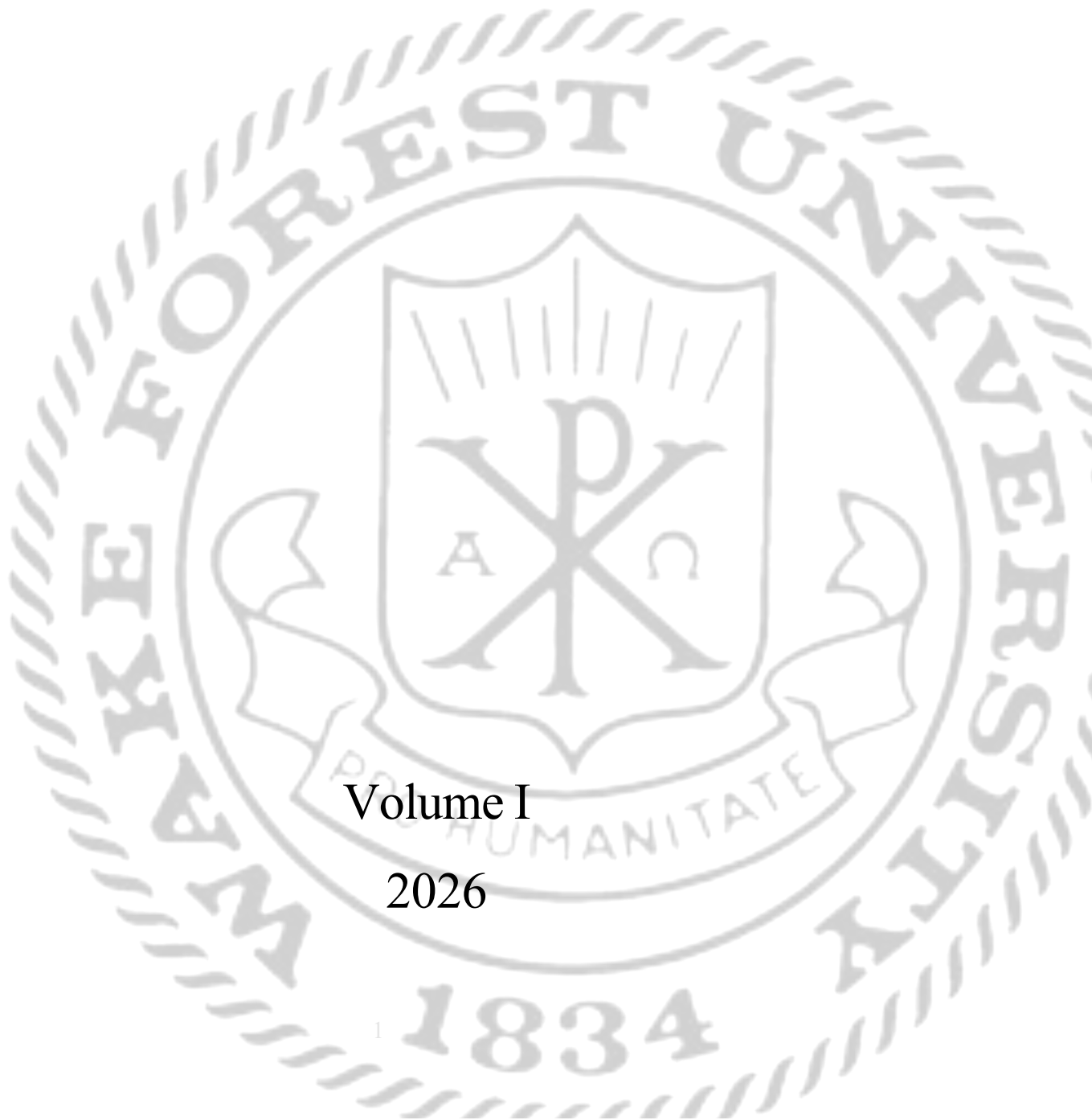


VOLUME I: ISSUE 1: 2026

Wake Forest University
Undergraduate Law Review



Volume I

2026

LETTER FROM THE EDITOR

Dear Reader,

I am so excited to share the inaugural publication of the Wake Forest Undergraduate Law Review (WFULR) with you. This publication is reflective of a semester of intellectual curiosity, critical legal analysis, and the promotion of original, authentic, and innovative legal scholarship. As a new program, we are particularly grateful for the passion and devotion displayed by our staff and authors. Such dedication has allowed us to build the review from the ground up and establish a committed academic forum for intellectual debate.

This semester, our editorial staff conducted an extensive search for the most notable works from across our university, leading each selected piece through a rigorous editing and revision process to ensure it reached its full potential. Our team has worked tirelessly to compile a collection that we believe sheds a new light on a wide range of legal topics. The high quality of these articles reflects a successful first call for submissions, establishing a standard of excellence that we hope will define WFULR for years to come.

The seven articles featured in this issue span critical legal domains, beginning with International Law, where William Rummage critiques the House of Lords, inviting readers to contemplate whether traditional institutions remain compatible with modern democratic principles. In the realm of Civil Law, Alyssa Totoro chronicles the doctrinal transformation of equal protection in *Students for Fair Admissions v. Harvard*, while Fritz Mezger evaluates the constitutionality of geofence warrants in “*Near-Perfect Surveillance*,” challenging the legal system to prepare for an increasingly technological future.

Our Criminal Law section addresses pressing ethical and structural challenges in the justice system, with Ella Kirschner exploring the “Ethical Dilemma of Prosecuting Juveniles As Adults” and Exahalia Lawrence arguing for “Restorative Justice as a Legal Obligation” rather than a mere policy preference. Additionally, Kate Shutz examines “State Resistance of *Kennedy v. Louisiana*” and its implications for the future of capital punishment. Finally, in Policy Law, Mae Dingley and Elizabeth Elliott expose a significant regulatory blind spot regarding the erosion of labor protections for undocumented workers in the wake of *Hoffman Plastic Compounds v. NLRB*.

While our authors represent a vast array of majors and career aspirations, they are united by a singular commitment to excellence in legal research. Perhaps the strongest thread connecting these diverse perspectives is a spirit of innovative thinking, with every author asking how old legal systems can adapt to serve twenty-first-century problems. This inaugural success would not have been possible without the resilience of our Executive Board and editorial staff, nor the guidance of our faculty advisors who shared their mentorship and legal knowledge throughout this process. As we conclude this first chapter, I look forward to a new era of growth and development in the semesters to come, and I hope this collection inspires you to engage in your own legal scholarship.

Sincerely,

Harper Lindsay
Editor-in-Chief

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MISSION STATEMENT

The Wake Forest Undergraduate Law Review (WFULR) is an independent, student-run organization at Wake Forest University that aims to promote the legal arguments of undergraduates. It seeks to educate Wake Forest students about the law and contemporary issues bearing on the common good. This scholarship is founded on the belief that knowledge and creativity will move humanity forward.

In addition to being the sole pre-law publication at Wake Forest, the WFULR seeks to promote partnerships on campus with like-minded student organizations to foster a collaborative undergraduate legal hub. Our hope is for students to develop a greater understanding of the law and the various pathways one may take.

SUBMISSIONS

Wake Forest University Undergraduate Law Review is calling for undergraduate students to submit original academic articles, essays, and research papers for our upcoming issue. As the sole pre-law publication at Wake Forest University, we seek to promote authentic and innovative legal scholarship that addresses contemporary issues bearing on the common good.

We welcome submissions regarding domestic or international legal issues, legal philosophy, or public policy. Our Editorial Board evaluates pieces based on the depth of research, the strength of the original argument, and the clarity of the legal analysis.

Please consult wfulr.org to begin a submission. Be prepared to submit:

Name

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University, Class, Field of Study

Submission Title

Abstract (150-300 Words)

Submissions for Volume II will open in May 2026 and are expected to be due in September 2026. Please stay tuned for the official call for submissions and confirmed deadline.



REMEDY WITHOUT RECOURSE: *HOFFMAN PLASTIC COMPOUNDS, INC. v*

***NLRB* AND THE EROSION OF LABOR PROTECTIONS FOR UNDOCUMENTED**

WORKERS

Mae Dingley and Elizabeth Elliott

Wake Forest Undergraduate Law Review

Policy Law Department

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ABSTRACT

The Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* (NLRB) represents a fundamental contraction of federal labor protections, establishing that the NLRB lacks the remedial discretion to award back pay to undocumented workers under the Immigration Reform and Control Act (IRCA). By stripping the most vulnerable members of the labor force of make-whole remedies, the Court effectively transformed immigration law into a shield for exploitative employers, thereby facilitating systemic discrimination against both documented and undocumented workers. This ruling incentivized a "low-cost road" of illegality where employers may prefer an unauthorized workforce that lacks the financial recourse to challenge unfair labor practices, while simultaneously eroding the collective bargaining power of authorized workers who witness this impunity. Consequently, the *Hoffman* precedent grants corporations the leverage to suppress unionization efforts through the credible threat of retaliatory discharge, relegating undocumented workers to a permanent remedial underclass with limited agency to report workplace abuses. This environment represents a human rights crisis; unionization remains essential to maintaining safe work environments and ensuring that all employees receive necessary protections. As undocumented immigrants face heightened discrimination from both governmental and societal structures, analyzing the ossification of labor law and the resulting lack of bargaining power is increasingly critical. This paper examines the historical intersection between immigration and labor law, the pervasive chilling effect of the *Hoffman* decision on collective action, and proposes a multi-tiered legal framework—including administrative reforms, statutory litigation under state labor codes or federal tort claims, and the creation of a new class of visas—designed to restore meaningful deterrence and dismantle the exploitative labor dynamics currently sanctioned by the Court.

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I. INTRODUCTION

There has been a long and tense relationship between immigration and labor law. Labor law has continually attempted to minimize immigration to the United States. *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* serves as the primary mechanism in the twenty-first century by which undocumented immigrants are denied a remedy for unfair and exploitative working conditions. There remains a need to understand the tension that has existed between labor law and immigrants to identify potential paths forward that can establish meaningful protections for workers.

The *Hoffman* decision effectively transformed immigration law into a shield for law-breaking employers, allowing them to discharge union activists with financial impunity. By stripping undocumented workers of make-whole remedies, the Court did more than resolve a statutory conflict: it created a permanent underclass by sending a message of intimidation to the entire workforce. This environment not only chills the exercise of labor rights for the undocumented but also erodes the collective bargaining power of authorized workers who stand beside them. This dynamic creates a perverse financial incentive structure through which employers can externalize the costs of labor violations, effectively treating undocumented workers as a disposable workforce, while avoiding the monetary consequences that would otherwise deter unlawful conduct. Consequently, the ruling represents a human rights crisis that necessitates a fundamental legal reevaluation of how federal agencies reconcile labor protections with immigration control.

To remedy these systemic harms, this paper will propose a multi-tiered legal and administrative path forward that moves beyond the National Labor Relations Board's (NLRB)

limited remedial arsenal. First, the NLRB must implement “Expanded Appropriate Remedies,” such as mandatory use of an “Explanation of Rights” document and a public notice reading to restore confidence in the workforce. Second, because the Board’s authority is often restricted to non-punitive measures, labor advocates should shift the venue of enforcement toward statutory litigation in U.S. courts under state labor codes or federal tort claims to ensure financial accountability for employers. Finally, this paper will argue for targeted legislative reforms, including the codification of pre-*Hoffman* back pay practices and the creation of “special visas” for workers involved in labor enforcement proceedings to eliminate the threat of retaliatory deportation. By integrating labor and immigration policy through “Joint Enforcement Actions” and “DHS Forbearance,” the legal system can begin to dismantle the exploitative informal Bracero Program sanctioned by the *Hoffman* majority.

II. THE INTERSECTION BETWEEN LABOR LAW AND IMMIGRATION

A. *The Intersection of Labor Law and Immigration Law Pre-Hoffman*

According to Vernon Briggs, there is a long history of worker solidarity in the United States; however, it was not until the 1850s that formal unions became strong enough to survive the anti-worker sentiment that pervaded politics. Immigrants and unions have often been at odds with each other, as immigrants were used as tools by employers to break strikes through increasing the threat of replacement in response to organizing behavior.¹ Major labor organizations, such as the American Federation of Labor (AFL) in the 1880s-1890s, actively opposed migrants and waged full-scale attacks on the scope of legal immigration.² This culminated in a series of anti-immigration policies, including the Chinese Exclusion Act of 1882

¹ Vernon M. Briggs Jr., *American Unionism and U.S. Immigration Policy*, CENTER FOR IMMIGRATION STUDIES (Aug. 1, 2001), <https://cis.org/Report/American-Unionism-and-US-Immigration-Policy>.

²*Id.*

and the Alien Contract Act of 1885.³ These acts made it illegal for American companies to hire Chinese workers, banned the foreign recruitment of workers, and ended contract work in the United States, requiring contract workers to return to their country of origin.

