GEORGIA TECH UNDERGRADUATE LAW REVIEW

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LETTER FROM EDITOR

Dear Reader,

It is with great pleasure and enthusiasm that I present the inaugural publication of the Undergraduate Law Review at Georgia Tech (ULRGT): Volume 1, Issue 1. It has been an honor to serve alongside our dedicated Editorial Team and Executive Board to make this publication happen. This work marks the beginning of our commitment to the continuous pursuit of intellectual curiosity and critical legal analysis in the nuanced and intricate field of law. I extend my deepest congratulations to all undergraduate authors and editors involved in this process and look forward to developing the ULRGT in coming semesters and for many years.

Georgia Tech's commitment to progress and service lies in the foundation of this Law Review. The innovative, and forward-thinking arguments of the featured authors offer unique contributions to current literature. Further, the nuanced applications of the presented ideas present efforts to serve broader communities and promote the well-being of our society. In this publication, we present two articles, each offering unique perspectives and compelling arguments: *Monopoly in the Machines: How Antitrust Can Spur AI Innovation*, authored by Aarush Maheswaran and *From Guidelines to Battlegrounds: The Future of Checks and Balances*, authored by Dean Evans.

As a new undergraduate program without connection to a law school, the production and development of our work has come from the passion and devotion of our team, and faculty advisor Andy McNeil. I extend my greatest thanks to our advisor, and fellow editors who worked around the clock to ensure the readiness of our publication. The continued support by our Georgia Tech community has made our program possible, and on behalf of the entire ULRGT team, I extend a great thank you to every individual involved in the creation, cultivation, and promotion of our work.

We now invite you to read the inaugural publication of the Undergraduate Law Review at Georgia Tech. Thank you for your support.

Sincerely,

Sarah Weitz, Editor-in-Chief

STAFF

Acknowledgements

Director of Law, Science,

and Technology Program

Andy McNeil

MONOPOLY IN THE MACHINES: HOW ANTITRUST CAN SPUR AI INNOVATION

Aarush Maheswaran

ABSTRACT

This paper examines the evolution of antitrust enforcement in the United States, focusing on the shift from structuralist approaches of enforcement to the new consumer welfare standard. The paper will examine the implications of this transformation for innovation and competition in emerging industries like artificial intelligence (AI). Through an analysis of historical case studies—including the breakups of Standard Oil and AT&T—this paper demonstrates how dismantling monopolies through a structuralist approach can spur innovation in the telecommunication and energy sectors. However, the adoption of the consumer welfare standard, championed by the Chicago School, has narrowed antitrust focus to price effects, overlooking structural harms in concentrated markets, and failing to provide similar outcomes in innovation. Drawing parallels to past antitrust actions, the paper argues for a return to structuralist principles to address monopolistic control in the AI sector. By fostering competitive markets, regulators can unlock technological advancements and ensure long-term industry dynamism.

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I. INTRODUCTION

In the 1970s, American telecommunications were entirely controlled by one firm—AT&T. Every aspect of the nation's phone service went through them: signals were carried through an AT&T cable, routed by AT&T switchboard operators, and maintained by AT&T engineers. Customers paid their bills to AT&T accountants, and at its height, the company controlled 85% of all telephone services in the United States.[1] The government permitted this dominance, endorsing AT&T as a natural monopoly—AT&T became the nation's sole provider of telephone lines, only regulated by state and federal agencies to prevent unchecked growth. AT&T used this authority to impose numerous restrictions on competitors and maintain an iron grip on the industry, such as by refusing to sell phone units to customers or allowing third-party devices to be connected to AT&T's network. They maintained a near-total monopoly on local telephone services and summarily prohibited any other competitor from using their cables to transmit signals.[2] AT&T's vertical control of the phone systems rested on the operation of lines for local telephone networks, lines which were required for companies producing telephone equipment or providing long-distance services. This "bottleneck" was a great competitive advantage for AT&T, preventing competitors from using their lines.

AT&T's dominance diminished in 1982 when the government settled *United States v. AT&T*. In the settlement, AT&T agreed to split off its "Baby Bells" (the regional operating companies that handled local service) in exchange for being allowed to enter the computer business. As a result, there was a sudden explosion of innovation in telecommunications, with competitors like Microwave Communications, Inc. (MCI) and Sprint experimenting with new ways to use the infrastructure and compete on even footing in the market for long-distance services. Television networks no longer had to rely on AT&T cables to

[1]Monika Schnitzer & Martin Watzinger, *How The At&T Case Can Inform Big Tech Breakups*, PROMARKET (Feb. 20, 2023), https://www.promarket.org/2023/02/20/when-considering-breaking-up-big-tech-we-should-look-back-to-att/.
[2] Martin Watzinger and Schnitzer, Monika, "The Breakup of the Bell System and Its Impact on US Innovation," *CRC TRR 190*, Rationality and Competition Discussion Paper Series, October 10, 2022.

distribute programming to local networks, and instead used cheaper satellite technology offered by companies like RCA and Western Union. Such technology had been available since the 1970s, though the networks had remained with AT&T due to contractual obligations.[3]

Following the settlement, patents filed for the telecom sector increased by 19%, and active companies registered under the "telephone and telegraph apparatus" sector increased by 56%[4] from 1982 to 1987. *United States v. AT&T* served as a landmark case, surpassing nearly 60 years of FCC efforts to regulate AT&T, as evidenced by these innovation booms. By dissolving the monopoly power of AT&T, the government set loose a wave of experimentation and discovery in a burgeoning new sector. The ability to play with these systems also laid the groundwork for a new generation of inventors to gain inspiration and build off previous advancements. Famously, Apple Inc. founders Steve Jobs and Steve Wozniak's first device was a "blue box", a device that manipulated the system for routing calls through the phone lines. Jobs later said that if it was not for the blue boxes, "there wouldn't have been an Apple."[5]

The attorneys who first filed the AT&T suit in the 1970s were in many respects influenced by structuralist antitrust analysis, paying careful attention to who the players in a given sector were, their size, and how they interacted. However, the era of structuralist analysis was ending. A new school of antitrust analysis, pushed by Robert Bork and a new laissez-faire economic ideology called the Chicago School, had begun to take center stage. This new analysis was termed the "consumer welfare standard". This model of antitrust analysis held that the dogma for antitrust policy should be consumer prices and consumer prices alone, and that markets ought to be deferred to. The Chicago School held that markets are overwhelmingly self-correcting, and that government intervention, through regulations or breakups, is detrimental to the efficiency of these markets.[6] Factors such as the structure of the market itself and the market power of

[3] W. Brooke Tunstall, *Disconnecting Parties: Managing the Bell System Break-up : An Inside View* (McGraw-Hill, 1985).
[4] *Supra* note 2, pg. 9.
[5] Walter Isaacson, *Steve Jobs,* 29-30 (Simon & Schuster, 2011).
[6] Leah Samuel & Fiona Scott Morton, *What Economists Mean When They Say "Consumer Welfare Standard,"* PROMARKET (Feb. 16, 2022), https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-

dominant firms were considered to hold diminished importance. The consumer welfare standard was promoted by Bork and his allies in the Chicago School as providing an objective economic analysis judges could use to evaluate antitrust cases. However, the models and assumptions that Bork employed were outdated by the time his book was published in 1978. They ignored new advances in game theory and models of monopolistic competition, as well as new understandings of intellectual property, networks, and information technology in relation to antitrust.[7] Nevertheless, prevailing attitudes towards deregulation saw this idea find favor. The adoption of this standard by the courts greatly reduced the tenacity of governmental pursuit in antitrust actions. Now, regulators were to defer to market forces in the formative years of a novel industry that emerged from the AT&T breakup.

In the age of AI, we stand at the precipice of an entirely new technological breakthrough and a major threat of consolidation. In contrast to AT&T's competitors in the 1980s, upstart firms that enter the AI space do not intend to stay—rather, they seek to be bought out and leave the industry entirely. The innovation gains made by these smaller firms are not entering into the sector as independent products, but are instead absorbed into the portfolios of the established players. Further, tech giants aim to protect domestic control by keeping competition from foreign markets far away and keeping profits high. For this sector to stay at the bleeding edge, however, AI cannot remain shielded from competition—it must be exposed to it. The current state of the AI space, where a small cadre of firms fund and develop this technology, has led to creative stagnation, user disappointment, and technical underperformance.[8] This is a symptom of the consolidation of the tech industry protecting its profits and interests at the expense of consumers and innovation. To truly capture the potential of this burgeoning sector, the fruits of innovation cannot be constrained in the grip of oligopoly. As such, policymakers must consider structural remedies to

economists/.

[7] Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1849-1850 (2020).

[8] Will Knight, *OpenAI Scrambles to Update GPT-5 After Users Revolt*, WIRED, https://www.wired.com/story/openai-gpt-5-backlash-sam-altman/ (last visited Sep. 16, 2025).

permit innovation and allow for adequate competition in the AI sector.

I argue that for the burgeoning AI space to remain innovative and cutting-edge, it cannot be shielded from competition. Such conditions result from the anticompetitive effects of the tech industry moving from rewarding entrepreneurs to favoring buyouts. The rise of AI technology is a clear signal that structuralist antitrust analysis must not only return; it must be enforced.

II. OVERVIEW OF ANTITRUST LAW

"If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life." [5]

- Senator John Sherman[9]

By the end of the 19th century, corporate trusts had come to dominate much of the American business landscape. Invented by Standard Oil's general solicitor, Samuel C. T. Dodd,[10] the company used the common law tool of a trust to transfer ownership from several disparate corporate structures into one centrally managed core. Trusts are commonly used to manage property, and this tool allows a property owner (a "trustor") to designate property or rights to someone else (the "trustee").[11] Separately owned and managed firms across state lines were difficult to administer, with turf battles and non-uniform practices complicating management decisions and efficient administration. To solve this, the Standard Oil Trust was formed, having the individual firm owners transfer their stocks—and effective control—to the Trust. This allowed Standard to control the entirety of 14 companies and take majority control of another 26. The Trust was controlled by a board of nine trustees who held certificates that controlled the organization. John D. Rockefeller held certificates giving him 41% of the trust, while the second largest trustee held about 13%

[9] 51 Cong. Rec. 4100 (1890) (statement of Sen. Sherman).
[10] Barak Orbach & Grace E. Campbell Rebling, *The Antitrust Curse of Bigness*, SSRN SCHOLARLY PAPER (May 17, 2012), https://papers.ssrn.com/abstract=1856553.
[11] SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS (2011). Pgs. 1-25.

of the trust.[12]

The structure of the Standard Oil Trust became widely adopted by other large firms around the same time, and the term "trust" quickly became a shorthand for the largest companies holding major swaths of the economy. Aside from the Oil Trust, there was the Steel Trust (U.S. Steel), the Tobacco Trust (American Tobacco Company), and the Shipping Trust (International Mercantile Marine Co.), among others. Trusts especially became correlated with the corrupt and anticompetitive practices that these firms would engage in, and the public developed an increasingly negative view of them. The most famous example of corruption was the Union Pacific-Credit Mobilier scandal under the Grant Administration, where the Speaker of the House, the Treasury Secretary, and the Vice President were all on the payroll of the railroad, taking bribes for favorable rulings during the construction of the first transcontinental railroad. With little governmental oversight and enforcement, conditions for workers in consolidated industries suffered. These workers often went on strike, protesting wage cuts or poor working conditions, and were frequently met with force. In 1877, unrest broke out in Maryland, Pennsylvania, Illinois, and Missouri among workers in response to a wage cut, alongside small business owners tired of being pressured by the railroad companies. The response—a "rifle diet," as the head of the Pennsylvania Railroad called it—resulted in dozens being killed.[13] Movements representing populist interests sprang up across the country, such as the Grangers and the Greenbacks, and farmers formed cooperative organizations with small business owners to protect themselves and retain their independence against the trusts.[14]

This unrest culminated with the passage of the Sherman Antitrust Act of 1890, which prohibited "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations" under Section 1, and also made it illegal to

[12] *Id*.
[13] Eric Foner & John A. Garraty, *The Reader's Companion to American History* (HMH, 2014).
[14] Laura Phillips Sawyer, *American Fair Trade: Proprietary Capitalism, Corporatism, and the "New Competition," 1890–1940* (Cambridge Univ. Press, 2018).

monopolize trade or commerce among the states, under Section 2.[15] The law became a favorite of Progressive Era administrations that sought to curtail the power of dominant corporate trusts; most prominently, President Theodore Roosevelt would use it to take aim against the biggest corporate trust—Standard Oil.[16]

Standard Oil Co. of New Jersey v. United States (1911)[17] was a major application of the Sherman Act. The *Standard* decision was consequential for both the United States government and the Standard Oil Company, but in precisely opposite directions. A key dispute in previous Sherman Act cases that caused problems for the federal government was the issue of interstate commerce. Many corporate combinations had been created under state corporation laws, which were solely the dominion of the state government. Only when the business crossed state lines could the federal government intervene.[18] In the *Standard* decision, however, the Court caveated the outright prohibition of restraints of trade with the "rule of reason," holding that some actions (such as price fixing) were illegal per se, but companies like Standard could not be deemed illegal for their size alone.[19] Rather, the government had to show that the purpose of the combination was to restrain trade. If that could be proven, then the federal government would be allowed to act without overstepping into state authority, since states cannot charter corporations in violation of federal law.[20] Although the rule of reason helped circumvent this issue of jurisdiction, the decision handed the judicial branch the power to decide what restraints of trade were "reasonable" and "unreasonable." Judges would now organize antitrust law, setting the standards the government must prove to win antimonopoly verdicts.

