon and Christine Yuan, “Goldman Sachs Group”

20 Shay Dvoretzky et al, “Supreme Court.”

21 Shay Dvoretzky et al, “Supreme Court.”

### III. Outcome

The Court reaffirmed *Basic*, meaning that the Court should assess all evidence relating to both the materiality of a misstatement and the damage done to investors.<sup>22</sup> This evidence, the Court opined, should include quantitative metrics, such as the percent change in stock price, qualitative metrics, such as the content of the falsification, and reasonably assumed reactions of investors and the market to the firm's statements.<sup>23</sup> The Court extended the *Basic* principle to apply to situations where the inflation maintenance theory is in play, even when the price impact is not an immediate result of the misrepresentation. Finally, the Court asserted that the defendant bears the burden of persuasion, even when the alleged misstatements are general.<sup>24</sup> In other words, the Court affirmed that instead of the plaintiffs having to prove that a false statement caused the stock price inflation, the defendant, in this case, Goldman, has to prove that there was no connection between the distortions and the inflated stock price. Finally, by determining that Goldman was liable for the erroneous statements, which were pulled from its 10-Ks, otherwise known as annual performance reports, the Court allowed defendants to be prosecuted for generic misrepresentations rather than only those concerning the specific situation.<sup>25</sup> Overall, the Supreme Court's decision acknowledged the inflation-maintenance theory as grounds on which to sue under *Basic*, placing the burden of proof on the defendant rather than the plaintiff and opening the door for lawsuits related to a variety of firms' misstatements. Plaintiffs have successfully used the Goldman principle in *Shupe et al. v. Rocket Companies Inc.*<sup>26</sup> and *Jaeger v. Zillow Group Inc.*<sup>27</sup> to prosecute these real estate firms for their misstatements.<sup>28</sup>

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22 U.S. Supreme Court. "Goldman Sachs"

23 In re: Allstate Corporation Securities Litigation, 966 F.3d 595, 613 n.6 (7th Cir. 2020),

24 Goldman Sachs, 594 U.S.

25 Goldman Sachs, 594 U.S.

26 *Shupe v. Rocket Companies, Inc. et al*, No. 1:2021cv11528 – Document 238 (E.D. Mich. 2025)

27 *Jaeger v. Zillow Group, Inc., et al.*, No. 24-6605 (9th Cir. 2025)

28 Barton, "Goldman Decision."

## Impact

Although the sale of CDOs largely ceased after the Financial Crisis of 2008, the potential for misrepresenting the risk profile of complex fixed-income securities remains. Multiple similar forms of fixed-income securities, such as the popular Collateralized Loan Obligation (CLO), have been created since 2008, and the rapid growth of these assets means that financial institutions must continue to be careful to honestly portray the uncertain returns of these securities.<sup>29</sup>

The simpler composition of CLOs may help limit accidental misstatements about risk, such as those presented in *Goldman*. Like a CDO, a CLO is a single security backed by a pool of debt and divided into tranches.<sup>30</sup> Rather than being made from a combination of consumer-facing loans such as mortgages and car loans, CLOs are composed of corporate loans.<sup>31</sup> These loans are typically issued to highly indebted firms with below-investment-grade credit ratings, or used by private equity firms to finance leveraged buyouts, which are when a private equity firm obtains a loan to buy a company, and then uses that company's profits to pay off the loan.<sup>32</sup> Unlike with loans that compose CDOs, it is far easier to spread leveraged loans across sectors, decreasing uncertainty.<sup>33</sup> Additionally, although these loans are not necessarily high quality, the presence of only one type of loan makes them much less complex than CDOs, making their risk profile much easier for assessors to analyze and helping firms avoid accidental misstatements.<sup>34</sup>

Another reason that firms such as Goldman misrepresented the risks of CDOs was that high demand for the product caused banks'

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29 Sirio Aramonte and Avalos Fernando, "Structured Finance Then and Now: A Comparison of CDOs and CLOs," Bank for International Settlements, published September 22, 2019

30 Troy Segal, "Collateralized Loan Obligation (CLO) Structure, Benefits, and Risks," Investopedia, updated September 1, 2025,

31 Aramonte and Fernando, "Structured Finance."

32 Aramonte and Fernando, "Structured Finance."

33 Segal, "Collateralized Loan Obligation."

34 Aramonte and Fernando, "Structured Finance."

underwriting standards to deteriorate. Essentially, when underwriting standards deteriorate, investors demand more CDOs and, therefore, more loans. Banks met this pressure by extending mortgages to borrowers with low credit scores. Similarly, the current high demand for CLOs may cause some banks to decrease their underwriting standards.<sup>35</sup> According to the BIS Quarterly Review, “leveraged loans without maintained covenants [measures that ensure that a firm maintains a good level of credit] increased from 20% in 2012 to 80% in 2018 [and] the share of low-rated... leveraged loans in CLOs has doubled in recent years.”<sup>36</sup> Because underwriting standards have deteriorated, low-rated loans, or loans without maintenance covenants, have become more prevalent in contemporary CLOs, potentially increasing risk. If firms do not disclose this decrease in underwriting standards in their statements or continue to market the assets as “ordinary securities,” they could be liable under Goldman.<sup>37</sup>

The modern CLO often avoids using credit default swaps, which is one mitigating factor for firms considering conflicts of interest, even though the considerable demand for CLOs may encourage corporations to understate the unpredictability of contemporary fixed-income assets. In this way, firms are protected from the specific conflict of interest that Goldman suffered, in which the same team that selected the assets in the security was allowed to bet against the security. However, opposing loyalties can still emerge in CLOs and throughout the broader financial industry. Just recently, for instance, the SEC discovered that Sound Point Capital Management had conflicts of interest regarding its CLOs. Sound Point Capital extended lines of credit to firms whose loans were included in the CLOs that Sound Point traded. In this way, it was able to use material nonpublic information from its credit arm to trade on the CLOs.<sup>38</sup> Because competing loyalties can appear at any time, not only in fixed-income securities, and because the Goldman decision allows banks to be

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35 Aramonte and Fernando, “Structured Finance.”

36 Aramonte and Fernando, “Structured Finance.”

37 Aramonte and Fernando, “Structured Finance.”

38 “SEC Charges Sound Point Capital Management for Compliance Failures in Handling of Nonpublic Information,” U.S. Securities and Exchange Commission, press release 2024-106, August 26, 2024,

prosecuted for general misstatements, banks must maintain structures that proactively search for conflicts of interest within their fixed-income sector and the firm at large.

## Conclusion

The Court's decision in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System* marks a pivotal moment in securities law, reinforcing the principle that financial institutions must be transparent and accountable in their public statements. By affirming that the inflation-maintenance theory falls within the *Basic Inc. v. Levinson* framework and extending liability to both general and specific misstatements, the Court significantly broadened investor protections. Additionally, the decision clarified that generic statements, such as those found in a company's annual reports, can form the basis for liability if they mislead investors, thereby setting a high standard for truth in firms' public statements. Thus, this ruling has far-reaching implications not only for class-action litigation but also for how firms manage risk disclosures and conflicts of interest.

Although the sale of CDOs largely ceased after the Great Financial Crisis of 2008, the *Goldman* ruling serves as a warning against the misrepresentation of risk. While the composition of CLOs may be simpler, more diverse across sectors, and arguably more transparent than the CDOs at the heart of the financial crisis, they are not immune to danger. Currently, demand for CLOs is growing, leading underwriting standards to deteriorate and CLOs to become riskier. If the firms do not accurately represent the risk of the CLOs, they could be exposed to legal liability under the standards set by *Goldman*.

In addition, although CLOs typically avoid the use of credit default swaps, thus avoiding the exact conflict of interest seen in *Goldman*, the potential for conflicts of interest remains a systemic issue. The Court's decision underscores the importance of proactive internal controls and strong conflict of interest identification processes, not just in structured finance but across all areas of a firm's operations. With the door now open for litigation based on general misrepresentations and latent conflicts of interest, banks and investment firms must adopt a culture of rigorous compliance and transparency.

Ultimately, *Goldman Sachs v. Arkansas Teacher Retirement System* reinforces that accurate risk representation is not merely a regulatory formality but a foundational requirement for the proper functioning of financial

markets. By affirming that both generic and specific misstatements can trigger liability, and by placing the burden on firms to prove that their statements did not affect market prices, the Court has made clear that investor trust must be protected even when disclosures involve complex financial instruments. As modern markets continue to innovate, the responsibility of firms to maintain transparency and proactively manage conflicts of interest remains critical. The Goldman decision thus stands as a continuing reminder that market stability depends on honest communication, robust internal controls, and a commitment to safeguarding the interests of the investors who make economic growth possible.



# Bundling the Sunday Ticket: Antitrust and the Future of Sports Distribution

EMILIO FERNANDEZ

## ABSTRACT

This legal analysis concerns the antitrust litigation brought against the National Football League regarding its out-of-market broadcasting package, NFL Sunday Ticket. Plaintiffs alleged the NFL, in collaboration with DirecTV, unlawfully bundled all Sunday afternoon games into a single package, preventing consumers from purchasing individual team games and inflating prices. The class action lawsuit, filed in 2015, covered a subscriber base of over 2.4 million residential customers and approximately 48,000 commercial establishments. In June 2024, a jury awarded over \$4.7 billion in damages to the class.<sup>1</sup> However, in August 2024, the trial judge granted judgment as a matter of law in favor of the NFL, ruling that the plaintiffs' damages experts were inadmissible and no reasonable jury could find class-wide harm without their testimony. This paper outlines the legal framework for assessing the alleged conduct, including the application of the Sherman Antitrust Act and the scope of the Sports Broadcasting Act. It further analyzes the reasoning behind key judicial opinions, evaluates how the court's interpretation of evidence influenced the outcome, and considers the broader implications for antitrust enforcement in sports broadcasting.<sup>2</sup>

## Introduction

The dispute centers on the National Football League's ("NFL") out-of-market broadcasting product known as NFL Sunday Ticket. The NFL licensed the rights to all Sunday-afternoon games to a single distributor, DirecTV, which then sold them exclusively as one bundled package. This product offered access to games not televised in a viewer's local market and marketed itself as a premium service. According to the plaintiffs, this structure prevented consumers from purchasing individual team games and forced residential and commercial subscribers to buy the full package to access any out-of-market games. The lawsuit reflects the full vertical chain of the broadcast arrangement. The plaintiffs include individual

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- 1 "In Re: National Football League's 'Sunday Ticket' Antitrust Litigation," Home, Accessed September 15, 2025, <https://www.nflsundayticketlawsuit.com/>.
  - 2 Kaleigh McCormick "Sunday Ticket Subscribers Punt Their NFL Lawsuit Back to the Ninth Circuit," Sunday Ticket Subscribers Punt Their NFL Lawsuit Back to the Ninth Circuit, *The Columbia Journal of Law & the Arts*, November 8, 2024, <https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/734>.

subscribers and commercial establishments, such as bars and restaurants that purchased the NFL Sunday Ticket. The defendants include DirecTV, affiliates, the NFL, NFL's media arm, and all thirty-two football clubs. Under the challenged system, individual clubs assign their telecasting rights to the NFL. The NFL coordinates the production of each game with its broadcast partners and determines which games air freely in local markets. DirecTV receives the full slate of Sunday-afternoon games, repackages them, and sells access through the NFL Sunday Ticket.<sup>3</sup>

## Theoretical Framework

The core legal theory advanced by the plaintiffs allege that the NFL's arrangement constitutes an antitrust violation. Antitrust violations are illegal practices that harm competition.<sup>4</sup> Specifically, they allege the pooling of club broadcast rights and exclusive bundling of out-of-market games into a single product unlawfully restricted output, reduced consumer choice, and inflated prices in violation of Sections I and II of the Sherman Act. The Sherman Antitrust Act of 1890 is a foundational federal statute aimed at maintaining competitive markets. It contains two core provisions: Section I, which prohibits contracts, combinations, or conspiracies that unreasonably restrain trade, and Section II, which bans monopolization and attempts or conspiracies to monopolize. The law applies to both horizontal and vertical restraints, serving as the backbone of federal antitrust enforcement.<sup>5</sup>

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3 Jodi S. Balsam, *Fumbling Antitrust: Fallacies in the NFL Sunday Ticket Litigation* (August 01, 2025), *Harvard Journal of Sports and Entertainment Law*, Volume 16, Summer 2025, Pp. 235-281, Brooklyn Law School Legal Studies Research Paper Series, No. 800, Available at SSRN: <https://ssrn.com/abstract=5388522> or <http://dx.doi.org/10.2139/ssrn.5388522>

4 "Antitrust Violations," Legal Information Institute, Accessed October 31, 2025, [https://www.law.cornell.edu/wex/antitrust\\_violations](https://www.law.cornell.edu/wex/antitrust_violations).

5 "Sherman Anti-Trust Act (1890)," National Archives and Records Administration, Accessed October 31, 2025, <https://www.archives.gov/milestone-documents/sher-man-anti-trust-act>.

The plaintiffs also seek treble damages, legal remedy where a court awards a plaintiff three times the amount of their actual financial loss, and injunctive relief, a court order that compels a party to do or refrain from doing a specific act, under the Clayton Act. The Clayton Act of 1914 was enacted to strengthen the Sherman Act by targeting specific anti-competitive practices such as exclusive dealing, tying arrangements, and certain mergers that may substantially lessen competition. It also allows private parties to seek treble damages and injunctive relief when harmed by antitrust violations.<sup>6</sup> A statutory overlay to the case involves the Sports Broadcasting Act of 1961. The Sports Broadcasting Act of 1961 provides a narrow antitrust exemption allowing professional sports leagues to pool and sell broadcasting rights collectively, but only for sponsored, over-the-air television broadcasts. However, it does not explicitly mention subscription services.<sup>7</sup> The plaintiffs contend that this exemption applies only to “sponsored telecasting,” i.e., free advertiser-supported broadcasts and does not extend to subscription-based satellite services like NFL Sunday Ticket.<sup>8</sup> This statutory argument is central to the plaintiffs’ claim that the NFL’s arrangement with DirecTV remains fully subject to federal antitrust scrutiny.

The litigation began in 2015 when Mucky Duck Sports Bar in San Francisco filed suit against the NFL and DirecTV. The case was dismissed at the pleading stage for a lack of standing, but later reinstated in 2019 as a class-action lawsuit by the U.S. Court of Appeals for the Ninth Circuit. The appellate panel concluded the plaintiffs had plausibly alleged a rule-of-reason violation under Section I and monopolization claims under Section II of the Sherman Act. The court also held that the consumers had antitrust standing, even considering the Illinois Brick doctrine.

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6 “Clayton Antitrust Act,” Legal Information Institute, Accessed October 31, 2025, [https://www.law.cornell.edu/wex/clayton\\_antitrust\\_act](https://www.law.cornell.edu/wex/clayton_antitrust_act).

7 Congress, “Sports Broadcasting Act of 1961,” GovInfo, September 30, 1961, <https://www.govinfo.gov/app/details/COMPS-12156>.

8 “15 U.S. Code § 1291 - Exemption from Antitrust Laws of Agreements Covering the Telecasting of Sports Contests and the Combining of Professional Football Leagues,” Legal Information Institute, Accessed October 27, 2025, <https://www.law.cornell.edu/uscode/text/15/1291>.

The Illinois Brick doctrine, established by the Supreme Court in 1977, limits the right to recover antitrust damages in federal court to direct purchasers. In other words, consumers who buy products indirectly, i.e., through intermediaries, are generally barred from seeking damages. This holds true even if they ultimately bear the cost of the overcharge.<sup>9</sup> The complaint alleged a vertical conspiracy involving the seller (DirecTV) and upstream participants (the NFL and its clubs). In addition, the panel noted the Sports Broadcasting Act applies only to Section I claims and does not insulate conduct that could violate Section II. At trial, a jury in Los Angeles returned a verdict in favor of the plaintiffs. The damages were divided between residential subscribers and commercial establishments, with the total award of \$4.7 billion. Due to the Clayton Antitrust Act, the NFL became potentially liable for \$14.1 billion in treble damages.<sup>10</sup> The Clayton Antitrust Act allows for parties that have been harmed by an antitrust violation to sue and recover three times their actual damages. However, in a post-trial ruling, the district judge granted judgment as a matter of law (“JMOL”) in favor of the NFL.<sup>11</sup> JMOL is a legal motion asking a court to rule that no reasonable jury could find for the opposing party, based on legally insufficient evidence. This can be granted during a jury trial to end the case, or as a post-trial motion. It is based on the judge’s determination of the law, not the facts. The court excluded the testimony of the plaintiffs’ two expert witnesses on damages and injury, finding their methodologies flawed. Without that testimony, the court concluded that no reasonable jury could find that class-wide injury or damages had occurred. The issue is currently before the Ninth Circuit

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9 Illinois Brick Co. v. Illinois | 431 U.S. 720 (1977), Justia U.S. Supreme Court Center, Accessed October 31, 2025, <https://supreme.justia.com/cases/federal/us/431/720/>.

10 “The Antitrust Laws,” Federal Trade Commission. Protecting America’s Consumers, March 4, 2022, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>.

11 Nat’l Football League’s Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136, 2019 U.S. App. LEXIS 24041, 2019-2 Trade Cas. (CCH) P80,870, 2019 WL 3788253

Court on appeal by the plaintiffs.<sup>12</sup> This factual and procedural foundation frames the legal issues at stake. The remainder of this paper explores whether the NFL's licensing structure amounts to an unlawful restraint, how the trial court's evidentiary rulings may affect the legal conclusions on appeal, and the rippling effects onto future antitrust violations.

## What the NFL Did: The Interlocking Agreements

At the heart of this antitrust case there are three vertically and horizontally interlocking agreements that, when combined, eliminated competition at multiple levels of the live sports broadcasting market. Vertical antitrust violation agreements occur when businesses at different levels of the supply chain regulate how goods or services are produced and distributed. Horizontal antitrust violation agreements occur when competitors at the same level of the supply or distribution chain set their prices together to reduce competition.<sup>13</sup> These agreements transformed a competitive market for individual NFL games into a centralized, all-or-nothing product sold at supracompetitive prices.

### A. Policy of Rights

The first agreement occurred at the top: every football club assigned its broadcast rights to the NFL. This pooling arrangement gave the NFL exclusive control over the commercial licensing of all thirty-two clubs' live game telecasts. Otherwise, clubs would be able to negotiate with broadcasters individually, creating diverse packages, a la carte game options, or regional offerings. This collective agreement substituted club-level competition with centralized control. From an antitrust standpoint, this is a textbook horizontal restraint: rival entities

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12 "Federal Judge Overturns \$4.7B Verdict in 'Sunday Ticket' Lawsuit, Rules for NFL," NFL, August 2, 2024, <https://www.nfl.com/news/federal-judge-overturns-4-7b-verdict-in-sunday-ticket-lawsuit-rules-for-nfl>.

13 Michael MacKenzie, "Antitrust 101," National Association of Attorneys General, June 30, 2025, <https://www.naag.org/issues/antitrust/antitrust-101/>.

(the clubs) agreeing to limit their independent commercial conduct.<sup>14</sup> The Ninth Circuit emphasized that this kind of pooling is not inherently immune from scrutiny, especially when it serves to suppress output or facilitate monopolistic structures downstream. The court held that this arrangement was not protected by the Sports Broadcasting Act, since the statute only applies to sponsored over-the-air telecasting, and not paid subscription models like Sunday Ticket.

### **B. The CBS/FOX Agreement: Single Telecast Per Game**

Next, the NFL entered into agreements with CBS and Fox, the two national broadcasters, for a system in which only one telecast per game is produced, and only a select few are broadcast free-to-air in local markets. This structure ensures that any given Sunday game is shown only in limited geographic areas, based on home-team territories and competitive matchups. For all out-of-market games, the content is withheld from general viewership unless a consumer pays for Sunday Ticket. This element of the scheme plays a critical role in suppressing output. By limiting the number of produced telecasts and tightly controlling their distribution, the NFL and its broadcast partners created artificial scarcity. Viewers interested in out-of-market games cannot access them via local channels, digital streams, or team-level subscriptions. The economic model is simple: the NFL limits viewers' accessibility to their preferred football game, in turn, forcing consumers to purchase DirecTV's high cost alternative, the exclusive Sunday Ticket Bundle.

### **C. The DirecTV Agreement**

The third and most direct restriction involves the NFL's long-standing agreement with DirecTV. Under this contract, DirecTV acquired the exclusive rights to distribute all out-of-market Sunday afternoon games nationwide. Moreover, consumers could not access Sunday Ticket as a stand-alone streaming product. It required a DirecTV base subscription, which added an additional layer of cost and infrastructure.

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14 "Dealings with Competitors," Federal Trade Commission. Protecting America's Consumers, December 16, 2024, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors>.

The NFL not only gave DirecTV these rights, it also imposed downstream restrictions on the product design itself. The NFL did not allow DirecTV to sell individual games, team-specific packages, or à la carte viewing options. Instead, all out-of-market games were bundled together and sold as a single premium product, with no way to opt out of unwanted content. This bundling requirement sharply curtailed consumer choice and raised entry barriers, especially for casual or price-sensitive fans.<sup>15</sup>

## D. Breakdown

Together, these three agreements suppressed output across every level of the market. Teams were forbidden from competing in the broadcasting rights market. Broadcasters agreed to show only one version of each game while also being limited to local markets. The only way to watch out-of-market games was to purchase a high-priced, non-divisible product from a single satellite provider.<sup>16</sup> The Ninth Circuit held that these facts plausibly stated a violation of Section I of the Sherman Act under the rule-of-reason framework. The rule-of-reason framework is an antitrust law test that determines if a business agreement or practice is an unreasonable restraint of trade by balancing its anti-competitive effects against any pro-competitive benefits. To apply the framework, a plaintiff must first prove the practice has adverse anti-competitive effects, such as increased prices or reduced output. Then, the burden shifts to the defendant to show pro-competitive justifications for the conduct.<sup>17</sup> By reducing output and raising prices through exclusive agreements,

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15 Ninth Inning, Inc. v. DIRECTV, no. 17-56119 (9th cir. 2019), Justia, <https://law.justia.com/cases/federal/appellate-courts/ca9/17-56119/17-56119-2019-08-13.html>.

16 Jeffrey Cohen, “Antitrust Blitz: NFL Sunday Ticket Ruling Could Have Potentially Broad Implication for All Professional Sports,” Antitrust Blitz: NFL’s Sunday Ticket Ruling Could Have Potentially Broad Implication for All Professional Sports: Flaster Greenberg | Law Firm & Attorneys, Accessed October 31, 2025

17 “Rule of Reason: Practical Law,” Practitioner Insights News & Analysis, Accessed October 27, 2025, <https://content.next.westlaw.com/practical-law/document/I03f4d78aeee311e28578f7ccc38dcbee/Rule-of-Reason?viewType=FullText&transitionType=Default&contextData=%28sc.Default%29>.

the NFL and its partners restricted market competition, causing harm to consumers. The court also allowed Section II claims for conspiracy to monopolize and monopolization, based on the combined conduct of the clubs and the NFL. These theories rested on the NFL's ability to maintain dominance in the market for live professional football telecasts not just through control of content, but through the suppression of alternatives and the use of exclusive distribution to foreclose competition. The panel further found residential and commercial subscribers had antitrust standing, since they purchased the product directly from a member of the alleged conspiracy (DirecTV). This sidestepped the usual bar on indirect purchaser claims under Illinois Brick, creating a clear path for subscriber lawsuits to proceed.

## Verdict vs. JMOL

In June 2024, after years of litigation and a reversal from the United States Court of Appeals for the Ninth Circuit, the case finally reached a jury. The subscribers, both residential and commercial, alleged that the NFL's exclusive agreement with DirecTV and bundling of all out-of-market games into a single premium product, violated Sections I and II of the Sherman Act. The jury agreed. It found the NFL liable and awarded approximately \$4.7 billion in damages, split across the two subscriber classes.<sup>18</sup> But the verdict didn't stand.

Shortly after the trial, U.S. District Judge Philip Gutierrez issued a ruling on the NFL's motion for JMOL. In doing so, he vacated the jury's decision entirely. His reasoning hinged on one critical issue: the admissibility and reliability of the plaintiffs' expert testimony on class-wide damages and injury. Judge Gutierrez excluded both of the plaintiffs' key experts, Dr. Daniel Rascher and Dr. Hal Singer, finding their models methodologically flawed under the Daubert standard. The Daubert standard, derived from *Daubert v. Merrell Dow Pharmaceuticals* (1993), governs

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18 Vaidehi Mehta, "Jury finds NFL liable for antitrust violations in upset win," Find Law, Accessed October 31, 2025, <https://www.findlaw.com/legalblogs/legally-weird/jury-finds-nfl-liable-for-antitrust-violations-in-upset-win/>.

the admissibility of expert testimony in federal courts.<sup>19</sup> Judges must determine if an expert's methodology is scientifically valid and applicable to the case. Factors include testability, peer review, error rates, and general acceptance in the relevant field. This standard gives trial judges broad discretion to exclude unreliable expert evidence under Rule 702 of the Federal Rules of Evidence. Without this expert evidence, Judge Gutierrez concluded that no reasonable jury could have found class-wide injury or damages. He therefore entered judgment for the NFL, wiping out the multibillion-dollar verdict. This ruling marks the procedural and analytical turning point of the litigation. What began as a question of market structure and competition ended with a judicial finding about the legal quality of evidence. The NFL's conduct was anticompetitive, but not-so if the jury lacked all the necessary information to reach an informed decision. To understand the legal stakes one needs to take into consideration that JMOL is not a policy judgment, but rather a legal standard. The judge's ruling did not mean the NFL's conduct was justified or consumer-friendly. Instead, it reflects a specific legal threshold. Given the exclusion of the expert testimony, could a reasonable jury still be in favor of the plaintiffs? Judge Gutierrez said no. The case now turns to the Ninth Circuit on appeal...again. This is the same appellate court that previously reversed the district court's dismissal, holding that the plaintiffs had plausibly stated a valid claim. That earlier decision emphasized the plausibility of the antitrust theories advanced by the plaintiffs. The upcoming appeal will test whether those theories were supported by admissible and persuasive evidence at trial. The outcome of that appeal will reshape not just this litigation, but the broader antitrust landscape for sports leagues, media distributors, and subscription-based content models.

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19 *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1995 U.S. App. LEXIS 12, 40 Fed. R. Evid. Serv. (Callaghan) 1236, CCH Prod. Liab. Rep. P14,094, 95 Cal. Daily Op. Service 131, 25 ELR 20856.