In 1892, the Supreme Court ruled in *Nishimura Ekiu v. United States* that the federal government is the sole authority over immigration policy in the United States.⁴ This narrowed the scope of where anti-immigration lobbyists' attention had to be placed. The Immigration Commission released a report in 1911 that securitized against immigrants, stating they were depressing wages, causing unemployment, and spreading poverty.⁵ The report created the justification for the commission to recommend an annual immigration restriction that would be significantly more selective.⁶ During and following the Second World War, there was the implementation of the 1942 Mexican labor program (called the “Bracero” program), which permitted Mexican farmworkers to work in the United States for busy seasons and subsequently return to Mexico. Unions at the time vehemently opposed the program, which then ensued immigration reforms until the Immigration Act of 1965 was passed. The program ended in 1964; however, farm owners had grown dependent on the cheap labor that came from migrants.⁷ The implications were staggering for immigration law; the United States had one of the most important domestic markets, dependent on what was now illegal immigration.

The Immigration Act of 1965 followed as policymakers faced increased pressure to create reform to deal with the influx of immigrants.⁸ These pressures on the government paved the way for the passage of the 1986 Immigration Reform and Control Act (IRCA), which has

³*Id.*

⁴*Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), <https://supreme.justia.com/cases/federal/us/142/651/>

⁵ WILLIAM P. DILLINGHAM, *REPORTS OF THE IMMIGRATION COMMISSION* 1-922 (1911), <http://archive.org/details/reportsofimmigra01unitrich>.

⁶ Vernon M. Briggs Jr., *American Unionism and U.S. Immigration Policy*, *CENTER FOR IMMIGRATION STUDIES* (Aug. 1, 2001), <https://cis.org/Report/American-Unionism-and-US-Immigration-Policy>

⁷ *Id.*

⁸ *Id.*

since dominated the national landscape of immigration policy and labor law. The American Federation of Labor supported immigration restrictions via legislative actions, including taking the stance that there should be no immigration at all, which culminated in the IRCA.⁹

The IRCA was signed into law by President Reagan in November 1986, becoming the backbone of legislation that controls undocumented immigration to the United States. Through introducing civil and criminal penalties for employers who knowingly hire people without work authorization in the United States, the IRCA consequently shifted the burden of vetting immigration status onto the employer.¹⁰ Proponents of the IRCA at its passing suggested that the Act created one of the largest pathways to legal immigration. Migrants who had been working in the United States for 90 days were permitted to begin the naturalization process, allowing them to obtain and retain citizenship. This created a legal pathway to citizenship for more than 3 million immigrants, mostly of Hispanic descent.¹¹ However, this clause of the IRCA was revoked after a year.

While attempting to control undocumented immigration, the IRCA instead increased the incentives for unethical employers to hire undocumented workers, thereby allowing them to gain an advantage over law-abiding employers. Shifting the burden onto employers to ensure that workers are documented creates an incentive for some employers to hire undocumented individuals to avoid that responsibility, as employers have a significant economic incentive to hire undocumented workers.¹² Employers recognize savings in the ability to pay lower wages and reduce their enforcement of labor law protections. Additionally, the government's inconsistent

⁹ *Id.*

¹⁰ *Immigration Reform and Control Act of 1986*, Libr. of Cong.: A Latinx Res. Guide: Civil Rights Cases and Events in the U.S., (last visited Apr. 19), <https://guides.loc.gov/latinx-civil-rights/irca>.

¹¹ *Id.*

¹² Joseph D. Layne, *Fighting a Losing Battle: IRCA's Negative Impact on Law-Abiding Employers*, 44 Loy. L.A. L. Rev. 1431 (2011).

application of the IRCA leads employers to believe they will not face penalties for violations. This creates a legal loophole by which employers are incentivized to illegally hire undocumented workers who they can force to work in dangerous conditions and pay pennies on the dime compared to authorized workers.¹³

B. The Hoffman Decision

Hoffman addresses the question: Does the National Labor Relations Board have the discretion to award back pay to immigrants who are not authorized to work in the United States? The case came to the Supreme Court after Jose Castro, a factory worker in California, was fired for union organizing. The NLRB rendered a decision that Jose Castro, along with his fellow organizers, was fired in violation of the National Labor Relations Act (NLRA) and should therefore be reinstated with back pay.¹⁴ The case then proceeded to an administrative law judge to determine the scope of the back pay owed, during which Castro admitted that he was never authorized to work in the United States. The administrative law judge then found that, per the IRCA, Castro was precluded from accessing back pay relief as a result of his immigration status.¹⁵

The case was appealed to the Supreme Court, where the decision found that the NLRB having this discretion ran counter to federal immigration policy, specifically the IRCA.¹⁶ The effect of this decision was staggering; it gave employers an economic incentive to hire

¹³ *Id.*

¹⁴ AMY SUGIMORI ET AL., Nat'l Emp. L. Proj., *Assessing the Impact of the Supreme Court's Decision in Hoffman Plastic Compounds v. NLRB on Immigrant Workers and Recent Developments* 1–7 (2013), https://media.nilec.org/wp-content/uploads/2016/04/Hoffman_NELP_NILC_FINAL.pdf.

¹⁵ *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 140 (2002) (Rehnquist, J., majority), <https://supreme.justia.com/cases/federal/us/535/137/>.

¹⁶ Oyez. n.d. “*Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*.” Accessed March 21, 2026. <https://www.oyez.org/cases/2001/00-1595>.

undocumented immigrants without recourse and, by extension, allowed employers to circumvent the labor laws that are the cornerstone of worker protections.

III. THE IMPACT OF *HOFFMAN*

A. How Hoffman Shaped the NLRB

The Supreme Court's decision in *Hoffman Plastic Compounds, Inc v. National Labor Relations Board* represents a significant shift in the remedial authority of the NLRB and, more broadly, in the hierarchy of federal labor policy. By denying back pay to undocumented workers who suffer retaliatory discharges for union activity, the Court did more than simply resolve a statutory conflict: it effectively reconfigured the power dynamic between the executive agency charged with protecting labor rights and the judiciary itself. A vital distinction must be made regarding these financial impacts: while *Hoffman* denies back pay for work not performed, or the wages a worker would have received if they were not unjustly fired, it does not disturb the right of workers to recover wages for work already performed. This distinction is critical to understanding the precise contours of the Court's holding and the limits of its impact on employer liability. Under the Fair Labor Standards Act (FLSA), undocumented workers remain entitled to minimum wage and overtime for actual hours worked, a distinction that prevents total immunity for employers regarding wage theft. Ultimately, this critical reevaluation remains essential, because if the *Hoffman* precedent—which prioritizes immigration control over the fundamental human right to organize—continues to expand, the remaining protections of the Fair Labor Standards Act for work already performed are also vulnerable to being sacrificed to the same exclusionary logic.

This ruling is symptomatic of a deeper structural failure in American law, where, because immigration and labor policies have usually been decoupled, the Court was able to pit immigration control against the right to organize, ultimately requiring labor protections to yield. This failure is rooted in the fragmented nature of federal statutory interpretation, where courts are often required to reconcile competing congressional objectives without clear guidance on hierarchy. Because the NLRA and the IRCA were enacted at different times, with distinct policy goals and enforcement schemes, courts are left to resolve tensions through implied preemption and purposive interpretation rather than explicit statutory instruction. In *Hoffman*, the Court effectively elevated immigration enforcement priorities over labor protections by treating the IRCA as a limit on the scope of the NLRB's remedial authority and not merely a complementary statute. This interpretive approach allows the judiciary to reshape the balance between statutory regimes, even in the absence of direct congressional intent to subordinate one to the other.

This judicial takeover was facilitated by what Cynthia L. Estlund describes as the “ossification” of American labor law—a state where federal labor law has remained practically unamendable for over sixty years, creating a legislative void that the Supreme Court has filled with its own policy preferences. Estlund posits that the ineffectuality of American labor law and the shrinking power of collective bargaining rights are “traceable to the law's ‘ossification’ and its longstanding insulation from democratic renewal and local innovation.”¹⁷ Because the National Labor Relations Act has been “essentially sealed off... from democratic revision” due to a longstanding political impasse at the national level, the Supreme Court has gained unprecedented power to define labor policy through its own interpretations.¹⁸ Since the NLRA contains no private right of action, the Board is the designated institutional vehicle for adapting

¹⁷ Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *COLUM. L. REV.* 1527-1612 (Oct. 2002), <https://www.jstor.org/stable/1123792>.

¹⁸ *Id.*

labor law to modern conditions, yet it is increasingly “hemmed in by Congress and particularly by the federal judiciary” through the cumulative impact of *stare decisis*.¹⁹

Christopher David Ruiz Cameron argues that *Hoffman* is “the most recent manifestation of a decades-long process by which the Court has been elevated from an interpreter to a maker of federal labor policy.”²⁰ This transformation reflects a broader trend where the judiciary has stepped in to fill a void left by legislative inaction. Since 1959, Congress has enacted practically no substantive reforms of the NLRA, yet the Supreme Court has fundamentally reshaped the landscape through its rulings. By setting up a “false conflict” at the margins between the NLRA and the IRCA, the majority was able to resolve the tension by effectively abrogating the NLRA in favor of “other” federal policies.²¹ In doing so, the Court dismissed the NLRB’s expertise, treating its efforts to reconcile the two statutes as the ravings of an incompetent bureaucracy and declaring the chosen remedies to be “outside the Board’s competence to administer.”²²

This categorical shift in power was solidified in the decade following the ruling, specifically through two key cases that tested the boundaries of the Board’s remaining authority. The first, *Mezonos Maven Bakery, Inc* (2011), addressed whether the *Hoffman* bar on back pay applied even when the employer, rather than the employee, was the party that violated immigration law.²³ In this case, the NLRB held that *Hoffman* was “categorical in its exclusion of back pay from undocumented workers under the NLRA,” regardless of whether the employer

¹⁹ *Id.*

²⁰ Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, The New Bracero Program, and the Supreme Court’s Role in Making Federal Labor Policy*, 51 *UCLA L. REV.* 1-34 (2003), https://www.uclalawreview.org/wp-content/uploads/2019/09/10_51UCLALRev12003-2004.pdf.

²¹ *Id.*

²² Rehnquist, *supra* note 15.

²³ David J. Liebman, Michael J. Hayes & Peter J. Pearce, *Mezonos Maven Bakery, Inc. and Puerto Rican Legal Defense and Education Fund*, HINSHAW & CULBERTSON LLP (Sept. 1, 2011), https://www.hinshawlaw.com/a/web/vKdEyNr2rTEdZXyyUuF7fb/a15wec/employmentpractices_mezonos_090111.pdf.

knowingly hired the worker in violation of IRCA.²⁴ The Board concluded that awarding back pay would “trench upon ‘policies underlying IRCA’ by replacing wages that ‘could not lawfully have been earned’ in the first place.”²⁵ This decision effectively transformed the IRCA into a “shield” for law-breaking employers, allowing them to escape financial liability for labor violations by invoking the immigration status of their victims.

The second post-*Hoffman* development appeared in *Agri Processors, Co. v. National Labor Relations Board* in 2008, which illustrated how employers attempted to expand the Court’s logic to challenge the very definition of a worker. While *Hoffman* did not disturb the 1984 *Sure-Tan* holding that undocumented workers remain “employees” protected by the Act, Ruben J. Garcia points out that the “seeds for revisiting” these basic protections had been planted during oral arguments when Justice Kennedy questioned whether such workers should be allowed in bargaining units at all.²⁶ In *Agri Processors*, the employers leveraged this uncertainty to challenge the validity of a bargaining unit, arguing that undocumented and documented workers could not share a “community of interest.”²⁷ Although the D.C. Circuit eventually rejected this challenge, the case highlights an emboldened employer class using the *Hoffman* precedent to try to strip undocumented workers of their status as employees entirely. The *Hoffman* outcome creates a practical fragmentation that erodes the legal unity within the shared communities of interest of undocumented workers. Authorized workers are less likely to join their peers in collective action when they see that a violation against an undocumented coworker results in no meaningful financial penalty for the employer.²⁸ This “lore of the shop,” or the

²⁴ Ruben J. Garcia, *Ten Years after Hoffman Plastic Compounds, Inc. V. NLRB: The Power of a Labor Law Symbol*, WILLIAM S. BOYD SCHOOL OF LAW (2012), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1800&context=facpub>.

²⁵ Liebman, *supra* note 23.

²⁶ Garcia, *supra* note 24.