The dissolution of Standard was not just beneficial in removing the amalgamated trust from its

[15] John Sherman, "Sherman Antitrust Act," Pub. L. No. 51–647, 15 USC 2 (1890).
[16] *LAW DEFYING RICH ATTACKED BY ROOSEVELT*, THE EVENING WORLD, Jan. 31, 1908, at 1.
[17] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)
[18] U.S. Const. art. 1, § 8, cl. 3.
[19] *Supra,* note *15* at pg. 229 US 96
[20] Naomi R. Lamoreaux, *The Problem of Bigness: From Standard Oil to Google*, 33 THE JOURNAL OF ECONOMIC PERSPECTIVES 98-99 (2019).

national dominance, but also removed a major roadblock to the development of alternative energy schemes. Standard's primary focus was kerosene, and because of the outsized power of Standard, it became the primary energy product powering America. While gasoline was on the rise, Standard stubbornly clung to the kerosene monopoly. Rockefeller's stubbornness prevented any of the Standard firms from exploring new technology, even when it was clear that kerosene was on the way out. It was only after the dissolution in 1911 that, free from Rockefeller's control, the successor firms were able to expand into the more efficient gasoline.[21]

The breakup of Standard also led to the dominance of the "seven sisters," the small cadre of firms that dominated the international oil industry into the 1970s. These firms, while still greatly concentrated and oligopolistic in nature, spurred innovation in the early years of the breakup as they sought to gain dominance in their regional markets and keep out possible competitors.

The concern of the growing power of trusts motivated the earliest antitrust laws and has been an essential element of their legislative intent ever since. Senator Sherman's repudiation of the kings of production shows the surest examples of this at the time of the first antitrust act's passage. The act left the heavy lifting of enforcement to the executive and judiciary, with the statute merely marking Congress's goals: monopolies and their restrictive conduct ought to be illegal. While these goals were supported, Congress did not legislate the means to achieve these goals. As a result, the new judicial involvement invited disagreement over the manner of enforcing these laws. Such debate became increasingly prominent as Justices on the Supreme Court took up against the power of big business, such as Justices John Marshall Harlan I and William O. Douglas, while others took up against overbearing regulation and market intervention, such as Justices Oliver Wendell Holmes and Antonin Scalia.[22]

As the courts interpreted the antitrust laws, Congress updated them to reflect current attitudes.

[21] Peter F. Drucker, *Beyond the Bell Breakup*, PUB. INTEREST (Fall 1984).
[22] Eleanor Fox, "Against Goals," *Fordham Law Review* 81, no. 5 (April 1, 2013): 2157.

Conservative judicial interpretations of the law led to the Clayton Act of 1914. The Clayton Act became a major part of the antitrust legal canon alongside the Sherman Act and the Federal Trade Commission Act of 1914. It closed perceived loopholes in the Sherman Act, restricted mergers that substantially diminished competition,[23] and prohibited individuals from serving as a director of two or more competing corporations.[24] The Act was amended in 1934 by the Robinson-Patman Act, which prohibited price discrimination. Later anxieties that massive concentration would play into the hands of another Hitler resulted in the Celler-Kefauver Amendment of 1950, which strengthened merger laws by closing loopholes in acquisitions and gave the government the ability to limit vertical and conglomerate mergers,[25] a key element in structural antitrust enforcement. The Court faithfully applied the congressional intent of the laws through the 1960s.

In the 1970s, as globalization set in and foreign competition surged, new Justices to the Court reflected the pro-business attitudes of the time in trusting that the markets knew best, and the law ought to leave it untouched. This line of thinking was formalized into antitrust law through Ronald Reagan's administration, which included prominent Chicago School thinkers like Milton Friedman and George Schultz. Reagan chose Stanford law professor William Baxter to lead the Department of Justice's Antitrust Division, and Baxter's merger guidelines marked a sea change for antitrust enforcement—the government would no longer oppose mergers due to concerns of industry size. Rather, it would focus only on clear economic analysis relating to consumer welfare.[26]This was a major shift from the previous understanding of antitrust policy–rather than ensuring no one firm becomes too dominant, regulators now looked unfavorably on most intervention. The Chicago School's idea that unfettered markets know best had left the world of economic theory and made its way into official government policy.

[23] 15 U.S.C. § 18
[24] 15 U.S.C. § 19
[25] *Supra* note 20
[26] Michael M. Weinstein, *W. F. Baxter, 69, Ex-Antitrust Chief, Is Dead*, N.Y TIMES (Dec. 2, 1998), https://www.nytimes.com/1998/12/02/business/w-f-baxter-69-ex-antitrust-chief-is-dead.html.

The consumer welfare standard, influenced and championed by the Chicago School, has come to dominate antitrust analysis. First promulgated by Robert Bork, the analysis argues that antitrust policy should focus primarily on consumer effects—namely, prices. Bork held, for example, that if a merger did not harm allocative efficiency and raise the price of goods, these mergers were at best procompetitive, or at worst not anticompetitive.[27] This new school of antitrust thought was tied to the Chicago School economic doctrines, which held closely to the wisdom of the markets. In this view, extensive government intervention is detrimental to economic efficiency, and the government should defer to the market on best practices. In short, as long as conduct does not lead to higher prices, the government should step aside and trust the market to do what is best.

The adoption of the consumer welfare standard caused a shift away from traditional market structure analysis to focus on price effects. Cases such as *Continental Television, Inc. v. GTE Sylvania, Inc.* (1977) redefined decades of precedent, moving the once per se illegal vertical restraint (agreements between firms in the same production chain to restrict competition in some way) into the rule of reason category, allowing firms to justify the once wholly illegal practice. *State Oil v. Khan* (1997) similarly moved vertical maximum price fixing (firms in the same production chain agreeing not to sell a product above an agreed price) into the rule of reason category. This shift has been increasingly criticized as markets have become more consolidated under a smaller group of firms since the 1980s. As economic understanding of markets grew, the decisions issued by courts using the outdated standard became more and more distant from economic literature. One example from Herbert Hovenkamp of the University of Pennsylvania's Wharton School and Fiona Scott Morisson of the Yale School of Management includes the *Brooke Group Ltd. v. Williamson Tobacco Corp.* (1993) ruling that recoupment is not possible in oligopoly markets, despite game theory literature from 15 years earlier showing exactly the opposite.[28] With the emergence of new markets, it has been increasingly argued that the consumer welfare standard is

[27] *Congress Hears Challenges to the Consumer Welfare Standard*, JD SUPRA (March 15, 2019), https://www.jdsupra.com/legalnews/congress-hears-challenges-to-the-95586/.
[28] *Supra* note 7, pg 1851

completely equipped to detect anticompetitive harm caused by new industry giants, especially where markets have been reshaped by the internet and digital commerce.[29]

III. MARKET STRUCTURE AND INNOVATION

It is commonly intuited that competition, in most industries, increases innovation. The idea is simple: as firms compete in imperfect markets, they must create ways to make their specific product more attractive to the consumer. One effective way to do so is to simply create a better product or more efficient production technique relative to their competitors, attracting consumers and increasing revenues. These expected profits incentivize firms to innovate, and in the long run, these innovations benefit consumers.

However, economic literature has stopped short of saying that competition encourages innovation. Skepticism of the innovative impacts of competitive markets dates back to Joseph Schumpeter, a Harvard economist who argued that monopolists and larger firms may be more innovative than firms in competitive markets. In his argument, Schumpeter identifies two primary factors: monopolists have deeper pockets that allow for larger research and development (R&D) projects, and agency costs are far reduced when funds are acquired from within the organization rather than from outside sources. Firms with an entrenched position are also less likely to be worried about their innovations being copied by competitors, since those competitors likely would not have the reputation or base to market such a product.[30]

Counterarguments were presented by influential economist Kenneth Arrow, who argued that competitive markets are better for innovation for the simple reason that a monopolist would have less to gain.[31] Since the monopolist has captured most (if not all) of a given market, they may find that such

[29] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 710-805 (2017).
[30] Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, 2013), https://doi.org/10.4324/9780203202050.
[31] K.J. ARROW, *Economic Welfare and the Allocation of Resources for Invention, in* READINGS IN INDUSTRIAL ECONOMICS: VOLUME TWO: PRIVATE ENTERPRISE AND STATE INTERVENTION 219, 219-36 (Charles K. Rowley ed., Macmillan Educ.1972), HTTPS://DOI.ORG/10.1007/978-1-349-15486-9_13.

innovations add little additional business. As a result, monopolists typically conclude that R&D projects are not worth the often-high costs. Firms facing competition, on the other hand, stand to gain far more from such innovations since they would expect to take away more business from rival firms and increase their individual firms' profits.[32] This idea is termed the "Arrow effect," or replacement effect.

The economic debate between these two viewpoints has continued to develop over time. Jonathan Baker, a law professor who served as the Director of Economics at the FTC from 1995- 1998 and Chief Economist at the FCC from 2009-2011, distilled this debate into four general principles as it relates to antitrust:[33]

1. Competition in innovation itself encourages innovation; that is, firms that are competing to innovate the same technology will try harder to innovate against each other. This is evident in patent races.

2. Competition among rivals to produce an existing product will lead to lower costs, improve quality, and develop better products.

3. Firms that expect to face more competition after innovating have less incentive to invest in R&D.

4. A firm will have extra incentive to innovate if doing so discourages potential rivals from doing the same (pre-emption incentive).

These principles illustrate the interplay of market structure and innovation. Points one and two highlight the traditional doctrine regarding the relationship of competitive markets and innovation—they speak to the position that competitive firms seeking to gain an edge on each other will compete to win a stronger market position. Points three and four, conversely, highlight that entrenched firms may or may not

[32] *Id*.
[33] Jonathan B. Baker, *Beyond Schumpeter vs. Arrows: Antitrust Fosters Innovation*, 74 ANTITRUST L. J. 575–602, (2007).

welcome innovation in their industries, depending on whether such innovations will invite new competitors. Baker's points show that the natural state of the market is not necessarily trending towards increased innovation. Rather, absent outside influences, entrenched firms have very little incentive to invest in new research and development to enhance products and services. As such, there needs to be more structural incentives to force firms to be constantly innovative; firms must feel pressure that not being on the cutting edge could cost them market share or profits. Baker's review of empirical studies concerning the link between competition and innovation finds that competition does not just "lead firms to produce more and charge less; it encourages them to innovate as well… [c]ompetition is not a piece of the puzzle; it is the spark that leads a [firm] to open the puzzle box and make the effort to solve it."[34] To ensure that innovation thrives, it is essential to effectively remedy anticompetitive conduct that undermines the competitive pressures needed to drive progress.