## Ripple Effects

Zooming out from the NFL, this model of pooled rights, centralized control, and restricted consumer choice is not unique. It reflects a broader trend across American sports. The National Basketball Association's ("NBA") League Pass similarly prevents fans from purchasing only their favorite team's games, offering access only through bundled, league-managed subscriptions.<sup>20</sup> Major League Baseball ("MLB") operates a comparable system, directing out-of-market games through league-owned platforms and regional exclusivity agreements.<sup>21</sup> Even the National Collegiate Athletic Association, particularly in the wake of Name, Image, and Likeness ("NIL") reforms, have consolidated their broadcasting rights under long-term, exclusive contracts with single streaming partners.<sup>22</sup> Thus, the outcome of *Bundling the Sunday Ticket* will set the tone for how much control leagues have of their content; particularly at the expense of consumers. If the Ninth Circuit reverses again, the case would go to retrial and if the plaintiffs eventually prevail, it would trigger a re-evaluation of exclusivity clauses across the industry. Leagues would need to offer more flexible, consumer-friendly packages or face the risk of expensive litigation and public backlash. But if the JMOL stands, it functions as a green light! Essentially, JMOL would send the message that antitrust liability is not about how restrictive your business model is, but how easily the plaintiff's experts can be beaten. In that world, the structure does not need to change, just the contracts and consultants.

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20 Danielle Williams, "NFL Tackled by Antitrust Litigation: Route to Renegotiation of Streaming Deals - Princeton Legal Journal," Princeton University, Accessed October 31, 2025, <https://legaljournal.princeton.edu/nfl-tackled-by-antitrust-litigation-route-to-renegotiation-of-streaming-deals/>.

21 Danielle Williams, "NFL Tackled by Antitrust Litigation: Route to Renegotiation of Streaming Deals - Princeton Legal Journal," Princeton University, Accessed October 31, 2025, <https://legaljournal.princeton.edu/nfl-tackled-by-antitrust-litigation-route-to-renegotiation-of-streaming-deals/>.

22 Eddie Pells, "College-Reform Bill Could Generate Extra Billions by Allowing Conferences to Pool Their TV Rights," AP News, September 30, 2025, <https://apnews.com/article/nil-congress-cantwell-sports-tv-2a955dde32f013198e54c48fcf25cfc9>.

The district court’s decision does not expand corporate power; it applies a procedural standard: whether, in the absence of admissible expert evidence, a reasonable jury could still find for the plaintiffs. That standard is rooted in Rule 50 of the Federal Rules of Civil Procedure, giving judges the authority to enter JMOL when a verdict lacks evidentiary support.<sup>23</sup> However, for residential and commercial subscribers, the practical effect of this ruling is significant. It signals that even a jury verdict can be undone if expert models are found insufficient post-trial. In class actions, where economic injury must be shown on a collective scale, this places heavy reliance on technical modeling and evidentiary thresholds. The bar for proving harm is not just factual, but it is procedural, and increasingly specialized. While plaintiffs could still prevail, it would require a much higher evidentiary standard. Plaintiffs need not only survive motions to dismiss and reach a jury, they must also ensure their expert evidence holds up under *Daubert* and align with the alleged theory of harm. That reality limits access to legal protections. The appeal now pending before the Ninth Circuit will test the contours of this balance between the role of the jury and the gatekeeping function of the court. The outcome will ultimately clarify whether this ruling reflects a high standard for antitrust evidence or a high barrier for antitrust plaintiffs.

## Conclusion

The NFL’s agreements with DirecTV, Fox, and CBS drew anti-trust scrutiny; however, they were not purely acts of market exclusion. The NFL’s centralized model can be understood as an attempt to preserve order in a uniquely complex product market. Football depends on competitive balance; if weaker market teams falter financially, the entire league’s value erodes. Therefore, pooling rights and selling subscriptions collectively can stabilize revenues and sustain parity across clubs. Exclusive distribution may also protect the brand’s perceived scarcity, which helps maintain fan engagement and justifies the enormous costs

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23 “Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling,” Legal Information Institute, Accessed October 27, 2025, [https://www.law.cornell.edu/rules/frcp/rule\\_50](https://www.law.cornell.edu/rules/frcp/rule_50).

of production and broadcasting. From this perspective, bundling out-of-market games into a single premium package was not only a commercial strategy, but a way to prevent fragmentation that could have diluted the product's appeal and undermined its long-term viability. This does not immunize the structure from antitrust law, but frames it less as a scheme to exclude and more as a calculated effort to safeguard the NFL's competitive ecosystem.

Ultimately, this case illustrates the tension between preserving a unified product, unfair competition, legal standards, and abuse of power. The NFL's model achieved remarkable stability and spectacle by walling off choice and forcing consumers into a market with only one path. Antitrust law exists to ensure success does not become self-insulation, and the jury's verdict reflected that principle. The later reversal highlights how technical barriers, particularly the exclusion of expert models, can override overwhelming evidence of market harm, shifting the focus from what happened, to how it was proven. In a video segment for *Pro Football Talk* on NBC, analyst and former attorney Mike Florio characterized the ruling as a stunning reversal and questioned the integrity of the process. He noted that Judge Gutierrez had allowed the plaintiffs' expert witnesses to testify throughout the trial despite full pretrial disclosures, depositions, and opportunities for opposing counsel to challenge, only to overturn the jury's \$4.7 billion verdict the very next month in a sixteen-page opinion. Florio suggested the speed and timing of the decision implied the judge had predetermined his course of action, effectively granting the NFL a procedural victory that prolongs its exclusive control over Sunday Ticket. The result delays accountability and extends a system already found by a jury to violate antitrust law, leaving consumers without meaningful relief while the case moves through the appeals process.<sup>24</sup> This raises an essential question about whether the law's gatekeeping function is starting to overshadow its role as a check on concentrated power. If exclusive control can erase competition and still survive because the proof is not formatted correctly, then the balance between market efficiency and market freedom is at risk of tilting too far.

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24 "Judge overturns \$4.7 billion verdict in NFL Sunday Ticket lawsuit | Pro Football Talk | NFL on NBC," YouTube, Accessed September 15, 2025, [https://www.youtube.com/watch?v=mmob\\_5SPEwI](https://www.youtube.com/watch?v=mmob_5SPEwI).

This case will not decide that balance indefinitely, but its outcome will signal whether antitrust law still has the capacity to protect consumers when the largest players in the market decide to act as one.





# LAW and SPEECH

# *Lindke v. Freed:* Facebook, Internet Censorship, and the Evolving First amendment

MADALYN COLE

## ABSTRACT

Under the United States common law system, significant legal precedent is established when First Amendment rights are applied to social media and internet censorship. However, censorship, specifically within the realm of the internet, is a concept of growing concern in both legal and political spheres. Digital public forums such as Facebook are central mediums for national political discourse. The First Amendment only protects free speech rights of individuals against government entities, but not against non-state, private actors. Because social media platforms are privately owned, there is an increasing number of cases that attempt to protect the free speech of social media users. To address these concerns, this paper analyzes the case *Lindke v. Freed* (2024) to comparatively study the recent internet censorship court rulings. Through a case study framework, this paper analyzes cases before and after *Lindke*, while also predicting what the nature of *Lindke* means for future internet censorship and free speech cases.

## Introduction

Social media, as both a medium for modern internet communication and an application that enables the sharing of content, is at the center of numerous free speech disputes in the United States.<sup>1</sup> According to Executive Order 13925, made under the Trump Administration, social media platforms function as a “21st century equivalent of the public square.”<sup>2</sup> As of November 2025, around 70% of Americans, or around 240 million people, use social media.<sup>3</sup> Therefore, social media platforms wield immense and unprecedented power to control the information people see. They

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1 Thomas Aichner et al., “Twenty-Five Years of Social Media: A Review of Social Media Applications and Definitions from 1994 to 2019,” *Cyberpsychology, Behavior, and Social Networking* 24, no. 4 (April 2021): 215-222. <https://doi.org/10.1089/cyber.2020.0134>.

2 Executive Office of the President, “Executive Order 13925: Preventing Online Censorship,” *Federal Register* 85 No. 34079 (May 28, 2020): 34080, <https://www.federalregister.gov/documents/2020/06/02/2020-12030/preventing-online-censorship>.

3 Pew Research Center, “Americans’ Social Media Use 2025,” November 20, 2025, <https://www.pewresearch.org/internet/2025/11/20/americans-social-media-use-2025/>.

also have the power to “censor, delete, or [make information] disappear,” engaging in selective censorship that harms the national discourse.<sup>4</sup> Censorship, specifically internet censorship, is the suppression of information or speech that is published or viewed on the internet.<sup>5</sup> Private actors such as Facebook can engage in censorship, as the First Amendment does not protect speech when there is no government or state action involved.<sup>6</sup> While direct censorship of the internet by the government is prohibited by the First Amendment under most circumstances, the use of social media to regulate under the agenda of the federal government raises new concerns.<sup>7</sup> Other legal concerns include federal officials and their role on the internet, acting as private or public messengers.

Federal courts are responsible for regulating social media entities—they must outline boundaries for state laws and content moderation, and establish circumstances in which federal actors can use social media to restrict speech.<sup>8</sup> However, there are a few issues that remain unresolved. One important issue is if the federal government is violating the First Amendment by working with social media companies to remove posts it considers disinformation or threatening speech. To analyze the relationship between the First Amendment and the federal government within the context of the internet and social media, this paper aims to approach these tensions through a case study framework. Using the 2024 Supreme Court case *Lindke v. Freed*, this paper studies the history of internet censorship before and after *Lindke* to create a comparative

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4 Executive Office of the President, “Executive Order 13925: Preventing Online Censorship

5 “What is Censorship,” American Civil Liberties Union, (August 30, 2006), <https://www.aclu.org/documents/what-censorship>.

6 Elizabeth R. Purdy, “Censorship,” Free Speech Center, Middle Tennessee State University (Tennessee: May 1, 2025), <https://firstamendment.mtsu.edu/article/censorship/>.

7 Conrad Chan et al., “Free Speech vs. Maintaining Social Cohesion: US Censorship,” Stanford University (Stanford: 2011), [https://cs.stanford.edu/people/eroberts/cs181/projects/2010-11/FreeExpressionVsSocialCohesion/us\\_policy.html](https://cs.stanford.edu/people/eroberts/cs181/projects/2010-11/FreeExpressionVsSocialCohesion/us_policy.html).

8 Congress.gov, “Social Media: Regulatory, Legal, and Policy Considerations for the 119th Congress,” February 11, 2025, <https://www.congress.gov/crs-product/IF12904>

framework that examines the impact of recent court rulings. *Lindke* sets a new, important legal test for government officials and their use of social media, highlighting the gray area between defining private conduct and state action. Additionally, this paper aims to predict what will happen with free speech and internet court rulings beyond *Lindke*—what does the nature of *Lindke* mean for future cases?

## I Before *Lindke v. Freed*: Censorship and the Internet

The history of censorship in the United States can be traced back to the democratic founding of the country. When the government engages in censorship, First Amendment freedoms of free speech and expression are compromised. Because the First Amendment only guarantees protection against *government* interference, private companies and entities are excluded.<sup>9</sup> In turn, no First Amendment right is absolute, and the need to balance free speech with public safety makes censorship highly complex and controversial in the face of the American public. This is especially apparent with the onset of the internet and the subsequent mainstream popularization of internet platforms and online public forums.

In 1997, the landmark case of *Reno v. American Civil Liberties Union* challenged the constitutionality of the 1996 Communications Decency

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9 According to Amdt1.7.2.4 “State Action Doctrine and Free Speech,” the First Amendment “applies only to laws enacted by Congress and not the actions of private persons.” This connects to the “right of access” theory. While not explicitly written in the Constitution, the Supreme Court has interpreted this theory to exist. This theory is defined and developed in *Columbia Broadcasting System, Inc. v. Democratic Nat’l Comm*, 412 U.S. 94, 98 (1973): the case “affirm[s] the general principle that broadcasters have a free speech interest in selecting their programming and that these interests are not outweighed by the public’s.” This theory addressing specifically broadcast media has been further applied to certain public forums, such as social media platforms. First Amendment challenges against public forums have ruled in the rights or interests of the forum, but not necessarily the rights and interests of the forum’s users.

Act (CDA).<sup>10</sup> Directly after the Clinton Administration passed the CDA, the plaintiffs, a coalition of individuals and organizations led by the American Civil Liberties Union, argued that the vagueness and overly broad application of the act was harmful for free speech, for it may curtail protected as well as unprotected free speech. Thus, the CDA's internet regulations of "indecent" communications to specifically protect minors under the age of 18 created a blanket restriction of free speech that failed to properly define such "indecent" material.<sup>11</sup> In turn, the "indecent transmission" and "patently offensive display" provisions of the CDA were ruled in a unanimous decision as violating the First Amendment.<sup>12</sup> *Reno* further established that internet speech is entitled to the same First Amendment protections as print media. The Court held that the internet is not a scarce resource, unlike broadcast radio, further recognizing and defining the internet as a diverse, interactive medium where users exchange information and speech on platforms of limited restriction and censorship.

The year after *Reno* established the internet as an entity of high First Amendment protection, the Eighth Circuit court addressed the use of the internet as a forum for criticizing government-run entities in *Beussink v. Woodland R-IV School District*.<sup>13</sup> The court ruled that high school

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10 The Communications Decency Act (1996) was enacted by Congress as part of the Telecommunications Act (1996) to prevent minors from accessing explicit material, particularly sexual material, on the internet. Although *Reno* established the precedent that the criminalization of obscene and offensive material was unconstitutional under First Amendment protections, Section 230 of the CDA, which provides immunity to internet and social media companies that remove material, still remains a large focus of free speech debates regarding "harmful content" on social media. For more information, see: Sara L. Zeigler, Communications Decency Act and Section 230 (1996), Free Speech Center, May 23, 2023, <https://firstamendment.mtsu.edu/article/communications-decency-act-and-section-230/>.

11 *Reno v. ACLU*, 521 U.S. 844 (1997).

12 *Reno v. ACLU*, 521 U.S. 844 (1997).

13 Stephen Wermiel, "Beussink v. Woodland School District (E.D. Mo.) (1998)," Free Speech Center, January 1, 2009, <https://firstamendment.mtsu.edu/article/beussink-v-woodland-school-district-e-d-mo/>.

student Brandon Beussink had the right to criticize his school on his personal website. This ruling was based on the offline precedents established under the 1969 ruling of *Tinker v. Des Moines Independent Community School District*. In *Tinker*, the Court held that it is unconstitutional for educational authorities to suspend students protesting the Vietnam War by wearing symbolic black armbands.<sup>14</sup> By establishing the substantial disruption test, which protects speech considered not majorly disruptive to school activities, order, or safety, the suspensions of the students violated their First Amendment rights. Therefore, First Amendment protections were extended to students in public schools. Connecting to the online contexts of Beussink, public school officials could not suppress Beussink’s internet speech and subsequently discipline him simply because they did not agree with the content of his speech.<sup>15</sup> Beussink was one of the first cases that applied the First Amendment to online student expression. This shows that students do not give up their right to internet free speech in a school setting, and officials can regulate their speech only if it disrupts school operations.

In 2011, the precedents laid out by *Reno* and *Beussink* were applied to a new wave of debate regarding First Amendment and internet speech–viewpoint discrimination from custom software used by public schools. Within *Parents, Families & Friends of Lesbians & Gays (PFLAG) v. Camdenton R-III School District*, the plaintiffs challenged this software, arguing that the website filters removing “sexuality” discriminated against LGBT content, causing students to be unable to access resources from LGBT websites.<sup>16</sup> Asserting that the sexuality filter that blocked these websites, such as webpages for student gay-straight alliances, was unconstitutional, the federal court ordered the school district not to use the discriminatory filter. This case importantly shows that public, state-run schools cannot limit individuals’ access to internet speech in a

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14 *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

15 *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

16 *Parents, Families, & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F.Supp.2d 888, 283 Ed. Law Rep. 261 (W.D. Mo. 2012).

discriminatory way; content must be viewpoint-neutral.<sup>17</sup> Therefore, all government entities, including state-run schools, must control access to internet speech in a viewpoint-neutral manner.

Internet speech does not just exist in the realm of civil disputes—it exists in the form of internet hate speech and internet crime as well. *Elonis v. United States* was the first Supreme Court case that dealt with internet crime. In 2015, Anthony Elonis was convicted under 18 U. S. C. §875(c), a federal law that makes it illegal to transmit interstate communication that involves threats to injure or harm others.<sup>18</sup> Elonis was said to have posted harassing and threatening material in the form of violent rap lyrics on Facebook toward his ex-wife, an FBI agent, and a kindergarten class.<sup>19</sup> In an 8-1 decision, the Court ruled in favor of Elonis, stating that his Facebook posts lacked *mens rea*—the guilty state of mind that assumes intent or knowledge of offenses, which is required for ruling someone as a criminal offender.<sup>20</sup> Although this case is considered a victory for the First Amendment, it sets an interesting and possibly dangerous precedent. The majority opinion, authored by Chief Justice Roberts, holds that a person cannot be convicted of communicating threats simply because a reason-

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17 Viewpoint neutrality laws are stricter than content neutrality laws, for they prohibit the government from favoring or disfavoring specific ideologies or ideas. While content neutrality laws focus on particular types of speech based on a topic or subject matter being discussed, viewpoint neutrality laws prevent discrimination based on content by not allowing a suppression of one viewpoint while still allowing other viewpoints. For more information, see: Kritsti Nickodem and Kristina Wilson, “Responding to First Amendment audits: Content-Based vs. Viewpoint-Based Restrictions,” *Coates’ Canons NC Local Government Law*, November 18, 2022, <https://canons.sog.unc.edu/2022/11/responding-to-first-amendment-audits-content-based-vs-viewpoint-based-restrictions/>.

18 18 U.S.C., 1940 ed., § 408d (May 18, 1934, ch. 300, 48 Stat. 781; May 15, 1939, ch. 133, § 2, 53 Stat. 743).

19 John R. Vile, “*Elonis v. United States* (2015),” Free Speech Center, July 2, 2024, <https://firstamendment.mtsu.edu/article/elonis-v-united-states/>.

20 “*Mens rea*,” Legal Information Institute (July 2023), [https://www.law.cornell.edu/wex/mens\\_rea.](https://www.law.cornell.edu/wex/mens_rea.); see: *Staples v. United States*, 511 US 600 (1994)

able person would view the statements as threatening.<sup>21</sup> The majority ruling of *Elonis* is primarily based on criminal-law principles, but this consequently avoids larger First Amendment issues by not applying the true threat doctrine. In the dissenting opinion, Justice Clarence Thomas does apply this doctrine, finding that deciding a case on *mens rea* that deals with internet speech causes true threats to be “one of the most protected categories of unprotected speech.”<sup>22</sup> In turn, *Elonis* leaves two large, unresolved questions regarding speech on social media: what constitutes a “true threat” online, and how will the Court rule on future cases regarding threatening or dangerous speech on the internet? Importantly, this doctrinal ambiguity established in *Elonis* creates a crucial legal opening that *Lindke* attempts to address nine years later.

Just three years after *Elonis*, the federal court case *Knight First Amendment Institute v. Trump* addressed the right of a president to block people from engaging with a presidential social media account. The plaintiffs argued that because the @realDonaldTrump account on Twitter was a public forum under the First Amendment, government officials, such as President Trump, could not censor or exclude individuals just because they had differing opinions.<sup>23</sup> After the federal court ruled in favor of the Knights Institute, the defendants attempted to petition for a rehearing in 2020, but in a 3-0 decision, the U.S. Court of Appeals for the Second Circuit affirmed the district court’s ruling. *Knights Institute* established the idea that a government-run social media account, such as President Trump’s Twitter page, can violate the First Amendment if critics are blocked from viewing and engaging with the content.

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21 Diana Palacios, “*Elonis* V. United States: So What’s a True Threat?” Davis Wright Tremaine LLP, August 2015, <https://www.dwt.com/blogs/media-law-monitor/2015/07/elonis-v-united-states-so-whats-a-true-threat>.

22 *Elonis v. United States*, 575 U.S. 723 (2015).

23 *Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 1:17-cv-5205 (S.D.N.Y.), No. 18-1691 (2d Cir.), No. 20-197 (Supreme Court).

As of July 2023, Twitter was renamed X. However, because Twitter is used to refer to the social media company within this case, Twitter will be used throughout this paper instead of X.

In a similar decision to *Knights Institute*, *Davison v. Randall* established at the Fourth Circuit that a public official did not have the right to block a citizen from a Facebook page, specifically if that account is used to communicate with constituents. In this 2019 ruling, Phyllis Randall, the Chair of the Loudoun County Board of Supervisors, violated the First Amendment rights of Brian Davison by banning Davison from a Facebook page she administered. The viewpoint discrimination against Davison was upheld due to the “interactive component” of Randall’s social media account.<sup>24</sup> This case was the first of its kind to reach the appellate level.

Before *Lindke v. Freed*, the Supreme Court had not previously addressed the relationship between censorship and government social media accounts. However, cases like *Davison* and *Knights Institute* established at lower-court levels that government-run social media accounts could not censor the speech of constituents and critics who engaged and commented on their pages. Other cases, like *Reno* and *Beussink*, ruled in favor of First Amendment rights against public officials. In the case of *Elo-nis*, threatening speech and the subsequent ability to remove such speech from the internet was not quite resolved, leaving questions regarding the extent to which speech can be considered dangerous in the context of social media. Interestingly, though, the ruling of *Lindke* did not follow the precedents established by *Knights Institute* and *Davison*, for the lower federal courts instead ruled in favor of a government official removing and blocking a constituent from a Facebook page.

## II *Lindke v. Freed*: Redefining Censorship

### A. Defining the Legal Principles

The Free Speech Clause of the First Amendment protects the rights of individuals to express themselves without government interference. In the age of social media, this clause has also been applied to limit the ability of the government to exclude the electorate from public forums, both online and offline.<sup>25</sup> However, according to the “state action” doctrine, First Amendment protections are solely applied to government

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24 *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).

25 Congress.gov, “*Lindke v. Freed* and Government Officials’ Use of Social Media,” April 30, 2025, <https://www.congress.gov/crs-product/LSB11146>.

action, rather than private individuals or institutions.<sup>26</sup> Acting as a textual interpretation of the Fourteenth Amendment, this doctrine asserts states' rights by imposing a rigid state action standard, consequently limiting the circumstances in which discrimination suits are valid. Another legal principle, the public-function doctrine, holds that if a private person or entity performs functions that are traditionally reserved by the government, these actions are considered "state action."<sup>27</sup> The state action doctrine and the public-function doctrine are cited in cases brought under 42 USCA § 1983, a federal law that provides individuals the ability to sue local and state officials for violating their constitutional rights.<sup>28</sup> To successfully win a lawsuit under 42 USCA § 1983, the plaintiff must allege that such conduct was committed by a person who "acted under color of state law" and that the conduct resulted in the plaintiff being deprived of a constitutional or statutory right<sup>29</sup>. In the case of *Lindke v. Freed*, the plaintiffs cited Section 1983, claiming that James Freed silenced Kevin Lindke's speech, thus restricting his First Amendment right

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26 The Fourteenth Amendment and the State Action Doctrine, 24 Wash. & Lee L. Rev. 133 (1967), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=3706&context=wlulr>.

27 Public-Function Doctrine, LSD Law, 2025, <https://www.lsd.law/define/public-function-doctrine.>; see *Civil Rights Cases*, 109 U.S. 3, 17 (1883) and *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

28 R.S. §1979; Pub. L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104-317, title III, §309(c), Oct. 19, 1996, 110 Stat. 3853.

29 42 U.S. Code § 1983 - Civil action for deprivation of rights.

"Color of law" refers to the appearance of legal authority that may not exist, describing an individual with governmental power that abuses such power to deprive others of their rights. Color of law is commonly synonymous with state action; for more information, see *Color of Law*, Legal Information Institute, 2022, [https://www.law.cornell.edu/wex/color\\_of\\_law#:~:text=Color%20of%20law%20refers%20to,authority%2C%20and%20is%20therefore%20illegal.](https://www.law.cornell.edu/wex/color_of_law#:~:text=Color%20of%20law%20refers%20to,authority%2C%20and%20is%20therefore%20illegal.)

## B. Case Synopsis

James Freed serves as the city manager of Port Huron, Michigan. Freed has a public Facebook account that reflects his local employment. While posting primarily about his personal family life, Freed also posted information related to his position as city manager, which solicited feedback from local residents about community issues.

During the COVID-19 pandemic, Freed posted about his job, causing commenters to respond to pandemic issues. Freed described some comments under his Facebook page as offensive and removed them. Kevin Lindke, a citizen of Port Huron, commented under Freed's posts, expressing intense displeasure with the city officials' response to the pandemic. Lindke said that the city's response was "abysmal," and that "residents were suffering" while city leaders neglected to talk to the community.<sup>30</sup> After deleting Lindke's first few comments, Freed ultimately blocked Lindke from commenting entirely.

When suing Freed under 42 USCA § 1983, Lindke characterized Freed's Facebook page as a public forum. Lindke argued that Freed was acting not just as a private citizen, but as a public official, so the Facebook posts were not strictly private and held official power when silencing his speech.<sup>31</sup> The District Court and the Sixth Circuit found that because Freed managed his Facebook page privately, state action was not a liability, and thus Lindke's claim failed.<sup>32</sup> In a 9-0 unanimous decision to vacate and remand the case back to the Sixth Circuit for further reconsideration, the Supreme Court affirmed only some of the lower courts' rulings. To do so, it applied a precedent under *Waters v. Morristown* to the social media context of *Lindke*: state actors or government officials can act outside of the authority of their office.<sup>33</sup> Thus, state and private actions are exclusive. Freed's status as a state employee did not underscore his own First Amendment right to speak privately even when spreading information associated with his employment. Further citing *Garcetti v. Ceballos* and *Lane v. Franks*, the courts found that instead of Freed violating Lindke's First

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30 *Lindke v. Freed*, 144 S.Ct. 756 (2024)

31 *Lindke v. Freed*, 144 S.Ct. 756 (2024).

32 *Lindke v. Freed*, 601 U.S. 4 (2024).

33 *Waters v. City of Morristown*, 242 F.3d 353, 358-59 (6th Cir. 2001).