²⁷ *Id.*

²⁸ Liebman, *supra* note 23.

shared history and anecdotes that define the unique culture and atmosphere of a business, sends a message that the group's collective power is only as strong as its most vulnerable members' lack of a remedy.²⁹

Ultimately, the reshaping of the NLRB has resulted in a feeble and toothless agency that can no longer restore the status quo *ex ante* after a violation.³⁰ As Rachel Steber concludes, by dividing the workforce into those worthy of remedies and those who are not, the Court has condoned a “sub-class of workers in high demand and with little to no rights.”³¹ The Board's remedial arsenal is now limited to future-oriented obligations, such as cease and desist orders and notice postings, which Justice Breyer warned would allow employers to “conclude that they can violate the labor laws at least once with impunity.”³²

B. The Chilling Effect of Hoffman on Labor Organizing

Beyond its direct impact on the NLRB's remedial powers, the *Hoffman* decision has had a profound and pervasive “chilling effect” on the willingness of undocumented workers to exercise their statutory rights or report workplace abuses. As Cameron observes, the Court's ruling creates a reality where workers are “promised workplace rights in theory, but not in practice.”³³ This silence is not merely a byproduct of a legal ruling but is often a calculated outcome leveraged by employers who use the specter of the decision more effectively than its actual legal application.

²⁹ *Id.*

³⁰ Rita Trivedi, *Restoring a Willingness to Act: Identifying and Remedying the Harm to Authorized Employees Ignored Under Hoffman Plastics*, Univ. of Mich. J.L. Reform (2018).

³¹ Rachel Steber, *Alternative Remedies for Undocumented Workers Left Behind in a Post-Hoffman Plastic Era*, 68 CATH. U. L. REV. 757, include page cited here (2019), <https://scholarship.law.edu/cgi/viewcontent.cgi?article=3524&context=lawreview>.

³² *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 140 (2002) (Breyer, J., minority), <https://supreme.justia.com/cases/federal/us/535/137/>.

³³ Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, The New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1-34 (2003), https://www.uclalawreview.org/wp-content/uploads/2019/09/10_51UCLALRev12003-2004.pdf.

The most immediate manifestation of this chill is the misuse of the discovery process in litigation. Ruben Garcia notes that “employers have tried to use *Hoffman* to seek discovery of immigration status in depositions and to deny workers' compensation in some cases,” effectively transforming a labor dispute into a deportation threat.³⁴ This strategy was explicitly addressed in *Rivera v. NIBCO, Inc* (2004), where the Ninth Circuit justified a protective order because “the substantial and particularized harm of the discovery—the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights—outweighed [the employer’s] interests” in obtaining that information.³⁵ The court recognized that if such discovery were permitted, “countless acts of illegal and reprehensible conduct would go unreported” because workers would withdraw meritorious claims rather than risk exposure.³⁶

This environment creates what Lance Compa describes as a “vicious cycle of abuse.”³⁷ Compa argues that immigrant workers’ defenselessness ensures that they fear exercising their collective bargaining rights or seeking legal redress when their workplace rights are violated for fear of retaliation or deportation.³⁸ Employers, fully aware of this fear, are then emboldened to intensify abuses and violations of their rights with the certainty that the workers will not complain to authorities. As Justice Breyer warned in his *Hoffman* dissent, without the deterrence of back pay, “employers could conclude that they can violate the labor laws... with impunity,” essentially receiving “one free bite of the apple” before facing any real consequence.³⁹

The behavioral impact extends into the broader context of occupational safety and health. Jayesh Rathod argues that, while immigration status is a primary factor, the *Hoffman* decision

³⁴Garcia, *supra* note 24.

³⁵ *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004).

³⁶ *Id.*

³⁷ Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards* (Aug. 1, 2000), <https://www.hrw.org/reports/2000/uslabor/>.

³⁸ *Id.*

³⁹ *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 140 (2002) (Breyer, J., minority), <https://supreme.justia.com/cases/federal/us/535/137/>.

“tacitly invited employers to test the significance of immigration status in other areas of employment and labor law,” leading to a tsunami of litigation across statutes like the Fair Labor Standards Act and Title VII.⁴⁰ This constant threat of disclosure “position[s] immigrant workers largely as objects, swayed by structural forces that override individual agency.”⁴¹ This chill is especially dangerous in hazardous industries, including agriculture, construction, and factory work, where workers may trade safety for the speed of work or fail to report injuries to avoid drawing government attention to their unauthorized status.

Ultimately, the most lasting damage of *Hoffman* is the coercive message sent to the entire workforce. As the concurring opinion in *Mezonos Maven Bakery* (2011) points out, “provided it is severe enough, one labor-law violation is all it really takes” to immobilize an organizing effort.⁴² This structural intimidation borders on a threat: assert your rights and you will be discharged, detained, and deported. This lore of the shop creates an enduring culture of intimidation that prevents even authorized coworkers from joining their undocumented peers in collective action, as they witness violations pass with only slaps on the wrists, such as notice posting, rather than meaningful financial remedies.⁴³

C. A Sub-Class of Workers and the New Bracero Program

The ultimate socio-economic consequence of the *Hoffman* decision is the formalization of what Rachel Steber describes as a “sub-class of workers in high demand and with little to no rights.”⁴⁴ While the Court maintained the technicality that undocumented workers are employees under the NLRA, it effectively stripped that status of its primary protective value. By dividing

⁴⁰ Jayesh Rathod, *Beyond the ‘Chilling Effect’: Immigrant Worker Behavior and the Regulation of Occupational Safety & Health*, https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2063&context=facsch_lawrev.

⁴¹ *Id.*

⁴² Liebman, *supra* note 23.

⁴³ Jayesh, *supra* note 40.

⁴⁴ Steber, *supra* note 31.

the American workforce between those worthy of make-whole remedies and those who are not, the Court has not only devalued the NLRA but has also “disadvantage[d] authorized American workers, essentially eroding the goals of IRCA that the Court originally sought to uphold.”⁴⁵

This development represents the revival of a discredited historical era—*Hoffman* enacts, in effect, a “new” Bracero Program. The original Bracero Program was a series of laws and treaties that imported Mexican nationals as “indentured servants” to bolster the agricultural labor pool.⁴⁶ Cameron notes that what “Jim Crow laws were to African Americans... the Bracero Program had become to Mexican Americans.”⁴⁷ Like its predecessor, the new program created by *Hoffman* places an underclass of low-wage Latino immigrants outside the protection of the law, where they are never truly guaranteed workplace rights or safety.

The historical parallel is most visible in the “captivity” of the labor force. In the original program, braceros were confined by law to a given crop and employer and lacked the freedom to travel across the country as they pleased or pursue better working conditions. Under the *Hoffman* regime, undocumented workers face a modern iteration of this captivity—while not legally tied to one employer, the categorical exclusion of back pay means they cannot safely exercise the right to “shop” for better conditions through collective bargaining without risking a “cost-free” discharge.⁴⁸ As Cameron argues, this creates a perverse “protectionism” for law-breaking employers, providing a subsidy in the form of lower labor costs for those who choose the “low-cost road of breaking the law.”⁴⁹

⁴⁵ *Id.*

⁴⁶ Cameron, Christopher. 2003. “Borderline Decisions: Hoffman Plastic Compounds, The New Bracero Program and the Supreme Court’s Role in Making Federal Labor Policy.” Pt. 1-34. *UCLA LAW REVIEW* 51 (1). https://www.uclalawreview.org/wp-content/uploads/2019/09/10_51UCLALRev12003-2004.pdf.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

This legal environment intentionally erodes the workforce unity that the Supreme Court once deemed essential. In the 1984 *Sure-Tan* decision, the Court warned that if undocumented workers were excluded from participation in union activities, “there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident coworkers,” thereby impeding effective collective bargaining for everyone.⁵⁰ *Hoffman* effectively ignored this warning, creating the very fragmented workforce the *Sure-Tan* court sought to avoid.

Ultimately, this subsection of the labor force is relegated to the shadows, serving as the “low-wage muscle” for industries ranging from Southern poultry factories to New York sweatshops, while being denied the tools to reach the middle class. This structural positioning arranges “immigrant workers largely as objects” whose individual agency is overridden by the constant threat of status-based exclusion.⁵¹ By ensuring the merits of this new Bracero Program will not be debated at all in a democratic forum, the *Hoffman* majority has successfully established permanent, remedial exclusion within the American economy.

IV. THE FAILURES AND POSSIBILITIES OF NLRB-BASED SOLUTIONS

A central, albeit restrictive, tenet of the *Hoffman* ruling is the categorical bar on backpay for hours not worked; however, the Court’s holding did not explicitly address whether such financial awards could be redirected to an alternative recipient. Legal scholars like Peter E. Shapiro at The George Washington University Law School argue that the financial liability normally owed to undocumented workers could instead be funneled to organizations dedicated to collective worker representation.⁵² By redirecting these funds, the legal system could effectively

⁵⁰ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

⁵¹ Rathod, Jayesh. 2010. “Beyond the ‘Chilling Effect’: Immigrant Worker Behavior and the Violation and the Regulation of Occupational Safety & Health.” *EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL*.

⁵² Peter E. Shapiro, Union Shops, Not Border Stops: Updating NLRB Sanctions to Help Organize Immigrant Workers After *Hoffman*, 78 *GEORGE WASH. LAW REV.* 1069, 1069-1085 (2010) (NLRB sanction fines should fund immigrant worker organizations) 78-5-Shapiro.pdf.

circumvent the *Hoffman* bar—since the award is not granted to the worker themselves—while ensuring that employers do not realize a windfall from their unlawful conduct.⁵³ This approach seeks to maintain a level of financial deterrence that preserves the integrity of the collective bargaining process for the entire workforce.

The viability of this approach, however, hinges on the precise scope of the NLRB’s authority. Because the Board’s mandate is traditionally viewed as remedial rather than punitive, the Supreme Court has historically interpreted any lack of explicit statutory permission to award damages as an “affirmative of the preclusion of the Board’s authority.”⁵⁴ This creates a significant hurdle: if a redirected backpay award is construed as a punitive damage rather than a make-whole remedy, it is unlikely to survive judicial scrutiny. Conversely, if the damages assessed are too low to be deemed punitive, they may fail to provide the meaningful deterrence necessary to address systemic unfair labor practices.

Nonetheless, the possibility for administrative innovation remains. In the *Mezonos Maven Bakery* opinion, Chairwoman Liebman noted that the *Hoffman* precedent:

“do[es] not definitely shut the door on other monetary remedies, which have not been tested here. It is arguable, for example, that a remedy that requires payment by the employer of backpay equivalent to what it would have owed to an undocumented discriminatee would not only be consistent with *Hoffman*, but would advance Federal labor and immigration policy objectives. Such backpay could be paid, for example, into a fund to make whole discriminatees whose backpay the Board had been unable to collect.”

⁵³ *Id.*

⁵⁴ Rachel Steber, *Alternative Remedies for Undocumented Workers Left Behind in a Post-Hoffman Plastic Era*, 68 CATH. U. L. REV. 757, include page cited here (2019), <https://scholarship.law.edu/cgi/viewcontent.cgi?article=3524&context=lawreview>.

This allows the door to remain open for litigation proposing a common fund, provided it stays within the Board’s legitimate power.⁵⁵ Ultimately, the Board faces a delicate balancing act: it must craft penalties stringent enough to create meaningful deterrence while ensuring it does not exceed its authority by awarding remedies that the judiciary will strike down as punitive.

V. THE PATH FORWARD

The legal community has long wrestled with determining the best course of action to address the immediate and long-term harms of the *Hoffman* decision. While the most direct resolution would be for the United States Supreme Court to overturn the ruling and reestablish the availability of back pay for all employees, the current judicial climate makes such a reversal deeply unlikely. Consequently, legal scholars and labor advocates have proposed a series of alternative legal and administrative actions designed to restore the integrity of the National Labor Relations Act and protect the most vulnerable members of the workforce. These solutions range from internal administrative adjustments by the National Labor Relations Board to broader legislative reforms and the creation of alternative remedial funds.

A critical, yet often ignored, component of the path forward involves addressing the harm done to authorized employees who work alongside undocumented workers. As Rita Trivedi observes, the current remedial structure fails to restore the psychological status quo *ex ante* for the remaining workforce after an employer commits an unfair labor practice.⁵⁶ When authorized workers witness their employer retaliate against an undocumented colleague with relative impunity—facing only a slap on the wrist rather than financial consequences—their own willingness to exercise collective bargaining rights is chilled.

⁵⁵ *Id.*

⁵⁶ Rita, *supra* note 30.