Merely identifying anticompetitive behavior is not enough. Finding the right remedy for that behavior is a critical part of antitrust analysis and policy. Regulators must take care to ensure that remedies go far enough to ensure that anticompetitive conduct does not re-emerge, but also not too far as to place undue restrictions on future industry development. The goal of antitrust authorities is to foster a competitive market, and going too far may inhibit future competition. Meanwhile, being too light may cause the harm to reappear. Breakups have become an increasingly rare method of repairing antitrust harm, making headlines when the possibility of doing so was raised by the DOJ in a recent case against Google.[35] The question of whether breakups have downstream procompetitive effects is debated, but in general, they do seem to spur innovation. Empirical analysis of the Standard Oil dissolution shows that the breakup stimulated innovation in oil refining over decades, particularly in the short term, as the immediate demand for oil prompted firms to take action and meet demand.[36] While the Standard Oil case is older, much of the

[34] *Id*. at 587–88.
[35] David McCabe, *U.S. Asks Judge to Break Up Google*, N.Y TIMES (Apr. 21, 2025), https://www.nytimes.com/2025/04/21/technology/google-search-remedies-hearing.html.
[36] Leon Taylor, *Do Court-Ordered Breakups Spur Innovation?*,LAW & ECON. (May 16, 2001), https://ideas.repec.org//p/wpa/wuwple/0105001.html.

economics of scale and market structure holds for modern markets.

Breakups are an effective method of returning structural competition. Cases like the breakup of IG Farben, a German chemical conglomerate during the Nazi era, show this. The firm was one of the most innovative companies in Germany, responsible for almost 6% of all patents from German inventors, and 16.7% in chemistry. Three of its scientists won Nobel prizes. Despite its accolades, its role in the crimes of the Nazi regime resulted in scrutiny from the Allied powers, who ordered the breakup of IG Farben in 1952. Farben was split into three large successors alongside several smaller businesses.[37] Studies into the results of the breakup found that innovation, as measured by patent filings, increased post-breakup, and created substantial competition leading to price decreases.[38] Similarly, even in the more technology-centric case of AT&T, releasing the market from the hold of one major monopolist led to similar increases in market entrants, patents, and price decreases. AT&T's monopoly had similar accolades to IG Farben: Bell Labs was commonly seen as the gold standard for engineering innovation, winning 11 Nobel Prizes, five Turing Awards for contributions to computer science, and 22 IEEE Medals of Honor over its lifetime.[39] AT&T went to great lengths to ensure that Bell Labs would remain as part of "Ma Bell" during divestiture, and it was felt that AT&T would pose a formidable challenge to computing giant IBM due to Bell Labs' innovative advantage. This proved not to be the case. Without the guaranteed customers that AT&T's monopoly structure provided, AT&T's computer technology venture was far from profitable, finally being spun off in 1995, just as the government had initially requested in its original antitrust suit.[40] AT&T, despite its amassed market power, was unable to compete in a truly competitive and organic market. The breakup exposed the unprofitable nature of AT&T's business in a truly competitive setting, and allowed for

[37] Felix Poege, *Competition and Innovation: The Breakup of IG Farben*, Boston Univ. Sch 22, 24 (Aug. 1, 2022), https://scholarship.law.bu.edu/faculty_scholarship/3230.
[38] *Ibid*.
[39] Bell Labs, "Awards & Recognition - Bell Labs," March 8, 2016, https://web.archive.org/web/20160308115624/https://www.bell-labs.com/our-people/recognition/.
[40] Andrew Pollack, "AT&T Move Is a Reversal Of Course Set in 1980's," Business, *The New York Times*, September 22, 1995, https://www.nytimes.com/1995/09/22/business/at-t-move-is-a-reversal-of-course-set-in-1980-s.html.

other smaller firms such as Dell or Compaq to compete against the giant—and win.

IV. APPLICATION TO THE TECH SECTOR

While the modern tech sector is a relatively new industry, it has brought many major developments and innovations in a short period of time. These innovations have pushed early innovators to become giants, generating massive profits and securing footholds in various other sectors. These new firms, however, differ in their approach to R&D compared to their predecessors from the '70s and '80s. Where older firms such as AT&T and IBM focused much of their research in-house, new-age Big Tech firms like Apple and Google have created a vast pool of startups to incubate new ideas, then acquire the ones they believe to be successful or promising, effectively outsourcing their research.

As previously discussed, competitive markets are often associated with increased innovation; however, it remains an open question whether this dynamic holds true within the technological sector. Many major breakthroughs in recent years have come from the big players or smaller firms with significant financial support from Big Tech. Is Big Tech an aberration from the trend?

Evidence suggests not. Many early movers were smaller firms that may have spun off talent from the larger players, such as former engineers leaving to form startups on their own. For example, AMD was founded by engineers from Fairchild Semiconductor, Adobe by ex-Xerox employees, and Qualcomm by employees formerly at Linkabit, a now-defunct networking company. The innovations that have rocked the tech industry in recent years, however, have largely come from smaller upstart firms. Startups are a major incubator for the technology that the dominant firms are interested in and have become a huge focus for individuals looking to get their foot in the door. Instead of developing their own R&D, big tech firms have shifted towards acquisitions, looking at smaller firms as test cases for new technology, and buying them out to gain their competitive edge. Research by Florian Ederer of Yale and Bruno Pellegrino of the University

of Maryland[41] supports this shift: initial public offerings (IPOs) have declined in favor of acquisitions because large firms gain the benefits of innovation without the threat of direct competition. Apple's acquisition of Siri[42]—a startup previously offered as a standalone iPhone app—exemplifies this model, where larger firms absorb innovative products before they become rivals. Now, innovators prioritize short-term exit strategies over long-term competition, allowing for entrenched firms to maintain their dominance without the high cost of R&D and market disruption risks.

The notion of "killer acquisitions," where firms buy out up-and-coming rivals only to then shut them down to preempt competition, has become an increasing fear. Colleen Cunningham, Ederer, and Song Ma found this trend in the pharmaceutical industry, where a conservative estimate shows that approximately 6% of all industry acquisitions are killer acquisitions.[43] However, tech does not seem to move in that direction. Rather than buying to shut down competitors, tech firms buy to keep those products under their brand name or product offerings, gain footholds in new markets, and ensure that smaller firms do not preempt them from entering new spaces. This model of conduct is precisely at issue in the case of *FTC v. Meta Platforms* (2020). The FTC argued that Meta's acquisitions of Instagram and WhatsApp were done with the intention of pre-empting competitors in the market of personal social networks (PSN). Emails between Meta executives show paranoia that the then independent Instagram might overtake Facebook, and that WhatsApp—which never formally entered the PSN market—also posed a threat should it decide to.[44] The FTC alleges that the acquisitions were anticompetitive and is asking that WhatsApp and Instagram be divested from Meta.[45] The implications of Meta's conduct are clear: rather than improve their

[41]Florian Ederer & Bruno Pellegrino, *The Great Start-up Sellout and the Rise of Oligopoly*, 113 AM. ECON. ASS'N PAPERS & PROC. (forthcoming May 2023), HTTPS://SSRN.COM/ABSTRACT=4322834.

[42] Steve Denning, "How To Create An Innovative Culture: The Extraordinary Case Of SRI," Forbes, accessed August 23, 2025, https://www.forbes.com/sites/stevedenning/2015/11/30/how-to-create-an-innovative-culture-the-extraordinary-case-of-sri/.

[43] Colleen Cunningham, *et al*., *Killer Acquisitions*, 129 J. POL. ECON. 649, 649–702 (March 2021), https://doi.org/10.1086/712506.

[44] Brendan Benedict, *Lean In:Witness Work and the Will to Monopoly Power* (April 17, 2025), https://www.bigtechontrial.com/p/lean-in-witness-work-and-the-will.

[45] FTC v. Meta Platforms, NO. 1:20-CV-03590 (D.D.C. amended complaint filed Aug. 19, 2021).

own products and services, Meta purchased popular competitors that stood to overtake it. Consumers now have fewer choices, fewer competitors, and fewer new offerings in this market segment, giving Meta an outstanding ability to load the feeds of its users with less content and more advertisements. Since customers have nowhere else to go, they have no choice but to use the platform on Meta's terms.

Trends of massive consolidations in the tech industry show no signs of stopping. The dominance of today's tech giants—Google, Amazon, Meta, and Apple, to name a few—has created a market where true competition is stifled. These companies control vast swaths of digital infrastructure, from search engines and social networks to e-commerce and mobile operating systems. Their entrenched positions allow them to operate without the pressure to innovate aggressively, as they face no meaningful rivals. Instead of competing on merit, they exploit their monopoly power to maintain control—whether by acquiring potential competitors, suppressing disruptive startups, or leveraging their platforms to disadvantage rivals.

History proves that monopolies resist and obstruct competition unless forced to change or are moved out of the way. When AT&T was broken up in 1982, the telecommunications industry exploded with innovation—new companies emerged, prices dropped, and technologies like fiber optics and mobile networks advanced rapidly. Similarly, the dissolution of Standard Oil in 1911 led to increased competition in energy markets, with smaller firms driving advancements in gasoline refining and distribution. In both cases, the breakup of a monopolistic giant unlocked a wave of entrepreneurial energy that benefited consumers and the economy. Today's tech monopolies are no different: their dominance is actively suppressing competition, and only structural interventions can restore a level playing field. The consumer welfare standard has major oversights that allow for the incumbent firms' dominance. Former FTC chair Lina Khan established the deficiencies of the consumer welfare standard in her 2017 Yale Law Journal article "Amazon's Antitrust Paradox."[46]

Using the Chicago School's interpretations of vertical mergers and predatory pricing analyses,

[46] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J.710, 710-805 (2016).

Khan argues that firms like Amazon have engaged in conduct that should be deemed anticompetitive, but the consumer welfare standard does not detect, much less stop, these harms. For example, the consumer welfare standard holds that vertical integration usually has procompetitive effects, and at worst is merely benign. However, Khan points out that Amazon was able to use its dominance in retail to force logistics companies like UPS and FedEx to offer Amazon lower rates for shipments, up to 70% below regular prices.[47] In turn, FedEx and UPS would have to charge higher rates to other customers to make up the loss. Finally, Amazon entered the logistics sector with its Fulfilled by Amazon service and was well-positioned to capture the market of sellers by undercutting FedEx and UPS's higher prices. Amazon's entry into a downstream market—operating first as a dominant retailer and then expanding into a logistics service—positioned them to weaken and capture existing players and expand Amazon's market share in both areas. With so much more control over both the retail and logistics market, Amazon is free to show preference to products using their preferred services and punish those that use alternative methods, to the detriment of possibly better products from sellers that refuse to play by Amazon's rules.

Antitrust actions in the past have had beneficial effects in promoting competition in high-tech markets, and should therefore be applied in the technological sector we see today. The case against IBM, a behemoth in early computing, is one such example. *US v. IBM* (1969) alleged that IBM had monopolized the general-purpose electronic digital computer market, violating Section 2 of the Sherman Act. Over the next decade and a half, IBM and the government fought vigorously as the claims were litigated. In the end, the case was simply dropped by Assistant Attorney General Baxter, stating that it was "without merit"[48]. The *IBM* case has been criticized by those of the Chicago School as being a waste of resources—Robert Bork famously called it "the Antitrust Division's Vietnam"[49]—as the Division spent 15 years litigating a case where even the best outcome would have been inconsequential. It is further speculated that AAG

[47] *Id*. at 775.
[48] In re International Business Machines Corp., NO. 94-3071 (2d Cir. Jan. 17, 1995), https://caselaw.findlaw.com/court/us-2nd-circuit/1354248.html.
[49] John E. Lopatka, *United States V. Ibm: A Monument to Arrogance*, 68 ANTITRUST LAW JOURNAL 145 (2000).