Amendment rights, Freed exercised his own.<sup>34</sup>

The Court reasoned that for social media activity to constitute state action, the government official must have both state authority and purport to use such authority.<sup>35</sup> Differentiating Freed’s actions from state authority, this per curiam opinion—or unanimous decision—reasoned that Freed was not acting “under color of law” due to him operating an ambiguous Facebook account. It was not designated as fully personal or official, especially since there is no city ordinance or statute that required the operation of the Facebook page. In turn, the content and function of the posts, rather than the Facebook page itself, are of closer consideration as the case is remanded. For example, content that is readily available to the public and merely spread by Freed is not state action, but content that is not available everywhere and is spread only on Freed’s page constitutes as state authority. In a legal sense, appearance alone is insufficient, and the plaintiffs must ultimately prove through evidence that there is a connection between the government official’s online conduct and the use of government authority. If private action is independent from state authority, then it is not considered state action.

This “case-by-case,” scenario-dependent basis of analysis in *Lindke v. Freed* displays the complicated nature of the social media platforms when combating free speech and censorship issues. The Court concluded that due to the nature of Facebook’s technology, blocking tools on Facebook operate on a page-wide basis, not a post-basis; therefore, all of Freed’s posts were up for analysis due to the possibility of Lindke wishing to comment on them.<sup>36</sup> Nevertheless, because *all* of Freed’s content

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34 *Lindke v. Freed*, 601 U.S. 7 (2024).

In *Garcetti*, the Court ruled that public officials’ speech is not protected by the First Amendment when the speech was made as part of their official duties. However, in *Lane*, the Court ruled that a public officials’ “truthful testimony” is protected speech, even if this speech was related to their official duties. The *Lane* decision provided an exception to the broad ruling that limited public official speech in *Garcetti*; see *Garcetti v. Ceballos*, 547 U.S. 410 (2006) and *Lane v. Franks*, 573 U.S. 228 (2014) for more information.

35 *Lindke v. Freed*, 601 U.S. 3 (2024).

36 *Lindke v. Freed*, 601 U.S. 3 (2024).

on his account was untraceable to state authority, this was not a case of government censorship in violation of Lindke's First Amendment right. Consequently, these tests the courts use to categorize Freed's conduct as private even while relating to his official duties as city manager *affirm* the ability for a government official to censor or silence speech from their constituents on a popular social media platform, like Facebook. However, if Lindke can prove that Freed used his actual government authority to make posts on Facebook, and thus exercised state action, then this ruling, when it occurs, can possibly be reversed when reconsidered by the Sixth Circuit. For the plaintiffs in cases brought under Section 1983, this could establish a higher burden for them to prove state action in digital spaces. For Lindke to demonstrate that Freed's page was used to exercise state action, Lindke would have to provide evidence that not all of Freed's page was untraceable to state authority, and that his conduct was public rather than private.

### III. Addressing Social Media and the Evolving First Amendment

According to 42 USC § 1862w(a)(2), social media platforms are websites or internet mediums that permit users to create and share content with other users under an account profile, thus primarily serving as a medium to interact with content generated by others.<sup>37</sup> Established by Supreme Court precedent, social media companies are private entities that have the agency to decide the speech and expression allowed on their platforms. Similar to the historical rulings made about internet speech, the Free Speech Clause applies to social media by only prohibiting governmental abridgement of speech, not private abridgement of speech. The 2019 case *Manhattan Community Access Corp. v. Halleck* reaffirmed that social media companies are not bound by the same restrictions as public establishments.<sup>38</sup> Additionally, the importance of social media as a medium for the free exchange of ideas is asserted in cases like *Packingham v.*

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37 SEC. 124. NSF Support of Research On Impacts Of Social Media On Human Trafficking, Pub. L. 117-348, title I, § 124, Jan. 5, 2023, 136 Stat. 6218.

38 *Manhattan Community Access Corp. v. Halleck*, 587 U.S. 1 (2019); for more information, see: *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 737.

*North Carolina*, which finds that “cyberspace—the vast democratic forums of the Internet in general, and social media in particular” are the most important places for the modern exchange of views.<sup>39</sup>

While *Knight First Amendment Institute v. Trump* addresses government censorship of ideas on Twitter in particular, *Lindke* deals with private censorship on Facebook. In comparison with Twitter, Facebook and other Meta platforms have the greatest number of active claims in federal lawsuits against them, making Facebook central to this discussion. As of April 2025, there are over 1,700 active claims against Facebook, ranging from social media addiction lawsuits, mental health lawsuits, privacy lawsuits, and censorship lawsuits.<sup>40</sup>

Complementary to the abundance of claims made against Facebook, the social media platform is a global superpower with over three billion monthly active users and two billion daily active users as of 2024.<sup>41</sup>

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39 *Packingham v. North Carolina*, 582 U.S. 5 (2017)

40 Tammy Cauley Rivers, “Facebook Mental Health Lawsuit,” MotleyRice, April 2025, <https://www.motleyrice.com/social-media-lawsuits/meta/facebook>.

As of October 2025, the number of active claims against Facebook has grown to over 2,000. Unfortunately, there is a lack of comprehensive data on these active claims, so the exact proportion of censorship lawsuits compared to other lawsuits is not known. Also, it is important to note that there are a growing number of claims about social media addiction, especially regarding minors (age 17 or under) as victims. This means that in addition to censorship cases, Facebook is facing some major tort law cases, which deal with private wrongdoings that lead to harm or injury. This shows how social media is at the forefront of legal, social, and political debates in the United States. An example of this on the state level is Florida House Bill 3 (2024) called Online Protections for Minors, which prohibits minors from creating social media accounts. The bill also provides conditions that social media platforms must follow to prohibit minors from creating such accounts. Notably, this goes against some of the precedent established by *Reno v. American Civil Liberties Union* (1997) mentioned earlier. For more information, see: H.B. 3, 2024 Leg., Reg. Sess. (Fla. 2024).

41 Brent Barnhart, “31 Facebook statistics marketers should know in 2025,” Sprout-Social, February 20, 2025, <https://sproutsocial.com/insights/facebook-stats-for-marketers/#:~:text=Facebook%20is%20the%20third%20most,for%20consumers%20and%20marketers%20alike>.

To put this into perspective, nine out of ten social media consumers have a Facebook profile, and around 26% of the world's population uses Facebook daily. Being the third most-visited internet platform behind Google and YouTube, Facebook is arguably “synonymous with social media itself.”<sup>42</sup> Because of the sheer influence Facebook has on worldwide communication, this platform is central for the evolving First Amendment within the United States.

The recent case *Murthy v. Missouri* highlights the role Facebook has in contemporary First Amendment and censorship lawsuits, especially in the context of political partisan conflict. Centering on jawboning, a legal term used to describe the abuse of authority, the case addresses how government officials use authoritative tactics to silence criticism or disfavorable speech.<sup>43</sup> In 2024, multiple plaintiffs, including academics, epidemiologists, human rights advocates, and media operators, accused the Biden Administration and the federal government of censoring conservative speech on platforms like Facebook during the COVID-19 pandemic and the 2020 presidential election.<sup>44</sup> Arguing that the executive branch of the federal government used threats of regulatory action through public statements, social media platforms were forced to suppress content. In turn, the plaintiffs argued that their First Amendment rights were violated. In a 6-3 decision, the Court found that the petitioners lacked standing under Article III's “case or controversy” requirement.<sup>45</sup> Additionally, the Court argued that the plaintiffs both failed to link their past social media restriction and the defendant's communications with the platforms. Thus, they failed to demonstrate a substantial risk of future injury traceable to

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42 Brent Barnhart, “31 Facebook statistics marketers should know in 2025.”

43 Will Duffield, “Jawboning against Speech,” CATO Institute, Policy Analysis No. 934, September 12, 2022, <https://www.cato.org/policy-analysis/jawboning-against-speech>.

44 *Missouri v. Biden*, 83 F.4th 350, 387 (5th Cir. 2023), cert. granted sub nom., *Murthy v. Missouri*, 144 S. Ct. 7 (2023).

45 *Murthy v. Missouri*, 603 U.S. 11 (2024).

The “case or controversy” clause in Article III, Section 2 of the U.S. Constitution establishes that “injury in fact” must be traceable for the doctrine to stand (and thus redressable); see *Muskrat v. United States*, 219 U.S. 346, 356 (1911) and *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937).

state action. Finding a redressability problem, the Court ruled that the case would unlikely affect Facebook’s content moderation decisions.<sup>46</sup> As decided in both *Murthy and Lindke*, the Court found that there was a lack of evidence provided to show state action occurred to censor content on Facebook.

While the majority of the justices in *Murthy* sided with the federal government, the dissenting opinion, joined by Justice Samuel Alito, Justice Clarence Thomas, and Justice Neil Gorsuch, suggested broader constitutional implications for the case. This dissenting opinion argued that *Murthy* is “one of the most important free speech cases to reach the Court in years,” adding that the Court had previously warned against government coercion toward private entities under *National Rifle Association of America v. Vullo* that same year.<sup>47</sup> However, because Facebook is not a government entity, it is not subject to the First Amendment and is protected under the Communications Decency Act of 1996. Section 230 of the Act grants private online service providers immunity from liability for content posted from their users, and also immunity for being sued when removing posts or restricting access to content. This establishes a specific categorization of censorship that does not occur due to the private ownership of social media platforms, highlighting how, in a legal context, the very nature of Facebook is not deemed public in significant ways. While Facebook is undoubtedly known as a public forum for billions of people around the world, this public quality of the platform does not hinder its independence from First Amendment protections. Censorship is displayed quite complexly in this case, where pinpointing instances of private versus government censorship exists in a gray area of growing concern.

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46 Content moderation decisions refer to the process of determining what is “suitable” for online content, and includes evaluating problematic content that may be illegal, obscene, harmful, insulting, etc. Because the Court ruled that there was a redressability problem, they could not offer a remedy for the “injured party”-- the plaintiffs. Because the litigant did not establish that the injury was redressable, the Lujan’s test for Article III standing failed.

47 John R. Vile, “Murthy v. Missouri (2024),” Free Speech Center, June 26, 2024, <https://firstamendment.mtsu.edu/article/murthy-v-missouri-2024/>.

Similar to *Murthy, Moody v. Netchoice, LLC*, addresses social media censoring and suppressing speech, specifically conservative voices. The State of Florida enacted Senate Bill 7072, which prohibits social media platforms from “willfully deplatforming a candidate” or “commit[ing] an unfair or deceptive act or practice.”<sup>48</sup> This 2024 case was vacated and remanded in a unanimous opinion, though, due to the Court ruling that the Eleventh and Fifth Circuit did not properly analyze First Amendment challenges to the regulatory legislation against large social media companies and internet platforms.<sup>49</sup> If the challenges were properly tested by the federal courts, this case would contribute to the government and social media debate upon the regulation of speech in accordance with the rising negative partisanship trends in the country. Although the challenge was not successful, it still represents the growing concern over censorship and the federal government’s involvement in regulating internet speech.

As a result of social media-specific cases like *Murthy* and *Moody*, the First Amendment is evidently evolving to become less protective of free speech rights for users of social media and internet platforms. Due to the private nature of Facebook, the courts cannot rule that the platform’s censorship of speech can be legally challenged under the First Amendment. While social media is an extremely powerful tool for modern communication, it is still controlled by private interests and held to a different and more lenient standard than public entities.

According to Pew Research Center, more and more adults every year receive their news from social media, with around 54% currently stating they “at least sometimes get news from social media.”<sup>50</sup> Hence, social media is profoundly ingrained in American political culture and thought. The power that these internet platforms hold generates a new wave of legislation and lawsuits to challenge current precedent. It is possible that the state-action and public-function doctrines of the Four-

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48 Senate Bill 7072, 2021 Fla. S.

49 *Moody v. NetChoice*, No. 22-277 (Supreme Court); *NetChoice v. Paxton*, No. 22-555 (Supreme Court).

50 Social Media and News Fact Sheet, Pew Research Center, September 17, 2024, <https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/>.

teenth Amendment may be applied in new and changing ways that align with the modern age of social media. While *Lindke* failed to apply these doctrines successfully to his case thus far, the indeterminate nature of social media legislation may change future rulings.

#### IV. Beyond *Lindke v. Freed*: What Does the Ruling Mean for Future Cases?

Internet censorship, as a subject for studying the First Amendment, is momentous due to the unprecedented, newly evolving nature of the power of social media, especially in modern American political culture. *Lindke v. Freed* only recently established a relationship between government-run social media platforms and their constituents on a Supreme Court level. However, a few important unresolved issues on government influence of social media content remain: (1) the “shaky” constitutional ground of state laws controlling social media; and (2) the pervasive nature of social media.

Justice Samuel Alito addresses these two unresolved issues in his opinions of *Moody* and *Murthy*. In his extensive concurring opinion on *Moody*, he warned that the courts must proceed with caution when dealing with constitutional principles and their application to new technology.<sup>51</sup> Similarly, Alito’s dissenting opinion in *Murthy* signifies a fine line between the government’s attempt to protect public health and governmental coercion. Alito finds that First Amendment issues are at stake, even if the “covert scheme of censorship” is limiting misinformation on platforms like Facebook.<sup>52</sup> By arguing that the federal government was implicit with its threats against Facebook, Alito speaks on behalf of the growing retaliation against social media platforms aiding in government-backed censorship.

*Lindke* represents only the beginning of this trend of internet censorship cases between government accounts and non-government officials as users. On August 26, 2024, Facebook and Meta CEO Mark Zuckerberg accused the Biden Administration of pressuring Facebook to censor COVID-19 content amidst the pandemic, thus aligning with the

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51 David L. Hudson Jr., “*Moody v. NetChoice, LLC* (2024),” Free Speech Center, July 9, 2024, <https://firstamendment.mtsu.edu/article/moody-v-netchoice-llc-2024/>.

52 John R. Vile, “*Murthy v. Missouri* (2024).”

plaintiffs in *Murthy*.<sup>53</sup> In a letter to Representative Jim Jordan, the Republican chair of the House Judiciary Committee, Zuckerberg confronted officials, alleging that for months Facebook was “repeatedly pressured” to remove content referencing COVID-19, “including humor and satire.” This letter is one of many efforts that Zuckerberg has deliberately used to target alleged government pressure to remove posts containing perceived misinformation. Zuckerberg declares that Facebook is “ready to push back if something like this happens again.”<sup>54</sup>

As represented in the legal cases discussed, censorship and First Amendment issues regarding social media are beginning to take a controversial center stage in the United States. Some conservatives especially are upholding a heated debate against Facebook and other major tech companies, expressing rising concerns about certain speech being favored above their own on platforms. However, with Zuckerberg recently announcing that Facebook will “never again” adhere to the pressures of the White House, an unprecedented alliance between conservative politicians and the major tech conglomerate prevails.<sup>55</sup> Notably, this changing relationship may affect the role of Facebook in future censorship and First Amendment court cases.

Consequently, legal cases about censorship will likely take a partisan route. In *Lindke*, internet censorship was fundamental to the case because of the plaintiff’s accusation of Freed being a government official, yet still blocking comments that criticized him. Facebook will most likely also take an increasingly prominent position in similar cases in the future because of its powerful and global nature in the communication sphere. As the First Amendment is evolving to limit speech protections on internet platforms, it may be harder for individuals or groups to successfully challenge censorship, especially if more government officials

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53 Associated Press, “Zuckerberg says the White House pressured Facebook to ‘censor’ some COVID-19 content during the pandemic,” PBS, August 27, 2024, <https://www.pbs.org/newshour/politics/zuckerberg-says-the-white-house-pressured-facebook-to-censor-some-covid-19-content-during-the-pandemic>.

54 Associated Press, “Zuckerberg says the White House pressured Facebook.”

55 Paris Marx, “How Mark Zuckerberg Fell for the Republican Right,” Jacobin, January 18, 2025, <https://jacobin.com/2025/01/mark-zuckerberg-meta-trump-tech>.

are protected when acting on their personal account. However, *Lindke* highlights an important element of recent internet censorship rulings: the context-driven, “case by case” characteristic of its decision. In *Lindke*, the federal courts needed to thoroughly study every post on Freed’s account to deem it not state action. This analysis within censorship cases will likely extend to future cases due to the complexity of social media and internet speech. Overall, following *Lindke*, the 2024 internet censorship cases highlight challenges from the plaintiffs representing conservative voices, showing a trend in the legal system regarding First Amendment decisions that is increasingly political in nature.





# LAW and LABOR

# Forced Labor: Legislation, U.S Corporations, and Global Accountability

EVA GALLEAZZI BRUNO

## ABSTRACT

This paper examines how U.S. legislation seeks to combat forced labor embedded in global supply chains and evaluates the practical limits of corporate accountability. Through the Trafficking Victims Protection Act of 2000 and its subsequent reauthorizations, Congress has sought to address exploitation associated with heightened reliance on low-cost production in weak regulatory frameworks. The 2008 expansion of 18 U.S.C. § 1595 broadened civil liability beyond direct traffickers to “whoever knowingly benefits,” adopting a constructive-notice standard to lower victims’ evidentiary burdens. To assess the law’s efficacy, the paper analyzes two illustrative case studies. In *Coubaly v. Cargill*, involving the major chocolate company Hershey, plaintiffs’ claims failed to find a traceable link between damages and the defendant-linked suppliers. In *Doe v. Apple*, plaintiffs cleared standing for damages but lost on merits because routine buyer–seller relationships did not constitute “participation in a venture.” Collectively, these cases reveal a double bind: without specific traceability back to individual suppliers and the presence of venture-level ties, § 1595 claims falter. This analysis highlights a persistent gap between broad legislative policies and what courts require to impose civil liability, underscoring the challenges of enforcing corporate accountability in global supply chains.

## Introduction

Corporations have become increasingly reliant on international supply chains for the production and distribution of goods, creating highly interconnected networks across the globe. Yet, this very interconnectedness has contributed to conditions that leave millions of workers abroad vulnerable to exploitation. In the pursuit of higher profits and competitive advantages, corporations often outsource labor to countries with weaker regulatory frameworks, where forced labor, child labor, and unsafe working conditions are prevalent.<sup>1</sup> Thus, the outsourcing of production to countries with weaker labor laws provides a platform for corporations to reduce costs while avoiding direct responsibility for labor abuses, creating a significant ethical and legal dilemma. Indeed, major U.S. corporations, such as Apple and Hershey, have been implicated in questionable labor practices. This raises urgent questions in regard to

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1 “What is forced labor?” Department of Homeland Security, Accessed September 16, 2025, <https://www.dhs.gov/blue-campaign/forced-labor>.

corporate accountability and the safeguards designed to prevent such abuses. To address these concerns, a variety of U.S. labor laws and international guidelines have been designed and implemented to encourage ethical business practices and responsible supply chain management. Despite these measures, gaps in enforcement and regulatory loopholes often allow corporations to continue exploitative practices with minimal consequences. These challenges underscore the tension between profit motives and ethical obligations, highlighting the need for stronger oversight, effective enforcement, and greater corporate accountability.

## Legislative Framework

Globally, forced labor remains a pervasive problem; the International Labor Organization (ILO) reports that roughly 27.6 million people are exploited in coercive working conditions.<sup>2</sup> Ethically produced products cost more to manufacture, and consequently, to purchase, creating a financial incentive for corporations to opt for lower-cost unethical labor. Therefore, unethical products share an unfair advantage in the global market and hinder fair competition. In response to this issue, Congress has progressively enacted legislation that would ensure goods made with forced labor do not enter the U.S. market.

The Trafficking Victims Protection Act (TVPA) of 2000 aims to combat exploitative labor practices by establishing the national criminal framework for the U.S. response to human trafficking.<sup>3</sup> The Act highlighted U.S. efforts to address labor exploitation, both domestically and in global supply chains. Since its passage in 2000, the TVPA has been reauthorized multiple times under the Trafficking Victims Protection Reauthorization Acts (TVPRAs). Such reauthorizations strengthened protections for vulnerable workers, adapting to evolving forms of labor exploitation and further expanding criminal liability for exploiters. Congress supplemented the TVPA's criminal framework with a civil remedy that provides legal standing for victims to sue in federal court. In

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2 "Forced Labour, Modern Slavery and Trafficking in Persons," International Labour Organization, October 9, 2025, <https://www.ilo.org/topics-and-sectors/forced-labour-modern-slavery-and-trafficking-persons>.

3 "Key Legislation," Human Trafficking, August 23, 2023, <https://www.justice.gov/humantrafficking/key-legislation>.

2008, Congress significantly broadened this civil liability provision under § 1595, finding prior statutes to be inadequate as they failed to address the full array of trafficking offenses.<sup>4</sup> Previously, the TVPA extended liability solely to the “perpetrator”. The 2008 reauthorization broadened the statute to encompass “whoever knowingly benefits, or attempts or conspires to benefit, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter.”<sup>5</sup> Thus, this expansion reflects the overarching purpose to strengthen prosecution and punishment of traffickers in the United States and abroad. This reform expands liability past the immediate perpetrator to encompass entities that profit from trafficking, including major companies with foreign supply chains. Adopting a “knew or should have known” constructive notice standard further reduces the burden on victims.<sup>6</sup> Under constructive notice, defendants are treated as aware of facts that are reasonably discoverable or publicly available, even if perpetrators deny actual awareness. By creating this legal presumption of awareness, redress remains attainable even when the defendant lacks admitted, first-hand knowledge. Courts have been working to define these elements by relying on the broader language of § 1595. Specifically, they diverge on the meaning of “whoever knowingly benefits.” Some interpretations insinuate companies merely need to be aware of the presence of forced labor in their supply chains; others require evidence of active facilitation, i.e. hands-on conduct that furthers the trafficking. As to “participation in a venture,” Congress aimed to protect victims by crafting a civil claim with lower evidentiary

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4 18 U.S.C. § 1595 is a federal law that provides a civil remedy allowing victims of human trafficking to sue their perpetrators and any other entity that knowingly benefited financially from the trafficking venture for damages.

5 Page 411 title 18—crimes and criminal procedure § 1589, Accessed November 4, 2025, <https://www.govinfo.gov/content/pkg/USCODE-2024-title18/pdf/USCODE-2024-title18-partI-chap77-sec1589.pdf>.

6 Courts apply constructive knowledge when evaluating “knew or should have known” under § 1595. See *J.B. v. G6 Hospitality, LLC et al*, No. 3:2022cv03765 - Document 174 (N.D. Cal. 2023), explaining that a defendant may be liable if it “knew or should have known” of a trafficking venture based on reasonably available information.

standards. However, the meaning of this provision is continuously debated, with certain rulings actually requiring a provable hands-on participation in the labor misconduct. While “venture” connotes an undertaking involving risk, courts generally look to whether the defendant’s conduct, viewed through the “knew or should have known” lens, ties it to a trafficking operation. Taken together, the 2003 creation and 2008 expansion of § 1595(a) empower survivors to pursue damages not only from direct traffickers but also from those who knowingly profit from trafficking ventures. The constructive notice standard and the broadened “whoever” language align with the TVPA’s goal to ensure that civil accountability reaches beyond direct perpetrators.

## Corporate Compliance: Case Studies

On paper, legislation is designed to deter abuse. In court, however, liability under §1595 raises two main questions: whether harms can be traced to a defendant’s supply stream (standing/traceability) and whether the defendant “participated in a venture”. The case studies mentioned below map where legislation falls short with what judges actually require to establish corporate culpability in multi-tier, global networks.

### I. The Hershey Company

The Hershey Company (“Hershey”), founded in 1894, is a leading U.S. chocolate and confectionery manufacturer with over \$7.5 billion in annual sales. Over the decades, the company grew significantly, acquiring other confectionery brands and becoming North America’s largest chocolate producer with more than 80 brands sold in approximately 70 countries.<sup>7</sup>

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7 “Celebrating U.S. Manufacturing at North America’s Largest Chocolate-Making Factory.” Home. Accessed December 4, 2025. [https://www.thehersheycompany.com/en\\_us/home/newsroom/press-release/2018-10-24-Celebrating-U-s-Manufacturing-At-North-Americas-Largest-Chocolate-making-Factory.html#:~:text=The%20Hershey%20Company%2C%20headquartered%20in,Rancher%2C%20Ice%20Breakers%20and%20SkinnyPop](https://www.thehersheycompany.com/en_us/home/newsroom/press-release/2018-10-24-Celebrating-U-s-Manufacturing-At-North-Americas-Largest-Chocolate-making-Factory.html#:~:text=The%20Hershey%20Company%2C%20headquartered%20in,Rancher%2C%20Ice%20Breakers%20and%20SkinnyPop).

Hershey emphasizes ethical and social responsibility through its *Supplier Code of Conduct*<sup>8</sup> and *Responsible Sourcing Supplier Program*<sup>9</sup>, prohibiting the use of forced or child labor at any stage of production. Furthermore, the company publicly releases annual reports of their sustainability disclosures and participates in third-party certification programs. Hershey is involved in *Rainforest Alliance*<sup>10</sup> and *Fairtrade*<sup>11</sup>; programs that focus on sustainability and workers rights respectively. Despite its efforts, Hershey has faced ethical challenges particularly regarding child labor practices in West African cocoa communities; a concern brought before the courts in *Coubaly v. Cargill, Inc. et al.*

*Coubaly is a standing case: no farm, no traceability, no Hershey liability.*

## A. Facts

In *Coubaly v. Cargill* (2025) eight Malian citizens, the plaintiffs, alleged that they had been trafficked as children to work on cocoa farms in Côte d'Ivoire, under conditions of forced labor. The plaintiffs claimed that Hershey, along with Cargill, Nestlé, Mars, Olam, Mondelz, and Barry Callebaut, the defendants, “were the architects and defenders” of a cocoa-supply system dependent on child labor.<sup>12</sup> The plaintiffs alleged that these companies collectively formed and controlled a “venture” designed

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8 “The Hershey Company Supplier Code of Conduct,” ©The Hershey Company, 2019, <https://www.thehersheycompany.com/content/dam/hersheyterms/supplier-code-of-conduct/supplier-code-of-conduct.pdf>.

9 “Responsible Sourcing Supplier Program,” The Hershey Company, Accessed November 3, 2025, [https://www.thehersheycompany.com/en\\_us/home/sustainability/sustainability-issues/responsible-sourcing-supplier-program.html](https://www.thehersheycompany.com/en_us/home/sustainability/sustainability-issues/responsible-sourcing-supplier-program.html).