To remedy this, we suggest that the NLRB should routinely implement “Expanded Appropriate Remedies” in cases involving undocumented workers to counteract the lore of the shop, which reinforces employer power. One such action is the use of an “Explanation of Rights” document, which sets out core statutory rights with clear examples relevant to the specific violations found in a case. By mailing this document to all current and former employees, the Board can educate the workforce and provide the information and reassurance critical to restoring collective confidence.⁵⁷ Furthermore, the Board could exercise its authority to order extended notice posting periods and notice readings where high-ranking management must acknowledge their legal obligations in front of the assembled workforce. To ensure these orders are not ignored, the Board should utilize visitation rights, both announced and unannounced, allowing agents to enter facilities to monitor compliance, which is especially vital in immigrant-heavy industries where workers are unlikely to report non-compliance for fear of retaliation.⁵⁸

Because alternative-recipient funds for back pay are often struck down as “punitive” and thus beyond the Board’s authority, a more viable path involves shifting the venue of enforcement from administrative actions to statutory and common law litigation. We suggest the initiation of employment claims in U.S. courts under the federal Alien Tort Claims Act or state labor codes.⁵⁹ As the Ninth Circuit noted in *Rivera v. NIBCO, Inc* (2004), federal courts possess superior expertise and the authority to balance Title VII and the NLRA against immigration policy in ways the NLRB cannot.⁶⁰ Unlike the Board, which is limited to “remedial” actions, the judiciary can decide whether a statutory violation warrants back pay by weighing the overriding national

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Ruben J. Garcia, *Ten Years after Hoffman Plastic Compounds, Inc. V. NLRB: The Power of a Labor Law Symbol*, WILLIAM S. BOYD SCHOOL OF LAW (2012), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1800&context=facpub>.

⁶⁰ *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004).

policy against discrimination against the goals of the IRCA. This bypasses the punitive label that plagues the NLRB-directed funds while ensuring that law-breaking employers are still held financially accountable for their misconduct.

Legislative action remains a primary, albeit admittedly difficult, avenue for reform. Congress could achieve partial restoration of labor protections by codifying the NLRB's pre-*Hoffman* practice. This would involve amending the NLRA to clarify that back pay remains a valid remedy up until the specific date the employer discovered the worker's undocumented status. Such a move would prevent employers from knowingly hiring undocumented workers, then holding that information as a defensive shield to be deployed only when the worker begins to organize.⁶¹ Additionally, Congress could model the proposed Workplace Action for a Growing Economy (WAGE) Act from 2016 and adapt it to contemporary conditions. The Act could be utilized to strengthen the NLRA's overall deterrent effect by introducing civil penalties and triple back pay, though specific language would be needed to ensure these protections reach the undocumented workforce.

To address the specific fear of deportation that silences workers, we propose modeling Sarah Zelcer's recommendation of the creation of a "Z-Visa," a new cooperative visa category modeled after the existing "U" and "T" visas.⁶² While the current U-Visa requires proof of "criminal activity," the Z-Visa would extend to civil violations, specifically focusing on serious workplace abuse, exploitation, and violations of environmental standards like pesticide misapplication. Under Zelcer's findings, the Z-Visa process would allow the Secretary of Homeland Security to grant temporary legal status to an undocumented person who has

⁶¹ Ruben J. Garcia, *Ten Years after Hoffman Plastic Compounds, Inc. V. NLRB: The Power of a Labor Law Symbol*, WILLIAM S. BOYD SCHOOL OF LAW (2012), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1800&context=facpub>.

⁶² Sarah Zelcer, *Engaging Farmworkers in Enforcement of Environmental Policy: The Case for a New Cooperative Visa*, 16 VT. J. ENVTL. L. 542, 542-571 (2015).

witnessed or been exposed to a “covered violation” and has been or is likely to be helpful to law enforcement or federal agencies.⁶³ This proposal is unique in its technical implementation: it expands the list of “certifying agencies” beyond the police and judiciary to include the Environmental Protection Agency (EPA), the Department of Labor (DOL), and even medical professionals.⁶⁴ A medical professional’s certification would verify that the worker’s physical symptoms match the health criteria associated with workplace hazards, such as chemical exposure.⁶⁵ The Z-Visa would not require the high standard of causation found in tort litigation but, rather, a *prima facie* showing that links workplace conditions to physical or mental harm.⁶⁶ This mechanism ensures that immigration enforcement is delayed or stayed while a *bona fide* workplace claim is investigated, preventing employers from using the threat of a raid to silence witnesses or undermine a pending NLRB election. Providing victims and witnesses with “work authorization” cards for the duration of legal proceedings would allow them to seek reinstatement and testify without the immediate threat of being deported, transforming workers from passive “ghosts” into active partners in the enforcement of federal labor and environmental standards.⁶⁷

Finally, the path forward must include “Joint Enforcement Actions” and greater inter-agency cooperation. Rather than treating labor and immigration law as a hierarchy where immigration control always trumps worker rights, agencies like the NLRB, EEOC, and ICE should work in unison to ensure that immigration enforcement is not used as a pretext for

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Human Rights Watch, *Unfair Advantage: Workers’ Freedom of Association in the United States Under International Human Rights Standards* (Aug. 1, 2000), <https://www.hrw.org/reports/2000/uslabor/>. AND Sarah Zelcer, *Engaging Farmworkers in Enforcement of Environmental Policy: The Case for a New Cooperative Visa*, 16 VT. J. ENVTL. L. 542, 542-571 (2015)

strike-breaking or union-busting.⁶⁸ For example, a mandatory policy of “DHS Forbearance” could be established, prohibiting raids or internal enforcement measures at any worksite where an NLRB election is pending or an active labor dispute is being adjudicated.⁶⁹

By combining these administrative remedies, equitable financial pools, and targeted legislative changes, the legal system can begin to mitigate the “sub-class” status *Hoffman* imposed on the immigrant workforce. These actions would not only protect the most vulnerable workers in America but would also shore up the desperately needed collective bargaining power and mental confidence of the authorized workers who stand beside them.

However, while the foregoing proposals collectively gesture toward a restoration of the pre-*Hoffman* remedial landscape, it would be analytically imprecise—and politically naïve—to assume their simultaneous adoption. The contemporary administrative and legislative environment is defined by fragmentation: a periodically under-quorum NLRB,⁷⁰ an increasingly skeptical federal judiciary,⁷¹ aggressive immigration enforcement priorities,⁷² and a Congress largely immobilized by partisan gridlock.⁷³ In such a climate, the question is not which reforms are normatively desirable in the aggregate, but which interventions are both politically plausible and independently capable of reintroducing meaningful deterrence against employer misconduct. Accordingly, reform efforts should be strategically concentrated on those mechanisms that can

⁶⁸ Garcia, Ruben. 2012. *Ten Years after Hoffman Plastic Compounds, Inc. V. NLRB: The Power of a Labor Law Symbol*. <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1800&context=facpub>.

⁶⁹ Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards* (Aug. 1, 2000), <https://www.hrw.org/reports/2000/uslabor/>.

⁷⁰ Robert C. Nagle, *The Lost Year at the NLRB: How a Lack of Quorum Stalled Change in 2025*, FOX ROTHSCHILD LLP (Dec. 5, 2025), <https://www.foxrothschild.com/publications/the-lost-year-at-the-nlr-how-a-lack-of-quorum-stalled-change-in-2025>.

⁷¹ Lauren McFerran, *How to Save Labor Law from Slaughter*, THE CENTURY FOUND. (Dec. 11, 2025), <https://tcf.org/content/commentary/how-to-save-labor-law-from-slaughter/>.

⁷² Kaleah Haddock, *ICE and Deportations: How Trump Is Reshaping Immigration Enforcement*, COUNCIL ON FOREIGN RELATIONS (Jan. 30, 2026), <https://www.cfr.org/articles/ice-and-deportations-how-trump-reshaping-immigration-enforcement/>.

⁷³ Jia Xin Luo, *Gridlock From Polarization: The Current State of the United States Government*, DEMOCRATIC EROSION CONSORTIUM (Nov. 22, 2023), <https://www.democratic-erosion.com/2023/11/22/gridlock-from-polarization-the-current-state-of-the-united-states-government/>.

operate within existing statutory frameworks while still altering the incentive structure created by *Hoffman*.

One such intervention lies in the expansion and formalization of immigration-based protections for workers engaged in labor disputes—most notably, the creation (or aggressive administrative analog) of “Z-Visas” for individuals participating in labor enforcement proceedings. Unlike comprehensive legislative overrides of *Hoffman*, which would require congressional action unlikely to materialize in the near term, a visa-based approach can be partially operationalized through executive discretion and inter-agency coordination between the NLRB and the Department of Homeland Security. By temporarily stabilizing a worker’s immigration status during the pendency of a labor claim, such a policy would directly target the coercive leverage that *Hoffman* affords employers: the credible threat of deportation. This reform, thus, is not just a supplement to existing remedies but an overhaul of the underlying enforcement dynamic. By enabling undocumented workers to participate in the proceedings without fear of removal, the likelihood of detection and prosecution of unfair labor practices is significantly easier. In implementing Z-Visas, labor organizers can reintroduce a form of accountability that, while not identical to back pay, nonetheless disrupts the cost-benefit calculus that *Hoffman* recalibrated in favor of employer impunity.

At the same time, if political or administrative constraints render even visa-based reforms only partially realizable, a secondary—and perhaps more immediately implementable—strategy would be the systematic expansion of state-level and federal court litigation pathways outside the NLRA’s remedial scheme. By channeling claims into jurisdictions that recognize broader damages frameworks (including tort and wage-and-hour statutes), advocates can circumvent the narrow remedial ceiling imposed by *Hoffman* without directly confronting it. This approach is

particularly attractive in the current legal landscape because it leverages existing causes of action and does not depend on doctrinal shifts at the Supreme Court level. Moreover, it is independently sufficient to reintroduce financial consequences for unlawful employer behavior, thereby restoring—at least in part—the deterrent function that *Hoffman* eliminated. While this strategy lacks the structural elegance of a unified federal solution and may not have the same guarantee to issue protection to undocumented workers, its decentralization may, in fact, be its greatest strength in the era of federal inaction.

Ultimately, if neither of these pathways proves viable in the present political moment, the more candid conclusion is that meaningful reform may need to await a shift in the composition of the political branches and the judiciary. However, even under such constraints, prioritizing immigration-linked labor protections and alternative litigation strategies offers a pragmatic means of mitigating the most pernicious effects of *Hoffman* without requiring its formal repudiation.

VI. CONCLUSION

The *Hoffman* decision serves as a definitive case study in the ossification of American labor law, where a decades-long legislative impasse has allowed the Supreme Court to displace Congress as the primary architect of federal labor policy. By effectively reviving the structural vulnerabilities of the Bracero Program, the Court has established a remedial underclass of undocumented workers who are promised statutory protections in theory but denied the financial means to enforce them in practice. This remedial void triggers a pervasive chilling effect, ensuring that reprehensible workplace conduct remains unreported as workers withdraw meritorious claims rather than risk exposure and deportation. Ultimately, this environment

silences the most vulnerable and effectively weaponizes immigration status to deter the exercise of fundamental labor rights. Furthermore, this legal framework operates to send a coercive message of impunity to employers that fragments the entire workforce and erodes the collective bargaining power and mental confidence of authorized American workers who stand alongside their undocumented counterparts.

The path toward restoring the integrity of the National Labor Relations Act requires a multifaceted approach that moves beyond the judiciary's currently limited remedial arsenal. As argued throughout this paper, the implementation of "Expanded Appropriate Remedies" by the NLRB, such as mandatory notice readings and an Explanation of Rights, can counteract encroaching employer power. Simultaneously, shifting the venue of enforcement toward statutory litigation and common law claims can provide the necessary financial deterrence to prevent employers from using immigration status as a shield against labor accountability. Further, legislative innovations like the Z-Visa and formalized Department of Homeland Security forbearance represent critical steps toward an integrated legal regime that recognizes labor rights as fundamental human rights rather than mere economic variables.

Ultimately, until the law is reformed to reflect the interconnected realities of a global economy, the American legal system will continue to fail its most vulnerable workers and, by extension, the democratic foundations of the workforce itself.



**ACCOUNTABILITY V. CONSTITUTION: THE ETHICAL DILEMMA OF
PROSECUTING JUVENILES AS ADULTS**

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ABSTRACT

Whether individuals under 18 should be tried as adults remains a persistent ethical dilemma in the criminal justice system. A drastic course of action, this form of punishment is only found valid for a certain caliber of crimes committed under current statutes. The most common crimes that are deemed “ethical” for this escalation of punishment are listed as: murder, sexual assault, gang violence, high profile drug cases, and cases involving weapons. Supreme Court cases *Kent v. United States (1966)*¹ and *Miller v. Alabama (2012)*² appeal to the constitutional rights of juveniles. *Kent v. United States (1966)* examines a sixteen year old boy who had been tried as an adult for robbery and sexual assault without a full investigation of his involvement being conducted prior to the transfer to adult court.³ This case introduces the importance of Fourteenth Amendment rights regarding the caliber of sentence for a juvenile individual. Similarly, *Miller v. Alabama (2012)* declares that mandatory life without parole is unconstitutional due to the neurological differences in reference to a fourteen year old boy on trial for murder.⁴ As a departure from the previous legislation, these cases weigh accountability and maturity among the defendants to ensure constitutional justice. This paper argues that juveniles who commit crimes comparable to the caliber of an adult, should be held accountable for the stature of said crime not only for justice, but also to ensure the safety of the public or victim(s) of the violation. This escalation must be carried out with a fair representation of due process and a consideration of constitutional rights.