Baxter, who himself supported the consumer welfare standard, did not want to win the case at all[50]. IBM's falling status as a titan, superseded by new upstarts such as Microsoft, Compaq, Dell, Intel, and others, has led proponents of the consumer welfare standard to hold that a lasting monopoly is simply unachievable in the rough-and-tumble world of technology.

However, as Columbia professor and antitrust scholar Tim Wu points out, IBM was not subject only to market forces—the company was facing legal challenges aimed squarely at its market dominance. Wu refers to the "policeman at the elbow" effect: even though the case left no final verdict and the Division handled the case in a disorganized manner, it ultimately served as a deterrent against anticompetitive conduct by IBM.[51] One specific impact addressed a harm originally alleged by the DOJ: IBM illegally bundled software offerings with its hardware. Due to concerns that defending the bundling in court would be impossible,[52] IBM ceased the practice, leading to the birth of the independent software industry.

There is little reason to believe that our present situation is any different. Recent breakthroughs in generative artificial intelligence have attracted a surge of investment from many of the traditional tech giants. Overnight, nearly all the major tech firms released models and services to get their feet in the door and build the first long-term, marketable model to gain a valuable first-mover advantage. To protect their advantage, firms in the US have sought to ban the export of essential hardware to foreign competitors,[53] repeal regulations that seek to control the expansion of the AI sector,[54] and curry government favor to avoid regulatory scrutiny.[55] Despite these advantages, large firms were blindsided when unknown, upstart firms

[50] Jeff Barge, *Judge's Rulings, Words Lead to Recusal: Appeals Court's Order Puts to Rest Decades-Long Feud between Jurist and IBM*, 81 ABA J. 32, 32-33 (1995).
[51] Tim Wu, "Tech Dominance and the Policeman at the Elbow," *After the Digital Tornado: Networks, Algorithms, Humanity, Kevin Werbach (Ed.), Cambridge University Press*, January 1, 2020, https://doi.org/10.1017/9781108610018.
[52] *Id*. at 89.
[53] Tae Kim, *Jensen Huang Says 'Deeply Painful' China Ban on Nvidia's H20 Chips Will Cut Sales by $15 Billion*, BARRON'S (May 19, 2025), https://www.barrons.com/articles/nvidia-stock-china-ai-d2cb34ee.
[54] Chris Fitzpatrick & Jill Ottenberg, *AI & Antitrust in the Second Trump Term*, HOGAN LOVELLS (Feb. 20, 2025), https://www.hoganlovells.com/en/publications/ai-antitrust-in-the-second-trump-term.
[55] Cecilia Kang, *Tech C.E.O.s Spent Millions Courting Trump. It Has Yet to Pay Off*., N.Y TIMES (April 8, 2025), https://www.nytimes.com/2025/04/08/technology/tech-ceos-lobbying-trump.html.

in China nearly matched the performance of even the most advanced AI models in the US at the time. The release of Deepseek, an open-source, fully free, and locally executable AI model, sent shockwaves through the insulated US AI development industry, showing that closing off US firms to innovation is not an effective strategy to keep the domestic industry on the bleeding edge.

The current state of the AI industry is a result of decades of dominance by the consumer welfare standard. The firms that are rewarded are those that keep prices low, regardless of the health of the market at large. A small cadre of firms now controls the entire space, and the wellspring of new entrepreneurs seeking to play with and push the limits of the technology must play within the boundaries that the big firms set. Firms are not interested in long-term staying power—rather, they are looking for technologies to buy out and add to their portfolios. Since new entrepreneurs are typically motivated by profit or financial gain, they tend to respond better to buyouts than to remaining in the field long term. This is especially true when the entrenchment of the already established players makes it far more difficult to compete with large firms, factoring in the high capital costs of computers, servers, and datasets. It is no surprise, then, that the dominant AI firms are those that are either owned outright or significantly invested in by established Big Tech giants. Smaller firms that once drove major innovations now simply surrender themselves to the established players' portfolios, leaving innovations and efficiencies that once would have been seen by the public and competitors into the hands of a handful of billion-dollar (or in some cases, trillion-dollar) companies.

Comfortably insulated from threats from below, US firms are resting on their laurels. As former FTC Chair Khan wrote in the New York Times, Big Tech executives have spent the last decade currying political favor rather than innovating new technologies.[56] Firms know that they do not face significant challenges from upstarts. They have transformed the open market, once a promising venture for young entrepreneurs to challenge conventional giants, into little more than a testing ground for technologies that

[56] Lina M. Khan, *Opinion | Stop Worshiping the American Tech Giants*, N.Y TIMES (Feb. 4, 2025), https://www.nytimes.com/2025/02/04/opinion/deepseek-ai-big-tech.html.

can be bought out, neutralized, and integrated. The consumer welfare standard ignores the impact of this practice on market health, prioritizing only price effects. As long as consumer prices remain low antitrust regulators are not expected to intervene.

As the Deepseek episode illustrates, this is a dangerous approach. The dot-com boom of the late 90s and the technological innovations of the 2000s were due to the risks taken by bold innovators freed from the grips of dominant firms. Consumer welfare proponents were quick to declare victory, but the hands-off approach of regulators led to the successful firms of the 2000s metastasizing into powerful oligopolies with influence that even Standard Oil would not have been able to imagine. Antitrust regulators have begun to meet the moment, challenging firms like Google[57] and Apple[58] in court, but these cases will take years to play out fully.

Shielding domestic firms from foreign innovation is not only detrimental to consumers but also harms national security. For those who justify export restrictions with the fear that countries hostile to the US may create more powerful models, the Deepseek episode was not confidence-inspiring. Those same export restrictions had a predictable effect—rather than hamper the ability of Chinese firms to innovate, those firms simply became more efficient, working intelligently with what they had. This phenomenon is extremely common in sectors where the domestic industry was shielded from foreign innovation through some sort of artificial bottleneck. When Harley-Davidson successfully convinced the US government to impose tariffs on motorcycles above 700ccs in the 1980s, the result was that foreign motorcycle manufacturers simply reworked their bikes to make them more efficient and squeaked under the 700cc limit, avoiding the tariff altogether.[59] A similar effect was seen in the setbacks the "Big Three" automakers faced in the 1970s when faced with more fuel-efficient Japanese vehicles entering the market. It is argued

[57] *Judge Rules Google Broke Antitrust Laws to Maintain Search Monopoly*, PBS News (Aug. 5, 2024), https://www.pbs.org/newshour/show/judge-rules-google-broke-antitrust-laws-to-maintain-search-monopoly.
[58] Press Release, U.S. Dep't of Just., *Justice Department Sues Apple for Monopolizing Smartphone Markets* (Mar. 20, 2024), https://www.justice.gov/archives/opa/pr/justice-department-sues-apple-monopolizing-smartphone-markets.
[59] Rich Duprey, "33 Years Ago, Tariffs Saved Harley-Davidson Inc. -- or Did They?," The Motley Fool, April 5, 2016, https://www.fool.com/investing/general/2016/04/05/33-years-ago-today-tariffs-saved-harley-davidson.aspx.

that had the US automakers not gotten complacent with their market strength and stopped investing in innovation, they may not have been as vulnerable to disruption.[60] Defense sectors, which have seen rising involvement from AI companies, have long been keenly aware of the risks of consolidation. The relatively small number of defense firms in the US has led to worry that firms are less able to respond to new technological innovations in commercial fields, and the Department of Defense has sought to diversify the defense industrial base to compensate.[61] Shielding AI firms from competition could easily result in such concerns for firms like Palantir that seek to gain footholds in the defense industry, where the consequences of a competitor with superior technology could pose far more dire risks.

The FTC and DOJ do not need to centrally plan the economy. Regulators do not need to impose specific restrictions on firms or prescribe the pace of progress. Divestment allows parts of firms to be spun off and to compete as individual entities in an open and public environment. The job of regulators is to make sure that the market remains fair and that firms with good ideas and hard workers are rewarded, rather than those with political influence and endless capital. To restore competition, regulators must pursue structural remedies, including breaking up vertically integrated monopolies and enforcing strict antitrust measures, instead of deferring to the market tendency to monopoly. Without intervention, Big Tech's own AI firms will continue to dominate through sheer market power rather than merit. Technologies like AI, which rely on constant research and investment, risk stagnating and being blindsided by foreign firms that are not afraid to take risks. The lesson from AT&T, IBM, and Standard Oil is clear: when monopolies are dismantled, competition flourishes, prices fall, and innovation accelerates.

V. CONCLUSION

The history of antitrust enforcement in the United States reveals the tension between market

[60] Jack Corrigan, *Promoting AI Innovation Through Competition*, CSET (May 2025), https://cset.georgetown.edu/publication/promoting-ai-innovation-through-competition/.
[61] Mark Thompson, *The Incredibly Shrinking Defense Industry*, Project on Government Oversight (Aug. 1, 2019), https://www.pogo.org/analysis/the-incredibly-shrinking-defense-industry.

concentration and innovation. Landmark cases like *Standard Oil Company of New Jersey v. United States* (1911) and *United States v. AT&T* (1982) demonstrates how breaking up monopolies can unleash competition and spur technological advancements, as seen in the explosion of innovation following AT&T's dissolution. However, the shift to the consumer welfare standard, championed by the Chicago School, has narrowed antitrust focus to price effects, often overlooking structural harms in emerging industries like technology. Today, dominant tech firms employ acquisition strategies to stifle competition, raising concerns about stifled innovation and entrenched oligopolies. As the AI sector emerges, we must return to structuralist antitrust principles to prevent monopolistic control and foster a dynamic, competitive landscape. The massive consolidation of corporate power has consequences, not just in the political landscape, but in the products and services that consumers are offered. Without innovators willing to take risks, firms competing fiercely, and a market structure that rewards disruption and punishes stagnation, we are doomed to a sea of ever-degrading services and ever-increasing prices. The AI sector, with the right oversight, can buck this trend and become the revolutionary technology it promises to be. Breaking up the old guard provides the lubricant needed to restart this industry and bring it to new heights.

FROM GUIDELINES TO BATTLEGROUNDS: THE FUTURE OF CHECKS AND BALANCES

Dean Evans

Abstract

In recent decades, the United States has witnessed an expansion of executive power, driven by normalization of overreach, partisan loyalty, and legal ambiguity. The Founders explicitly warned against such concentrations of power and created a system of checks and balances to prevent it. While amendments were designed to reform the system as a whole, their high voting barriers make them rare. The separation of powers defines roles, but offers little protection against a branch exceeding its limits. This leaves checks and balances as the defense against government overreach and Constitutional violations.

The recent Supreme Court ruling in Trump v. United States fundamentally redefined presidential accountability by granting criminal immunity for official acts. This ruling shifted the balance of power, further weakening Congressional oversight—already diminished by party-line politics—and placing greater weight on the judiciary. When the courts fail to hold the executive branch accountable, citizens are only left with the court of public opinion. The erosion of constitutional safeguards and the unchecked use of executive authority risk long-term damage to democratic governance. The consequences of this shift, if left uncurbed, may demolish the already crumbling foundations of government accountability.