10 “Guardians of Forests. Advocates for Farmers,” Rainforest Alliance, October 13, 2025, <https://www.rainforest-alliance.org/>.

11 “Fairtrade America 2024 Annual Report,” Fairtrade America, Accessed November 3, 2025, <https://www.fairtrade.net/us-en.html>.

12 *Coubaly v. Cargill Incorporated*, no. 22-7104 (D.C. cir. 2025), Justia, Accessed November 4, 2025, <https://law.justia.com/cases/federal/appellate-courts/cadc/22-7104/22-7104-2025-07-22.html>.

to secure inexpensive cocoa through exploitative practices. Furthermore, they argued that the defendants delayed forced-labor reforms by creating superficial initiatives such as the *World Cocoa Foundation*, that were more symbolic than substantive.<sup>13</sup>

## B. Procedural History

The plaintiffs filed a class-action complaint in the U.S. District Court for the District of Columbia under 18 U.S.C. § 1595(a), asserting that the defendants knowingly benefited from “participation in a venture” engaged in forced labor, violating the TVPRA. The district court dismissed the case for failure to comply with Article III standing requirements. Article III requires “that the plaintiff has personally (1) suffered some actual or threatened injury; (2) that the injury can fairly be traced to the challenged action of the defendant; and (3) that the injury is likely to be redressed by a favorable decision.”<sup>14</sup> The court ruled that the plaintiffs failed to plausibly link their injuries to any specific farm supplying the defendants. On appeal, the D.C. Circuit Court of Appeals, in an opinion by Judge Justin R. Walker, re-affirmed the dismissal, holding that the plaintiffs’ allegations lacked the factual specificity required to establish causation between the defendants’ conduct and the plaintiffs’ forced labor.<sup>15</sup>

## C. Statutory Interpretation

The appellate court’s analysis centered on whether the plaintiffs’ alleged injuries were “fairly traceable” to the defendants’ “participation in a venture” under § 1595(a). The court reaffirmed that under the TVPRA, plaintiffs must show a traceable connection between the forced-labor injuries and the defendant’s involvement in the venture, not simply industry-wide participation. The court emphasized that Article III still

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13 “Sustainable Cocoa through Global Collaboration,” World Cocoa Foundation, Accessed November 3, 2025, <https://worldcocoafoundation.org/>.

14 Art III.S2.C1.1 Overview of Cases or Controversies, Congress, Accessed November 4, 2025, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-1/ALDE\\_00013375/](https://constitution.congress.gov/browse/essay/artIII-S2-C1-1/ALDE_00013375/).

15 *Coubaly v. Cargill Incorporated*, no. 22-7104 (D.C. cir. 2025).

requires specific factual allegations, not general assertions. The complaint failed to identify the farms or intermediaries supplying the defendants. The court therefore found the alleged “venture” too vaguely defined, noting that it was unclear whether it referred to the defendants of the case or to a broader collective network of cocoa buyers and suppliers.

#### D. Decision and Implications

The D.C. Circuit concluded that the plaintiffs lacked standing because they did not provide sufficient facts showing that their individual injuries were caused by cocoa sourced by Hershey. The plaintiffs relied on statistical likelihoods rather than concrete evidence directly linking their forced labor to Hershey’s supply network. This failed to satisfy Article III’s traceability requirement. Accordingly, the court affirmed the dismissal for lack of standing, emphasizing that while the plaintiffs’ experiences were undeniably troubling, their complaint did not meet the constitutional threshold for federal jurisdiction.

The decision in *Coubaly v. Cargill* reveals how procedural barriers, specifically standing and traceability, can restrict the reach of federal labor protections, even in industries where the risks of exploitation are well-documented. Without specific, verifiable links between individual victims and a company’s supply chain, courts remain hesitant to extend liability, leaving much of the burden for enforcement to voluntary corporate initiatives. For Hershey, this outcome underscores the importance of continued investment in transparency and traceable systems, as less than half of the company’s cocoa sourcing is traced back to the farm level.<sup>16</sup> The case also illustrates a broader structural challenge: while child labor and poverty persist in West African cocoa communities, the existing legal framework places greater emphasis on proof of direct causation than on ethical accountability.

## II. Apple Inc.

Apple Inc. (“Apple”), founded in 1976 by Steve Jobs and Steve Wozniak, is an American multinational technology company that rede-

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16 Sandy Smith, “Groups Claim Hershey Chocolate Is Not so Sweet for Child Laborers,” EHS Today, September 14, 2011, <https://www.ehstoday.com/archive/article/21907920/groups-claim-hershey-chocolate-is-not-so-sweet-for-child-laborers>.

fined the sector through its innovation of computer software, personal computers, mobile tablets, and smartphones.<sup>17</sup> Over the years, the company has positioned itself as a leader in supply-chain responsibility, adopting detailed policies to address forced labor and supplier compliance.

Apple has assembled more than 470 labor recruitment, employment, and placement agencies in Southeast Asia to strengthen oversight of its suppliers.<sup>18</sup> These steps have won Apple public recognition, including a 2018 Stop Slavery Award for transparency and anti-forced-labor efforts.<sup>19</sup> However, while Apple’s supplier policies project a commitment to ethical labor standards, the company’s practices were tested in *Doe v. Apple Inc.*

*Standing survived, the claim did not: no venture participation, no liability for Apple.*

## A. Facts

In *Doe v. Apple Inc.* (2024), a group of Congolese child miners and their families, the plaintiffs, brought suit against Apple among other major technology companies, the defendants, alleging violations of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). The plaintiffs asserted that the defendants “participated in a venture” that profited from forced child labor in cobalt mining.<sup>20</sup> They further alleged that Apple’s international suppliers relied on local subsidiaries

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17 Apple Inc. | History, products, Headquarters, & Facts | Britannica Money. Accessed December 5, 2025. <https://www.britannica.com/money/Apple-Inc>.

18 “Example in Action: Apple’s\* Supplier Code of Conduct and Recruitment Fees.” DOL. Accessed November 28, 2025. <https://www.dol.gov/agencies/ilab/comply-chain/steps-to-a-social-compliance-system/step-6-remediate-violations/example-in-action-apples-supplier-code-of-conduct-and-recruitment-fees>.

19 “Example in Action: Apple’s\* Supplier Code of Conduct and Recruitment Fees,” DOL, Accessed September 15, 2025, <https://www.dol.gov/agencies/ilab/comply-chain/steps-to-a-social-compliance-system/step-6-remediate-violations/example-in-action-apples-supplier-code-of-conduct-and-recruitment-fees>.

20 *Doe v. Apple Inc.*, no. 21-7135 (D.C. Cir. 2024), Justia, Accessed November 4, 2025, <https://law.justia.com/cases/federal/appellate-courts/cadc/21-7135/21-7135-2024-03-05.html>.

that obtained cobalt through these exploitative practices.<sup>21</sup> The plaintiffs, many of whom were minors at the time of their injuries, recounted stories of tunnel collapses, debt bondage, and threats of blacklisting if they refused to work. They contended that Apple and the other defendants knowingly benefited from this forced labor by maintaining demand for cobalt obtained under exploitative conditions, thereby perpetuating systemic human rights violations in their supply chains.

## B. Procedural History

The plaintiffs filed suit in the U.S. District Court for the District of Columbia, seeking damages and injunctive relief under 18 U.S.C. § 1595(a). The district court dismissed the case finding that the plaintiffs lacked standing as they failed to establish a cognizable claim under the TVPRA. On appeal, the District of Columbia Circuit Court of Appeals, led by Judge Neomi Rao, reinstated standing for the plaintiffs' damages claims, holding that they had suffered concrete injuries fairly traceable to the defendants' alleged participation in forced labor...but ultimately, affirmed dismissal for failure to state a claim in congruence with § 1595's "participation in a venture."<sup>22</sup>

## C. Statutory Interpretation:

The appellate court's analysis centered on the meaning of "participation in a venture" under § 1595(a). The plaintiffs argued that the defendants knowingly benefited from and thereby participated in a venture that violated federal trafficking laws by purchasing cobalt through a supply chain that included forced labor. The court, however, rejected this interpretation. Judge Rao emphasized that the ordinary meaning of "venture" implies an undertaking or enterprise involving shared risk and mutual gain, not merely a buyer-seller transaction. The court held that Apple's purchase of cobalt from suppliers, even with awareness of possible labor abuses, did not establish a joint enterprise sufficient to meet the statutory threshold for venture participation. The opinion contrasted this case with precedents such as *Ricchio v. McLean* (1st Cir. 2017), where motel owners were found to have actively facilitated a trafficking operation by

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21 Doe v. Apple Inc., no. 21-7135 (D.C. Cir. 2024).

22 Doe v. Apple Inc., no. 21-7135 (D.C. Cir. 2024).

knowingly profiting from and assisting in the scheme.<sup>23</sup> By comparison, Apple's relationship with its suppliers lacked the continuous, cooperative conduct or shared control necessary for liability under the TVPRA. The D.C. Circuit thus interpreted "participation" narrowly, confining it to situations involving active collaboration or deliberate facilitation of trafficking ventures.

#### D. Decision and Implications

The court concluded that the plaintiffs had standing to seek damages but not injunction relief, a judicial order requiring action or restraint. It reasoned that an injunction against Apple would not likely redress the plaintiffs' injuries since the alleged forced labor occurred within a complex global network involving numerous independent actors. On the merits, i.e. based on the substantial facts and law of a case, rather than on procedural grounds, the court affirmed dismissal under Rule 12(b)(6). Rule 12(b)(6) is a provision under the *Federal Rules of Civil Procedure* that allows a defendant to move for dismissal of a complaint for "failure to state a claim upon which relief can be granted".<sup>24</sup> Under this rule, the court held that purchasing a fungible commodity through an extended supply chain does not amount to participation in a trafficking venture. This interpretation effectively protected Apple and other multinational corporations from liability, unless there was clear proof that they directly controlled or were actively involved in their suppliers' labor practices. You might wonder: what does this mean for corporate accountability under the TVPRA? The decision marks a significant limitation on the reach of the TVPRA's civil liability provisions, reinforcing a judicial reluctance to equate corporate purchasing relationships with active participation in human trafficking. As a result, the ruling makes it more difficult for plaintiffs to hold multinational corporations civilly liable for forced labor

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23 Ricchio v. McLean, no. 16-1680 (1st cir. 2017), Justia, Accessed November 4, 2025, <https://law.justia.com/cases/federal/appellate-courts/ca1/16-1680/16-1680-2017-04-05.html>.

24 "Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing," Legal Information Institute, Accessed November 3, 2025, [https://www.law.cornell.edu/rules/frcp/rule\\_12](https://www.law.cornell.edu/rules/frcp/rule_12).

abroad, despite Congress's intent under the TVPRA to extend accountability to indirect beneficiaries of trafficking. Therefore, *Doe v. Apple Inc.* illustrates the enduring challenge of translating the TVPRA into enforceable corporate responsibility standards in transnational contexts.

Apple's case highlights the tension between policy and practice. While the company's public policies reflect a genuine effort to promote ethical sourcing and compliance, the *Doe v. Apple* ruling illustrates the complexity of corporate accountability under current U.S. labor laws. The decision demonstrates that effective oversight within multilayered supply chains remains a significant legal and operational challenge. The court's interpretation of "participation in a venture" clarifies that liability under the TVPRA requires demonstrable control or active involvement, emphasizing the importance of direct corporate engagement in supplier monitoring.

### Comparative Case Analysis: *Coubaly vs. Cargill* & *Doe vs. Apple*

*Coubaly* lost on standing; the argument lacked a traceable connection between the plaintiffs' damages and Hershey's involvement in the harm caused. *Doe* is a merits loss; the argument lacked substantive connection to the applicable law under the TVPRA provisions. Together, they underscore that without venture-level ties and clear legislation, \$1595 cannot reach forced labor practices hidden in multi-tier supply chains. Despite successive reauthorizations that broadened the TVPRA's civil liability, recent case law shows it is still not enough when plaintiffs cannot provide a direct, traceable link from their exploitation to a specific corporate defendant. Nor is it sufficient when plaintiffs cannot draw a clear connection between the alleged forced labor and the defendant's direct participation in a venture.

*Coubaly* and *Doe* create a double bind that systematically disadvantages victims in global supply chains. *Coubaly* says that even if plaintiffs can describe venture-like structures, they must still trace their personal injuries to defendant-linked suppliers. *Doe* says that even if plaintiffs could trace the connection, they must still allege venture-type collaboration rather than mere purchasing. The combination effectively rewards distance and negligence. Corporations that route purchases through third-party suppliers and layered intermediaries can avoid "venture" allegations, and those same layers make it exceptionally hard for

workers, who lack access to shipping records, supplier contracts, audit trails, and lot numbers, to plead traceability with the specificity Article III demands.

## Conclusion:

Multinational corporations occupy a central place in the global economy, moving capital, technology, and consumer goods across borders at an unprecedented speed and scale. In highly competitive, price-sensitive markets, the pressure to keep costs low and profit margins stable is relentless. Access to very cheap labor can function as a quiet but powerful mechanism, allowing firms to hold retail prices steady and match low-cost competitors. Within this framework, labor that is underpaid, underprotected, and difficult to investigate, may become, from a narrow cost perspective, an attractive feature of outsourced supply chains.

Yet, the same practice that makes such labor “efficient” in business terms makes it indefensible in ethical terms. Forced labor strips workers of autonomy, safety, and, often, the most basic conditions of dignity. International instruments and domestic statutes alike treat it as categorically prohibited, not as a negotiable trade-off. Core ILO standards, human rights norms, and U.S. legislation such as the TVPRA, reflect a broad consensus that forced labor is not just undesirable, but unjustifiable. However beneficial the economic incentives may be, they can never outweigh the legal and ethical commitments necessary to prevent labor exploitation.

Despite this formal consensus, forced labor remains embedded in global supply chains that serve major consumer markets. The litigation in *Coubaly v. Cargill* and *Doe v. Apple* captures this tension. Even though the courts did not make factual findings that these corporations were directly involved in forced labor, the complaints themselves illustrate how global demand can intersect with entrenched patterns of forced labor. The current state of civil liability under § 1595 sends a complicated signal. As it stands, victims must continuously satisfy evidentiary thresholds that are misaligned with their access to information; they must trace their own injuries through dark chains of intermediaries to specific corporate buyers. Even then, they must demonstrate a causal relationship beyond the standard purchasing transaction; namely, a “venture” involving control, meaningful influence, or active assistance to the forced labor. In such an environment, it is difficult to ignore the TVPRA’s limited capabilities.

Therefore, those best positioned to benefit from low-cost inputs are also those best positioned to remain insulated from judicial consequences.

The gap between the TVPRA's goals and its on-the-ground operations is hard to overlook. On paper, Congress has opted for a victim-centered approach: "whoever" knowingly benefits from a trafficking venture, under a "knew or should have known" standard, appears within reach. In practice, however, the combination of Article III standing requirements and § 1595 "participation in a venture" clause, effectively favors corporations that are best positioned to deflect allegations originating deep within their supply chains. The result is a system that looks robust in theory, yet in many transnational cases does little to discipline corporations that benefit most. Until legal standards, evidentiary expectations, and corporate structures are brought into closer alignment with the statute's stated aims and the realities of multi-tier supply chains, the law will continue to promise more than it can deliver, and the distance between ethical obligation and reality, will remain part of the cost of doing business.



# How Copyright and Trademark Law Fail Fashion Designers in the Era of Fast Fashion

JULIANNA ZUCKER

## ABSTRACT

The fast-fashion market exposes a major flaw in U.S. intellectual property law: clothing is everywhere, copied in seconds, yet rarely protected. This paper examines how copyright law fails designers by classifying garments as useful articles, leaving silhouettes, cuts, and design outside legal protection. It also analyzes how trademark and trade dress law demand overwhelming proof of distinctiveness and consumer recognition, a burden most independent designers cannot meet. The discussion highlights legal battles involving major brands like Shein, Zara, Adidas, and Gucci to illustrate the disparity IP law reinforces. The paper ultimately argues that without legislative reform, including proposals like the IDPPPA, fashion designers will remain legally exposed in an industry that moves faster than the courts can respond.

## Introduction

In 2021, designer Bailey Prado made a viral Tik Tok video accusing Shein, a global online fashion retailer, of duplicating her patented butterfly jeans. In the same year, several independent designers sued Shein for copyright and intellectual property infringement, with one case resulting in a \$100 million racketeering lawsuit that alleged Shein engaged in egregious manner.<sup>1</sup> Shein, a Chinese fast-fashion retailer, produces thousands of new designs each day, showing how fast fashion moves quicker than U.S. copyright law. By the time any action is taken, copied items have already vanished from the market, making intellectual property (IP) protection largely symbolic rather than effective.<sup>2</sup>

The lawsuits against Shein claim not only repeated copyright infringement, but also violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), an uncommon step in fashion law that

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- 1 Waite, T. (2021, August 11). Knitwear designer Bailey Prado on having her ‘whole life’ copied by Shein. Dazed. <https://www.dazeddigital.com/fashion/article/53779/1/independent-designer-bailey-prado-talks-whole-life-copied-shein-fast-fashion>
  - 2 Cartner-Morley, Jess. “Shein Is Getting Away with Daylight Robbery.” Dazed Digital, August 13, 2021 <https://www.dazeddigital.com/fashion/article/55146/1/shein-fast-fashion-exploitation-plagiarism-independent-designers-copy-aliexpress>

compares Shein’s copying practices to organized crime.<sup>3</sup> The plaintiffs argue that Shein uses computer programs to copy online designs and mass-produce them quickly, leading to widespread copying of original work. While U.S. designers can seek protection through copyright, trademark, and trade dress laws, these frameworks offer limited coverage for clothing designs, which are often considered functional rather than artistic. Yet despite the severity of these allegations, the cases face strict proof requirements and long court processes. This shows how difficult it is to hold fast-fashion companies legally accountable under current intellectual property laws.

These events are not isolated incidents but are evidence of a systemic issue. The fast fashion economy based on speed and reproduction is worth hundreds of billions, usually to the cost of the original designer. Despite combative and whistleblowing efforts to call out these companies on social media, Prado’s campaign exemplifies how difficult it is for independent designers to protect their work under current law. Independent designers rarely possess the resources or recognition that established brands rely on to prevail in court. This paper will examine three central legal shortcomings that contribute to this failure: the narrow scope of copyright’s useful article doctrine, the difficulty of proving distinctiveness in trademark and trade dress claims, and the mismatch between the slow pace of litigation and the rapid cycle of fashion. In the absence of meaningful reform, such as the reintroduction of the Innovative Design Protection and Piracy Prevention Act (IDPPPA), Intellectual Property law in the United States will continue to enable the creative exploitation of designers like Prado.

## The Problem of Useful Articles and the Copyright Gap

Fashion designers seeking legal protection face their greatest challenge under copyright law, which excludes “useful articles” such as clothing from protection. Clothing, by its own definition, is practical—it is used to cover the body and provide warmth. According to 17 U.S. code

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3 U.S. Code. (n.d.). 18 U.S.C. §§ 1961–1968 (Chapter 96, Part I, Racketeer Influenced and Corrupt Organizations). <https://www.law.cornell.edu/uscode/text/18/part-I/chapter-96>

§ 101, a useful article is that whose purpose was inherently utilitarian.<sup>4</sup> Copyright only protects pictorial, graphic, or sculptural features (such as decorative patterns, embroidery, or artistic designs) that can be recognized and exist apart from the garment's utilitarian elements (like its stitching, cut, or function of covering the body).

This is referred to as the test of separability, which was cemented in 2017 in the Supreme Court case of *Star Athletica, L.L.C. v. Varsity Brands, Inc.* The Court held that a feature included in a useful article is copyrightable when (1) it is perceivable as a two- or three-dimensional work of art independent of the useful article and (2) would be considered a protectable pictorial, graphic, or sculptural work (whether standing alone or embedded in another tangible work) had it been otherwise imagined.<sup>5</sup> In *Star Athletica v. Varsity Brands (2017)*, Varsity Brands sued Star Athletica for copying its cheerleading uniform designs. The Court ultimately ruled that only the decorative elements of the uniforms, rather than the functional garment itself, qualified for copyright protection.

Although Star Athletica was regarded as the triumph of the cheerleading uniform designs of Varsity Brands, it is limited in its application.<sup>6</sup> The court's rulings mostly safeguard any graphic prints, appliques, or woven designs that can be conceptually detached out of the garment. As an illustration, a special floral print on a dress can be copyrighted, but not the overall cut, silhouette, or style such as Dior's classic "New Look" shape, which often represents the essence of a designer's creativity. The unusual way a designer drapes a garment, the architectural form of a sleeve, or a new neckline are all examples of utilitarian features of a useful article. Because of this, they fall into the public domain, where anyone can legally copy them.

This dogma provides a perverse motivation for fast fashion businesses. Under the useful article doctrine, they have the legal right to

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4 17 U.S. Code § 101 - Definitions. n.d. Legal Information Institute, Cornell Law School. <https://www.law.cornell.edu/uscode/text/17/101>

5 *Star Athletica, L.L.C. v. Varsity Brands, Inc.* 2017. 580 U.S. <https://www.oyez.org/cases/2016/15-866>

6 Bridy, Jacqueline. 2016. "Why Copyright Law Doesn't Work for Fashion." *The Conversation*, September 15, 2016.

dissect a designer's clothing, reproduce the non-protectable functional components (such as the cut, silhouette, and style), and then simply alter or remove the protectable decorative elements (like a print or emblem). The result is a product that is legally permissible but ethically debatable. The law protects surface ornamentation such as logos, prints, or graphic details, yet it leaves the underlying structure and creativity of the garment unprotected. In this way, the useful article doctrine turns copyright from a system meant to safeguard individual clothing designs into one that primarily preserves a company's broader image and branding.

## The Burden of Distinctiveness in Trademark and Trade Dress

In the event of unsuccessful copyright, designers usually resort to a different type of protection: trademark law and its offshoot trade dress protection. The trademark law safeguards means of brand identification, such as logos, names and slogans, which associate the origin of a product to consumers. Direct counterfeit logos are typically avoided by fast fashion brands, who are aware that this will be sued away easily. They instead imitate the overall design of a product, forcing designers to rely on the more complex and indirect trade dress doctrine for protection.

Trade dress safeguards the overall picture and general impression of a product—including its form, size, color, texture, and packaging—when those elements function as a source identifier. In cases concerning an infringement of trade dress, a designer must demonstrate two challenging things. First, it must be inherently distinctive or have acquired a secondary meaning (for example, a consumer has learned to associate that design with one supplier). Second, the alleged copy must generate a likelihood of confusion among the consumers.<sup>7</sup>

The greatest challenge for designers lies in proving that the design of a garment, rather than a logo, is distinctive in itself. Judges are not likely to decide that a clothing design is a mere indication of a brand origin unless backed by significant evidence. It is also difficult to prove a secondary meaning, as this would demand huge volumes of consumer

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7 Hemphill, C. Scott, and Jeannie Suk. 2009. "The Law, Culture, and Economics of Fashion." *Stanford Law Review* 61 (5): 1147–99. <https://www.stanfordlawreview.org/wp-content/uploads/sites/3/2010/03/Hemphill-Suk.pdf>

survey data, large sums of spending on advertisement, and extensive media coverage. This is a vast undertaking for independent designers who do not have the hefty marketing budgets of large corporations. More so, defendants in fast fashion cases can readily claim that their items are sold at a much lower price on other sites; for example, it is unlikely that consumers would associate a twenty-dollar Shein dress with a five hundred dollar independent designer collection.

A leading example of trademark and trade dress conflict can be seen in the case of *Adidas America, Inc. v. Forever 21, Inc.* (C.D. Cal. 2017)<sup>8</sup>, where Adidas sued Forever 21, a fast-fashion retailer similar to Shein, for using two- and four-stripe designs that it claimed were too similar to its iconic three-stripe mark. Adidas argued that these stripes were a central part of its brand identity, supported by decades of advertising, consumer recognition, and legal enforcement. In response, Forever 21 contended that stripes are common decorative elements in fashion and that Adidas was attempting to monopolize a generic design feature. The dispute concluded in a confidential 2018 settlement after Forever 21 dropped its objections, leaving Adidas's trademarks intact.

This outcome underscores how trademark and trade dress law often favor established brands with the resources to prove distinctiveness and secondary meaning. Courts are more receptive when consumers clearly associate a logo or pattern with a single company, but they rarely extend such protection to design elements like cuts or silhouettes. For example, when designer Tuesday Bassen accused Zara of copying her pins and patches, her claims failed due to limited copyright protection.<sup>9</sup> Adidas's global recognition allowed it to defend its mark, while independent designers lack the financial and evidentiary power to do the same. The case also reveals a deeper tension within trademark law: while it aims to protect brand identity and prevent consumer confusion, it risks granting dominant players excessive control over shared aesthetic features. *Adidas v. Forever 21* ultimately demonstrates how intellectual property law, though effective for major corporations, continues to leave smaller designers unprotected in the fast-fashion economy.

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8 *Adidas America, Inc. v. Forever 21, Inc.* 2017. Case No. 3:17-cv-00377 (D. Or.)

9 Igneri, Jenna. "How Indie Artist Tuesday Bassen Is Fighting Back Against Zara." NYLON, July 21, 2016. <https://www.nylon.com/articles/zara-plagiarism-tuesday-bassen>

## A Similar Dispute: Gucci v. Forever 21 and Trademark Power

Additionally, this imbalance becomes even clearer in *Gucci America, Inc. v. Forever 21, Inc.* in a case that mirrors *Adidas v. Forever 21* in its treatment of brand distinctiveness and consumer recognition. In 2017, after receiving multiple cease-and-desist letters from Gucci, Forever 21 filed a declaratory judgment action in the U.S. District Court for the Central District of California.