¹ Kent v. United States, 383 U.S. 541 (1966).

² Miller v. Alabama, Oyez, <https://www.oyez.org/cases/2011/10-9646> (last visited Apr. 5, 2026).

³ Kent v. United States, 383 U.S. 541 (1966).

⁴ Miller v. Alabama, 567 U.S. 460 (2012).

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I. INTRODUCTION

A complex ethical and constitutional debate within the American justice system is trying juveniles as adults. The U.S. juvenile justice system has created a system that prioritizes rehabilitation over punishment. This system was created on the basis that juveniles are too immature and underdeveloped to be held to the same standard as an eighteen year old legal adult. Even with this system of safeguards in place, there have been many instances where juveniles are still tried as adults with no regard to their right to due process enlisted in the Fourteenth Amendment. This paper claims that regardless of the magnitude of the crime, the defendant must be tried with the correct representation under the Fourteenth Amendment in order to be given a constitutional verdict.

The Fourteenth Amendment states, “no state may deprive any person of life, liberty, or property, without due process of law.”⁵ Due process is the component of the justice system that grants fairness to all citizens. This right can become nebulous when a case takes an extended amount of time to go to trial, be it from controllable or uncontrollable circumstances. Additionally, the carelessness of a defense, prosecution, or law enforcement group can alter the trajectory of a trial.⁶ This delay of trial can result in prejudice, loss of evidence, and loss of witnesses.

The debate centers on whether minors can learn and grow from their crimes in juvenile detention, or whether they fully understood and deliberately chose their actions. The juvenile justice system is oriented in a way to provide ample opportunity for rehabilitation, growth, and

⁵ U.S. CONST. amend. XIV, § 1.

⁶ Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, THE CHAMPION, June 2012.

change among convicted persons. Crimes that involve murder, abuse, drug, gang, and weapons are included in this constitutional question as they are concerns for public safety. The prosecution of juveniles as adults is either seen as an act of civil safety or as unconstitutional punishment. By offering opportunities of rehabilitation, the justice system is not only respecting the defendants' constitutional rights, but also attempting to eliminate negative behavior from happening again in the future.⁷ *Reforming Juvenile Justice: A Developmental Approach* collaborated on by Bonnie et al., states in reference to juvenile rehabilitation, “holding adolescents accountable for their offending can promote positive legal socialization, reinforce a prosocial identity, and facilitate compliance with the law,”⁸ therefore affirming the positive benefits of the juvenile justice structure.

The United States Supreme Court has reviewed many cases that are related to the constitutional rights of juvenile prosecution. Cases such as *Kent v. United States* (1966),⁹ *Miller v. Alabama* (2012),¹⁰ *Roper v. Simmons* (2005),¹¹ and *In re Gault* (1967),¹² have altered the legal parameters of juvenile cases and drawn attention to the lack of constitutional protections. Each case argues the concepts of liability for the crimes committed against the neurological differences between adults and minors. The American Academy of Adolescent Psychiatry states that juvenile brains, “are guided more by the emotional and reactive amygdala and less by the thoughtful, logical frontal cortex,” affirming the presence of cognitive development in juvenile cases must be considered.¹³ These cases have helped the courts justly and appropriately try

⁷ SUBHAL PRATAP SINGH, *Rehabilitation in the Juvenile Justice System*, <http://dx.doi.org/10.2139/ssrn.4401981> (Mar. 27, 2023).

⁸ National Research Council, *Reforming Juvenile Justice: A Developmental Approach* 4-5 (Richard J. Bonnie et al. eds. 2013), <https://www.nationalacademies.org/projects/DBASSE-CEGIS-09-11/publication/14685>.

⁹ *Kent v. United States*, 383 U.S. 541 (1966).

¹⁰ *Miller v. Alabama*, 567 U.S. 460 (2012).

¹¹ *Roper v. Simmons*, 543 U.S. 551 (2005).

¹² *In re Gault*, 387 U.S. 1 (1967).

¹³ American Academy of Child & Adolescent Psychiatry, *The Teen Brain: Behavior, Problem Solving, and Decision Making*, FACTS FOR FAMILIES No. 95 (Dec. 2011).

juveniles by changing the approach to juvenile prosecution while highlighting the mishandling of previous trials.

Juveniles who commit a crime to the caliber of an adult should be held accountable for the stature of said crime to set a precedent, but also to ensure the safety of the general public or victim(s) in the case. This escalation also must be carried out with a fair representation of due process and a consideration of constitutional rights. Due process is present both for the victims and offenders in ensuring fairness throughout the justice process. Part I of this article examines the difference between rehabilitation and punishment and the history of the juvenile detention system. Part II explores the importance of due process and the Fourteenth Amendment while prosecuting juveniles while referencing cases such as *Kent v. United States (1966)*¹⁴ and *In re Gault (1967)*, which established guidelines for juvenile prosecution. Part III considers the consequences of trying juveniles as adults while referencing Supreme Court case *Miller v. Alabama (2012)*. Part IV describes the positives of trying minors as adults in terms of accountability and public safety. Part V addresses the counterarguments for juvenile prosecution while referencing maturity, rehabilitation, and potential long-last effects on defendants. Part VI and VII similarly address the ethics and future for juvenile prosecution while taking into consideration appropriate punishment, justice for victims, and potential balances for the system. Part VIII explores future developments of the prosecution of juveniles and the constitutional protections they should be afforded.

II. THE PURPOSE OF THE JUVENILE JUSTICE SYSTEM

¹⁴ Kent v. United States, 383 U.S. 541 (1966).

The juvenile justice system was created in 1899 to emphasize the difference between adult offenders and juvenile offenders.¹⁵ The difference was deemed necessary when cases occurred where the rights of juveniles were disregarded. Due to the lack of separation between adult and juvenile court, defendants under the age of 18 were being held to the same standard as adults, even if there were circumstances that differentiated their crimes.¹⁶ As the National Academies of Science, Engineering, and Medicine states, “the guiding premises are that youth who offend should be treated differently from adults who offend,” due to the neurological difference between the two.¹⁷

The difference in juvenile development is the lack of prefrontal cortex development, which means high impulsivity and lack of critical thinking in stressful situations.¹⁸ In response to this, the juvenile detention system was implemented in order to support the defendant's development out of their harmful patterns. The Human Service Agency states, “There is much more emphasis on treatment, therapy, and education rather than just punishment,”¹⁹ affirming that the judicial system is aware of the mental limitations of juveniles.²⁰ This model was implemented resultantly from the belief that adolescents are more susceptible to behavioural changes than adults, so rehabilitation is used as a tool to reduce threatening habits.²¹

The juvenile justice system seeks to rebuild and restore a minor's life to its pre-criminal state through a range of approaches. The Columbia Undergraduate Law Review (CULR)²² highlights the most common forms of rehabilitation used by facilities as, “adjudicatory hearings,

¹⁵ Office of Juvenile Justice and Delinquency Prevention, *Juvenile Justice System Structure & Process* https://www.ojjdp.gov/ojstatbb/structure_process/overview.html (last visited Apr. 5, 2026).

¹⁶ Evie Komninakas, *Presumed Guilty: The Unconstitutionality of Juvenile Transfers to Adult Court*, COLUM. UNDERGRADUATE L. REV. (Aug. 18, 2025).

¹⁷ National Research Council, *Reforming Juvenile Justice: A Developmental Approach* (Richard J. Bonnie et al. eds. 2013), <https://www.nationalacademies.org/projects/DBASSE-CEGIS-09-11/publication/14685>.

¹⁸ American Academy of Child & Adolescent Psychiatry, *The Teen Brain: Behavior, Problem Solving, and Decision Making*, FACTS FOR FAMILIES No. 95 (Dec. 2011).

¹⁹ Human Services Agency, *Differences Between Adult and Juvenile Criminal Court*, <https://www.humanserviceagency.org/NEPrevention/forms/JuvenileVsAdultLaws.pdf>.

²⁰ Komninakas, *Presumed Guilty*, supra note 16.

²¹ Human Services Agency, supra note 18.

²² Komninakas, *Presumed Guilty*, supra note 16.

media privacy protections, and a focus on individualized rehabilitation over fixed sentencing.”²³

The reflective process prompts a deterrence in the juvenile’s mind, which as the National Library of Medicine explains, “deterrence is based on the theoretical notion that offenders learn from the negative experience of (fear of) punishment.”²⁴ Therefore, this definition affirms that the rehabilitation structure that has been adopted, is prompting a scare-factor along with growth for the defendants which elicits a deviance from crime.

The more brutal scale from juvenile to adult is even seen through the prejudice after being convicted. Defendants are depicted as convicts, felons, and inmates. However, the rehabilitation approach strays away from that as CULR explains, “The court even labels minors as ‘delinquent’ rather than ‘guilty’ to shield them from full accountability.”²⁵ The juvenile judicial system encourages growth, confidence, and change prompting people to believe that juvenile centers are beneficial for the trajectory of the youth’s lives.

The scale of the crime a juvenile defendant is convicted of is important for the nature of their prosecution in terms of public safety and extenuating circumstances. Although the rehabilitation resources encourage positive growth, some crimes must be tried at a higher caliber. For instance defendants accused of crimes that have to do with murder, abuse (sexual or physical), drugs, gangs, or weapons, must be held to a higher standard due to their direct threat to the security of others.²⁶ Such prosecutions must take place under constitutional circumstances to ensure the due process of the conviction and decide the course of action for their accountability, whether it be rehabilitation or punishment.

²³ *Id.*

²⁴ Put, Claudia E. van der, Noelle F. Boekhout van Solinge, Geert Jan Stams, Machteld Hoeve, and Mark Assink. “Effects of Awareness Programs on Juvenile Delinquency: A Three-Level Meta-Analysis.” *International Journal of Offender Therapy and Comparative Criminology* 65, no. 1 (2021): 68–91. <https://doi.org/10.1177/0306624X20909239>.

²⁵ Komninakos, *Presumed Guilty*, *supra* note 16.

²⁶ Tiara Greene, *Should Youth Be Charged as Adults in the Criminal Justice System?*, Am. Bar Ass’n, <https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/should-juveniles-be-charged-adults-criminal-justice-system/> (last visited Mar. 12, 2026).

III. CONSTITUTIONAL PROTECTIONS AND JUVENILE DUE PROCESS

The juvenile justice system lacked awareness and priority for the defendant's constitutional rights when it was first created in 1899.²⁷ It is vital that each defendant must be presented with due process, which is explained through the Constitution.²⁸ The Fourteenth Amendment of the United States Constitution outlines that a state may not rescind a defendant's right to ample resources, care, and decency before they are sentenced to a crime in court.²⁹ The Fifth Amendment in the U.S. Constitution addresses that, "due process guarantees protect individual rights by limiting the exercise of government power,"³⁰ for juveniles this means fair treatment and a full investigation before the transfer of their case to adult court.³¹ Due to the nature of juvenile rehabilitation, due process was often pushed aside as less of a factor in the case because the defendant had the opportunity for rehabilitation therefore appealing to their constitutional rights.

As time went on, the disregard for constitutional rights became more prevalent. One of the influential developments in the presence of fundamental rights for juvenile prosecution took place in 1966 with the Supreme Court case *Kent v. United States (1966)*.³² In this case, a sixteen year old boy named Morris Kent was detained as the perpetrator in connection to multiple cases of robbery and rape.³³ During his interrogation, Kent admitted minor involvement which prompted the juvenile court to transfer his case to adult court due to the nature of his crimes being too severe.³⁴ Kent's defense called for a dismissal of the indictment due to the lack of a full

²⁷ Office of Juvenile Justice and Delinquency Prevention, *Juvenile Justice System Overview*, https://www.ojjdp.gov/ojstatbb/structure_process/overview.html (last visited Mar. 28, 2026).

²⁸ Library of Congress, *Overview of Due Process*, Amdt5.5.1, Constitution Annotated, https://constitution.congress.gov/browse/essay/amdt5-5-1/ALDE_00013721/ (last visited Mar. 30, 2026).

²⁹ U.S. Const. amend. XIV, § 1.

³⁰ Library of Congress, *Overview of Due Process*, Amdt5.5.1, Constitution Annotated, https://constitution.congress.gov/browse/essay/amdt5-5-1/ALDE_00013721/ (last visited Mar. 30, 2026).

³¹ *Kent v. United States*, 383 U.S. 541 (1966).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

investigation, as guaranteed through due process.³⁵ The Supreme Court agreed and allowed his case to be remanded to investigate if the waiver of jurisdiction was viable, and due to the time that passed since the original trial the conviction was waived.³⁶ Not only was it declared that a thorough investigation must occur before transferring a juvenile to adult court, but the court requires a written statement outlining evidence to support the transfer.³⁷ The *Kent v. United States (1966)*³⁸ Supreme Court ruling paved the way for juvenile cases in the future to be handled fairly and constitutionally for the defendant.