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I. INTRODUCTION

The drafting of the United States Constitution started in the summer of 1787 following the concerns with the Articles of Confederation. This Constitutional convention was a series of secret sessions held by delegates of the states, and was the defining debates, ideas, and plans that shape modern-day America. From the Virginia and New Jersey plans to the Federalist and Anti-Federalist papers, the founders weighed and argued concepts that would be selected for the new constitution.[1] Ratified over two centuries ago, the delegates of the Constitutional Convention were not able to predict the issues that would face modern day America.[2] Instead, they created a list of protections granted by the government, outlined a separation of powers in each branch, and established a system of self-government in the framework of authority.[3] Each of these are critical to the American government, yet one is the only pillar to proactively protect the public.

The Bill of Rights (BoR), the first ten amendments of the Constitution, was created as a compromise among the Federalists and Anti-Federalists.[4] Ratified in 1791, it outlined personal freedoms granted to United States citizens, a means of addressing Anti-Federalist desires for limits on governmental power. The BoR does not provide any avenue to provide protections for these listed rights; it is up to checks and balances to prevent the government from overstepping and violating the Constitution. The separation of powers is laid out in the Constitution, within Articles I, II, and III designating powers to each branch of government.[5] This effectively distributes the ruling power between each of the branches, yet it does not establish any ability to control or limit the others. Checks and balances are the essential safeguards embedded within the Constitution, more than the enumeration of rights or the formal separation of powers, because they offer a means of internal enforcement when other protections are threatened. Structural design alone cannot restrain

[1] Constitution of the United States—A History, National Archives (Nov. 4, 2015), https://www.archives.gov/founding-docs/more-perfect-union.
[2]U.S. Senate: Constitution Day, https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution-day.htm.
[3] History, Checks and Balances | Definition, History, & Facts, Britannica (July 20, 1998), https://www.britannica.com/topic/checks-and-balances.
[4] Bill of Rights (1791), Civil Rights and Civil Liberties https://billofrightsinstitute.org/primary-sources/bill-of-rights.
[5] U.S. Const. art. I–III.

overreach, and rights on paper provide little defense mechanisms without the ability to assert them. This is especially true today as executive authority continues to expand in scope and speed, often outpacing congressional or electoral checks.[6] While the Bill of Rights and institutional divisions remain foundational, they depend on a system of mutual oversight to preserve a constitutional balance. The Framers recognized that the Judiciary is the weakest branch and similarly noted that the Executive was the most prone to power concentration. To aid in the strength and legitimacy of the Judiciary, the Framers implemented judicial independence which helps further protect the structure of government.

Part I of this article provides further background and theory behind the system of checks and balances. It analyzes the philosophical foundations outlined in the Federalist Papers, the structural provisions embedded in the Constitution, and how they were designed to prevent the concentration of authority in any one branch, especially the executive.

Part II highlights the current and recent threats to checks and balances. It examines pivotal Supreme Court decisions, executive orders, and congressional inaction that have accumulated power in the executive.

Part III analyzes the future risks and potential attacks to this system. It explores the consequences of continued executive centralization, weakened judicial independence, and legislative abdication. This section also addresses how historical precedents, congressional actions, and the Supreme Court's decisions impact checks and balances.

II. WHY CREATE CHECKS AND BALANCES?

Given its well-known amendments, and foundational role in the Constitution, the Bill of Rights may be interpreted as the most significant document in American history.[7] Former Supreme Court Justice Antonin Scalia, however, would argue that "...it is a mistake to think that the Bill of Rights is the defining, or even

[6] Exec. Orders of Donald J. Trump, Federal Register, https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2025 (last visited June 21, 2025).
[7] Bureau, US Census. 2022. "Bill of Rights Day (1791): December 15, 2022." Census.gov. December 15, 2022. https://www.census.gov/newsroom/stories/bill-of-rights-day.html.

the most important, feature of American democracy."[8] Justice Scalia asserts that protection from an autocrat outweighs the "parchment guarantees" of some nations, as the ruler could ignore any of those constitutional guarantees. A similar Bill of Rights could be written in an autocratic nation or simply one without separation of powers, and the human rights and protections in that nation would "not [be] worth the paper they were printed on."[9] He furthers the classification of a well created constitution by stating, "the real key to the distinctiveness of America is the structure of our government."[10] The structure created by the Framers consisted primarily of rights laid out to protect the citizens, a separation of powers, and checks and balances between the branches.[11]

While the concepts of separation of powers and checks and balances are familiar to many and often used interchangeably, the concepts bear crucial differences. In Daniel Epps' Vanderbilt law review article, *Checks and Balances in Criminal Law*, he explains: "The idea of separation of powers … stresses the necessity of each branch of government performing only its specified government functions. Checks and balances, by contrast, emphasizes the importance of permitting different government actors and institutions to check each other's exercise of power."[12] These ideas both play a critical role in the establishment of the United States Constitution, but the system of checks and balances is the only one with power granted to regulate other branches. The notion behind such regulation is well outlined in the Federalist Papers No. 47, 48, and 51, written by James Madison.[13] Federalist Paper No. 47 establishes the idea of separation of powers but argues that it alone is not strong enough to prevent the future concentration of power and tyranny.[14] Federalist Paper No. 51 argues for the necessity of these limits due to the "necessity of auxiliary precautions"

[8] Antonin Scalia, Foreword: The Importance of Structure in Constitutional Interpretation, 83 NOTRE DAME L. REV. 1417 (2008). (Further Scalia Notre Dame Foreword)
[9] *Id.* at 1418
[10] Antonin Scalia, Statement on American Exceptionalism, in *Considering the Role of Judges under the Constitution of the United States*, at 6 (Sen. Judiciary Comm., Oct. 5, 2011), available at https://www.govinfo.gov/content/pkg/CHRG-112shrg70991/html/CHRG-112shrg70991.htm?utm_source=chatgpt.com
[11] U.S. Const.
[12] Daniel Epps, Checks and Balances in the Criminal Law, 74 Vanderbilt Law Review 1 (2021)
[13] Library of Congress. 2019. "The Federalist Papers: Primary Documents in American History." Loc.gov. Library of Congress. 2019. https://guides.loc.gov/federalist-papers/full-text.
[14] The Federalist No. 47 (James Madison)

as the government must control itself with some additional internal structure, protecting the electorate from the government and one branch from another.[15] Madison continues to lay out his reasoning for checks and balances, as "framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[16]

In Federalist Paper No. 48, Madison observes that "[the] departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. BUT NO BARRIER WAS PROVIDED BETWEEN THESE SEVERAL POWERS[sic]…" during a comparison of varying constitutional models.[17] This highlights the importance of checks and balances and asserts that a "demarcation [of] … constitutional limits … is not a sufficient guard against … a tyrannical concentration of all powers."[18] Through the Federalist Papers, Madison continuously stresses that the fundamental flaw in the separation of powers is a lack of protection from any overreach.

In response to the federalist arguments for internal oversight, the Constitution established various checks and balances; including the Senate's confirmation power, the President's veto power, and the power of impeachment which were all established at the signing of the Constitution.[19] Yet the power of judicial review, a core mechanism of the checks and balances system, was not formally articulated until *Marbury v. Madison* (1803), and it remained largely dormant for decades. The Supreme Court did not use *Marbury* to strike down another act of Congress until *Dred Scott v. Sandford* in 1857, and it was not cited again to invalidate legislation until 1895.[20] For much of the nineteenth century, constitutional interventions by the judiciary were rare, and Congress and the president faced few formal checks from the courts. This changed dramatically in the twentieth century: between 1960 and 2019, the Supreme Court invalidated 483 federal

[15] The Federalist No. 51 (James Madison)
[16] *Id.*
[17] The Federalist No. 48 (James Madison)
[18] *Id.*
[19] U.S. Const. art. I–III.
[20] *ABA Journal*, "Cases & Controversies," *ABA Journal*, July 1, 2018. https://www.abajournal.com/magazine/article/cases_and_controversies

laws—an unprecedented volume compared to the relatively quiet century that preceded it.[21] More recently, lower federal courts have increasingly deployed procedural tools—especially nationwide injunctions—to block executive actions across broad policy areas; as in the first one hundred days of President Trump's second term, twenty five nationwide injunctions were ordered.[22] A 2024 *Harvard Law Review* study found that while only two nationwide injunctions were issued from 1963 to 1982, that number exploded to fifty nine during the Trump administration alone, with at least fourteen more under President Biden by 2023.[23] These trends indicate that judicial review has evolved from a seldom-used theoretical power into an active, institutional check, demonstrating that disputes involving constitutional overreach and interbranch conflict are not only more visible but also increasingly frequent in modern governance. In the recent decision of *Trump vs. CASA*, the use of "[u]niversal injunctions [are] likely [to] exceed the equitable authority that Congress has given to federal courts."[24] This decision will change how plaintiffs will be given relief and the scope of the parties, however, this ruling on nationwide injunctions will not be covered in this article.

Judicial independence is another pillar of constitutional structure that plays a critical role in the protections provided by the American Constitution. Without these protections, the structure and functionality of the United States judiciary would be insufficient to ensure branches stay within their bounds and the rights of Americans are protected. Alexander Hamilton, in Federalist No. 78, stressed that an independent judiciary is essential to preserving the rule of law and guarding against legislative or executive encroachments. Hamilton wrote that courts "have no influence over either the sword or the purse," and thus rely entirely on the firmness of their judgments to uphold the Constitution.[25] He further states that the "independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society," and further argues that permanent tenure and a separation from the legislative is imperative to be a 'feature of a good

[21] Unconstitutional Laws, Constitution Annotated, https://constitution.congress.gov/resources/unconstitutional-laws/ (last visited June 27, 2025).
[22] Lampe, Joanna R., *Nationwide Injunctions in the First Hundred Days of the Second Trump Administration*, Cong. Rsch. Serv., R48476 (May 1, 2024), https://www.congress.gov/crs-product/R48476
[23] Spencer E. Amdur, District Court Reform and the Future of Nationwide Injunctions, 137 Harv. L. Rev. 1857 (2024), https://harvardlawreview.org/print/vol-137/district-court-reform-nationwide-injunctions/.
[24] *Trump v. CASA*, Inc., 606 U.S. ___ (2025)
[25] The Federalist No. 78 (Alexander Hamilton)

government."[26]

Checks and balances protect the public from governmental overreach. This system was designed to allow each branch to limit the others, ensuring that power would not be concentrated in any single entity. These features reflect the Framers' belief that internal resistance, not mere public will, would be the most effective bulwark against tyranny. A prime example occurred during the Watergate scandal under President Richard Nixon. When Nixon asserted executive privilege to withhold subpoenaed White House tapes, the Supreme Court in *United States v. Nixon*, unanimously ruled that the President must comply with the subpoena, affirming that not even the President is above the law.[27] Simultaneously, Congress, through the House Judiciary Committee's passage of articles of impeachment, exercised its constitutional check, illustrating how legislative pressure, joined with judicial rulings, compelled Nixon's resignation, held the executive branch accountable, and preserved the balance of power.[28]

III. UNCHECKED POWER

In recent years, checks and balances have come under increasing pressure. The executive branch has begun to overstep its traditional boundaries, pushing the limits of constitutional executive authority.[29] Some recent court, executive, and congressional decisions display a concerning trend: the executive's actions are increasingly left unchecked or met with a tepid judicial response. Similar to the US, a trend of concentration to the executive branches has arisen in other countries.