In that filing, Forever 21 asked the court, using the Lanham Act's trademark cancellation provision (15 U.S.C. § 1119), to cancel Gucci's green-red-green and blue-red-blue stripe trademarks, which Forever 21 often used on its own bags, clothing, and accessories.<sup>10</sup> In response, Forever 21 fought that stripes are widely used in fashion, and not exclusive to major brands. Shortly after, Gucci counterclaimed for trademark infringement and dilution, arguing that its stripes had gained secondary meaning and that consumers recognised them as distinctly from Gucci. Fundamentally, this dispute focused on whether basic design elements, such as designated colored stripes, could serve as distinctive trademarks or were merely decorative features unworthy of legal protection.<sup>11</sup>

Eventually, the case ended in November 2018 with a confidential settlement, leaving Gucci's trademark stripes intact and Forever 21's challenge dismissed. While Gucci effectively preserved its branding, no legal precedent emerged, highlighting the inefficiency and exclusivity of IP law in fashion. Trademark protection depends on consumer recognition, not originality, meaning powerful brands can claim ownership over common design features while independent designers cannot. Even though Forever 21 was the accused party, the case exposes a deeper issue: IP law rewards fame and market power rather than artistic innovation. In the same way, and similar to Shein's exploitation of unprotected designs, *Gucci v. Forever*

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10 Fashion Law Institute. "Posts Tagged 'Gucci.'" Fashion Law Institute. Accessed October 9, 2025. <https://www.fashionlawinstitute.com/tag/gucci>

11 CBS News. "Gucci Sues Forever 21 for Trademark Infringement." Last modified August 10, 2017. <https://www.cbsnews.com/news/gucci-sues-forever-21-trademark-infringement-bomber-jacket/>

21 shows the same inequality from the opposite direction, as both cases reveal how IP law in the United States fails to protect creativity in the fast-paced world of fashion.<sup>12</sup>

## The Temporal Mismatch between Pace of Law and the Speed of Fashion

While a designer may have a theoretically protectable design and have the financial resources needed to file suit, the reality of the fashion industry is complicated by an insurmountable hurdle: time. A fast fashion company can spot a trending design, produce a replica, and ship it to different parts of the world in as little as two to three weeks. In contrast, the average U.S. federal copyright or trademark infringement case takes over two years to resolve, with more than six months typically passing before discovery even begins.

Before a court can even consider a preliminary injunction to stop sales of the infringing product, the copied item has already been produced, marketed, discounted, and often sold out across online marketplaces. It is too late to save the potential market of the original designer. The lawsuit itself serves as a costly symbol rather than an effective measure of protection. In the case of fast fashion companies, the calculus is easy: the possible gains of selling a profitable knockoff greatly exceed the low risk of a court settlement or a small judgment that may happen two or three years later.

The gaps in copyright and trade laws do not just hurt individual designers, they affect the whole fashion world. When knockoffs flood the market and original ideas go unprotected, creativity gets pushed aside and imitation starts to feel like the standard. As a result, fashion begins to lose its meaning, with originality and artistry replaced by disposable copies. Weak rules allow exploitation to persist, while counterfeits blur the line between real and fake, eroding trust in brands and the marketplace alike. These failures create an industry driven more by speed and cost-cutting than by innovation or responsibility. This unsustainable

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12 Forever 21, Inc. v. Gucci America, Inc., et al., Case No. 2:17-cv-04706, Filing 38, Central District of California, Justia Dockets & Filings. Accessed October 9, 2025. <https://docs.justia.com/cases/federal/district-courts/california/cacd-ce/2%3A2017cv04706/682210/38>

cycle demonstrates exactly how copyright and trademark law fail fashion designers in the era of fast fashion, leaving creativity vulnerable and the industry in need of meaningful reform.<sup>13</sup>

## Conclusion and Policy Implications

The intellectual property law system in the United States currently provides the fast fashion industry with a legal environment that makes design appropriation remarkably easy. Copyright law's useful article doctrine excludes the creative features that matter most in fashion, which means that the artistic parts of a garment do not qualify for meaningful protection. Trademark and trade dress law also impose demanding standards for proving distinctiveness and consumer confusion, making it difficult for most designers, especially smaller or newer ones, to secure exclusive rights. Even when a claim appears viable, the slow pace of the court system cannot compete with the rapid movement of the fashion trend cycle. As a result, copied designs often circulate, sell, and disappear long before any legal remedy becomes available.

These shortcomings have significant consequences. They discourage designers from taking creative risks because they know their ideas can be copied without realistic recourse.<sup>14</sup> Consumers also suffer, since the market becomes saturated with lower quality imitations that diminish the value, originality, and diversity of design. Over time, this dynamic creates an industry where companies compete by replicating trends at high speed rather than by investing in innovation or quality.<sup>15</sup>

The core problems discussed in this paper, including the limits created by the useful article doctrine, the burdens of distinctiveness required for trademark and trade dress protection, and the mismatch between litigation timelines and fashion cycles, cannot be resolved by the

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13 Hemphill and Suk. 2009. "The Law, Culture, and Economics of Fashion"

14 Matthew Cook, "The Complexities and Consequences of Fashion Knockoffs," St. Louis Volunteer Lawyers and Accountants for the Arts, Law Student Blog, July 18, 2024 <https://vlaa.org/the-complexities-and-consequences-of-fashion-knockoffs/>

15 Sustainability Directory. "How Does Trade Law Impact Fashion?" Sustainability Directory. January 27, 2025. <https://fashion.sustainability-directory.com/question/how-does-trade-law-impact-fashion>

courts alone. Judges must interpret the statutes that already exist, and those statutes do not provide a structure capable of protecting fashion design in a timely or effective way. Because these failures are embedded directly within the law, a meaningful solution must come from outside the judicial system.

For this reason, a legislative response is essential. Earlier attempts to create a *sui generis* (“of its own kind” or “unique”) type of protection for fashion design, which would offer a short period of exclusive rights for unique and original designs, would address many of the gaps outlined in this paper. Such a statute would close the space between copyright and trademark law by protecting the creative features that copyright leaves out, while also removing the heavy burdens associated with proving distinctiveness or consumer confusion. Most importantly, it would align the period of protection with the rapid pace of the fashion cycle, finally giving designers and courts a practical framework that supports timely and effective remedies.

Ultimately, meaningful reform requires Congress to act. Until lawmakers update the statutory framework to recognize fashion design as a form of intellectual property worthy of protection, designers will remain vulnerable to copying, and the courts will remain unable to provide the level of protection that creativity in this industry deserves.





# LAW and PUBLIC HEALTH

# Humanizing Addicts: A Shift in Perspective of the Nature of Addiction

ISABELLA AGUILAR

## ABSTRACT

For over half a century, the War on Drugs has centered on dismantling supply chains, prosecuting distributors, and enforcing punitive measures against individuals who use illicit substances. Despite isolated successes—such as Miami’s suppression of major cartels in the 1980s—these strategies have failed to curb addiction or reduce drug-related harm in the present day. Early drug control regimes framed addiction as a moral failing afflicting societally marginalized individuals, reinforcing stigma and legitimizing policies that criminalized users, rather than supporting them. International examples, including Switzerland’s experience in Zürich during the AIDS and opioid crises, demonstrate that aggressive policing and social exclusion neither reduce drug use nor mitigate its consequences; instead, they displace users, deepen public fear, and fracture social cohesion. This paper argues that the persistence of the drug epidemic stems not from insufficient enforcement but from entrenched societal attitudes that dehumanize people with substance use disorders. To reduce mortality and address the structural harms perpetuated by punitive drug policy, governments must reorient their approach toward compassion-based, evidence-driven interventions. These include expanding access to treatment programs, normalizing over-the-counter opioid antagonists, and strengthening drug courts as alternatives to incarceration. Reframing addiction as a chronic illness rather than a moral defect is essential to building effective public health responses and fostering a more humane, socially cohesive society.

## Introduction

The War on Drugs has been a grueling battle between the United States and violent drug cartels against substance use that has been raging for over 50 years. While many strides have been made by these so-called drug control regimes—for example, the great success of Miami law enforcement in crushing the dangerous and powerful cartels that had overrun the city in the 1980s—the drug epidemic still exists despite decades of efforts. While drug control regimes have focused much of their attention on combating the methods by which individuals may obtain illicit drugs (e.g., dismantling cartels, arresting distributors, and giving anti-drug use presentations to children), those who suffer from drug addiction are overlooked when ironically, they are the greatest contributors to the illegal drug trade. In the early years of the War on Drugs, addiction was viewed as afflicting only those with an “inadequate personality;” namely, outcasts of society involved in the subculture movement indic

ative of the 1960s and 1970s against traditional societal values. It was believed that drug users felt so inadequate by societal standards that they turned to drugs to ease their internal turmoil.<sup>1</sup> Essentially, members of society with higher economic and social status were not easy victims of addiction: addicts were “weak-minded”, “non-contributing members of society,” villainized and scapegoated as causes of the misery that illegal drugs brought to the community. To combat the issue of drug addiction, governments took a tough approach of arresting drug users, people who were in possession of illicit drugs, or even anyone in possession of needles at parks, underpasses, and other locations where these users congregated—but none of these initiatives brought significant change to the number of users. This occurred in Switzerland, for example, where in Zürich, the number of heroin users skyrocketed from 3,000 in 1975 to 30,000 by 1992.<sup>2</sup> Dr. Andre Seidenberg, a physician who ran a drug treatment clinic in Zürich during the height of the AIDS and opioid epidemic in the 1980s, recounted that the police and government would cordon off entire districts, arrest and brand users, and restrict addicts from spaces such as restaurants and bars.<sup>3</sup> However, none of these efforts bore any fruit: addicts would just move from one place to another. Moreover their constant ostracization from society only brought fear and suspicion upon them, further dividing the nation. The issue was clear: the War on Drugs had allowed for the pervading perspective of institutions, governments, and society that treats addicts as less than human and unworthy of assistance and compassion. This paper examines the idea that in order to ensure that fewer people are dying from this terrible illness, there must be an effort to shift public opinion on drug addicts, starting by treating them as people with chronic illnesses, not with immoral minds. To humanize addicts and alleviate the deaths and social issues brought about by the drug epidemic, governments must implement counter efforts in the form

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- 1 John Bucklew, “The Paradigm for Inadequate Personality,” *Paradigms for Psychopathology: A Contribution to Case History Analysis.*, 1960, 109-111.
  - 2 Stefanie Knoll, “The US Can Learn a Lot from Zurich about How to Fight Its Heroin Crisis,” *The World from PRX*, July 30, 2016.
  - 3 Andre Seidenberg. “The Incredible Story of Zürich’s Journey to Harm Reduction.” *Filter*, September 9, 2020.

of treatment programs, increasing access to over-the-counter opioid antagonists, and drug courts.

To understand and create suitable treatment and legislation for addiction, it must be understood from a medical lens, not a biased social perspective of what defines an addict. According to Dr. Alan I. Leshner, director of the National Institute on Drug Abuse (NIDA), from 1994-2001, prolonged drug use significantly alters brain function at “all levels: molecular, cellular, structural, and functional.”<sup>4</sup> The NIDA went further to even label addiction as a “chronic relapsing brain disease”, or CRBD. CRBD is a disease that attacks a person’s most important organ, the brain, by permanently altering normal brain function and chemical responses, making it extremely difficult to overcome.<sup>5</sup> However, the past few decades of the drug war campaign have eroded public perception, leading society to view addicts as worthless and the cause of the suffering brought on by drug violence.

An addict cannot simply “quit” their habit of drug-taking; a drug addicted brain’s neurotransmitters have been permanently altered, as dopamine receptors to the brain now require the added dopamine chemicals in drugs to function.<sup>6</sup> In Dr. Seidenberg’s article, he details his experience of watching addicts being forced to quit in order to receive medical care without any guidance or sedation go through the agony of withdrawal: he describes terrible pain, uncontrollable shivering and tremors, diarrhea, and paranoia, with the only relief available in the form of more drugs.<sup>7</sup> It is clear that addicts need some form of medical treatment that does not just entail quitting “cold turkey”. Some of the best forms of treatment to alleviate the problems of the drug epidemic can be found in the form of opioid-substitution treatment (OST) with methadone and buprenorphine treatments. Methadone and buprenorphine are both long-acting opioid receptor agonists, meaning that they connect to the

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4 Timothy A. Hickman. “Target America: Visual Culture, Neuroimaging, and the ‘Hijacked Brain’ Theory of Addiction.” *Past and Present* 222, no. Supplement 9 (September 17, 2013), 219.

5 Hickman, 216-218.

6 NIDA. “Drugs and the Brain.” National Institutes of Health, July 2020.

7 Seidenberg, “The Incredible Story of Zürich’s Journey to Harm Reduction.”

opioid receptors in the brain, just as drugs like heroin and morphine do.<sup>8</sup> However, these drugs do not produce the same high that opioids do, and since they are blocking the opioid receptors that drugs like heroin and morphine usually take up, addicts do not experience cravings or withdrawal and are able to live a normal, functioning life.<sup>9</sup> Furthermore, and most importantly, methadone and buprenorphine doses are controlled by the doctors distributing them, therefore, virtually eliminating the risk of death by overdose or contraction of HIV/AIDS through contaminated needles.<sup>10</sup> Although OST is not a cure for addiction, as it does not end the addicted brain's need for more opioids to reach its receptors, it is a great solution to help addicts quickly return to a more sustainable and healthy life. Moreover, it is far more viable and safer for the addict to slowly taper off methadone and buprenorphine treatments than from possibly dangerous heroin use.

Despite evidence that supports the efficiency of adopting opioid substitution treatments, methadone and buprenorphine treatments faced a great deal of backlash when they were first introduced and are only now slowly receiving support. After the creation of methadone by Drs. Vincent Dole and Marie Nyswander in 1966, methadone programs to help lower drug-related crime and the distribution of illegal heroin were implemented all over the country by the Nixon administration.<sup>11</sup> Four key legislative actions that the Nixon administration passed for this movement were the Comprehensive Drug Abuse Prevention and Control Act of 1970 (also known as the Controlled Substances Act), the FDA

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8 Andrew J. Saxon, Yih-Ing Hser, George Woody, and Walter Ling. "Medication-Assisted Treatment for Opioid Addiction: Methadone and Buprenorphine." *Journal of Food and Drug Analysis* 21, no. 4 (December 2013), 1.

9 Tyler S. Oesterle, Nuria J. Thusius, Teresa A. Rummans, and Mark S. Gold. "Medication-Assisted Treatment for Opioid-Use Disorder." *Mayo Clinic Proceedings* 94, no. 10 (October 2019), 2076.

10 Matthew Hickman, Colin Steer, Kate Tilling, Aaron G. Lim, John Marsden, Tim Millar, John Strang, Maggie Telfer, Peter Vickerman, and John Macleod. "The Impact of Buprenorphine and Methadone on Mortality: A Primary Care Cohort Study in the United Kingdom." *Addiction* 113, no. 8 (April 19, 2018), 1461-1462.

11 Michael Massing. *The Fix*. Berkeley, California: University of California Press, 1998.

methadone regulations for Investigational New Drugs of 1971, the FDA methadone regulations of 1972, and the Narcotic Addict Treatment Act of 1974. The Controlled Substances Act created the drug classifications that are still utilized today to distinguish drugs from how controlled they are on the market, from over-the-counter access to all to completely illegal. Under the act, methadone was classified as a Schedule II drug, meaning that there was a high potential for abuse, but it could be prescribed by medical professionals. The two FDA methadone regulations in 1971 and 1972 added more barriers to access by requiring all physicians who prescribed methadone treatments to be first approved by the FDA on a patient-by-patient basis where patients had to enter drug counseling programs along with their treatments. Lastly, the Narcotic Addict Treatment Act restricted treatment even more as addicts in methadone treatment programs had to register as addicts with the Drug Enforcement Agency (DEA) and could be removed from it arbitrarily by the Attorney General.<sup>12</sup>

Despite Dole and Nyswander's successes of methadone treatment in the 1960s with community-based and patient-by-patient protocols, these federal legislations did the opposite, causing the programs to have limited success. By overregulating these methadone treatment programs, fewer and fewer people had access to them, more people were disqualified mid-treatment, and patients faced higher scrutiny from the government, causing many to quit treatment to avoid stigma and judgement.<sup>13</sup> Moreover, the programs faced opposition from the public as the prevailing perspective for many in this time period was that the use of any type of drug, even if it did not provide a high like methadone, was morally wrong. Additionally, many believed that the creation of methadone treatment programs would only encourage drug users to continue using.<sup>14</sup> This line of reasoning is unsubstantiated, as the function of methadone is to inhibit

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12 Richard A. Rettig and Adam Yarmolinsky, *Federal Regulation of Methadone Treatment* (Washington, D.C.: National Academy Press, 1995), 125, 128-131, 134-135

13 Rettig and Yarmolinsky, 85-87, 127

14 Samuel Kelton Roberts. "The Politics of Stigma and Racialization in the Early Years of Methadone Maintenance Regulation." *National Academies of Science, Engineering and Medicine Publication*, (2022), 6.

the addicted brain's desire to continue using drugs and eliminate cravings or withdrawal symptoms from an addict. Still, methadone clinics soon became very marginalized, inaccessible, and stigmatized, suddenly throwing those who were flourishing under the program back into their previous addiction. Opponents of methadone clinics, who sought to stop opioid use by shutting the clinics down and scolding patients, ironically brought it about in greater force as many addicts undergoing methadone treatment were now forced to buy illegal drugs to ease the symptoms of withdrawal. Twenty years later, in the 1990s, more movements were made to increase the amount of methadone programs in the country, but many stigmatizations and misconceptions still prevailed. On one hand, addicts believed that methadone was a worse drug than heroin that was even harder to quit, and physicians often argued that taking methadone was "just substituting one drug for the other" and had negative medical and moral implications.<sup>15</sup> Even worse, there were reports of physicians having harsh attitudes towards methadone users, with some doctors refusing to treat a patient on methadone unless they quit or simply refusing to see the patient at all. Fortunately, while the movements in the 1990s had very limited success, it opened the door to the great strides made in the acceptance of methadone and now buprenorphine treatments in the present day. Recently, methadone clinics have been allowing take-home doses of the controlled substance, a practice that began during COVID-19 to reduce in-person visits, and they have not reported an increase in misuse or overdose. Moreover, there has been a bipartisan effort in Congress to allow doctors, not just specialized treatment clinics, to directly prescribe methadone to addicts—a practice that is currently illegal—to increase access to more people. While there are risks of overdose from methadone and buprenorphine, since doses would be determined by physicians and not the user, the danger is greatly reduced.<sup>16</sup> Opioid substitution treatments such as methadone and buprenorphine are not cures for drug addiction, but they are vital resources that must not be marginalized or stigmatized in order to save the lives of those suffering from this drug

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15 Joan Ellen Zweben, and J. Thomas Payte. "Methadone Maintenance in the Treatment of Opioid Dependence: A Current Perspective." *Western Journal of Medicine* 152, no. 5 (May 1990), 588.

16 Saxon, Hser, Woody, and Ling, 2, 5.

epidemic.

Just as with any disease or widespread epidemic, those suffering from the disease require accessible medication. Unlike prescription treatments for addiction, such as methadone and buprenorphine, antibiotics for common illnesses have long had over-the-counter (OTC) alternatives that require no doctor's approval. By contrast, OTC options for addiction have only become available in recent years. In the case of an illness like strep throat, for example, one may opt to buy cough syrup to take along with their antibiotics to soothe pain; in the case of addiction, one should be able to buy naloxone, or its nasal spray form of Narcan. Naloxone is an opioid receptor antagonist, meaning that once it is absorbed into the body, it blocks the effects of opioids on the brain, returns respiration and heart rhythm to normal levels, and most importantly, reverses the effects of a lethal opioid overdose within a few minutes.<sup>17</sup> Also, if naloxone is administered to someone who is not, in fact, overdosing on opioids, it will have no effect on them, making the drug particularly safe.<sup>18</sup> However, once again, the stigma brought on by the War on Drugs has been translated into a stigma on the widespread use of naloxone.

As with methadone treatments, personal naloxone use and possession was perceived to encourage drug using behavior: if one could easily reverse an overdose with OTC medication, what was to stop drug users from overusing drugs more frequently? Some physicians viewed it as a "safety net" for an addict's personal failure to quit using drugs responsibly, and some addicts chose not to carry Narcan for the fear that they would be labeled as drug users or found violating parole.<sup>19</sup> Because of public stigmas such as these, naloxone was restricted to some hospital

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17 Amalia D. Ardeljan, Benjamin Fiedler, Lawrence Fiedler, George R. Luck, Dennis G. Maki, Lisa Clayton, Charles H. Hennekens, and Allison Ferris. "Naloxone Over the Counter: Increasing Opportunities and Challenges for Health Providers." *The American Journal of Medicine* 136, no. 6 (June 2023), 504.

18 Courtney Perkes. "What OTC Naloxone Means for the Opioid Crisis." *UCLA Health*, January 27, 2023.

19 Alex S. Bennett, and Luther Elliott. "Naloxone's Role in the National Opioid Crisis—Past Struggles, Current Efforts, and Future Opportunities." *Translational Research* 234 (August 2021), 47, 50.

environments after it was approved by the FDA for use in 1971, and later in the 1980s and 1990s when they were in the possession of first responders.<sup>20</sup> However, the majority of overdoses happen quickly and do not allow for time for first responders to arrive, leading to countless deaths while the loved ones of someone who is overdosing stand helplessly. In 2023, Narcan was finally made available in the U.S. as an OTC product, costing only about \$18 for insured individuals.<sup>21</sup> Moreover, by 2023, all 50 states also approved legislation to protect access to Narcan as an OTC.<sup>22</sup> Not only did these pieces of legislation make it more accessible, but also more affordable. Between April 2020 and April 2021 (before Narcan's availability as an OTC product in the United States), 100,306 people died from drug overdoses just in the U.S., and 75,673 of those deaths were attributed to opioids.<sup>23</sup> Provisional data from the Centers for Disease Control and Prevention (CDC) reported 87,000 drug overdose deaths between October 2023 and September 2024—a 24 percent decrease from the previous year—indicate a promising downward trend.<sup>24</sup> As over the counter medications such as Narcan become more widespread and accessible across the globe, hundreds of thousands of people can be saved from lethal overdoses caused by opioids with just the push of a simple nasal spray.

Lastly, a practice that has been proven to alleviate both drug addiction issues and the stigma surrounding drug addicts is an unexpected one: drug courts. While the term “drug court” on the surface seems counterintuitive from a non-punitive perspective, it is a successful initiative that began in Miami, Florida in 1989 to help solve the issue of drug addicts

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20 Nancy D. Campbell. *OD: Naloxone and the Politics of Overdose*. Cambridge, Massachusetts: MIT Press, 2020, 102, 134.

21 Amalia D. Ardeljan, Benjamin Fiedler, Lawrence Fiedler, George R. Luck, Dennis G. Maki, Lisa Clayton, Charles H. Hennekens, and Allison Ferris. “Naloxone Over the Counter: Increasing Opportunities and Challenges for Health Providers.” *The American Journal of Medicine* 136, no. 6 (June 2023), 504.

22 “State Naloxone Access Rules and Resources.” SAFE Project, August 21, 2025.

23 Ardeljan, B. Fiedler, L. Fiedler, Luck, Maki, Clayton, Hennekens, and Ferris, 504

24 “CDC Reports Nearly 24% Decline in U.S. Drug Overdose Deaths.” Centers for Disease Control and Prevention, February 25, 2025.

being overlooked and dehumanized. The United States in the 1980s was experiencing shocking rises in drug-related offenses, with Miami acting as a main hub for drug use and trafficking. In response to the virtually unsustainable amount of drug cases, the policy for approaching minor drug-related offenses— such as possession of recreational drugs, shoplifting, public urination, etc.—was to have the offender spend the night in jail, have a quick bond hearing, come back a few weeks later to plead guilty with credit for time served (i.e., the night in jail), and be released to continue using and offending.<sup>25</sup> This practice deeply troubled Judge Herbert M. Klein, who recognized not only the futility of continuously sending the same suffering addicts back out on the streets without any kind of support, but also the lack of respect for these individuals as human beings. Therefore, in 1989, he pioneered Miami's "Drug Court", which gives all nonviolent offenders with drug possession charges the choice of prosecution or the court-run rehabilitation program. The program is a 12 to 18 month process consisting of counseling, a custom treatment plan, fellowship meetings, educational courses, vocational training, as well as regular urine tests and court appointments. Once defendants "graduate" from the program, they will have their criminal cases dismissed.<sup>26</sup> However, a program such as this would not be as successful without a "personal touch;" it was decided that only one judge who was sympathetic to the plight of addicts and would be intrinsically driven to help the defendants get back on their feet, would be in charge of drug court. In 1993 this was Judge Stanley M. Goldstein, a man familiar to the drug-using community because of his years of experience volunteering at youth drug prevention programs in vulnerable communities, as well as his time as a former police officer, defense attorney, and prosecutor. He was described as firm but encouraging and supportive through his tactics of addressing defendants by their first names and inquiring about their families and jobs. If they were keeping to their treatment program, he would praise them; if they had relapsed or were missing counseling, he would sternly

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25 Peter Finn and Andrea K Newlyn. "Dade County Diverts Drug Defendants to Court-Run Rehabilitation Program." National Institute of Justice, June 1993, 11.

26 Finn and Newlyn, 2.

reprimand them but encourage them to resume their treatment plan.<sup>27</sup> In 1993, only 4 years after the drug court system in Miami was established, over 4,500 people were admitted to the program and only 11% of those who completed it recidivated in the following year.<sup>28</sup> For the first time, the court system was looking at drug addicts as human beings suffering from a terrible disease who can relapse and may need more than a second chance to help them succeed.

Today, the Miami drug courts are still flourishing and have expanded. Under Florida Statutes § 397.334, instead of just admitting individuals charged with non-violent drug offenses, those who commit non-violent misdemeanors or minor felonies and are suffering from addiction and/or mental illness are now also eligible for the treatment program.<sup>29</sup> One of these defendants was 61-year Alretha Toombs, a woman with an addiction to crack cocaine since she was 18 years old. Ms. Toombs was diagnosed with schizophrenia and depression and has been booked into the Miami-Dade jail system over 70 times in the last 40 years. However, today she is thriving with the help of the drug court and the judge assigned to her case, Judge Andrea Wolfson, whom she affectionately calls “my judge.”<sup>30</sup> After being arrested in late 2020 for shoplifting to support her drug addiction, Toombs joined the jail diversion program and credits her success to the drug court. While it was a rigorous program that required her to remain in treatment and avoid trouble with the law for at least a year, she was also provided with the comforts of food, clothing, housing, therapy, and a job. Moreover, the court will then scour the internet and social media for long-lost family members and loved ones who can help provide support for the defendants during their treatment, and then when they face the world afterwards.<sup>31</sup> Drug courts are one of the best examples of how humanizing addiction, rather than stigmatizing it, truly has an impact on the drug epidemic. In the cases of people

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27 Finn and Newlyn, 3, 9.