The following year, another significant case came to light that changed the course of juvenile prosecution. The case of *In re Gault (1967)*³⁹ made significant strides towards due process considerations. Fifteen year old Gerald Gault was arrested on the charges of making a vulgar phone call and was taken to a detention home with his friend.⁴⁰ The arresting officer did not follow the appropriate steps or honor Gault's constitutional rights. Gault was not given a proper trial, was not provided representation, and did not have access to a reliable witness.⁴¹ This case was brought to the Supreme Court due to the poor police work and disregard of the defendants constitutional rights.

In this case, the police reports were not disclosed, petitions were hidden, and prejudice flooded the opinions of the public. The sentence would have been a \$50 fine and two months in jail for adults and yet Gault was sentenced to six years of juvenile detention until he turned twenty one years old.⁴² In response to this, the Gault family filed a petition on the clause of

³⁵ *Id.*

³⁶ *Kent v. United States*, Oyez, <https://www.oyez.org/cases/1965/104> (last visited Mar. 11, 2026).

³⁷ *Kent v. United States*, 383 U.S. at 541, *supra* 31.

³⁸ *Kent v. United States*, 383 U.S. 541 (1966).

³⁹ *In re Gault*, 387 U.S. 1 (1967).

⁴⁰ Administrative Office of the U.S. Courts, *Facts & Case Summary: In re Gault*, <https://www.uscourts.gov/about-federal-courts/educational-resources/educational-activities/sixth-amendment-activities/gideon-v-wainwright/facts-and-case-summary-re-gault> (last visited Mar. 12, 2026).

⁴¹ *Gault*, *supra* note 39.

⁴² *Id.*

habeas corpus, which allows for convicts to challenge their ruling in court.⁴³ The Supreme Court reviewed the case and agreed to reverse and reprimand the previous ruling due to the underscore of Gault's due process rights.⁴⁴ The Supreme Court has directly stated, "had Gault been eighteen at the time of his arrest, he would have been afforded the procedural safeguards available to adults," therefore proving the lack of rigor regarding juvenile rights.⁴⁵

The *In re Gault (1967)*⁴⁶ case prompted the Supreme Court to examine the youth correctional system. They acknowledged the difference in adolescents and adults, and emphasized that there is circumstance that prompts treating the ages differently. However, the conclusion found the importance of juveniles facing incarceration are also entitled to the due process guarantees found in the Fourteenth Amendment while still holding them accountable.⁴⁷

These two cases fundamentally changed the course of juvenile courts. *Kent v. United States (1966)*⁴⁸ introduced the importance of investigation and thoroughness in juvenile cases.⁴⁹ *In re Gault (1967)*⁵⁰ emphasized the importance of details and due process pertaining to trials and convictions for delinquents.⁵¹

IV. JUVENILE SENTENCING AND TRANSFERS

The decision to try a minor as an adult is dependent on many factors such as severity of crime, level of involvement, and the defendant's history. Certain crimes are regarded as higher profile. This is due to the danger the crime presents, the threat on public safety, and the

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Kent v. United States*, 383 U.S. 541 (1966).

⁴⁹ *Id.*

⁵⁰ *Gault*, supra note 39.

⁵¹ *Id.*

likelihood of a repeated action. The justice system is there to not just help the defendant or the victim, but also to maintain social order.

When an offender commits a crime of a highly dangerous nature, and the correct precautions are taken, the case is transferred to adult court. The most common precaution begins with the prosecutor filing a petition which then gets taken to court and assessed to gauge whether or not rehabilitation would be a beneficial course of action for the juvenile defendant.⁵² This process results in a judicial waiver, which is a motion filed by the judge to transfer the juvenile case to adult court.⁵³ The judge weighs the nature of the crime and the history of the defendant. By transferring the case to adult court, the juvenile's rehabilitative opportunities are revoked and they are treated like a cognitively developed adult. The nature of this transfer is dependent on the state due to jurisdiction; however, the majority of the power in a transfer is allocated to the prosecutor.⁵⁴ This is a demonstration of the due process considerations throughout the transfer process to adult court. The transfer process is put in place for offenders that are not compatible with the rehabilitative goals of juvenile detention.

*Kent v. United States (1966)*⁵⁵ prompted the Supreme Court to establish that juveniles must have a trial before their cases are transferred from juvenile to adult court.⁵⁶ This process ensures that transferring cases is made with transparency and respects the defendants' rights. Supreme Court cases, *Roper v. Simmons (2005)*⁵⁷ and *Miller v. Alabama (2012)*,⁵⁸ explore the differences in sentencing for adults. *Roper v. Simmons (2005)*⁵⁹ explores a seventeen year old boy named Christopher Simmons who was sentenced to death in 1993 after being tried as an adult.⁶⁰

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Office of Juvenile Justice and Delinquency Prevention, *Juvenile Transfer to Criminal Court*, https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/reform2/ch2_j.html (last visited Mar. 12, 2026).

⁵⁵ *Kent v. United States*, 383 U.S. 541 (1966).

⁵⁶ *Id.*

⁵⁷ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁵⁸ *Miller v. Alabama*, 567 U.S. 460 (2012).

⁵⁹ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁶⁰ *Roper v. Simmons*, Oyez, <https://www.oyez.org/cases/2004/03-633> (last visited Mar 11, 2026).

After multiple appeals to the courts to get his execution canceled, his defense team was finally able to draw on the Eighth Amendment on the grounds that due to evolving standards it is completely unethical to execute minors.⁶¹ This case was able to fully eliminate the possibility of the death penalty for juvenile offenders due to its unconstitutional nature.

*Miller v. Alabama (2012)*⁶² similarly barred the possibility of life without parole for juveniles. In this case, a fourteen year old boy was arrested for murder and sentenced to life without parole.⁶³ The state courts of Alabama upheld this request, however the Supreme Court decided to revise the punishment. Chief Justice Roberts, wrote the dissenting opinion where he claimed, “the Court’s role is to apply the law, not to answer questions about morality and social policy,”⁶⁴ implying the controversy of sparing minors just because of maturity. The final ruling claimed that the death penalty and life without parole share too many similarities in entrapment and individualized punishment to be appropriate for minors.

Fundamentally, children are underdeveloped and less mature than adults and therefore their actions can be qualified as risky.⁶⁵ Due to the lack of cognitive development, it is unconstitutional for minors to be executed or given life without parole. For example, lack of development in the pre-frontal cortex which alters one’s ability to make rational judgement, the influence of peer pressure, and the lack of emotional regulation that juveniles have must be considered.⁶⁶ The Supreme Court does agree that juveniles that commit a higher caliber of crime should be held accountable but not in any way that would compromise safety.⁶⁷

V. COUNTERARGUMENTS: GROWTH AND REHABILITATION

⁶¹ *Id.*

⁶² *Miller v. Alabama*, 567 U.S. 460 (2012).

⁶³ *Miller v. Alabama*, Oyez, <https://www.oyez.org/cases/2011/10-9646> (last visited Mar. 10, 2026).

⁶⁴ *Id.*

⁶⁵ National Research Council, *Reforming Juvenile Justice: A Developmental Approach* (Richard J. Bonnie et al. eds., Nat’l Acad. Press 2013), <https://doi.org/10.17226/9629>.

⁶⁶ *Id.*

⁶⁷ *Roper v. Simmons*, 543 U.S. 551 (2005).

The developmental differences between juveniles and adults is a key component in the argument against juvenile transfers. The frontal cortex of minors is not developed until 25 years old, therefore meaning that the defendant's ability to think about, process, and understand what they are doing is fundamentally different from an adult.⁶⁸ With limited brain capability of impulse control, reflection, and risk assessment, it is less able to stop itself in a threatening situation or think all the way through before acting. The rehabilitation of the juvenile correctional system is the differing component of trying juveniles and adults differently. Due to the undeveloped frontal cortex of minors, their thought patterns and behaviors are relatively malleable. Therefore, the previously harmful patterns that led them to the crimes they committed, may be reversed or helped with the right access to help.

Ethically, punishing juveniles on the same scale as fully developed adults is also wrong. According to The National Library of Medicine, “there is evidence that transferred youth experience ‘cumulative disadvantage,’ including fewer work opportunities and lower paying jobs, both of which can lead to higher risk of reoffending,”⁶⁹ implying that there can be negative connotations to transferring cases to adult courts. There have also been instances that have led to the abuse and exploitation of juveniles. This exploitation has been said to have led to being taken advantage of sexually by the older offenders, or used to commit further crimes due to their malleability.⁷⁰ Oftentimes juveniles end up in solitary confinement for their own safety. However, as Tiara Greene of the American Bar Association states solitary confinement, “interferes with adolescent development and results in self-harming behaviors.”⁷¹ People argue

⁶⁸ Arain, Mariam, Maliha Haque, Lina Johal, et al. “Maturation of the Adolescent Brain.” *Neuropsychiatric Disease and Treatment* 9 (2013): 449–61. <https://doi.org/10.2147/NDT.S39776>.

⁶⁹ Susan O. Kaasa, J.R. Tatar II, A. Dezember & Elizabeth Cauffman, *The Impact of Waiver to Adult Court on Youths’ Perceptions of Procedural Justice*, 24 Psychol. Pub. Pol’y & L. 418 (2018), <https://doi.org/10.1037/law0000181>.

⁷⁰ Greene, supra note 26.

⁷¹ *Id.*

that trying minors as adults not only is harmful mentally, but also can lead to physical and sexual harm down the line.

The rehabilitation attempts of the youth correctional system are not just established to regulate the future crimes that the defendants may commit, but also to set them up for success. The activities that juvenile offenders may partake in are, “Yoga, meditation, personality development, counseling, vocational training, computer training, short-term courses, art and craft therapy,” because these activities exhibit calming and stimulating exercises.⁷² Convicted juveniles have trouble finding jobs, housing, qualifying for drivers licences, maintaining citizenship or immigration status, or becoming educated.⁷³ The effects of being transferred to adult court does not just affect their sentencing, but it also affects the defendant's ability to contribute to society.

The validity of punishment in the adult court system is another leading argument in juvenile prosecution. As Greene addresses, “Court intervention has been shown to increase, rather than decrease reoffending, with imprisonment negatively impacting cognitive growth of youth.”⁷⁴ Part of the reason why trying juveniles as adults is so debated, because the minors are not developed and exposed to criminal mannerisms and behavior which may lead to more harm.⁷⁵ This exposure to monstrous behavior can be detrimental as the juveniles may adopt these traits.

Trying juveniles as adults eliminates the possibility for resilience or growth. It stops their childhood and stunts their ability to cognitively develop. The rehabilitation system is oriented to allow opportunities for changing the course of the defendant's life for the better, however when a minor is tried in adult court it solidifies their life's trajectory. The defendant's constitutional

⁷² Pratap, *supra* note 7.

⁷³ Greene, *supra* note 26.

⁷⁴ *Id.*

⁷⁵ *Id.*

rights are significantly less regarded in not only adult court, but also in the adult prison systems. It is argued that harmful habits of juveniles must be given the opportunity to change, not given the opportunity to grow stronger.

VI. JUSTIFICATIONS FOR PROSECUTING JUVENILES AS ADULTS

Although rehabilitation is the top priority among the juvenile justice system, some extenuating circumstances arise that trump this service. Crimes that can prompt a transfer of courts are measured on a scale of safety and threat to the public. These are considered crimes that demonstrate immense levels of danger, intent, and preparation are seen as the biggest pressure point that must be resolved. The larger the threat on the public, the more drastic the judicial process must be.

Responsibility is also one of the strongest arguments made when trying juveniles as adults. It is vital to promote accountability and discourage this behavior from ever happening again, this is the reason for the juvenile justice system enforcing rehabilitation.⁷⁶ Justice must be served when someone is put into danger, and if the justice system did not honor this obligation, the social order of the country would not be present if people could commit crimes and consistently get away with it with no repercussions.

The nature of the crimes that juveniles commit must be measured against the threshold for adult crimes while acknowledging the fundamental difference between the two. The mental capacity at each age varies, but if a juvenile is engaging in behaviors aligned with adult criminal behavior then they are labeled a stronger threat that must be contained. When a minor participates in a criminal activity that requires immense premeditation and organization prior to

⁷⁶ National Institute of Justice, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, U.S. Dep't of Justice (2010).

the act, evidently, they are capable of these violent tendencies.⁷⁷ A prime example of this is premeditated murder which is meticulously planned and terrifyingly intricate, therefore, proving to the court that the juvenile's capacity for violence is abnormal. The impact that violent crimes committed by a juvenile can have on a community is an important point among this debate. In these cases, it is important to maintain the public image of the justice system by holding the juveniles to the same standard as adult offenders.

VII. ETHICAL AND POLICY CONSIDERATIONS

The legal system is set up to ensure not only accountability for criminals, but also to provide support and justice for the victims and their families. Ethically, there is a moral dilemma surrounding how to handle cases of this matter involving juveniles. It is important for the victims to be shown that they are cared for and that the appropriate legal consequences are being directed to the defendant. However, there are many factors that go into trying minors while respecting all of their constitutional rights.