A. Recent Executive Decisions

Over the past two decades, the modern presidency has increasingly relied on executive orders and unilateral directives to bypass legislative gridlock and expand the executive's influence.[30] This shift has

[26] *Id.*
[27] *United States v. Nixon*, 418 U.S. 683 (1974)
[28] Encyclopaedia Britannica, *Watergate Scandal* (2025), https://www.britannica.com/summary/Watergate-Scandal.
[29] "Constitutional Scholar on Whether Trump's Actions Are Executive Overreach." 2025. PBS News. February 14, 2025 https://www.pbs.org/newshour/show/constitutional-scholar-on-whether-trumps-actions-are-executive -overreach
[30] Executive Orders 101: What Are They and How Do Presidents Use Them?, Nat'l Const. Ctr. (last visited June 23, 2025), https://constitutioncenter.org/blog/executive-orders-101-what-are-they-and-how-do-presidents-use-them.

intensified in recent administrations, culminating in unprecedented use during Donald Trump's second presidency, signing one hundred and forty seven executive orders in the first one hundred days.[31] Executive orders, proclamations, and emergency declarations have served as tools for direct presidential action that often circumvent traditional checks and balances, raising critical questions about the scope of executive authority.[32]

In recent decades, but most dramatically during and after President Trump's first administration, the executive branch has steadily accumulated authority that was once evenly distributed among the three branches of government. This shift has not occurred through a singular constitutional amendment or legislative overhaul, but rather a steady build-up of executive actions, broad statutory interpretations, and political accommodation. Together, these changes have reshaped the modern presidency into an office with unprecedented unilateral control.

The centralization of power accelerated in the wake of the September 11, 2001 (9/11), attacks. In response to 9/11, Congress passed the PATRIOT Act, which vastly expanded surveillance powers and reduced judicial oversight, effectively granting the executive broad discretion to conduct domestic and international monitoring in the name of national security.[33] Additionally, the Authorization for Use of Military Force (AUMF)**,** passed just days after the attacks, gave the president wide latitude to engage in military operations without a formal declaration of war.[34] This authorization has since been used by multiple administrations to justify a range of military actions across the globe, often without direct congressional approval or ongoing oversight.[35]

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[31] The American Presidency Project. 2019. "Executive Orders." Ucsb.edu. 2019. https://www.presidency.ucsb.edu/ statistics/data/executive-orders. See also: Hughes, Susan A. Harvard Kennedy Sch., *Explainer: Executive Orders as a Governing Tool*, https://www.hks.harvard.edu/faculty-research/policy-topics/democracy-governance/ explainer-executive-orders-governing-tool

[32] Library of Congress, *Executive Orders: Order, Proclamation, or Memorandum?*, https://guides.loc.gov/ executive-orders/order-proclamation-memorandum (last visited July 1, 2025).

[33] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001).

[34] Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).

[35] Bradley, Curtis A. and Goldsmith, Jack L., Obama's AUMF Legacy (2016). American Jouurnal of International Law Articles. 10209. https://chicagounbound.uchicago.edu/journal_articles/10209

President Obama inherited and expanded upon many of these precedents. His administration's use of drone strikes to target people abroad, justified by classified legal memos rather than public judicial review, demonstrated how the powers granted after 9/11 could evolve into tools for opaque and unilateral decision-making. When legislative negotiations stalled, President Obama increasingly relied on executive orders and memoranda, such as those affecting immigration enforcement priorities, drawing both praise and criticism for bypassing gridlocked congressional action.[36]

While presidents from George W. Bush to Barack Obama employed executive actions to further policy goals, particularly in areas like national security, immigration, and climate change, Donald Trump's first administration marked a turning point in both the volume and assertiveness of executive action.[37] He stated that he would "[fight] all the subpoenas" in 2019, in relation to the Robert Mueller investigation into his business dealings and taxes, and has recently called for the impeachment of a judge due to a decision against his administration.[38] [39] His frequent use of EOs was coupled with an openly antagonistic stance toward congressional oversight and judicial review, challenging long-held norms and interpretations of executive restraint.

One of Trump's earliest and controversial executive actions was Executive Order 13769, known colloquially as the 'Muslim Ban.'[40] Issued just one week after taking office in January 2017, it barred citizens of several predominantly Muslim countries from entry into the US. Although initial versions of the order were blocked by courts, a revised version was eventually upheld by the Supreme Court in Trump v. Hawaii

[36] The American Presidency Project. 2019. "Executive Orders." Ucsb.edu. 2019. https://www.presidency.ucsb.edu/statistics/data/executive-orders. [Select the 276 hyperlink, for Obama's term takes to a list of 276 executive orders]
[37] Gerhard Peters & John T. Woolley, *Executive Orders*, American Presidency Project, https://www.presidency.ucsb.edu/statistics/data/executive-orders (last visited July 1, 2025).
[38] American Oversight, *Donald Trump's Obstruction of Congressional Oversight*, https://americanoversight.org/investigation/donald-trumps-obstruction-of-congressional-oversight/ (updated July 31, 2020).
[39] Dareh Gregorian, Gary Grumbach & Chloe Atkins, *Judges Stand Firm as Trump Ramps Up Attacks on Judiciary*, NBC News (Mar. 24, 2025), https://www.nbcnews.com/politics/trump-administration/judges-stand-firm -trump-ramps-attacks-judiciary-rcna197287.
[40] Faiza Patel, Harsha Panduranga & Michael Price, *Extreme Vetting and the Muslim Ban*, Brennan Ctr. for Just. (Oct. 2, 2017), https://www.brennancenter.org/our-work/research-reports/extreme-vetting-and-muslim-ban.

(2018).[41] This ruling expanded presidential discretion in matters of national security and immigration, signaling judicial deference to executive claims of security-based justifications—even in the face of potential religious discrimination.[42] Another significant expansion of executive authority came with Trump's declaration of a national emergency in 2019 to divert military funds for the construction of a U.S.–Mexico border wall, despite Congress's refusal to appropriate funds for the project.[43] This marked one of the most overt uses of emergency powers to override the legislative process. While Congress attempted to block the move, it was ultimately unsuccessful, reinforcing the precedent that presidents can invoke national emergencies to reallocate resources without legislative approval.

In the aftermath of the 2020 election, President Trump considered and reportedly drafted executive orders aimed at seizing voting machines and appointing special counsels to investigate alleged voter fraud—actions that would have represented a dramatic breach of constitutional norms had they been carried out. While many of these plans never materialized, the mere fact that they were seriously contemplated illustrates a willingness to use executive mechanisms to alter democratic outcomes.[44]

This threat escalated further on January 6, 2021, when a violent mob, seen by many to be encouraged by President Trump, stormed the Capitol to block the certification of the electoral vote.[45] The attack was not only a physical assault on a branch of government but also a striking challenge to the peaceful transfer of power. It was the most visible and violent manifestation of the executive attempting to override a legitimate electoral outcome. The threat posed by the January 6th US Capitol riot was not confined to the violence of that day; it symbolized how far the executive branch, under Trump, was willing to go to hold onto power. Even after extensive investigations by the bipartisan January 6th Committee, dozens of court cases rejecting

[41] *Trump v. Hawaii*, 585 U.S. 667 (2018)
[42] Neal Katyal, *Trump v. Hawaii and the Future of Presidential Power*, 128 Yale L.J. F. 497 (2018), https://www.yalelawjournal.org/forum/trump-v-hawaii.
[43] Cong. Rsch. Serv., *Legal Authority to Repurpose Funds for Border Barrier Construction* (R45908) (Sept. 10, 2019), https://www.congress.gov/crs_external_products/R/PDF/R45908/R45908.1.pdf.
[44] Betsy Woodruff Swan, *Read the Never-Issued Trump Order That Would Have Seized Voting Machines*, Politico, https://www.politico.com/news/2022/01/21/read-the-never-issued-trump-order-that-would-have-seized-voting-machines-527572. (Last updated Jan. 25, 2022)
[45] Portis, Jennifer L., *Interpreting Obstruction: The Capitol Riot & Donald Trump*, 76 Stan. L. Rev. Online 89, (2024) https://www.stanfordlawreview.org/online/interpreting-obstruction-the-capitol-riot-donald-trump/

fraud claims, and continued prosecutions of rioters and domestic terrorists, the sheer magnitude of President Trump's attempt to subvert democracy left a lasting, insurmountable threat to institutional norms. The fact that a sitting president could mobilize supporters and use executive rhetoric to challenge election results deeply shook the resilience of American democracy.

Recently, the president pardoned the January 6th rioters at the beginning of his second presidency. This signified another dangerous idea highlighted in *Trump v. United States*: the president can promote a riot to stop a congressional proceeding and overturn the legal and judicial punishment for their actions by pardoning them.[46]

Presidents have increasingly resorted to executive orders to enact significant policy shifts.[47] While this practice is not unique to Trump, his administration stands out for both the frequency and scope of these orders, as well as the confrontational posture toward checks and balances.[48] The expansion of executive authority through unilateral actions highlights the erosion of the traditional balance of power. The executive branch has slowly taken steps to expand its own power, including the PATRIOT Act, AUMF, the recent travel ban executive orders, and the diversion of allocated funds to the U.S.-Mexico border wall.[49] These executive actions, orders, and laws are a few of the many ways in which the capability and reach of the executive branch has grown and overstepped.

B. Broader Look at Executive Breaches

The recent executive challenges to checks and balances in the U.S. are a part of a larger global trend where executive branches expand their power at the expense of judicial independence and legislative

[46] *Trump v. United States*, 603 U.S. 593 (2024). See also Joyce Vance, *Trump Pardoning Jan. 6 Insurrectionists Would Endorse Attacks on Democracy*, Brennan Center for Justice, https://www.brennancenter.org/our-work/analysis-opinion/trump-pardoning-jan-6-insurrectionists-would-endorse-attacks-democracy. (Last updated Jan 21, 2025)
See also: *Executive-Branch Attacks on January 6 Prosecutors: A Notable Case of Democratic Backsliding*, 78 Stan. L. Rev. Online 52, (2025) https://www.stanfordlawreview.org/online/executive-branch-attacks-on-january-6-prosecutors-a-notable-case-of-democratic-backsliding/.
[47] National Archives. 2025. "Executive Orders." Federal Register. 2025. https://www.federalregister.gov/presidential-documents/executive-orders.
[48] *Id.*
[49] Erin Peterson, *Presidential Power Surges*, Harvard Law Today (July 17, 2019), https://hls.harvard.edu/today/presidential-power-surges/.

oversight. Examining international examples provides valuable insights into the importance of maintaining robust checks and balances to safeguard the United States' constitutional structure and democratic design.

In Turkey, President Recep Tayyip Erdoğan's administration has taken steps to centralize authority, especially following the 2016 failed coup attempt. The government purged thousands of judges and prosecutors, restructured the judiciary to align with executive interests, and curtailed media freedoms.[50] These measures have effectively dismantled institutional checks on executive power, leading to concerns about authoritarianism and the erosion of democratic norms.[51] While Turkey is a parliamentary democracy, parallels can be drawn from the centralization of power, as the shift in government changed "into a heavily centralized presidential one further removed [from] checks and balances."[52]

Russia presents another stark example of executive overreach, where President Vladimir Putin's regime has systematically dismantled democratic parts of the Russian Federation. The Russian Federation followed the collapse of the Union of Soviet Socialist Republics (USSR), and the "re-autocratization" of this government was due to many of the "antidemocratic norms and habits" within the capital, the Krelim, and elites.[53] For instance, Putin has changed the Russian Constitution to allow himself to serve additional terms beyond the original two maximum.[54] As of today, he is in his 5th term as president of Russia. The judiciary lacks independence, often serving as a tool for political repression.[55] An example of the judiciary becoming utilized for repression can be seen in the trial of Alexei Navalny, the leading opponent of President Putin. His charges were seen as fabricated by some and his subsequent death meant that one of the largest dissenters