28 Finn and Newlyn, 2.

29 Dana Miller Ervin. “Fractured Part 10: The Miami Model.” WFAE 90.7 - Charlotte’s NPR News Source, May 3, 2024.; Florida Statutes § 397.334 (2025)

30 Ervin, “Fractured Part 10: The Miami Model.”

31 Ervin, “Fractured Part 10: The Miami Model.”

like Ms. Toombs, who before the introduction of these more sympathetic courts, had been arrested and taken through the system countless times, the root of their issue had not been resolved. They were still addicted, ill, poor, and stuck in the cycle of engaging in petty crime to support themselves. For 40 years, Ms. Toombs was trapped in this cycle, but only one year's worth of treatment and being treated as an individual worthy of dignity helped her grow. She reports reconnecting with her family, feeling content with her physical and mental state, and that even though she faced the challenge of temporary joblessness her sobriety remains intact.<sup>32</sup> Choosing to put addicts in jail and giving them harsh sentences has been proven to be ineffective—it only creates a stigma towards their disease, costs millions of taxpayer dollars to continue processing them through the court system, and still results in a person who continues to suffer from addiction. However, if more and more cities adopt the Miami model to combat the drug epidemic, many more lives can be saved and changed with more efficiency and with lasting results.

For decades, addiction was not viewed as an illness and a tragedy resulting from the drug epidemic—it was one of its evils. It was believed that individuals who became addicted became so because of personal failings and immoral standards. They were the scapegoats of the drug control regime by being active participants in the illegal drug trade, facilitating it through their continued business. Over time, society seemed to forget that the people that they were condemning and spitting vitriol upon were human beings, their neighbors, loved ones, and maybe one day even themselves. Narcan, for example, was opposed by some because it did not allow for addicts to “get what they deserved”: they chose to do drugs, thus they should suffer the consequences.<sup>33</sup> Government-run methadone clinics faced so much backlash that the programs became nearly impossible for anyone to join. Finally, when it came to establishing the drug court in Miami and assisting those in the program with receiving college and vocational education, the faculty of two Miami community colleges argued against the initiative because it would make them, students, and

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32 Dana Miller Ervin. “Fractured Part 10: The Miami Model.” WFAE 90.7 - Charlotte’s NPR News Source, May 3, 2024.; Florida Statutes § 397.334 (2025).

33 Campbell, 115.

parents uncomfortable being around “criminals” and drug abusers.<sup>34</sup> Addicts have a disease, one that debilitates them and causes society to shun them; however, addicts are human beings and individuals with goals, aspirations, and dreams. They have loved ones and communities and many truly wish to change their lives for the better. They cannot do that by themselves; they need support and guidance and that can only be achieved when they are given the respect and dignity awarded to all people, especially those suffering from disease.

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34 Finn and Newlyn, 11.

# Cannabis Regulation and The Controlled Substances Act: A Law and Economics Perspective

ALLISON FOWLER

## ABSTRACT

This paper examines cannabis regulation through the lens of law and economics, with particular attention to the dissonance between federal prohibition under The Controlled Substances Act (CSA) and widespread state legalization. Despite nearly fifty years of categorical federal prohibition, more than two-thirds of U.S. states have legalized cannabis for medical or recreational purposes. This fragmented legal environment has created market inefficiencies, generated equity concerns, and sustained illicit markets. Drawing on behavioral economics, this analysis explains why deterrence-based enforcement fails to suppress demand: present bias, shifting social norms, and optimism bias drive consumption regardless of legal penalties. Classical economic analysis reveals market failures, including information asymmetry, negative externalities, and distorted incentives caused by federal tax and banking restrictions. At the macroeconomic level, legalization offers tax revenues and job creation; however, it imposes costs on public health and regulatory systems. The analysis evaluates potential pathways toward a harmonized federal-state framework that would include rescheduling cannabis, calibrating taxation and licensing to displace illicit markets, and incorporating behavioral regulatory tools; such as potency labeling and advertising restrictions. Additionally, equity-focused reforms, including expungement and community reinvestment, are analyzed as mechanisms to address disproportionate harms of prohibition. These assessments are presented based on empirical research and economic analysis rather than political advocacy, aiming to highlight potential policy structures that improve efficiency, equity, and legal coherence.

## Introduction

The regulation of controlled substances in the United States reveals a persistent tension between legal doctrine, economic reality, and public health. For more than a century, federal law has prohibited or restricted specific drugs on the grounds of potential abuse, societal disapproval, and medical safety. However, these prohibitions never fully suppressed demand. Instead, prohibition shaped illicit markets, distorted consumer behavior, and imposed significant economic and social costs. Despite nearly fifty years of categorical federal prohibition under The Controlled Substances Act (CSA), state governments have increasingly legalized cannabis for medical and recreational purposes. This divergence between federal criminalization and state-level legalization has created a fragmented and unstable legal environment.

The cannabis case study illustrates the complex interaction between law and economics. At the federal level, cannabis remains a Schedule I substance, defined as having “a high potential for abuse,” “no

currently accepted medical use in treatment,” and a “lack of accepted safety for use under medical supervision”.<sup>1</sup> At the state level, however, forty jurisdictions now permit some form of legal cannabis, ranging from tightly regulated medical access to open adult-use markets.<sup>2</sup> The resulting disparity has produced profound consequences: banking restrictions that force businesses into cash-only operations, inconsistent tax regimes that sustain black-markets, and disparities in criminal enforcement that raise constitutional questions.

Economics provides valuable tools for analyzing these outcomes. Microeconomics reveals how prohibition inflates prices, enriches illicit suppliers, and fails to reduce overall consumption. Behavioral economics highlights consumer biases; such as, present bias and optimism bias, undermine deterrence-based legal frameworks. Macroeconomic analysis indicates that legalization generates tax revenue, as well as externalities, including public health costs and impaired driving. Legal doctrine, in turn, constrains and amplifies these effects, through Commerce Clause jurisprudence, federal supremacy, and the Eighth and Fourteenth Amendments.

## Legal Background

### A. The Controlled Substances Act

The Controlled Substances Act of 1970 remains the central framework for federal drug regulation. It established a five-tiered scheduling system based on medical use, potential for abuse, and risk to public health.<sup>3</sup> Cannabis was classified under Schedule I, alongside heroin and

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1 Drug Enforcement Administration. 2025. “Schedules of Controlled Substances: Temporary Placement of N-pyrrolidino metonitazene and N-pyrrolidino protonitazene in Schedule I.” Federal Register. <https://www.federalregister.gov/documents/2025/08/15/2025-15566/schedules-of-controlled-substances-temporary-placement-of-n-pyrrolidino-metonitazene-and>.

2 Cross, Greta. 2025. “Which states have legal weed? See where marijuana has been legalized.” USA Today. <https://www.usatoday.com/story/news/health/2025/04/16/which-states-legal-weed-marijuana/83086694007/>.

3 Silva, Costa E. 2024. “Controlled Substance Act - StatPearls.” NCBI. <https://www.ncbi.nlm.nih.gov/books/NBK574544/>.

LSD, reflecting Congress's determination that it lacked accepted medical use and presented a high abuse potential.<sup>4</sup> As a result, cannabis remains prohibited under federal law, with penalties ranging from possession fines to mandatory sentences for trafficking.

The CSA grants the Attorney General, acting through the Drug Enforcement Administration (DEA), authority to reschedule substances based on scientific and medical evidence.<sup>5</sup> Over the past five decades, numerous petitions have sought to reclassify cannabis under a less restrictive schedule.<sup>6</sup> These petitions, filed by medical researchers, patient advocacy organizations, state governments, and members of Congress, have largely argued that modern scientific findings contradict the original basis of Schedule I classification. They point to growing empirical evidence of cannabis's therapeutic potential in treating chronic pain, epilepsy, and certain neurological disorders, as well as the approval of cannabinoid-based medications by the FDA.<sup>7</sup> Petitioners have also argued that rescheduling would increase medical research by easing regulatory

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4 Congress.gov. n.d. "The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap." Congress.gov. Accessed September 15, 2025. <https://www.congress.gov/crs-product/R44782>.

5 "Federal Marijuana Rescheduling | Moritz College of Law." 2025. Moritz College of Law. <https://moritzlaw.osu.edu/faculty-and-research/drug-enforcement-and-policy-center/research-and-grants/policy-and-data-analyses/federal-marijuana-rescheduling>.

6 Miller, Zeke, Joshua Goodman, Jim Mustian, and Lindsay Whitehurst. 2024. "US DEA will reclassify marijuana, ease restrictions, AP sources say." AP News, April 30, 2024. <https://apnews.com/article/marijuana-biden-dea-criminal-justice-pot-f833a8dae6ceb31a8658a5d65832a3b8>

7 Grinspoon, Peter. 2024. "Cannabidiol (CBD): What we know and what we don't." Harvard Health, April 4, 2024. <https://www.health.harvard.edu/blog/cannabidiol-cbd-what-we-know-and-what-we-dont-201808242496>.

barriers that currently limit clinical testing.<sup>8</sup>

Despite repeated petitions and administrative reviews, the DEA has consistently declined to reschedule cannabis. The agency has maintained that the substance fails to meet the CSA's criteria for accepted medical use in treatment. Its therapeutic effects have not been verified through large-scale, FDA-approved studies; furthermore, its chemical composition remains highly variable across strains and products. Also, the DEA has expressed concern about cannabis's abuse potential and the lack of standardized dosing, citing ongoing risks to public health. Federal courts, when asked to review these decisions, have generally deferred to the DEA's scientific and administrative discretion under the doctrine of *Chevron* deference, emphasizing that Congress considered the DEA, not the judiciary, to weigh medical evidence and public safety considerations.<sup>9</sup> However, the Court overturned *Chevron* in *Loper Bright Enterprises v. Raimondo* (2024), ruling that judges must now decide questions of law. Meaning future challenges to DEA decisions will involve courts independently interpreting statutes rather than deferring to the agency's expertise.<sup>10</sup> This may reopen the debate over the statute's definitions of accepted medical use and abuse potential.

This evolving legal framework could have major implications for cannabis regulation. While the combination of statutory authority and scientific evidence has preserved cannabis's Schedule I status for more than fifty years, the end of *Chevron* deference introduces the possibility of closer judicial security. As public opinion and state law continue to move

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8 King and Spalding. 2024. "DEA's Proposed Rule to Reschedule Marijuana Could Reduce Obstacles to Medical Research but Public Input Is Needed to Fill in Knowledge Gaps." King and Spalding. <https://www.kslaw.com/news-and-insights/deas-proposed-rule-to-reschedule-marijuana-could-reduce-obstacles-to-medical-research-but-public-input-is-needed-to-fill-in-knowledge-gaps>.

9 "Chevron deference' refers to the doctrine under which courts historically deferred to a federal agency's interpretation of an ambiguous statute that the agency administers." Cornell Law. n.d. "Chevron deference | Wex | US Law | LII / Legal Information Institute." Law.Cornell.Edu. Accessed December 5, 2025. [https://www.law.cornell.edu/wex/chevron\\_deference#](https://www.law.cornell.edu/wex/chevron_deference#).

10 Skadden Publication. 2024. "Supreme Court's Overruling of Chevron Deference to Administrative Agencies' Interpretations of Statutes Will Invite More Challenges to Agency Decisions | Insights." Skadden. <https://www.skadden.com/insights/publications/2024/07/the-supreme-courts-overruling-of-chevron-deference>.

toward legislation, further litigation may test whether federal prohibition can be sustained under a stricter standard of judicial review.

## B. Supreme Court Doctrine

The Supreme Court has consistently upheld broad federal authority regarding drug regulation. In *United States v. Oakland Cannabis Buyers' Cooperative* (2001), the Court rejected the assertion of a medical necessity defense to CSA enforcement, stating Congress had prohibited the manufacture and distribution of cannabis without exception.<sup>11</sup> Four years later, in *Gonzales v. Raich* (2005), the Court held the Commerce Clause<sup>12</sup> permits Congress to regulate intrastate cultivation and possession of cannabis intended for medical purposes.<sup>13</sup> The majority reasoned local activity could substantially affect the intrastate market for controlled substances, thereby justifying federal oversight.

These rulings affirmed the supremacy of federal law and limited arguments that state legalization provides immunity from federal prosecution. However, the Court has also identified boundaries to federal authority in related cases. In *Gonzales v. Oregon* (2006), the Court held the CSA did not grant the Attorney General power to prohibit physician-assisted suicide permitted under Oregon law, suggesting the statute's reach may not extend to every area of medical regulation.<sup>14</sup> This distinction underscores ongoing ambiguity concerning the interaction between federal supremacy and state autonomy.

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11 "UNITED STATES v. OAKLAND CANNABIS BUYERS' COOPERATIVE." n.d. <https://supreme.justia.com/cases/federal/us/532/483/case.pdf>.

12 "The Commerce Clause gives Congress broad power to regulate interstate commerce and restricts states from impairing interstate commerce." Prentice, E., and J. Egan. n.d. "Overview of Commerce Clause | Constitution Annotated | Congress.gov | Library of Congress." Constitution Annotated. Accessed October 20, 2025. [https://constitution.congress.gov/browse/essay/artI-S8-C3-1/ALDE\\_00013403/](https://constitution.congress.gov/browse/essay/artI-S8-C3-1/ALDE_00013403/).

13 "Gonzales v. Raich | 545 U.S. 1 (2005)." n.d. Justia U.S. Supreme Court Center. Accessed September 15, 2025. <https://supreme.justia.com/cases/federal/us/545/1/>.

14 "Gonzales v. Oregon | 546 U.S. 243 (2006)." n.d. Justia U.S. Supreme Court Center. Accessed September 15, 2025. <https://supreme.justia.com/cases/federal/us/546/243/>.

### C. Federal Enforcement Discretion

While the CSA authorizes prosecution of all cannabis-related activity, federal enforcement practices have adapted over time. The Obama Administration’s 2013 “Cole Memorandum” directed U.S. Attorneys to deprioritize prosecution in states implementing comprehensive regulatory frameworks for cannabis. This guidance specifically focused federal enforcement efforts on preventing distribution to minors, diversion across state lines, and involvement of criminal enterprises.<sup>15</sup> Although rescinded in 2018, the memo reflected a resource-based approach to enforcement and growing public support for legalization.<sup>16</sup> Federal financial regulations continue restricting cannabis-related banking under anti-money laundering statutes, deterring many financial institutions from engaging with state-licensed businesses.<sup>17</sup> Consequently, much of the industry remains cash-based, generating operational inefficiencies and security risks.

### D. State-Level Legislation

State-level reforms began with California’s Proposition 215 in 1996, which legalized medical cannabis. Since then, forty states have enacted medical programs, and over twenty have established adult-use recreational markets.<sup>18</sup> Colorado and Washington initiated regulated recreational markets in 2012, developing models for taxation, licensing,

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15 “Marijuana: Medical and Retail—Selected Legal Issues.” 2015. April 8, 2015. <https://www.everycrsreport.com/reports/R43435.html>.

16 “Federal Policy - How can states legalize when the federal government prohibits it?” n.d. Marijuana Policy Project. Accessed September 15, 2025. <https://www.mpp.org/policy/federal/how-can-states-legalize-when-the-federal-government-prohibits-it/>.

17 American Bankers Association. n.d. “Cannabis Banking.” American Bankers Association. Accessed September 15, 2025. <https://www.aba.com/advocacy/our-issues/cannabis>.

18 “Report State Medical Cannabis Laws.” 2025. National Conference of State Legislatures. <https://www.ncsl.org/health/state-medical-cannabis-laws>.

and quality control.<sup>19</sup> More recently, New York and New Jersey have incorporated equity provisions aimed at addressing equity concerns by reserving licenses for communities disproportionately affected by drug enforcement.<sup>20</sup>

These reforms operate alongside continuing federal prohibition, creating overlapping regulatory systems. Businesses face obstacles including interstate commerce, banking, and taxation under Internal Revenue Code § 280E, which prohibits expense deductions related to Schedule I or II substances.<sup>21</sup> For instance, individuals and employers encounter inconsistent legal regimes in contexts such as, workplace drug testing and child custody. Consequently, the coexistence of divergent laws has produced administrative and economic complexity across jurisdictions.

## Behavioral Economics and Cannabis Consumption

### A. Rational Choice versus Behavioral Reality

Conventional economic models assume individuals are rational agents, weighing costs and benefits to maximize utility.<sup>22</sup> Under rational-choice theory, criminal penalties, health warnings, and social stigma, would be expected to reduce cannabis use by increasing the perceived

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19 Payán, Denise D., Paul Brown, and Anna V. Song. 2021. “County-Level Recreational Marijuana Policies and Local Policy Changes in Colorado and Washington State (2012-2019).” PubMed Central. <https://pmc.ncbi.nlm.nih.gov/articles/PMC8718590/>.

20 ACLU New Jersey. 2020. “New Jersey Legislature Passes Historic Bills to Implement Cannabis Legalization and Decriminalize Cannabis.” ACLU New Jersey. <https://www.aclu-nj.org/press-releases/new-jersey-legislature-passes-historic-bills-implementation-cannabis-legalization-and/>.

21 Hart, Haileigh, Stacy Boyer-Davis, and Maria Arakelian. 2025. “An Exploration of the Cannabusiness in Michigan and the Influence of Internal Revenue Code (IRC) 26 U.S. Code § 280E.” SBIJ. <https://sbij.scholasticahq.com/article/138362>.

22 Conventional economic models are simplified theoretical frameworks that use mathematical equations to describe and predict economic phenomena, based on key assumptions like individual rationality and self-interest. Ouliaris, Sam. 2011. “What Are Economic Models? - Back to Basics: Finance & Development, June 2011.” International Monetary Fund. <https://www.imf.org/external/pubs/ft/fandd/2011/06/basics.htm>.

cost of consumption.<sup>23</sup> However, empirical data indicates cannabis use has remained steady, and in some age cohorts, increased despite decades of federal prohibition.<sup>24</sup> Behavioral economics provides additional explanatory tools for understanding these patterns.

Individuals often exhibit present bias, in which future costs are discounted relative to immediate rewards.<sup>25</sup> Cannabis produces immediate psychoactive effects (relaxation, euphoria, pain relief) while potential long-term harms, such as dependency or cognitive impairment, may appear later and are probabilistic rather than certain.<sup>26</sup> Because present benefits are weighted more heavily than future costs, deterrence mechanisms such as incarceration or warnings regarding long-term health effects may have limited influence on individual behavior.

A relative cognitive phenomenon is optimism bias, the tendency to believe that negative outcomes are less likely to occur for oneself than for others.<sup>27</sup> Among cannabis users, this bias often manifests as the perception that one's own use of cannabis is controllable or that dependency risks apply primarily to others. Such biases may reduce the efficacy of public health campaigns, as individuals discount the personal applicability of information regarding negative effects.

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23 “Rational choice theory assumes that individuals make informed decisions instead of random choices.” Ganti, Akhilesh. 2025. “What Is Rational Choice Theory?” Investopedia. <https://www.investopedia.com/terms/r/rational-choice-theory.asp>.

24 “Among youth, the prevalence of past year CUD reached a peak in the early 2000s, declined between 2002–2013, and has remained stable since 2014.” Hammond, Christopher J., Aldorian Chaney, Brian Hendrickson, and Pravesh Sharma. 2020. “Cannabis use among U.S. adolescents in the Era of Marijuana Legalization: a review of changing use patterns, comorbidity, and health correlates.” PubMed Central. <https://pmc.ncbi.nlm.nih.gov/articles/PMC7588219/>.

25 Hayes, Adam. 2025. “Temporal Discounting: The Psychology Behind Future Reward Depreciation.” Investopedia. <https://www.investopedia.com/temporal-discounting-7972594>.

26 Alcohol and Drug Foundation. 2025. “Cannabis.” Alcohol and Drug Foundation. <https://adf.org.au/drug-facts/cannabis/>.

27 Pilat, Dan, and Sekoul Krastev. n.d. “Optimism Bias.” The Decision Lab. Accessed September 15, 2025. <https://thedecisionlab.com/biases/optimism-bias>.

## B. Legal Implications of Behavioral Insights

Behavioral biases significantly affect the formulation of regulatory policies. When consumers do not process information fully or rationally, deterrence-based policies; such as prohibition or severe sentencing, may achieve limited compliance. Regulatory approaches that account for bounded rationality provide alternative mechanisms for influencing behavior. For instance, mandatory potency labeling and standardized packaging can reduce information asymmetry<sup>28</sup> and guide consumers toward more informed decisions.

Judicial decisions have indirectly recognized the limitations of deterrence in cannabis regulation. Although not explicitly framed in behavioral terms, cases such as *Gonzales v. Raich* (2005) and associated memoranda acknowledge that comprehensive prohibition can consume substantial enforcement resources with relatively limited deterrent effect.<sup>29</sup> Similarly, state regulatory frameworks increasingly incorporate measures; for instance, restrictions on youth-targeted advertising, public education campaigns, and child-resistant packaging, which rely on shaping decision-making environments rather than imposing solely punitive sanctions.

## C. The Role of Social Norms

Cannabis consumption is also influenced by evolving social norms. Historically, strong social stigma contributed to deterrence by attaching reputational costs, reinforcing the impact of criminal penalties. However, as many states have legalized cannabis, public perception has shifted nationwide, even in state jurisdictions that continue to prohibit cannabis. Exposure to legalization elsewhere, through media

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28 “Information asymmetry is an economic phenomenon where one party in a transaction possesses more information than the other, potentially leading to an imbalance in decision-making.” Mohn, Elizabeth. 2025. “Information asymmetry | Research Starters.” EBSCO. <https://www.ebsco.com/research-starters/social-sciences-and-humanities/information-asymmetry>.

29 Department of Justice. 2018. “Justice Department Issues Memo on Marijuana Enforcement.” Department of Justice Archives. <https://www.justice.gov/archives/opa/pr/justice-department-issues-memo-marijuana-enforcement>.

coverage, policy diffusion, and normalization of use, has reduced stigma beyond state borders. This cross jurisdictional effect weakens the social reinforcement that once supported prohibition, lowering the perceived non-monetary cost of consumption even when criminal sanctions remain.

Behavioral economics recognizes that individuals are utility-maximizers<sup>30</sup> and socially responsive, adapting preferences based on peer behavior and cultural norms. These dynamics partially explain increased usage rates post-legalization, even when prices remain stable or rise due to taxation. Policymakers therefore face the challenges of regulating a substance with measurable demand elasticity while responding to broader cultural forces that influence consumption independent of formal law.<sup>31</sup>

## Market Failures and Externalities

### A. Information Asymmetry

Information asymmetry is a notable market failure within cannabis markets. Consumers often lack complete or reliable data regarding potency, strain composition, and potential contamination. In illicit markets, sellers have limited incentive to disclose accurate information, and buyers face challenges in verifying product quality. This can result in adverse selection, where lower-quality or potentially unsafe products persist because consumers cannot effectively distinguish them from safer, higher-quality alternatives.

Legalization and regulation partially address this issue. Mandatory lab testing and labeling requirements offer verifiable information,

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30 “Utility maximization is the concept that individuals and organizations seek to attain the highest level of satisfaction from their economic decisions.” CFI Team. n.d. “Utility Maximization - Overview, How It Works, Calculation.” Corporate Finance Institute. Accessed October 20, 2025. <https://corporatefinanceinstitute.com/resources/economics/utility-maximization/>.

31 “Price elasticity of demand measures how a change in price affects a product’s demand. If a price change creates a large change in demand, it is considered elastic. If a price change creates a small or no change in demand, it is inelastic.” The Investopedia Team. n.d. “Price Elasticity of Demand: Meaning, Types, and Factors That Impact It.” Investopedia. Accessed October 20, 2025. <https://www.investopedia.com/terms/p/priceelasticity.asp>.

reducing information asymmetry for consumers participating in the legal market. However, these safeguards do not extend to parallel black markets, which may persist due to high taxation or regulatory barriers, leaving information asymmetry prevalent in those contexts.

## B. Negative Externalities

Cannabis consumption generates externalities, which are costs or benefits experienced by third parties instead of the individual consumer. Examples include public health expenditures, traffic accidents involving impaired driving, and potential reductions in workplace productivity. For instance, Colorado has directed portions of its cannabis tax revenue toward the Marijuana Tax Cash Fund, which finances mental health services, substance abuse treatment, and youth prevention programs.<sup>32</sup> Similarly, Washington State allocates revenue to its Department of Health for public education and research on long-term health outcomes.<sup>33</sup> These examples illustrate how legalization requires states to absorb and manage new categories of social spending to mitigate consumption-related harms.

From an economic perspective, such externalities provide a rationale for state intervention aimed at aligning private decision-making with broader social welfare. Policy tools that account for negative externalities include excise taxes, age restrictions, and advertising limits. However, these tools must be carefully constructed. Excessive taxation, as observed in California, where combined excise and local rate can exceed 40%, has pushed consumers back to illicit markets, reducing

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32 Footprints to Recovery. n.d. “Colorado’s Marijuana Tax Cash Fund.” Footprints to Recovery. Accessed November 5, 2025. <https://footprintstorecovery.com/addiction-treatment-locations/denver-colorado/marijuana-tax-cash-fund/>.

33 Stidham, Melanie, and Eric Thomas. 2024. “Dedicated Cannabis Account appropriations and expenditures.” JLARC Washington. [https://leg.wa.gov/jlarc/reports/2023/cannabisRevenues/pf\\_01/default.html#:~:text=Between%202015%20and%202023%2C%20state,how%20these%20funds%20were%20used.](https://leg.wa.gov/jlarc/reports/2023/cannabisRevenues/pf_01/default.html#:~:text=Between%202015%20and%202023%2C%20state,how%20these%20funds%20were%20used.)

revenue and regulatory compliance.<sup>34</sup> Conversely, insufficient taxation fails to cover rising expenditures in public health and law enforcement, leaving governments with fiscal shortfalls.

Overly stringent advertising bans can also have counterproductive effects. When legal producers are prohibited from sharing accurate information about dosage, safety, or potency, consumers may turn to unregulated sellers, exacerbating information asymmetry. Striking a balance between harm reduction and consumer access is therefore important to efficient policy design. Effective regulation must mitigate externalities and sustain active participation in legal markets, in order to ensure taxation, enforcement, and education reinforce one another instead of undermining the overall system.