The nature of the repercussions for minors is at a different scale and requires significantly more thought than adults. As seen in cases such as *Roper v. Simmons* (2005)⁷⁸, the typical punishments for crimes of that nature must be altered due to the cognitive differences of the defendant. The death penalty was deemed unconstitutional to be sentenced to a minor, therefore changing the rules around due to mental ability.⁷⁹ The moral responsibility of the courts sometimes overpowers the standard protocol for the crime committed.

⁷⁷ Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Dev. Rev. 78 (2008).

⁷⁸ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁷⁹ *Id.*

Another ethical consideration is the possibility of change and growth through the rehabilitation resources offered in the juvenile correctional system. The courts must question what the threshold for change is with the specific defendant. When there are systems that prioritize punishment, it can worsen the outcomes for the defendant and the justice system as well. The negative implications that come along with punishment may worsen the lives of the people involved in the crime.

Prejudice is also an important component to the juvenile justice system as being accused of a crime of this manner disrupts and alters the lives of defendants, victims, and the families of those involved. Whether the prejudice is before, after, or during the process of prosecution, it can alter the outcome of the case. For example, the case of Christopher Pittman shows the impact of a delay in a juvenile case can completely alter how a jury looks at the defendant. A twelve year old child named Christopher shot and killed his grandparents. His defense team tried to waive a different sentencing due to the underdeveloped and immature nature of the defendant but there was an immense delay of trial for 21 months.⁸⁰ During this delay of trial Christopher hit puberty and went from a scrawny kid to a six foot two man. Once the trial finally came around, the jury could not fathom that the defendant was cognitively underdeveloped, and therefore tried him as an adult.⁸¹ The jury utilized prejudice to make a life altering decision, rather than believing in the evidence about his stunted cognitive development. The lack of constitutional rights for Christopher to be given a right to a fair trial is ethically inconsistent.

Some youth correctional systems have been able to create programs where juveniles can still be held accountable as adults, be treated fairly, and have access to rehabilitative services.⁸²

⁸⁰ Alison Powers, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried as Adults Without the Possibility of Youth as a Mitigating Factor*, 62 Rutgers L. Rev. 241 (2009).

⁸¹ *Id.*

⁸² Boston Bar Association, *The Juvenile Justice System: The Impact of Rehabilitation on Juvenile Custody*, <https://bostonbar.org/journal/the-juvenile-justice-system-the-impact-of-rehabilitation-on-juvenile-custody/> (last visited Mar. 14, 2026).

This is a respectable hybrid scenario that honors the rights of defendants while also being able to adequately hold them accountable and help them improve.

VIII. THE FUTURE OF JUVENILE PROSECUTION IN THE UNITED STATES

As time goes on, developments in science and technology will allow for further understanding of juvenile crime. The reasons for the crimes committed will start to become more evident. Developments in psychology and neuroscience will expose more answers to how to treat juvenile delinquency. For instance the implementation of yoga, art, and other neurological stimulants that promote tranquility, highlight the strides being taken to adhere to juvenile mood and development.⁸³ There will be more resources to respect constitutional rights while also holding people accountable for their actions.

Developments will arise that explore how juveniles who are tried as adults can get through life as normal as possible. The rehabilitation process will not just pertain to trying to change juvenile habits, but it will also encourage the offenders to re-establish their place in society and become a contributing member to their communities.

There may be more procedures dictating which cases get transferred to adult court and which maintain their status in juvenile court. This could mean psychological evaluations, tests, and clearer rules as to what is and is not viable for juvenile court, meaning that more cases will continue to arise that push the barrier of ethics and constitutional rights.

The future of juvenile prosecution will not be a problem of whether or not juveniles should be tried as adults. Rather, it will be a discussion of how to make the most ethically

⁸³ Pratap, *supra* note 7.

appropriate decisions to be mindful of juveniles constitutional rights and set them up for success in the future.

IX. CONCLUSION

The argument over trying minors as adults in the United States is incredibly complex and requires significant circumstantial factors in each case. The 14th and 8th Amendments highlight the constitutional rights to due process that all citizens are entitled to while engaging with the legal system. As juveniles, these rights are often overlooked on the clause that juvenile courts are significantly different from adult courts.

The rehabilitation goals of juvenile court are written to give defendants a second chance to better themselves and their futures. While this rehabilitation is important, some crimes do not justify the ability to redeem oneself. However, there are ways for defendants to have access to both rehabilitation and punishment that hold them accountable for their crimes.

The Supreme Court has tried cases that have influenced the trajectory of the juvenile justice system. For example cases such as *Kent v. United States* (1966),⁸⁴ *In re Gault* (1967),⁸⁵ *Miller v. Alabama* (2012),⁸⁶ and *Roper v. Simmons* (2005).⁸⁷ These cases have all contributed to the ethical stance taken on juvenile prosecution, as well as affected how the courts must operate juvenile cases. Each case was monumental in ensuring juvenile constitutional rights within the justice system.

For public safety and the victims of crimes, the prosecution of juveniles as adults is essential. It is vital that they are aware of their actions and take responsibility for the damage they caused. It is important for the courts to remember the fundamental differences from minors

⁸⁴ *Kent v. United States*, 383 U.S. 541 (1966).

⁸⁵ *Gault*, supra note 39.

⁸⁶ *Miller v. Alabama*, 567 U.S. 460 (2012).

⁸⁷ *Roper v. Simmons*, 543 U.S. 551 (2005).

to adults. There are significant neurological differences that can alter the actions of a minor, meaning that the courts must be mindful of the differences, and inadvertently on the severity of the punishment.

It is vital that a juvenile case that is transferred to adult court is handled with considerations of the 14th and 8th Amendment rights, appropriate legal framework and structure, and ability to be held accountable while still having access to rehabilitation and the ability to change. If this is achieved, then the United States legal system will be able to fairly keep order and prioritize public safety parallel to prioritizing the constitutional rights of juvenile offenders.



RESTORATIVE JUSTICE AS A LEGAL OBLIGATION: EQUAL PROTECTION

LIMITS ON EXCLUSIONARY SCHOOL DISCIPLINE

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ABSTRACT

After decades of research indicating the harms of school discipline, public schools across the country still choose to rely on zero-tolerance policies (i.e. suspensions, expulsions, and law enforcement referrals). Zero-tolerance policies affect students of color, students with disabilities, and students from low-income communities disproportionately. Black students are 3.6 times more likely to be suspended outside of school, 2.5 times more likely to be suspended in school, 3.6 times more likely to be expelled, 2.4 times more likely to be referred to law enforcement and 2.9 times more likely to experience school-based arrest in comparison to their White peers.¹ Even as restorative justice gains more support as an approach, it is generally considered a discretionary practice rather than a mandatory measure in light of proven inequalities in disciplinary actions at schools. This paper argues that the failure to effectively put restorative justice practices into action in public schools constitutes not only a policy shortcoming, but a systemic legal failure and potential civil rights violation.

Relying on constitutional doctrine, federal civil rights law, and educational policy, this paper asserts that punitive disciplinary systems can produce racially unequal outcomes that raise concerns under Title VI of the Civil Rights Act and the Equal Protection Clause. Using an analysis of zero-tolerance policies, the expansion of police authority in schools, and the criminalization of minor forms of student behavior such as classroom disruptions or defiance, this paper demonstrates how current disciplinary methods expose school districts to legal liability by perpetuating discriminatory practices under the guise of neutrality. Empirical evidence from school districts that have implemented restorative justice practices is used to refute claims that

¹ Sean Darling-Hammond and Eric Ho, *No Matter How You Slice It, Black Students Are Punished More: The Persistence and Pervasiveness of Discipline Disparities*, 10 AERA OPEN 1, 1-21 (2024).

exclusionary discipline is necessary for safety and order. Thus, this paper redefines restorative justice as a legally necessary response to systemic inequities in school discipline, as opposed to voluntary reforms.

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I. INTRODUCTION

Public Schools in the United States rely on exclusionary disciplinary practices like suspension, expulsions, and referrals to law enforcement in order to address student misconduct. Throughout several decades, these practices, typically associated with zero-tolerance policies, have become the standard for maintaining order in educational settings. Zero-Tolerance policies are disciplinary frameworks that enforce predetermined punishments without considering context or intent. These practices were adopted during the 1990s in an effort to ensure school safety. However, research shows that exclusionary discipline can impact educational outcomes, increase student disengagement, and contribute to what scholars call the “school-to-prison pipeline.”²

These disciplinary systems have been shown to affect students unequally. Research shows that students of color, students with disabilities, and students from low-income backgrounds experience suspensions and expulsions at disproportionately high rates relative to their peers.³ Black students are three times more likely to be suspended than their white counterparts for the same behaviors.⁴ Students with disabilities tend to receive out-of-school suspensions at higher rates compared to their peers who do not have disabilities.⁵ The consequences of these disparities are visible beyond the classroom, increasing the likelihood of students becoming disconnected from schools and experiencing consequences that impact them beyond the classroom. Even though these disciplinary practices are framed as unbiased responses

² Mara Schiff, *Dignity, Disparity and Desistance: Effective Restorative Justice Strategies to Plug the “School-to-Prison Pipeline,”* UCLA CENTER FOR CIVIL RIGHTS REMEDIES 1, 1-18 (2013).

³ Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REVIEW 317, 317-342 (2002).

⁴ *Id.*

⁵ Daniel J. Losen and Russell J. Skiba, *SUSPENDED EDUCATION SUSPENDED EDUCATION URBAN MIDDLE SCHOOLS IN CRISIS* 19 (Marion Chartoff et al. eds., 2010).

to student behavior, the outcomes suggest patterns of inequality that raise important questions about fairness and systemic bias within public education.

For the purpose of this paper, restorative justice is defined as the practice of a disciplinary system used by schools to address any form of harm experienced without resorting to direct punishment or even punishment through exclusion from school. Instead, this approach uses methods like holding circles, dialogue, and conferences in order to try to solve the root causes, understand why the behavior was exhibited, and rectify the situation as a way of dealing with it. Opposed to punitive justice, which tends to exclude students from schooling during punishment, restorative justice ensures that the students are not excluded.

The restorative justice model has been developed to be an alternative for dealing with school discipline issues. While traditional models utilize punitive measures and removal from classrooms, the restorative process attempts to foster responsibility, conversation, and healing within schools.⁶ The implementation of restorative justice is being tested by many school districts throughout the United States to reduce suspensions.⁷ Even with the growing support of restorative justice practices, it is constantly treated as a discretionary policy reform as opposed to a structural or legal necessity.⁸

This paper asserts that reliance upon exclusionary disciplinary practices, especially considering the evidence of inequality observed, raises legal concerns. To be specific, disciplinary systems that produce racially inequitable outcomes may violate protections under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. The continued use of these discriminatory systems of discipline, despite the evidence regarding

⁶ Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School-to-Prison Pipeline* 41 J.L. & EDUC 281, 281-335 (2012).

⁷ Yolanda Anyon, *Restorative Interventions and School Discipline Sanctions in a Large Urban School District*, 53 AMERICAN EDUCATIONAL RESEARCH JOURNAL, 1663, 1663-1697 (2016).

⁸ Trevor Fronius et al., *Restorative Justice in U.S. Schools: A Research Review* 6 (Fredrika Baer et al. eds., 2016).

the inequalities they perpetuate, leaves room for legal action to be taken. While advocates for these policies may argue neutrality by pointing out instances of student misconduct, the effect of said programs makes this inherently flawed. It is even more challenging to explain the use of exclusionary discipline when one considers the fact that there are other ways of addressing the issue that involve lesser punishment. When educational institutions keep systems that result in disparities while effective methods are available, it makes one question the legitimacy of such a system in terms of equity and equal opportunities in education.

This paper consists of five sections. Section I examines the historical development of exclusionary discipline in American public schools. Section II explores the unequal impact of exclusionary disciplinary practices on certain student populations and the policy's relation to the school-to-prison pipeline. Section III considers the constitutional basis for regulating student discipline, referencing rulings by the Supreme Court on student rights and school governance. Section IV evaluates the empirical results of school districts using restorative justice programs. To conclude, section V will evaluate how restorative justice may function not only as a policy reform but as a framework necessary for addressing systemic inequities in school discipline.

I. THE RISE OF EXCLUSIONARY SCHOOL DISCIPLINE

The process of exclusion from the public education system is certainly not something new. In the past, access to schooling in the US was determined by various structures of inequality, ranging from legally enforced segregation to the denial of equal educational opportunities for people of color. Before the mid-twentieth century, Black students had been systematically barred from a majority of academic institutions and denied even the basic right of receiving a proper education.⁹ Even following the implementation of judicial decisions such as

⁹ Brown v. Board of Education, 347 U.S. 483 (1954).

Brown vs. Board of Education, where racial segregation in schools was declared unconstitutional, there remained the continuity of educational discrimination, albeit in other forms.