[50] Berk Esen , *Judicial Transformation in a Competitive Authoritarian Regime: Evidence from the Turkish Case*, Law & Policy, vol. 47 iss. 1, (Jul. 8, 2024).
[51] Jacob Awrabi, *Erdogan's Empire: A Case Study of Democratic Backsliding in Turkey*, Democratic Erosion Consortium (Mar. 14, 2018), https://democratic-erosion.org/2018/03/14/erdogans-empire-a-case-study-of -democratic-backsliding-in-turkey-by-jacob-awrabi-university-of-california-los-angeles/.
[52] https://www.brookings.edu/articles/the-rise-and-fall-of-liberal-democracy-in-turkey-implications-for-the-west/
[53] Snegovaya, Maria, *Why Russia's Democracy Never Began*, 34 J. Democracy 3, at 105-18 (2012),https://www.journalofdemocracy.org/articles/why-russias-democracy-never-began/
[54] University College London, *Analysis: How Vladimir Putin Was Able to Change Russia's Constitution and Become President for Life*, UCL News (Jan. 24, 2025), https://www.ucl.ac.uk/news/2025/jan/analysis-how -vladimir-putin-was-able-change-russias-constitution-and-become-president-life.
[55] Int'l Comm'n of Jurists, *Russian Federation: Independence and Impartiality*, (June 12, 2014) https://www.icj.org/cijlcountryprofiles/russian-federation/russian-federation-judges/russian-federation-independence-and-impartiality-judicial-integrity-and-accountability-2/.

of Putin and the government was now silenced and others may fear similar actions, further quelling oppositions.[56] Opposition figures and journalists often face imprisonment, harassment, sham trials, or death, illustrating a blatant disregard for inalienable rights and the rule of law.[57]

China's political system exemplifies the subordination of the judiciary to the ruling People's Republic of China (PRC). Although the constitution nominally guarantees judicial independence, courts are expected to align with party directives, Additionally the courts are funded by levels of government and are thus "in a subordinate situation" with respect to that level of corresponding government.[58] Case rulings are often influenced by the PRC Party, Political-Legal Committees (PLCs), or local government interference.[59] Another major issue with the structure is the "procuratorate and the people's congresses have the power to supervise the work of judges and the courts and to call for the reconsideration of cases… [and] this power presents particular problems[, as] the procuratorate has a dual role as both prosecutor and supervisor of the legal process, it has a conflict of interest in exercising its function of supervising the courts."[60] This structure eliminates meaningful checks on executive power and suppresses dissent, as legal outcomes are predetermined by political considerations.[61]

These international cases underscore the critical role that checks and balances play in maintaining democratic governance and protecting individual rights. The erosion of judicial independence and the concentration of power within the executive branch have led to the suppression of dissent, the undermining

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[56] Thomas Grove & Matthew Luxmoore, *Alexei Navalny, the Kremlin's Most Ardent Critic, Dies in Prison*, *Wall St. J.* (Feb. 16, 2024), available at https://www.wsj.com/world/russia/alexei-navalny-dead-prison-putin-critic-d58db496. See Also: Ann M. Simmons & Matthew Luxmoore, *Alexei Navalny's Death Marks End of Political Dissent in Russia*, *Wall St. J.* (Feb. 16, 2024), available at https://www.wsj.com/world/russia/alexei-navalnys-death-marks-end-of-political-dissent-in-russia-92cb69b9.

[57] Jon Allsop, *The Journalism of Alexei Navalny*, Columbia Journalism Rev. (Feb. 19, 2024), https://www.cjr.org/the_media_today/alexei_navalny_death_journalism_putin_russia.php.
See also: Office of the High Commissioner for Human Rights, *Russia: Journalists Gershkovich and Kurmasheva's Sham Trials and Imprisonment*, UN Human Rights Office (July 2024), available at https://www.ohchr.org/en/press-releases/2024/07/russia-journalists-gershkovich-and-kurmashevas-sham-trials-and-imprisonment.

[58] Mariia Safronova, *The Power of Judicial Review in the People's Republic of China*, Wm. & Mary L. Sch. (July 18, 2021)

[59] Congressional-Executive Commission on China, *Judicial Independence in the PRC*, https://www.cecc.gov/judicial-independence-in-the-prc (last visited June 22, 2025).

[60] *Id.*

[61] Freedom House, *Russia: Country Report*, https://freedomhouse.org/country/russia (last visited June 20, 2025).

of the rule of law, and the violation of inalienable rights. The experiences of these countries serve as cautionary tales, emphasizing the necessity of robust institutional safeguards to prevent the descent into authoritarianism.[62] As seen in China, the lack of strong judicial independence introduces conflicts of interest and a weakened ability to control other branches, as the People Congress and Procuratorate can effectively excerpt control over the judiciary. The changes to the Russian Federation should underscore the importance of focusing on the principles of the democratic foundation of the Constitution and consider how changes like adding to the maximum number of terms a president can serve or the utilizing the courts to oppress political opponents can damage the democratic processes. Lastly, Turkey and President Recep Tayyip Erdoğan's administration highlights how a shift towards centralized power in the executive branch can lead to fears of authoritarianism.

Since the 1960's the idea of an expanding executive in America has been noted, as a 1968 book, *The New American Commonwealth,* states that the "main difference between the modern American President and a medieval monarch is that there has been a steady increase rather than a diminution of [the president's] power."[63] *Presidential Power Surges* by Erin Peterson argues that presidential power continues to rise and notably with the "last three presidents in particular have strengthened the powers of the office through an array of strategies;" including executive orders, interpretations of statutes, and calling for a national emergency to circumvent congress.[64] The slow encroachment of power extensions has not come through dramatic coups, but through normalization, partisan loyalty, and legal rulings. As Justice Scalia once warned, [bills of rights] were not worth the paper they were printed on, as are the human rights guarantees of a large number of still-extant countries governed by Presidents-for-Life. They are what the Framers of our Constitution called 'parchment guarantees,' because the real constitutions of those countries—the provisions that establish the institutions of government—do not prevent the centralization of power in one man or one

[62] May, Capucine. 2021. "Separation of Powers under Attack in 45 Countries." Verisk Maplecroft. November 17, 2021. https://www.maplecroft.com/insights/analysis/separation-of-powers-under-attack-in-45-countries/.
[63] L. Heren, The New American Commonwealth 8-9 (1969).
[64] Erin Peterson, *Presidential Power Surges*, Harvard Law Today (July 17, 2019), https://hls.harvard.edu/today/presidential-power-surges/.

party, thus enabling the guarantees to be ignored. Structure is everything (Scalia, 2008).[65]

The lesson from around the world is clear: when structure erodes, rights soon follow. Judicial independence is necessary for the ideas of the separation of powers and checks and balances to function. Centralized power in the executive branch of countries has led to the deterioration of media, political expression and opposition. The preservation of checks and balances is not just a legal necessity but fundamental for democracies, vital to the continued defense of democratic governance and human dignity. The United States is not immune from democratic backsliding—its resilience depends on the vigilance of its institutions and its people.

IV. FUTURE PROBLEMS AND RISKS OF AN UNRESTRICTED LEADER

As the balance of power continues to shift, the erosion of traditional checks and balances presents both immediate challenges and long-term risks for the constitutional framework of the United States. The increasing centralization of executive authority, coupled with a judiciary that faces mounting political pressures, raises concerns about the sustainability of an independent court. If these trends persist, the risk of dysfunction grows, risking abandonment of the government model placed forth by the Founding Fathers. The "[framers] well understood that power corrupts and absolute power corrupts absolutely," and through this knowledge, as Federalist Paper No. 48 states, Madison concludes that "… the executive department is very justly regarded as the source of danger."[66] Almost 250 years after the ratification of the Constitution, that fear from 1788 is still regarded as the largest risk to checks and balances.

Recent executive actions have raised serious concerns about the willingness of the current administration—and potentially future ones—to adhere to judicial rulings or recognize the authority of the courts. High-ranking officials, including Vice President J.D. Vance, have publicly floated the idea of ignoring

[65] Antonin Scalia Notre Dame Foreword at 1418
[66] Philip B. Kurland, "The Constitution: The Framers' Intent, the Present and the Future," 32 Saint Louis University Law Journal 17 (1987).
The Federalist No. 48 (James Madison)

court decisions they view as 'illegitimate' or dangerous.[67] Public actions have eroded the trust in the judiciary even further, as more threats have come against judges, including: bomb threats, physical and death threats, and impeachment. Paul Grimm, a former federal judge, states that "'intimidat[ing] judges, if that's your goal, so that they do not do their constitutional duty, …jeopardize[s] the rule of law.'"[68] With public reactions to judicial decisions causing threats to judges, and warnings from public officials that they may be impeached, judges are under pressure to balance their safety, their families' safety, and the rule of law. Chief Justice John Roberts has publicly decried these threats, insisting that "we do not have Obama judges or Trump judges," and later stating that impeachment is not the proper direction for disagreeing with a court's rulings.[69] The ability to have an independent judicial system is critical, the ability to impeach a judge due to unpopular rulings or decisions would fundamentally change the power of the courts and change the actions of the courts, as judges may be faced with the pressure of the majority or what is popular, but not what is legally right. Such rhetoric continues to undermine the foundational principle that the judiciary is the final arbiter of constitutional interpretation and the final appellate authority.[70]

At the same time, Congress has allowed oversight mechanisms to weaken. Traditional watchdogs like the Office of Government Ethics and Inspector Generals have faced budget cuts, firings, or political intimidation.[71] Oversight once conducted in the spirit of institutional responsibility is now frequently viewed through a partisan lens, weakening its legitimacy and effectiveness.

A. Congressional Actions

In the structure of the United States government, Congress was intentionally designed to be the most

[67] Avery Lotz, *Vance says Chief Justice "wrong" on judiciary's role in checking executive branch*, Axios (May 21, 2025), https://www.axios.com/2025/05/21/trump-jd-vance-john-roberts-supreme-court.
[68] Carrie Johnson, *Judges threatened with impeachment, bombs for ruling against Trump agenda*, NPR (updated Mar. 14, 2025), https://www.npr.org/2025/03/13/nx-s1-5316340/threats-judges-trump.
[69] Amy Howe, *Chief Justice Rebukes Trump's Call for Judicial Impeachment*, SCOTUSblog (Mar. 18, 2025), https://www.scotusblog.com/2025/03/chief-justice-rebukes-trumps-call-for-judicial-impeachment/.
[70] Hon. Paul L. Friedman, *Threats to Judicial Independence and the Rule of Law* (speech, Nov. 6, 2019), American Bar Association, https://www.americanbar.org/groups/litigation/about/awards-initiatives/american-judicial-system/threats-to-judicial-independence-and-rule-of-law/.
[71] Danielle Caputo, *The Significance of Firing Inspectors General*, Campaign Legal Ctr. (Jan. 31, 2025), https://campaignlegal.org/update/significance-firing-inspectors-general-explained.

direct representative of the people and a core check on executive power. Its legislative authority, power of the purse, and ability to conduct oversight are all essential components of the system of checks and balances envisioned by the Framers.[72] Yet, in recent years, Congress has largely failed to meaningfully challenge or constrain expansions of executive authority.[73] This inaction has fueled concerns that a pillar of the three-part constitutional system is weakening.

A central reason Congress has been reluctant to act is the intensification of party loyalty and polarization. Lawmakers increasingly vote along party lines, prioritizing partisan unity over institutional responsibility.[74] This shift is particularly evident when the president and a congressional majority are aligned with the same party. During Donald Trump's first presidential term, Republican lawmakers—many of whom publicly expressed concerns about executive overreach in the past—largely refrained from challenging his use of executive orders, emergency powers, or controversial appointments.[75] Even in cases where norms were visibly tested, such as the firing of an Inspector General or the declaration of a border emergency, partisan alignment often outweighed any institutional accountability.[76] Many congressional Republicans became wary of opposing Trump for fear of political backlash from their base. Threats and public condemnation on social media made defection from the party line a political risk.[77] Many newly elected, and even incumbent GOP representatives, relied on the alliance and backing from President Trump to win over voters. This has led to an overall increase in 'party line' votes and effective control of the congressional GOP as a whole.[78] From threats to the judicial system to blocking a bipartisan border bill before he was sworn in as the forty-seventh president, this environment discouraged internal checks on executive actions, especially during Trump's first

[72] U.S. Const. art. I
[73] Carlos A. Ball, *Democracy's Chief Executive*, Yale J. on Reg.: Notice & Comment (Feb. 5, 2020), https://www.yalejreg.com/nc/symposium-shane-democracy-chief-executive-02/.
[74] Jamie L. Carson et al., *The Electoral Costs of Party Loyalty in Congress*, 54 American Journal of Political Science (2010)
[75] Caroline Fredrickson, Alan Neff, *When Impeachment Fails*, Brennan Center for Justice (Jan. 23, 2020), https://www.brennancenter.org/our-work/analysis-opinion/when-impeachment-fails.
[76] https://www.congress.gov/crs-product/IF11546
[77] *Id.*
[78] David M. Driesen, Donald Trump and the Collapse of Checks and Balances, 77 SMU L. REV. F. 199 (2024)

term, when criticism was often framed as disloyalty.[79] [80] This reach into the legislative branch has continued to shape congressional behavior, limiting bipartisan efforts to restrain presidential powers, and allowing greater presidential control over the legislative branch.[81] Legislative gridlock further reinforces this pattern: when Congress cannot agree internally, the president steps in with unilateral actions and executive orders.[82] Moreover, entrenched partisanship has effectively silenced minority-party legislators, depriving vast constituencies of meaningful representation as Congress deadlocks on critical policy matters. With cross-party compromise increasingly rare, the legislative process grinds to a halt, compelling presidents to resort to executive orders to advance contentious policy goals.[83] Unilateral executive action and orders continue to be utilized due to the regularity of partisan impasses and congressional gridlocks.