### C. Federalism and Market Distortions

Federal prohibition contributes to additional market distortions that limit the efficiency of legal cannabis markets. Because cannabis remains a Schedule I substance, financial institutions face potential liabilities under anti-money laundering statutes if they serve cannabis-related businesses. As a result, many dispensaries and cultivators operate primarily in cash, creating operational inefficiencies, heightened security risks, and difficulties in financial recordkeeping. In addition, Section 280E of the Internal Revenue Code prohibits cannabis businesses from deducting ordinary operating expenses, effectively imposing higher tax rates than those applied to comparable industries.<sup>35</sup> These financial and tax constraints distort competition and discourage investment, particularly for smaller operators with limited access to private capital.

These barriers have broader ripple effects on market development. When legal firms are overburdened by taxes, denied access to banking, or constrained by limiting financing, their products become more expensive

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34 California Government. 2025. "Cannabis in Crisis: Results from the California Cannabis Count Study." California Government. [https://cannabis.ca.gov/wp-content/uploads/sites/2/2025/08/2020-ucla-cannabis\\_in\\_crisis.pdf](https://cannabis.ca.gov/wp-content/uploads/sites/2/2025/08/2020-ucla-cannabis_in_crisis.pdf).

35 IRS. 2024. "Marijuana remains a Schedule I controlled substance; Internal Revenue Code Section 280E still applies | Internal Revenue Service." IRS. <https://www.irs.gov/newsroom/irs-marijuana-remains-a-schedule-i-controlled-substance-internal-revenue-code-section-280e-still-applies>.

and less accessible. Consumers, facing higher retail prices and fewer purchasing options, often turn to the illicit market, which operates free of regulatory and tax obligations. This pattern has been visible in states like California and New York, where the coexistence of legal and illegal sales remains a challenge. In California, only an estimated 40% of the cannabis consumed is purchased from legal sources, meaning the illicit market accounts for roughly 60% of consumption.<sup>36</sup> In New York, the legal market's share has been estimated to be even lower, at around 30% of total sales as of November 2025.<sup>37</sup> Despite robust consumer demand for regulated products, fragmented governance prevents the legal industry from reaching a competitive equilibrium and turns consumers towards black markets

In economic terms, this dynamic represents a persistent inefficiency: resources flow toward unregulated suppliers even when consumers might prefer safe, tested, and lawful alternatives. Federal-state conflict sustains this imbalance by preventing uniform enforcement and regulatory coherence. Without federal alignment, state agencies must shoulder the weight of enforcement costs, often with limited capacity to deter unclaimed production or distribution. Consequently, the black market continues to undercut regulated businesses, suppresses taxable

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36 Lange, Tony. 2025. "60% of Cannabis Consumed in California Comes From Unregulated Market as Licensed Production Grows." Cannabis Business Times. <https://www.cannabisbusinesstimes.com/us-states/california/news/15738922/60-of-cannabis-consumed-in-california-comes-from-unregulated-market-as-licensed-production-grows>.

37 The Silent Majority. 2025. "New York Cannabis Market Analysis: How Tax Reform and Enforcement Drove 894% Sales Growth—And What Threatens It." State-by-State Analysis. [https://www.silentmajority420.com/new-york-cannabis-market-analysis/#:~:text=New%20York's%20cannabis%20market%20hit%20\\$1B%20in,remains%20just%2030%25%2C%20worst%20in%20the%20nation](https://www.silentmajority420.com/new-york-cannabis-market-analysis/#:~:text=New%20York's%20cannabis%20market%20hit%20$1B%20in,remains%20just%2030%25%2C%20worst%20in%20the%20nation).

revenue, and undermines the goals of legalization itself.<sup>38</sup>

Ultimately, the persistence of illicit markets in legalized states underscores a key paradox in cannabis policy. Legalization can expand consumer access and generate revenue, but without federal harmonization, particularly in banking, taxation, and interstate commerce, these reforms remain only partially effective. Market efficiency, regulatory compliance, and fiscal stability all depend on resolving the policy dissonance that allows black markets to continue alongside legal markets.

## Macroeconomic Impacts

### A. Fiscal Revenues and Public Costs

Cannabis legalization has been associated with the generation of fiscal revenue through excise taxes, sales taxes, and licensing fees.<sup>39</sup> States such as Colorado, Washington, and California report annual collections

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38 “Economies of scale occur when the cost of producing a product decreases as production volume increases. They can be internal or external: Internal economies of scale occur within your company and include technical, managerial, financial, marketing, and network economies of scale. External economies of scale arise from outside factors, such as industry size, skilled labor availability, and technological advancements.” Gibson, Kate. 2024. “Economies of Scale: Definition, Types, and Strategies.” HBS Online. <https://online.hbs.edu/blog/post/economies-of-scale>.

39 “Excise tax is an indirect tax on specific goods, services and activities. Federal excise tax is usually imposed on the sale of things like fuel, airline tickets, heavy trucks and highway tractors, indoor tanning, tires, tobacco and other goods and services.” IRS. n.d. “Basic things all businesses should know about excise tax | Internal Revenue Service.” IRS. Accessed October 20, 2025. <https://www.irs.gov/newsroom/basic-things-all-businesses-should-know-about-excise-tax>. “Sales tax is added to the price of taxable goods or services and collected from the purchaser at the time of sale.” Florida Department of Revenue. n.d. “Florida Dept. of Revenue - Florida Sales and Use Tax.” Florida Department of Revenue. Accessed October 20, 2025. [https://floridarevenue.com/taxes/taxesfees/Pages/sales\\_tax.aspx](https://floridarevenue.com/taxes/taxesfees/Pages/sales_tax.aspx). “Licensing fees grant businesses and individuals specific rights to operate or use intellectual property, like trademarks and patents, legally.” Brown, JeFreda R. n.d. “Understanding Licensing Fees: Definitions,

amounting to hundreds of millions of dollars.<sup>40</sup> These revenues have been allocated to public services including education, public health programs, and infrastructure projects.

However, early revenue projections can overestimate net gains in the early years of legalization. Administrative costs including regulatory agencies, enforcement against black-market operators, and public education campaigns, consume a significant portion of tax proceeds.<sup>41</sup> Moreover, legal markets compete with illicit sellers who evade taxation, reducing the effective taxable base.

California offers a telling example of these fiscal complexities. Despite being one of the world's largest cannabis markets, the state has collected less revenue than anticipated. In the first several years of legalization, California imposed high excise and cultivation taxes while maintaining strict local licensing rules. These barriers constrained entry into the legal market and allowed the illicit sector to remain highly competitive.<sup>42</sup> Estimates from the Reason Foundation and California's Legislative Analysts Office suggest that a majority of cannabis sales in the state (up to two-thirds) still occur outside the legal system.<sup>43</sup> The combination of high tax rates, complex permitting, and inconsistent local enforcement has limited the state's ability to capture expected revenues while simultaneously burdening compliant businesses with steep costs.

These fiscal challenges illustrate a broader policy tension: states

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40 Cavendish, Violet. 2025. "States Collected Nearly \$25 Billion from Legal Adult-Use Cannabis Sales." Marijuana Policy Project. [https://www.mpp.org/news/press/states-collected-nearly-\\$25-billion-from-legal-adult-use-cannabis-sales/](https://www.mpp.org/news/press/states-collected-nearly-$25-billion-from-legal-adult-use-cannabis-sales/).

41 "Summary States Can(nabis) Collect Millions." n.d. National Conference of State Legislatures. Accessed September 15, 2025. <https://www.ncsl.org/fiscal/states-cannabis-collect-millions>.

42 Lawrence, Geoffrey. 2020. "LAO Report: California's Taxes and Rules Mean Legal Marijuana Can't Compete With Black Market Prices." Reason Foundation. <https://reason.org/commentary/lao-report-californias-taxes-and-rules-mean-legal-marijuana-cant-compete-with-black-market-prices/>.

43 Lawrence, Geoffrey. 2023. "California considers legislative changes to its legal cannabis market." Reason Foundation. <https://reason.org/commentary/california-considers-legislative-changes-to-its-legal-cannabis-market/>.

depend on cannabis taxes to fund regulatory programs and social initiatives, however, the very tax and licensing structures designed to generate revenue can inadvertently sustain black-market activity. This feedback loop demonstrates the importance of calibrated taxation and coordinated enforcement mechanisms, especially if federal reform were to expand market participation across state lines.

On the cost side, legalization introduces new public expenditures. Increased demands on emergency services, substance abuse treatment programs, and impaired-driving prevention campaigns require ongoing, public funding. Although some costs are partially offset by reduced criminal justice spending (arrests and incarceration for possession), the net fiscal impact varies across jurisdictions and depends heavily on regulatory design. States with well designed regulatory systems, efficient tax administration, and accessible licensing frameworks tend to experience more stable fiscal outcomes over time, while those with fragmented or overly restrictive systems continue to struggle to displace illicit markets.

## B. Labor Market Effects

The cannabis industry has contributed to labor market activity by creating jobs in cultivation, retail, and ancillary services such as testing and security.<sup>44</sup> States that have legalized cannabis report thousands of new positions and millions in wages added to their economies. Conversely, potential productivity implications exist. Increased cannabis consumption may result in absenteeism or decreasing productivity in the work force, particularly in safety-sensitive sectors such as transportation or construction. Evidence regarding medical cannabis laws indicates mixed results regarding labor market outcomes.<sup>45</sup>

Legalization also interacts with the prior criminal justice burdens. Reduced arrests and the possibility of record expungement may

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44 Cooper, David, and Sebastian M. Hickey. 2021. "Ensuring the high road in Cannabis: Legalization offers a chance to make the cannabis industry a model of good jobs—if workers are given a voice." Economic Policy Institute. <https://www.epi.org/publication/ensuring-the-high-road-in-cannabis-jobs/>.

45 "The Cannabis Question: Marijuana and Workplace Safety?" 2022. Healthsystems. <https://healthsystems.com/rxi-articles/the-cannabis-question-marijuana-and-workplace-safety/>.

improve labour market access for individuals historically affected by drug enforcement.<sup>46</sup> These effects suggest that policy decisions regarding legalization can have broader economic and social implications beyond direct industry activity.

## Policy Reform

Empirical research in law and economics identifies two central areas where inefficiencies persist in cannabis regulation: the conflict between federal and state frameworks and the design of taxation and market structures. The following discussion integrates insights from economic modeling and administrative law scholarship to describe patterns identified in existing research instead of proposing specific reforms.

### A. Federal-State Harmonization

The persistent conflict between the federal prohibition of cannabis under the CSA and the diverse legalization frameworks adopted by states generates substantial and measurable inefficiencies across banking, taxation, interstate commerce, and regulatory compliance. Scholars have characterized this conflict as a structural market distortion created by overlapping sovereigns. Julie Andersen Hill’s study demonstrates that, in the absence of federal banking guidance or safe-harbor protections, cannabis firms face exclusion from ordinary financial services, forcing them into cash-dominant operations. This raises transaction costs, elevates the risk of theft and tax noncompliance, and discourages institutional investment that might otherwise increase scale and efficiency.<sup>47</sup> The problem is not merely theoretical: FinCEN data consistently reveals fewer than ed-

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46 Joshi, Spruha, Samantha M. Doonan, and John R. Pamplin II. 2023. “A tale of two cities: Racialized arrests following decriminalization and recreational legalization of cannabis.” *Drug and Alcohol Dependence* 249 (August). <https://doi.org/10.1016/j.drugalcdep.2023.109911>.

47 Hill, Julie A. 2015. “Banks, Marijuana, and Federalism.” *Case Western Reserve Law Review* 65 (3): 597-647. [https://download.ssrn.com/15/05/11/ssrn\\_id2605067\\_code1099633.pdf?response-content-disposition=inline&X-Amz-Security-Token=IQoJb3JpZ2luX2VjELT%2F%2F%2F%2F%2F%2F%2F%2F%2F%2FwEaCXVzLWVhc3QtMSJHMEUCIQCEM%2Bw3GW%2Be0%2BdOVadY-2bgL4v%2BOqxfulwKeuwXgMShoOwIgfSDEJ](https://download.ssrn.com/15/05/11/ssrn_id2605067_code1099633.pdf?response-content-disposition=inline&X-Amz-Security-Token=IQoJb3JpZ2luX2VjELT%2F%2F%2F%2F%2F%2F%2F%2F%2F%2F%2FwEaCXVzLWVhc3QtMSJHMEUCIQCEM%2Bw3GW%2Be0%2BdOVadY-2bgL4v%2BOqxfulwKeuwXgMShoOwIgfSDEJ).

erall,000 financial institutions nationwide engage with cannabis-related businesses, a minuscule portion of the approximately 10,000 banks and credit unions operating nationally.<sup>48</sup>

Taxation further reinforces these distortions. Benjamin Leff explains how Internal Revenue Code § 280E applies to state-licensed cannabis firms, because cannabis remains a Schedule I substance. As a result, legal businesses face effective tax rates far higher than those imposed on similarly situated industries, sometimes exceeding 70 percent once disallowed deductions are accounted for.<sup>49</sup> This creates a competitive disadvantage vis-à-vis illicit operators and reduces incentives for firms to transition into, or remain within, regulated markets.

Harmonization proposals, including rescheduling, descheduling, or adopting a cooperative federalism model are mechanisms to reduce market inefficiencies.<sup>50</sup> Rescheduling, for example, allows state-licensed firms to access banking, claim ordinary business deductions, and potentially engage in interstate transportation subject to federal standards. Conversely, a cooperative federalism approach would permit states to maintain divergent approaches while reducing conflicts related to taxation, enforcement, and commerce. Across these analyses, the common theme is that the current dual-sovereign inconsistency imposes measurable economic costs re

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48 FinCEN. n.d. "Marijuana Banking Update." FinCEN. Accessed November 4, 2025. [https://www.fincen.gov/system/files/shared/287473\\_3Q\\_FY2019\\_Marijuana\\_Banking\\_Update\\_Public.pdf](https://www.fincen.gov/system/files/shared/287473_3Q_FY2019_Marijuana_Banking_Update_Public.pdf).

49 Leff, Benjamin M. 2013. "Tax Planning for Marijuana Dealers." *American University Washington College of Law* 99 (February): 523-569. [https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1413&context=facsch\\_lawrev](https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1413&context=facsch_lawrev). Hart, Haileigh, Stacy Boyer-Davis, and Maria Arakelian. 2025. "An Exploration of the Cannabis Business in Michigan and the Influence of Internal Revenue Code (IRC) 26 U.S. Code § 280E." *SBIJ*. <https://sbij.scholasticahq.com/article/138362>.

50 Tower, Roger. 2024. "Pros & Cons of Federal Rescheduling of Cannabis: A Game-Changer for Operators?" *We Cann*. <https://www.wecannca.com/pros-cons-federal-rescheduling-for-cannabis-operators/#:~:text=The%20fragmented%20nature%20of%20the,Become%20a%20cannabis%20landlord.tio>

ardless of one’s normative position on legalization.<sup>51</sup>

## B. Taxation and Market Design

Taxation and licensing structures determine whether legal markets can effectively displace illicit supply while generating revenue to offset public health and regulatory costs. Economic studies of “sin taxes” on alcohol and tobacco provide a foundational framework: excessively high excise taxes tend to preserve or even strengthen illicit markets, whereas moderate, predictable tax rates, combined with targeted enforcement, are more likely to shift consumers toward regulated channels.<sup>52</sup> This principle has been validated in early cannabis markets. For example, California’s Legislative Analyst’s Office reports that cumulative tax burdens and high regulatory costs have contributed to the persistence of a large illicit market, even after legalization, because legal prices remain significantly higher than those offered by unlicensed sellers.<sup>53</sup>

Market design choices interact with taxation in important ways. Licensing regimes determine market entry conditions, firm behavior, and competitive dynamics. Overly restrictive licensing, such as strict caps on retail outlets or high application and compliance fees, can create artificial scarcity that elevates prices in legal markets, reducing substitution away from illicit supply. Conversely, overly permissive licensing may generate concerns about market saturation, public health, or potent consolidation

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51 The Edu Law. 2025. “Where THC Is Legal in the US in 2025 – State-by-State Guide for Recreational and Medical Use.” The Edu Law. <https://theedulaw.com/where-thc-is-legal-in-the-us/#:~:text=Cannabis%20remains%20illegal%20at%20the,state%20markets%20and%20national%20regulations.>

52 Lawrence, Geoff, and Spence Purnell. 2020. “MARIJUANA TAXATION AND BLACK MARKET CROWD-OUT.” Reason. <https://reason.org/wp-content/uploads/marijuana-taxation-black-market-crowd-out.pdf>

53 Lawrence, Geoffrey, Kaitlyn Boecker, Leonard Gilroy, Aubri Strachan, and Michelle Minton. 2020. “LAO Report: California’s Taxes and Rules Mean Legal Marijuana Can’t Compete With Black Market Prices.” Reason Foundation. <https://reason.org/com>

by large firms.<sup>54</sup> Law-and-economics highlights that optimal market design requires balancing these competing considerations while maintaining consumer access to regulated products that meet testing and labeling standards.

Tax policy also shapes long-run industry structure. High fixed compliance costs and elevated effective tax rates can lead to industry consolidation, as only large firms can absorb fiscal burdens, potentially undermining equity-oriented licensing programs adopted in several states.<sup>55</sup> On the other hand, a calibrated tax system—one that adjusts rates based on potency, product type, or risk profile—may help internalize negative externalities such as impaired driving or youth access without creating insurmountable barriers to legal participation.<sup>56</sup>

In this broader context, taxation and market design are important determinants of whether legal markets can function efficiently under fragmented federal oversight. Research indicates that predictable tax structures, transparent licensing standards, and enforcement strategies calibrated to actual risk can mitigate black-market persistence and support consumer migration into regulated channels, independent of advocacy

## Conclusion

The regulatory landscape surrounding cannabis in the United States remains defined by a persistent disconnect between f

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54 Payán, Denise D., Paul Brown, and Anna V. Song. 2021. “County-Level Recreational Marijuana Policies and Local Policy Changes in Colorado and Washington State (2012-2019).” PubMed Central. <https://pmc.ncbi.nlm.nih.gov/articles/PMC8718590/>.

55 Orenstein, Daniel G. 2020. “Preventing Industry Abuse Of Cannabis Equity Programs.” Southern Illinois University Law Journal. [https://law.siu.edu/\\_common/documents/law-journal/articles-2020/fall-2020/3-orenstein-final.pdf#:~:text=Market%20pressures%20in%20the%20industry%20also%20facilitate,damaging%20behavior%20in%20the%20nascent%20cannabis%20industry.](https://law.siu.edu/_common/documents/law-journal/articles-2020/fall-2020/3-orenstein-final.pdf#:~:text=Market%20pressures%20in%20the%20industry%20also%20facilitate,damaging%20behavior%20in%20the%20nascent%20cannabis%20industry.)

56 Davis, Carl, and Richard Phillips. 2015. “Issues with Taxing Marijuana at the State Level.” ITEP. <https://itep.org/issues-with-taxing-marijuana-at-the-state-level/#:~:text=Unlike%20per%2Dunit%20excise%20taxes%2C%20a%20value%2Dbased%20tax,is%20typically%20more%20expensive%20than%20weaker%20strains.>

prohibition and diverse state-level policy approaches. This misalignment produces measurable economic, administrative, and compliance challenges that extend across financial services, taxation, enforcement, and market oversight. As the analysis throughout this paper has shown, federal inaction has not eliminated demand or clarified expectations for states attempting to regulate emerging markets; instead, it has created a fragmented environment in which legal and illicit activity operate simultaneously, often to the detriment of efficiency and public accountability.

State-level legalization has generated a set of regulatory ‘experiments,’ as each jurisdiction has adopted different taxation models, licensing rules, and enforcement strategies. These variations provide insight into how regulatory design shapes market behavior, yet their effectiveness remains constrained by the overarching federal framework. Evidence from banking access, tax burdens, and ongoing illicit market participation demonstrates inconsistencies between jurisdictions imposing substantial operational hurdles on both regulators and market actors. At the same time, behavioral factors and historical patterns of enforcement complicate efforts to design policies that address public-health considerations, consumer decision-making, and equitable outcomes.

Taken together, these dynamics underscore the importance of coherent and predictable governance rather than signaling support for any-particular substantive policy outcome. Whether the federal government chooses to maintain prohibition, modify scheduling, or pursue alternative approaches, additional regulatory clarity would reduce economic distortions, strengthen oversight, and allow both federal and state institutions to carry out their respective responsibilities effectively. Ultimately, the challenges identified in this paper reflect a broader need for coordinated policy design—one that acknowledges evolving state practices while ensuring that regulatory policies, enforcement priorities, and economic realities are aligned within a consistent national framework.





LAW and  
GLOBAL SECURITY

# Daytime Sarin-ade: How Conterterrorism Law in Japan has Changed

LILLIAN RODONICH

## ABSTRACT

This paper explores how a domestic terrorist attack orchestrated by a Japanese religious group sparked an important question for legal scholars, policymakers, and citizens: How do we prosecute terrorists without jeopardizing the freedom for religious practice? On the one hand, a lack of prosecution breeds sneakier behavior from terrorist groups, and potentially more fatal attacks against the public. On the other hand, too much prosecution can perpetuate religious stereotypes, profiling every small religious group as cult-like and terroristic. By reviewing relevant laws and acts that were applied to Aum Shinrikyo's trial after the Tokyo gas attack, including the Subversive Activities Prevention Law of 1952 and the Religious Corporations Act of 1951, this paper highlights how Japanese courts have attempted to prosecute dangerous religious groups without outlawing the practice of the religious tenets themselves. This paper also includes how Aum's actions could fit more of these laws than what was applied in the Aum trials, highlighting Aum's violent actions against dissenters prior to the 1995 Tokyo gas attack. This paper also includes how problems of religious discrimination and the lack of aid for former Aum members remains an issue in the twenty-first century, especially with Aum victim aid projects facing funding cuts and premature shutdowns. These funding cuts and shutdowns come in the wake of Aum members being recognized as victims of Aum Shinrikyo in the same way that gas attack victims are, potentially highlighting a bias against Aum members perpetuated by the government itself.

## Introduction

For many in Tokyo, March 20, 1995, was considered a regular workday. A Japanese religious cult, however, planned to plunge the rest of society into its doomsday prophecy. Traveling from their original Kamikuishiki Village location southwest of Tokyo, five members of Aum Shinrikyo boarded five different subway cars during the Tokyo Metropolitan Train Station's bustling rush hour.<sup>1</sup> The plastic bags carried by each member contained sarin, a toxic nerve agent known for its lethality, which filled each of the five train cars upon being punctured with the sharp end of an umbrella.<sup>2</sup> Sarin's release within the train cars caused people to suffocate,

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1 Robert Jay Lifton, *Destroying the World to Save It: Aum Shinrikyo, Apocalyptic Violence, and the New Global Terrorism* (New York City: Henry Holt and Company, 1999), 3

2 Lifton, *Destroying the World to Save It*, 3.

convulse, and collapse, killing eleven and injuring thousands more.<sup>3</sup> The sudden spike in casualties caused essential police and medical services to devolve into complete disarray. Faxes from medical specialists regarding sarin treatment sent to St. Luke's Hospital, the medical center closest to the Tokyo Metropolitan, were lost in the chaos as the Neuropathy and Emergency departments attempted to handle the constant flow of sarin victims entering the facility.<sup>4</sup> Doctors were forced to prioritize the most severe cases of sarin poisoning and leave lighter cases to let time heal the ailment.<sup>5</sup> While the attack did not induce the doomsday salvation that Aum Shinrikyo had anticipated, it highlighted concerns about Japan's ability to respond to terrorism. The attack exposed concerns regarding how counterterrorism and freedom of religious practice can coexist in a post-Aum society.

## Japan's Past with Terrorism

The Tokyo gas attack is not Japan's first run-in with terrorism. In fact, as early as the 1960s, the country faced a significant terrorist threat from the Japanese Red Army.<sup>6</sup> The faction arose from university students and Marxists seeking to introduce themselves as pioneers of a new anti-imperialist revolution, particularly criticizing American imperialism and the Vietnam War (1955-75).<sup>7</sup> Students concluded that a revolutionary wave was not receding but actually about to break—a wave that would rely on them to bring about the revolution's genesis.<sup>8</sup> Even if this proposition was severely flawed, their mission still triggered a world

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3 Lifton, *Destroying the World to Save It*, 3.

4 Haruki Murakami, *Underground: The Tokyo Gas Attack and the Japanese Psyche* (New York City: Random House, Inc., 2000), 220.

5 Murakami, *Underground*, 221.

6 Mursel Dogrul, "Counter-Terrorism in a Pacifist Country: Japan's Case," *Journal of Humanities and Social Sciences* 20, (2022): 3.

7 Dogrul, "Counter-Terrorism in a Pacifist Country," 8.

8 Meredith Box and Gavin McCormick, "Terror in Japan: The Red Army (1969-2001) and Aum Supreme Truth (1987-2000)," *The Asia-Pacific Journal: Japan Focus* 2, no. 6 (2004): 4.

transformation that proclaimed the Red Army Faction as a gladiator for a worldwide revolution that declared war on the bourgeoisie.<sup>9</sup> Their hatred for Japan's wealthiest one percent galvanized their various bombings and bank robberies carried out in their name, though also allowing for police pressure to accumulate on the backs of the Red Army Faction.<sup>10</sup> It was the increased police pressure against them that forced the Red Army Faction to evolve into three distinct groups: the Yodo Group that relocated to North Korea, the Japanese Red Army that relocated to Lebanon, and the United Red Army that remained in Japan.<sup>11</sup> However, this did not come with legal discourse on the most effective policies for countering the JRA's new subgroups.

A policymaking shift made its debut in September 1977, shortly after the JRA hijacked a Japan Airlines Flight from Paris to Tokyo and demanded a \$6 million (¥912,420,000) ransom for the 151 passengers held hostage.<sup>12</sup> Unlike how other countries undergo hostage communications, the Japanese government paid the ransom, with former Prime Minister Takeo Fukuda stating that "life is heavier than the Earth."<sup>13</sup> This statement held that human life had the utmost inherent value, and it was the duty of the Japanese government to respect it. Paying the ransom felt like securing a higher chance that these hostages would be freed and unharmed, and it aligned with its desired pacifist attitude, since it valued human life without risking it.<sup>14</sup>

## The Rise and Fall of Aum Shinrikyo

Although the payment of ransom to hostage-takers and the reactions to the decision highlighted a contradiction between national policy and the nation's desired ethos, this incident didn't spark legal discourse

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9 Box and McCormick, "Terror in Japan," 4.