There have been key moments in American history when Congress, regardless of alignment with the president, acted to check executive overreach. While political divisions existed, lawmakers placed institutional integrity over party loyalty. In the early 2000s, some Republicans pushed back against President George W. Bush's surveillance and detention policies, leading to bipartisan legislation like the McCain Detainee Amendment, which imposed limits on interrogation techniques.[84] This example underscores that Congress can, and has, asserted its constitutional authority, even against presidents from their own party. The contrast with the post-2016 period is stark: while past lawmakers prioritized the long-term health of the republic, recent sessions have too often treated executive power as a partisan tool rather than a shared responsibility.[85]

During the first term of the Trump administration, when Republican members protested President

[79] Jonathan Rauch, *Liz Cheney's Excommunication from the Church of Trump*, Brookings Institution (Aug. 18, 2022), https://www.brookings.edu/articles/liz-cheneys-excommunication-from-the-church-of-trump/.
[80] William A. Galston, *The Collapse of Bipartisan Immigration Reform: A Guide for the Perplexed*, Brookings Institution (Feb. 8, 2018), https://www.brookings.edu/articles/the-collapse-of-bipartisan-immigration-reform-a -guide-for-the-perplexed/.
[81] *Id.*
[82] Fang-Yi Chiou & Lawrence S. Rothenberg, *Presidential Unilateral Action: Partisan Influence and Presidential Power*, 67 Pol. Res. Q. 461 (2014), https://www.jstor.org/stable/48719672.
[83] Sarah A. Binder, *Polarized We Govern?,* Center for Effective Public Management at Brookings 13, 15 (2022).
[84] Alex Johnson, Senate Votes to Restrict Treatment of Detainees, NBC News (Sept. 29, 2005), https://www.nbcnews.com/id/wbna9601116.
[85] Sarah A. Binder, *Polarized We Govern?,* Center for Effective Public Management at Brookings 13, 15 (2022).

Trump and his actions, they were ousted from the party and struggled with reelection. In contrast to earlier eras where members of Congress crossed party lines to uphold these institutional checks, those who attempted to check President Trump faced opposition within their party and faced swift and severe political consequences. One of the most prominent examples is Representative Liz Cheney (R-WY), who served as the third-ranking Republican in the House. Cheney became a vocal critic of Trump's false claims about the 2020 election and served as vice chair of the House Select Committee investigating the January 6th Capitol insurrection.[86] Her actions were rooted in a commitment to constitutional principles over party loyalty; despite this, her actions led her to become censured by the Wyoming Republican Party, removed from House Republican (additionally known as and referred to as GOP) leadership, and ultimately lose her 2022 primary by a wide margin.[87] Similar fates befell other Republicans who voted to impeach Trump or supported the investigation, including Representatives Adam Kinzinger(R-IL) and Peter Meijer(R-MI), who either retired or were ousted by Trump-backed challengers.[88] These developments reflect a chilling reality: when party loyalty is enforced over constitutional duty, the cost of dissent becomes personal, and the space for intra-party checks on executive power narrows dramatically.

Congressional action remains critical to the integrity of the constitutional system. The checks and balances framework hinges on each branch exercising its role. Congress has the power and the duty to investigate executive abuses, withhold funding, override executive orders through legislation, and impeach, in cases of high crimes and misdemeanors. When it fails to exercise these tools, the balance tips dangerously toward executive branch dominance. Moreover, congressional inaction signals to future presidents that bold or even unconstitutional actions may go unchallenged. If Congress does not assert its constitutional authority, the precedent becomes one of acquiescence. An assertive Congress can prevent that expansion from

[86] Jonathan Rauch, *Liz Cheney's Excommunication from the Church of Trump*, Brookings Institution (Aug. 18, 2022), https://www.brookings.edu/articles/liz-cheneys-excommunication-from-the-church-of-trump/.
[87]Wyoming Republican Party, *Resolution from the Central Committee of the Wyoming Republican Party: Censure of Liz Cheney*, https://www.wyoming.gop/post/resolution-from-the-central-committee-of-the-wyoming-republican -party-censure-of -liz-cheney (last visited July 1, 2025).
[88] Alex Thompson, *Republicans Who Voted to Impeach Trump Are Losing Primaries*, Axios (Aug. 3, 2022), https://www.axios.com/2022/08/03/impeachment-republicans-trump-primaries.

becoming permanent, restoring balance over time.

B. SCOTUS Impacts

The Supreme Court of the United States (SCOTUS) has recently played a critical role in shaping the debate over checks and balances. As the final authority in the appellate process, the Court's interpretations directly influence the boundaries of constitutional power. Although individual justices differ in judicial philosophies, the current six-to-three conservative-liberal split has led to a noticeable pattern in decision-making. Prior to this ideological alignment, the Court often relied on Chief Justice John Roberts as a swing vote in closely contested cases. Now, with the addition of three justices appointed by President Donald Trump (Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett), the Court has increasingly delivered decisions that reimagine the limits and protections of executive authority.[89]

One of the most consequential decisions under this new judicial landscape is *Trump v. United States* (2024).[90] In this case, the Court ruled that former presidents are entitled to presumptive immunity from criminal prosecution for "official acts" taken while in office. The majority reasoned that such immunity is necessary to ensure that presidential decision-making "is not distorted by the threat of future litigation" and to preserve the integrity of the separation of powers. They argue that fear of prosecution could inhibit the president's effectiveness, thereby weakening the executive branch's constitutional role.[91]

However, this rationale comes at the cost of dismantling a fundamental pillar of checks and balances. The ruling introduces a dramatic shift in executive accountability. Justice Sonia Sotomayor, in a blistering dissent, condemned the majority for creating a legal framework that places the president above the law.[92] In David Driesen's article, *Donald Trump and the Collapse of Checks and Balances*, he summarizes the court's decision, stating,

[89] Justia, *Supreme Court Cases by Topic: Government Agencies*, https://supreme.justia.com/cases-by-topic/government-agencies/ (last visited July 1, 2025).
[90] *Trump v. United States*, 603 U.S. 593 (2024).
[91] *Id.*
[92] *Id.* at (Sotomayor, J., dissenting)

> … [in] *Trump v. United States*, the Court went further, creating a new immunity for presidents using their official positions to commit crimes. As the dissent points out, the President can now presumably order Navy SEALs to assassinate a political rival, organize a military coup, or take a bribe in exchange for a pardon—all without fear of criminal liability (Driesen, 2024).[93]

In a haunting closing line from *Trump v. United States*, that reflects the gravity of the moment, Justice Sotomayor ended with, "With fear for our democracy, I dissent."[94]

The ruling also introduces a vague distinction between "official" and "unofficial" acts. While the Court claims only the former are protected by immunity, critics argue that this line is easily blurred and ripe for abuse. What constitutes an "official" act may become a matter of political convenience, allowing presidents to recast personal or illegal behavior as constitutionally shielded conduct. The implications of this decision reverberate beyond just one case, it fits into a broader trend under the Roberts Court of expanding executive protections. Recent rulings from the Supreme Court have begun to interpret the Constitution in ways that shield executive officials from oversight and liability. Two primary examples include *Seila Law LLC v. Consumer Financial Protection Bureau* (*Seila Law*) and *Trump v. Mazars*, as the rulings collectively erode traditional checks on executive authority and signal a trend that favors centralized presidential control over institutional accountability.[95] In *Seila Law*, the Court limited Congress's power to structure independent regulatory agencies, strengthening presidential removal power over executive officers, circumventing the legislative designed protections of independent agencies.[96] Similarly, in *Trump v. Mazars USA* (2020), the Court raised new hurdles for congressional subpoenas targeting the President's personal records, further separating the President from the oversight abilities of Congress.[97]

In contrast to prior judicial restraint, the current Court has demonstrated a willingness to not only limit the regulatory authority of executive agencies (as seen in recent rulings involving the EPA, independent

[93] David M. Driesen, Donald Trump and the Collapse of Checks and Balances, 77 SMU L. REV. F. 199 (2024)
[94] *Trump v. United States*, 603 U.S. at 657 (Sotomayor, J., dissenting).
[95] *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197
[96] *Id*.
[97] *Trump v. Mazars USA, LLP*, 591 U.S. 835

agencies, and other administrative bodies) but simultaneously insulate the president from legal accountability.[98] This contradictory posture—limiting executive agencies action while shielding the executive office—has led to significant concern about the imbalance being created within the constitutional structure.[99]

V. CONCLUSION

Consolidation of power, immunity from criminal prosecution, and a weak Congress have led to an erosion of checks and balances. While focusing primarily on the actions of President Trump, these risks exist for the current and any future President. Regardless of ideology, party affiliation, or policy beliefs, a chief executive holding this power is a threat to the foundation of the Constitution and the principles American democracy was founded upon.

Congress and the courts must recognize the significance of these checks and balances laid out by the Founders in the Constitution, as their action or inaction is aiding in the deterioration of this system. The fundamental structure and ideology of the Constitution are at stake, during a time when Presidents are granted immunity for all official acts and the Executive is extending its power and reach, the Legislative and Executive should revisit the concept of checks and balances. Federalist Paper No. 47, 48, and 51 show that separation alone is not enough to prevent the concentration of power, the auxiliary powers given to each branch were designed with the knowledge that overreaches may occur to ensure each branch would stay within its limitations. Such conditions are worsened under the circumstance where members of Congress are more concerned with reelection over honoring their oath to protect and uphold the Constitution. Threats on judges and the judiciary will continue this erosion of the United States' democracy. Allowing the President to be criminally immune from all criminal actions is one of many ways the judiciary branch has allowed for a continual expansion of the executive branch and the inaction of Congress and repetitive gridlock has gifted

[98] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) See also: *Trump v. United States*
[99] *Trump v. United States*, 603 U.S. 593 (2024). See also: *Trump v. Mazars USA*, *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024)

the executive branch the ability to increase its power.

A democratic executive with consolidated power approaches an aristocracy or a monarchy. By analyzing the actions and consequences of other nations, like China and Russia, the loss of an independent judiciary has been shown to weaken democratic structure, even in those countries that claim to remain democracies. By reviewing the recent events in Turkey, the centralization of power has led to fears of authoritarianism. Even with the overarching structure of the United States Constitution, the inaction of members of the government would lead the Bill of Rights and other protections to simply become parchment guarantees.

The three branches must turn their focus back onto the core principles laid out by the Constitution. The intergovernmental checks only work if the members of the government respond when there are overreaches from another branch. If the branches allow another to continue this expansion, then the government has failed at protecting the citizens, the country, and ultimately, the Constitution.