10 Box and McCormick, "Terror in Japan," 4.

11 Box and McCormick, "Terror in Japan," 4.

12 R. James Woolsey, *Combating Terrorism: Strategies of Ten Countries* (Ann Arbor: University of Michigan Press, 2002), 345.

13 Woolsey, *Combating Terrorism*, 346.

14 The National Diet is Japan's legislative body.

in the same way that the gas attacks later would. A new religious group—Aum Shinrikyo—would rise from the shadows in 1987 with yoga teacher Shoko Asahara as its guru. Initially starting as a yoga class, its theology drew heavily from Tibetan Buddhism and transitioned into a collective effort to prepare each other for the inevitable Armageddon.<sup>15</sup> The sinful outside world would be destroyed, with only Aum's true believers elevated to a higher spiritual realm. Through this understanding, Aum members felt a responsibility to save as many people from the outside world as possible. This responsibility was the primary motivation for Aum's sarin attack within the Tokyo Metropolitan train station in March 1995, an imperative move that the group had to take if they wanted to save humanity from eternal damnation.<sup>16</sup>

A raid conducted by over 2,500 police officers across 25 separate Aum buildings yielded dangerous chemicals and laboratory equipment.<sup>17</sup> These findings gave the police sufficient probable cause to perform over 400 arrests of Aum Shinrikyo members, especially after soil samples from a previous Aum-related incident in 1993 revealed that there was sarin residue in the soil close to the group's Matsumoto area headquarters.<sup>18</sup> Shoko Asahara himself was not exempt from the large-scale raid, with the guru facing a total of 17 indictments with 25 counts of murder.<sup>19</sup>

However, the arrests of both Asahara and his group members only marked the beginning of discussions surrounding counterterrorism and religious freedom. Arresting the majority of the group allowed for a temporary relief against potential terrorist attacks in the future, but it was merely a temporary solution. Questions remained about whether Aum should be banned and if existing laws that governed religion were

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15 Jonathan B. Tucker, *Toxic Terrorism: Assessing Terrorist Use of Chemical and Biological Weapons* (Cambridge, Massachusetts: MIT Press, 2001), 208.

16 Tucker, *Toxic Terrorism*, 208.

17 Tucker, *Toxic Terrorism*, 224.

18 Tucker, *Toxic Terrorism*, 224.

19 Tucker, *Toxic Terrorism*, 224.

still fit to remain enforceable.<sup>20</sup> The magnitude of charges against the group caused trial proceedings against them to drag on, causing increased public anxiety about Aum members attempting to assimilate into society shortly after the gas attack. Such a skyrocket in anxiety was due to the lack of an official opinion on how to go about remembering the gas attack.<sup>21</sup> Once the government sets a particular standard on how the public must remember domestic attacks, such as through commemorative ceremonies, national holidays, and erecting monuments, it becomes the collective memory of the attack. The state would eventually converge with the mass media to frame Aum Shinrikyo as a destructive cult that posed a persistent domestic threat, perpetuated by extensive coverage of post-Aum legislation, policies, and criminal trial proceedings.<sup>22</sup> Although documenting the Aum Affair in such an antagonistic manner drilled the vile, unreasonable nature of the gas attack into the public's head, concerns remained regarding how religious groups can maintain fundamental rights in a post-Aum society.

## The Subversive Activities Prevention Law of 1952 (SAPL)

Most of the legal discourse surrounding these concerns involves the Subversive Activities Prevention Law of 1952 (SAPL), which Japanese courts continuously attempted to use against Aum Shinrikyo following the 1995 Tokyo gas attack.<sup>23</sup> SAPL prescribes, "necessary control measures on an organization which has conducted a terroristic subversive activity as an organizational activity."<sup>24</sup> It also "[supplements] penalties

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20 Rin Ushiyama, *Aum Shinrikyo and Religious Terrorism in Collective Japanese Memory* (Oxford, England: Oxford University Press, 2023), 81

21 Ushiyama, *Aum Shinrikyo and Religious Terrorism in Collective Japanese Memory*, 81.

22 Ushiyama, *Aum Shinrikyo and Religious Terrorism in Collective Japanese Memory*, 83.

23 Mark Fenwick, "Japan's response to terrorism post-9/11," *Global Anti-Terrorism Law and Policy* 2, (2012): 390-419.

24 Subversive Activities Prevention Law (No. 240). Chapter 1, Article 1, 1952. [https://www.japaneselawtranslation.go.jp/en/laws/view/4045/en#je\\_ch2](https://www.japaneselawtranslation.go.jp/en/laws/view/4045/en#je_ch2)

for terroristic subversive activities, thereby enhancing public security.” This statement indicates that SAPL implements stringent control measures against terrorist organizations and promotes public security by imposing penalties on such organizations. To ban a group from participating inactivity as an organizational activity.<sup>25</sup> It also “[supplements] penalties for terroristic subversive activities, thereby enhancing public security.”<sup>26</sup> This statement indicates that SAPL implements stringent control measures against terrorist organizations and promotes public security by imposing penalties on such organizations. To ban a group from participating in certain activities, SAPL outlines a legal standard that religious organizations must meet: the organization must be involved in destructive activities, such activities must also have been done for a political purpose, and the organization poses a future threat to the livelihoods of others.<sup>27</sup> Such an application of this legislation to the 1995 Tokyo gas attack makes sense, since the incident was perpetrated by an organization for the sake of instilling fear in an otherwise unsuspecting public. For outsiders, it seemed unexpected for a religious group’s rhetoric to become more violent and absolute, but for Aum Shinrikyo, this was a reality. This radicalization stemmed from the fact that Asahara’s image to outsiders was a sharp contrast to that within Aum: a spiritual intellectual compared to the cold, cutthroat cult leader that Asahara truly was. In early 1993, Aum guru Shoko Asahara preached that the only way for the group to survive was to create an alternative society—where Aum members were superior beings armed with state-of-the-art intelligence and technology.<sup>28</sup> The group’s chief scientists followed Asahara’s desires

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25 Subversive Activities Prevention Law (No. 240). Chapter 1, Article 1, 1952.

[https://www.japaneselawtranslation.go.jp/en/laws/view/4045/en/#je\\_ch2](https://www.japaneselawtranslation.go.jp/en/laws/view/4045/en/#je_ch2)

26 Subversive Activities Prevention Law (No. 240). Chapter 1, Article 1, 1952.

[https://www.japaneselawtranslation.go.jp/en/laws/view/4045/en/#je\\_ch2](https://www.japaneselawtranslation.go.jp/en/laws/view/4045/en/#je_ch2)

27 Mark Fenwick, “Japan’s response to terrorism post-9/11,” *Global Anti-Terrorism Law and Policy* 2, (2012): 390-419. Mark Fenwick, “Japan’s response to terrorism post-9/11,” *Global Anti-Terrorism Law and Policy* 2, (2012): 390-419.

28 David E. Kaplan and Andrew Marshall, *The Cult at the End of the World: The Terrifying Story of the Aum Doomsday Cult, from the Subways of Tokyo to the Nuclear Arsenals of Russia* (New York: Crown Publishers, Inc., 1996), 85

for pursuing a secret, more far-reaching plan for militarization, and they decided that sarin would be the best route, considering how easy it is to produce and the number of people it could kill. Even if this is a sensible application of such a law to the case of Aum and their subsequent gas attack, there are still loopholes and lingering questions that could jeopardize both the existence of harmless religious groups and the integrity of the Japanese government.

The Tokyo High Court used SAPL to charge Asahara for the Tokyo gas attack as early as when his trial first began in February 1996. According to SAPL, crimes such as murder, arson, and robbery could be prosecuted by the state if the crime was committed ‘with a political purpose’ and ‘by a person or persons affiliated with a subversive organization.’<sup>29</sup> The Tokyo gas attack was perpetrated for a religious purpose, specifically to save humanity from a prophesied Armageddon. At the same time, Asahara and the men who deployed the sarin gas onto the subway are also persons affiliated with a subversive organization. SAPL also allows for organizations to be banned from doing certain activities, especially if it is considered a subversive one.<sup>30</sup> There was ample reason to prohibit Aum Shinrikyo from participating in certain activities under this legal framework. The 1995 Tokyo gas attack not only left 13 dead and nearly 3,000 injured amongst seven train cars, but Asahara made claims after the attack that the dead should be grateful for the Aum-given opportunity to reach a “higher spiritual level.”<sup>31</sup>

Although it can be argued that Aum’s original purpose for the gas attack was for the sake of salvation, the group’s standing with the Japanese government also gave it enough reason to hasten the attack. A prominent example of this is the Sakamoto family murder. Tsutsumi Sakamoto, a human rights lawyer in Yokohama, found himself representing the parents of children who had joined the group and lost contact

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29 Mark Fenwick, “Japan’s response to terrorism post-9/11,” *Global Anti-Terrorism Law and Policy* 2, (2012): 390-419.

30 Fenwick, “Japan’s response to terrorism post-9/11.frameworkunder”

31 David E. Kaplan and Andrew Marshall, *The Cult at the End of the World: The Terrifying Story of the Aum Doomsday Cult, from the Subways of Tokyo to the Nuclear Arsenals of Russia* (New York: Crown Publishers, Inc., 1996), 251.

with their families indefinitely. During a meeting with Aum's lawyer, Yoshinobu Aoyama, Sakamoto exposed a pattern of fraud in Aum's operations. For example, rumors of leading medical schools examining Asahara's blood made their way to Sakamoto, which was revealed to be vehemently false by the schools themselves.<sup>32</sup> Aoyama argued that Sakamoto's claims were a misunderstanding, clarifying that Asahara's blood was proven to be special by a medical school graduate who worked at an Aum facility.<sup>33</sup> It was an argument that would make sense to Aoyama, since it is plausible that a medical school graduate working at an Aum facility would frame the study's findings to paint Asahara as the guru he claimed to be. However, Sakamoto continued pushing back, demanding that Aoyama either provide proof that Asahara's blood was special or compensate Aum members who paid for a blood ritual that held no spiritual ground in the first place.

This caused the already fragile relationship to shatter within seconds. Word of the hostile meeting made its way to Asahara, who ordered the murder of Sakamoto's family just two days later. Once the family was murdered by strangulation and injection of potassium chloride, their 'anything goes' policy extended to politics alongside religion.<sup>34</sup> Asahara was free to expand his influence into any extra career paths he deemed fit, especially without a gutsy lawyer riding his coattails. His first order of business was creating the Supreme Truth Party for Japan's 1990 Parliamentary election.<sup>35</sup> As a result, efforts towards a prophesied Armageddon intensified while Aum continuously violated election law through door-to-door campaigning, campaigning past allowable times, and ripping down political posters of opponents.<sup>36</sup> The uncovering of Aum's actual influence in cases such as the Sakamoto family murder after the Tokyo gas attack could have given enough reason to ban the organization from participating in mass demonstrations, processions, or public

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32 Kaplan and Marshall, *The Cult at the End of the World*, 39.

33 Kaplan and Marshall, *The Cult at the End of the World*, 39.

34 Kaplan and Marshall, *The Cult at the End of the World*, 37.

35 Kaplan and Marshall, *The Cult at the End of the World*, 46.

36 Kaplan and Marshall, *The Cult at the End of the World*, 46.

assemblies<sup>37</sup> under SAPL.

## SAPL's Results

However, the Public Security Commission (PSC) rejected the dissolution order given to Aum in January 1997.<sup>38</sup> Aum's political motive in the Tokyo gas attack was officially recognized, but the issue lay in the group's future threat. It was concluded that following the police crackdown on Aum after 1995, the group no longer posed an ongoing threat to the nation or on an international scale. What remained was that the Public Security Investigation Agency (PSIA) closely monitored Aum's activities. Several newspaper editorialists joined the conversation, praising the decision. In 1995, *The Asahi Shimbun* began calling into question the mere existence of SAPL, labelling it as draconian and 'likely to violate basic human rights.'<sup>39</sup> Both the Japanese Civil Liberties Union and the National Bar Association argued that SAPL violated the due process provisions of Japan's Constitution, especially since any PSC decision to dissolve an agency is made by an organization and not a court.<sup>40</sup> Article 31 of the Japanese Constitution states that "no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."<sup>41</sup> This is similar to—if not precisely—how due process is defined: that the government must follow a particular set of legal procedures before proceeding to deprive someone of life, liberty, or property. What this meant was that SAPL infringed on the people's right to freedom of association outlined in Japan's Constitution, especially considering its ability to force groups to dissolve per the law's

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37 Subversive Activities Prevention Law (No. 240). Chapter 2, Article 5, 1952.

[https://www.japaneselawtranslation.go.jp/en/laws/view/4045/en#je\\_ch2](https://www.japaneselawtranslation.go.jp/en/laws/view/4045/en#je_ch2)

38 Mark Fenwick, "Japan's response to terrorism post-9/11," *Global Anti-Terrorism Law and Policy* 2, (2012): 390-419.

39 Mark Fenwick, "Japan's response to terrorism post-9/11," *Global Anti-Terrorism Law and Policy* 2, (2012): 390-419.

40 Mark Fenwick, "Japan's response to terrorism post-9/11," *Global Anti-Terrorism Law and Policy* 2, (2012): 390-419.

orders.<sup>42</sup>

### The Religious Corporations Act of 1951

Although Aum narrowly escaped being dissolved under SAPL, lawyers introduced another law into the gas attack trials. The courts tried to apply the Religious Corporation Act of 1951 to the group, primarily because it produced sarin gas and its role in the Tokyo gas attack.<sup>43</sup> The Act defines a religious organization as one that focuses on “the dissemination of religious teachings, the conduct of ceremonies and functions, and the education and nurture of believers.”<sup>44</sup> It provides two definitions of a religious organization: a shrine, temple, church, monastery, or convent having an establishment for worship; or a denomination, church, order, or diocese or district that comprises establishments for worship.<sup>45</sup> Article 2 also describes the functions of religious organizations, including disseminating religious teachings, conducting ceremonies and rituals, and educating and nurturing believers. Since Aum draws on the religious teachings of Tibetan Buddhism and has maintained multiple headquarters across three prefectures in Japan, the group can be classified as a religious organization under the Religious Corporation Act of 1951. While the Act helps to classify Aum as a religious organization, it also justifies Aum's dissolution. Article 81 of the Act sets out the qualifications for submitting an Order of Dissolution to a religious organization. Article 81(1)(i) states that a court can send the order if the religious organization commits “an act which is clearly found to harm public welfare substan-

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42 Mark Fenwick, “Japan’s response to terrorism post-9/11,” *Global Anti-Terrorism Law and Policy* 2, (2012): 390-419.

43 Scott M. Lenhart, “Hammering Down Nails: The Freedom of Fringe Religious Groups in Japan and the United States—Aum Shinrikyo and the Branch Davidians,” *Georgia Journal of International and Comparative Law*, 29 no. 491 (2001): 520.

44 Religions Corporations Act (No. 126). Chapter 1, Article 2, 1951. <https://www.japaneselawtranslation.go.jp/en/laws/view/3898/en>

45 Religions Corporations Act (No. 126). Chapter 1, Article 2, 1951. <https://www.japaneselawtranslation.go.jp/en/laws/view/3898/en>

tially.”<sup>46</sup> The Tokyo gas attack, in killing 11 people with one of the most toxic and volatile nerve agents used in chemical warfare<sup>47</sup>, could certainly be seen as harming public welfare. Sarin blocks the functions of certain enzymes in the body, causing constant use of muscles until the individual is tired and no longer able to keep breathing.<sup>48</sup> This is also the exact reason why the first half of Article 81(1)(ii) was also applied to Aum’s gas attack. According to Article 81(1)(ii), an Order of Dissolution can be served to a religious group if it “commits an act which deviates substantially from the purpose of a religious organization prescribed in the provisions of Article 2.”<sup>49</sup> Releasing sarin across one of Japan’s busiest train stations substantially deviates from Aum’s classification as a religious organization. The dangerous nature of sarin, both by itself and in the context of the Tokyo gas attack, allowed for Aum’s actions to be classified as a valid reason to serve the group an Order of Dissolution under the Religious Corporations Act of 1951.

However, it can also be argued that Aum’s actions fit more of Article 81 of the Religious Corporations Act than just Article 81(1)(i) and the first half of Article 81(1)(ii). This is especially true when analyzing the second half of Article 81(1)(ii), which says that an Order of Dissolution can also be served to religious organizations that “fail to carry out any act for such purpose for one year or more.”<sup>50</sup> Aum had failed to adhere to the functions outlined for religious organizations in Article 2 of the Act years before the sarin attack. The first example of this was the Sakamoto family murders in 1989. It could be argued that simply doing anything outside of the religious sphere is not enough to strip a group of its religious identity.

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46 Religions Corporations Act (No. 126). Chapter 9, Article 81, Section 1, 1951. <https://www.japaneselawtranslation.go.jp/en/laws/view/3898/en>

47 “Sarin,” Centers for Disease Control and Prevention, September 6, 2024. <https://www.cdc.gov/chemical-emergencies/chemical-fact-sheets/sarin.html>

48 “Sarin,” Centers for Disease Control and Prevention, September 6, 2024. <https://www.cdc.gov/chemical-emergencies/chemical-fact-sheets/sarin.htm>

49 Religions Corporations Act (No. 126). Chapter 9, Article 81, Section 2, 1951. <https://www.japaneselawtranslation.go.jp/en/laws/view/3898/en>

50 Religions Corporations Act (No. 126). Chapter 9, Article 81, Section 2, 1951. <https://www.japaneselawtranslation.go.jp/en/laws/view/3898/en>

However, it is essential to note that Article 81(1)(ii) clarifies that such actions must “deviate substantially from the purpose of a religious organization.”<sup>51</sup> Despite the absence of further clarification on what actions substantially deviate from the purpose of religious organizations, such clarification can be drawn from societal understanding. It is common for people to regard religion as subjective and supplemental. Religion can be nurturing for believers by offering possible answers to phenomena that objective facts cannot. Faith-based explanations depend on the religion and the denomination that people choose to follow. However, religion is also regarded as supplemental because of the common understanding that it should not be forced on those unwilling to participate. Asahara did not send his men to the Sakamoto family home to nurture believers or disseminate religious education, but to kill the family and buffer Sakamoto’s legal efforts against the group. This incident, similar to the Tokyo gas attack, does not fall under the functions of a religious organization. The fact that this incident happened two years before the sarin attack—the attack that served as a primary reason for interpreting the Religious Corporations Act of 1952—helps the entirety of Article 81(1)(ii) serve as a reason for legal action against Aum.

## The Religious Corporation Act’s Results

The Order of Dissolution was highly successful in reducing the group’s potential for future terrorist attacks. Aum entered a period of dormancy, with no new threats from the outside world. However, a loophole within the Religious Corporations Act of 1952 allows Aum Shinrikyo to continue operations and even rebrand. The court said that the Act “deals exclusively with the secular side of the organization.”<sup>52</sup> This meant that the Act focused solely on the secular aspects of the organization, including classifying the group as a religious corporation, as was the case with Aum. Therefore, an Order of Dissolution only required that a religious organization cease nonreligious operations, thereby forcing Aum to

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51 Religions Corporations Act (No. 126). Chapter 9, Article 81, Section 2, 1951. <https://www.japaneselawtranslation.go.jp/en/laws/view/3898/en>

52 Scott M. Lenhart, “Hammering Down Nails: The Freedom of Fringe Religious Groups in Japan and the United States—Aum Shinrikyo and the Branch Davidians,” *Georgia Journal of International and Comparative Law*, 29 no. 491 (2001): 520.

relinquish its corporate status. Followers could still practice the tenets of Aum as a religion even if the group no longer had corporate standing. This clarification of the Religious Corporations Act of 1952 led to Aum Shinrikyo renaming itself as Aleph in February 2000.<sup>53</sup>

## Lasting Issues in a post-Aum Society

Although members maintained their freedom to practice Aum tenets, problems remained regarding victim support and widespread social stigma. 112 children of Aum members were taken into temporary custody after the gas attack, with only 68 being raised by non-Aum relatives.<sup>54</sup> The rest were sent to children's homes, where their situation was reported to be less than ideal. Two six-year-old daughters were not allowed to attend a local elementary school in the Saitama prefecture because of their membership in the group.<sup>55</sup> Similar instances occurred in the Ibaraki and Tochigi prefectures that same year, where Asahara's three children were blocked from school registration. Although the Education Ministry asked Saitama officials to reverse the decision affecting the two daughters, the Japanese government made no efforts to overturn any of the decisions made by school administrators.<sup>56</sup>

These issues remain decades later, even when the Japanese government's efforts are trying to extend victim support to former Aum members as well as gas attack victims. In a 2025 investigative journalism report conducted by Nippon Hoso Kyokai (NHK)<sup>57</sup>, adults were able to leave Aum and rely on government resources to find work and other

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53 Scott M. Lenhart, "Hammering Down Nails," 520,

54 Ueno Yamato, "Children of Aum doomsday cult suffering decades after the Tokyo subway sarin attack," NHK World Japan, March 27, 2025. <https://www3.nhk.or.jp/nhkworld/en/news/backstories/3902/>

55 "2000 Annual Report on International Religious Freedom: Japan," U.S. Department of State, September 5, 2000. [https://1997-2001.state.gov/global/human\\_rights/irf/irf\\_rpt/irf\\_japan.html](https://1997-2001.state.gov/global/human_rights/irf/irf_rpt/irf_japan.html)

56 "2000 Annual Report on International Religious Freedom: Japan," U.S. Department of State, September 5, 2000. [https://1997-2001.state.gov/global/human\\_rights/irf/irf\\_rpt/irf\\_japan.html](https://1997-2001.state.gov/global/human_rights/irf/irf_rpt/irf_japan.html)

57 The NHK is Japan's broadcasting system

forms of support.<sup>58</sup> However, no such support was given to their children. A panel of experts that was arranged to determine what kind of support would be necessary for Aum children concluded in only two years, with vague recommendations about how to go forward.<sup>59</sup> Considering how growth and development vary significantly among different children highlights the problematic nature of the lack of victim support for children. Aum prided itself in recruiting children as well as adults, yet the two age groups were separated upon initiation. Prior child developmental studies yield that family separation can be an additional trauma to other adverse experiences children may have dealt with before joining the group.<sup>60</sup> While it may have been a step in the right direction to reunite Aum children with their families and to extend governmental support to adults, uncertainty surrounding parents' lives could lead to anguish, despair, and guilt. These feelings then translate into a disruption of how children learn life skills.<sup>61</sup> Perhaps this is understood when a former panel member highlighted the study's failure to continue research and provide extended care to children, due in part to stringent time limits bestowed upon panel members.<sup>62</sup>

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58 Ueno Yamato, "Children of Aum doomsday cult suffering decades after the Tokyo subway sarin attack," NHK World Japan, March 27, 2025. <https://www3.nhk.or.jp/nhkworld/en/news/backstories/3902/>

59 Ueno Yamato, "Children of Aum doomsday cult suffering decades after the Tokyo subway sarin attack," NHK World Japan, March 27, 2025. <https://www3.nhk.or.jp/nhkworld/en/news/backstories/3902/>

60 Melissa De Witte, "Separation from parents removes children's most important protection and generates a new trauma, Stanford scholar says," StanfordReport, June 26th, 2018. <https://news.stanford.edu/stories/2018/06/psychological-impact-early-life-stress-parental-separation>

61 Melissa De Witte, "Separation from parents removes children's most important protection and generates a new trauma, Stanford scholar says," StanfordReport, June 26th, 2018. <https://news.stanford.edu/stories/2018/06/psychological-impact-early-life-stress-parental-separation>

62 Ueno Yamato, "Children of Aum doomsday cult suffering decades after the Tokyo subway sarin attack," NHK World Japan, March 27, 2025. <https://www3.nhk.or.jp/nhkworld/en/news/backstories/3902/>

Some experts are stressing the importance of setting up safe zones where children can come forward and discuss their experiences in the group, but the results of this idea will remain unknown unless proper resources are allocated to Aum victim care improvement.<sup>63</sup> The issue's mysterious nature demonstrates that the government must take experts' expertise more seriously. Experts are often highly regarded because of the time and research they devote to their craft. By having multiple experts from different fields work on a common problem, a nuanced and multifaceted solution can be drafted appropriately. Still, the onus is on the government to provide the necessary time and resources for these experts to complete their job. The government has also attempted to resolve the Aum Affair for good through a new wave of legislation, particularly aiming to increase transparency among religious groups and expand the police force into monitoring them.<sup>64</sup> This could be a step in the right direction for ensuring another act of religious terrorism does not happen again, but it can quickly become a double-edged sword. A lack of such extended legislation can motivate dangerous groups to become more covert in their potential plans to harm public welfare. At the same time, the existence of such legislation can perpetuate a social stigma where 'small religions' are unfairly synonymous with 'cults.' Perhaps both issues can be avoided if legislation aimed at increased transparency within religious organizations is supplemented by guidance on distinguishing a cult from a small religion. However, until the government trusts expert advice and considers the concerns that its new legislation may create, such implications will remain only a fog of fragmented ideas.

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63 Ueno Yamato, "Children of Aum doomsday cult suffering decades after the Tokyo subway sarin attack," NHK World Japan, March 27, 2025. <https://www3.nhk.or.jp/nhkworld/en/news/backstories/3902/>

64 Scott M. Lenhart, "Hammering Down Nails: The Freedom of Fringe Religious Groups in Japan and the United States—Aum Shinrikyo and the Branch Davidians," *Georgia Journal of International and Comparative Law*, 29 no. 491 (2001): 525.



## Notes on Contributors

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ALLISON FOWLER, A second year University of Florida student, is pursuing a double major in Economics and Political Science. Before attending law school, she will earn a master's degree in Mass Communications. She aims to work for a federal agency with a long-term goal by contributing to pro-bono legal work. Her academic interests focus on behavioral economics, domestic policy, and corporate law.

LILLIAN RODONICH is a junior at the University of Florida studying English and Legal History. Her academic interests include international and comparative law. She combines these interests with writing through her involvement as an author for the Florida Pre-Law Review. With a background of involvement in Model United Nations, Lillian is passionate about how different countries' laws shape the people and cultural practices that encompass each nation. Outside of the Florida Pre-Law Review, Lillian competes as a delegate and serves as a member of the Officer Corps for the University of Florida Model United Nations team. Alongside being the Assistant Director for Conference Logistics and part of the Member Development Team, Lillian has successfully directed committees for two high school conferences. After graduation, she plans to attend law school and open her own law firm.

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