Although past forms of exclusion were clearly stated, current forms of exclusion may manifest more subtly. The practices of exclusionary discipline, such as suspension, expulsion, and even referral of the students to police officers, have been key processes through which certain students are deprived of continuous learning. Several studies have established that such exclusionary disciplinary measures tend to target students coming from disadvantaged backgrounds.¹⁰ Thus, it can be suggested that the present processes of exclusion can be seen as a continuation of past processes of exclusion.

The use of suspensions, expulsions, and police referrals has become increasingly common as a means of managing behavioral problems. These approaches represent a relatively recent development regarding how schools handle behavioral problems, specifically with the expansion of zero-tolerance policies in the late twentieth century.¹¹ Traditionally, school discipline's purpose was intended to correct behavior while maintaining students' access to education. Yet, recently, disciplinary frameworks have instead adopted measures that remove students from the learning environment rather than addressing the underlying causes of said misconduct.

The expansion of exclusionary discipline increased during the late 20th century with the rise of zero-tolerance policies. This was created in the context of President Reagan's "War on Drugs" campaign; the zero-tolerance approaches were then adopted across school systems in the 1990s. This came after the passage of the Gun-Free Schools Act of 1994, which required strict disciplinary responses to weapons in school. Gradually, these policies were used beyond serious

¹⁰Daniel J. Losen & Russell J. Skiba, *Suspended Education: Urban Middle Schools in Crisis* 19 (Marion Chartoff et al. eds., 2010).

¹¹ Russ Skiba and Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 THE PHI DELTA KAPPAN 372, 372-376, 381-382 (1999).

infections and included a wide range of student behavior.^{12 and 13} Although the goal was originally to tackle infractions, such as weapon possession, zero-tolerance policies expanded to include minor forms of misconduct (i.e., classroom disruption). In parallel with the expansion of these models, another trend observed was the increased presence of law enforcement officials in schools. More precisely, the emergence of school resource officers (SROs) in public schools evidences another attempt to make schools safer. The presence of police in schools appears to be associated with an altered perception of student conduct, as conduct previously dealt with by school teachers or school administrators became more often viewed as an issue demanding intervention from a law enforcement official. Subsequently, consequences that would traditionally be enacted by educational administrators transitioned into law enforcement issues, contributing to the criminalization of student behavior.¹⁴

Consequently, it has been found that there is a greater effect on marginalized student groups when it comes to being disciplined. Black students compose only around seventeen percent of the public school population, but constitute almost thirty-four percent of those suspended from school. Students with disabilities are also disproportionately affected by disciplinary actions. This trend is proven by the relatively higher percentage of mentally and physically disabled juveniles who enter the juvenile detention centers. Studies have proven that almost two-thirds of male detainees and two-thirds of female detainees meet the criteria for at least one psychiatric disorder, showing the overrepresentation of vulnerable youth in the juvenile justice system.¹⁵

¹² 20 U.S.C. § 796 (1994).

¹³ *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AMERICAN PSYCHOLOGICAL ASSOCIATION 852, 852-862 (2008).

¹⁴ Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 JOURNAL OF CRIMINAL JUSTICE 280, 280-287 (2009).

¹⁵ Linda A. Teplin et al, *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES OF GENERAL PSYCHIATRY 1133, 1133-1143 (2002).

A historical examination of how educational exclusion operates suggests that, although the form of exclusion may have changed, the consequences have continued to be deeply rooted within the educational system. Exclusion has now become a process of disciplining that excludes children from the learning environment. Exclusionary discipline must be seen not only as an administrative procedure aimed at controlling student conduct, but as one that perpetuates the same inequality that characterizes the educational process.

II. Disparities and the School-to-Prison Pipeline

A. Race

National data shows that students of color are disciplined at higher rates across different punishment classifications like suspensions, expulsions, and law enforcement referrals, showing consistent disparities in how disciplinary policies are applied.¹⁶ These disparities have become a concern within the education policy and civil rights scholarship, especially as researchers analyze the relationship between school discipline and future involvement in the criminal justice system. Scholars have demonstrated that Black children have been over three times more prone to suspension than white children, with no difference in behavior noted between them.¹⁷

Research shows that Black students make up ninety-nine percent of measured disciplinary outcomes over one thousand five hundred and eighty one analytic comparisons.¹⁸

Zero-tolerance policies have been a significant part of this trend. In cases where both groups violate school rules to an equal extent, it appears, more often than not, that Black or Latino students face tougher forms of punishment, from suspension or expulsion to police intervention. There is evidence to indicate that racial discrimination within the schools does not

¹⁶ Sean Darling-Hammond and Eric Ho, *No Matter How You Slice It, Black Students Are Punished More: The Persistence and Pervasiveness of Discipline Disparities*, 10 AERA OPEN 1, 1-21 (2024).

¹⁷ Daniel J. Losen & Russell J. Skiba, *Suspended Education: Urban Middle Schools in Crisis* 19 (Marion Chartoff et al. eds., 2010).

¹⁸ Darling-Hammond Ho, *supra* note 17.

derive from more frequent misbehavior on the part of Black or Latino students, but is due to differential perceptions and responses to misbehavior.¹⁹ It was found that Black children are more frequently disciplined for subjective reasons, such as “defiance” or “disruption,” whereas white children receive discipline for objective misconduct. This difference becomes critical due to the nature of subjective definitions, which enable the exercise of discretion by school authorities in punishing similar actions according to their interpretation.²⁰

These trends demonstrate that the practice of using exclusionary punishment is not an unbiased approach to handling student behaviors, but rather one that leads to discrimination among racial groups. This makes exclusionary practices more common for minority groups, which in turn denies them their right to education and increases the risk of their academic disengagement and failure. This becomes even more relevant because exclusion from educational institutions correlates highly with increased juvenile crime rates and higher dropout rates.²¹

B. Disabilities

The correlation between disabilities and punishment at schools is yet another example of the uneven distribution of exclusions in disciplinary practice. Children with special needs have a greater tendency to be suspended, expelled, or even put in the juvenile justice system as opposed to their non-disabled counterparts. According to national statistics, students with disabilities are more than twice as likely to receive out-of-school suspensions compared to their peers, although these differences are not fully explained by variations in behavior.²²

¹⁹ Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 THE URBAN REVIEW 317, 317-342 (2002).

²⁰ *Id.*

²¹ American Civil Liberties Union, *Bullies in Blue: The Origins and Consequences of School Policing* (2017).

²² U.S. Dep’t of Educ., Office for Civil Rights, *Civil Rights Data Collection* (2013–2014).

Race and disability provide a unique intersection when examining these disparities. It has been found that black children tend to be disproportionately represented in special education classes that focus on problem behaviors, despite no significant difference in the level of problem behavior between Black and White students.²³ The disproportionate representation of Black children within disability programs has been explained using two theories: racism within disability classification, and broader inequality in education.

Discipline disparities do not emerge merely from the students' conduct, but rather from institutional failure in recognizing the true state of affairs. If students with special needs are punished rather than assisted, then such an approach will only lead to a cycle of further marginalization and push students into punishment structures.

C. The School-to-Prison Pipeline

These patterns have contributed to what scholars refer to as the “school-prison-pipeline,” describing the process in which exclusionary discipline policies increase the possibility that students (specifically marginalized students) will be removed from educational systems and will later encounter juvenile or criminal justice systems.²⁴ Although schools argue that exclusionary discipline is necessary to maintain order and safety, empirical evidence suggests that these practices instead reinforce systemic inequalities within education. This raises legal questions regarding whether the current disciplinary structures can be repaired with comprehensive principles of equality and fairness within public education. If these practices consistently produce unequal outcomes for marginalized students, then continuing to rely on these systems calls for legal scrutiny.

²³Torin D. Togut, *The Gestalt of the School-to-Prison Pipeline*, 20 Am. U. J. Gender Soc. Pol’y & L. 1 (2011).

²⁴Mara Schiff, *Dignity, Disparity and Desistance: Effective Restorative Justice Strategies to Plug the “School-to-Prison Pipeline”* 1 (UCLA Ctr. for Civ. Rts. Remedies 2013).

III. Constitutional Framework of School Discipline

Public schools have significant jurisdiction over regulating student conduct, yet their authority is not entirely unrestricted. The Supreme Court has confirmed that public schools exist under the respective state's discretion and should conduct themselves within the parameters of the Constitution while disciplining students many times. However, even with that in mind, the Court has recognized that schools need leeway in creating and maintaining an orderly learning environment. Evidently, school discipline is practiced within a legal setting, granting power to school officers, while also ensuring there are limits on the power given.

One of the most well-established limitations in terms of school discipline set forth in the U.S. Constitution is the decision made in *Goss v. Lopez (1975)*. In this particular case, the issue considered was whether public school students in the state of Ohio could be expelled for up to ten days without a hearing.²⁵ According to the court, an individual's fundamental right to public schooling meant that, irrespective of the time, any suspension required a minimal form of due process of law. It entails that students must be provided with information about allegations brought against them and an opportunity to respond to those claims. The ruling in *New Jersey v. T.L.O (1985)* has contributed to the constitutional structure of school searches by clarifying the extent of power granted to school officials over their students.²⁶ As per the court's judgment, searches by school authorities are subject to the Fourth Amendment, which implies that public school officials cannot be considered immune to constitutional protection. However, the court ruled that the standard would shift from "probable cause" to "reasonableness," arguing that such

²⁵ *Goss v. Lopez*, 419 U.S. 565 (1975).

²⁶ *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

searches are constitutionally valid if they are reasonable at their inception and in terms of scope.²⁷

The struggle between student rights and the power of the school system is again evident in the landmark case of *Tinker v. Des Moines Independent Community School District* (1969). While this is primarily considered a First Amendment case, *Tinker* is relevant to the doctrine on student rights, since the Supreme Court ruled that students do not surrender their constitutional rights when they enter a public school. The court decided that student speech is allowed, provided there is no material and substantial disruption to the operation of the school.²⁸ Unlike *Goss* and *T.L.O.*, which were cases involving student discipline, this case is applicable because of the ruling that schools are not above constitutional boundaries. In addition, the Supreme Court, in the *Safford Unified School District v. Redding* (2009), made it clear that, despite the standard set in *T.L.O.*, schools are not entitled to unlimited authority in disciplining students. In *Safford* (2009), an investigation on a thirteen-year-old girl led to a strip search since there were reports of her possession of prescription-strength ibuprofen pills. However, this practice was found to be unconstitutional since the degree of invasion was disproportionate to the alleged crime. The significance of the ruling is that, even in the school environment, there should be proportionality of disciplinary and investigatory procedures.

In *Brown v. Board of Education* (1954), the court ruled that racial segregation through public schools run by the state constitutes an unconstitutional discrimination against minority populations under the Equal Protection Clause, regardless of whether such schools have equal resources. Though *Brown* relates to segregation in the sense of desegregation, rather than exclusionary discipline policy. *Brown* is significant since it establishes the rule that equal

²⁷ *Id.*

²⁸ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

protection of law precludes any system of public education based on systematic discrimination of people according to their racial background.

Together, the legal precedents outlined above illustrate two fundamental principles. First, public schools have legitimate power over the preservation of security and order. However, the scope of that power is not unlimited in any way. Students continue to enjoy their constitutional rights, the processes involved in punishment are expected to adhere to at least some form of due process standards, searches are supposed to be proportional, and the system of public schooling continues to be implemented in a fair and equal manner. This becomes relevant in demonstrating the fact that exclusionary discipline cannot simply be considered an administrative matter.

IV. Restorative Justice as an Alternative Framework

Restorative interventions in large urban school districts have found declines in suspension rates after these practices were implemented; however, the effectiveness of this is more clearly demonstrated in their ability to reduce repeated misconduct and alter disciplinary practices.²⁹ Research has also suggested that restorative approaches can improve school climate, strengthen communication between students and staff, and reduce the amount of repeated behavioral incidents.³⁰ These findings are important because they challenge the assumption that exclusionary discipline is a necessity to maintain safety and order in schools.

Oakland Unified School District has shown that with the usage of restorative justice practices, there is a substantial decline in suspensions and a shrinking display of racial discipline gaps. At Cole Middle School, suspensions dropped by eighty-seven percent and expulsions were

²⁹Yolanda Anyon et al., *Restorative Interventions and School Discipline Outcomes in a Large Urban School District*, 53 Am. Educ. Res. J. 1663 (2016).

³⁰Trevor Fronius et al., *Restorative Justice in U.S. Schools: A Research Review* (WestEd Justice & Prevention Research Ctr. 2016).

eliminated after implementing a school-wide restorative justice model.³¹ Denver Public Schools similarly saw a reduction of forty percent in out-of-school suspensions following the implementation of restorative processes within the school system. These findings are important not only because suspensions decreased, but because they suggest that restorative justice practices reduce the amount of disciplinary involvement that repeats and limit student contact with exclusionary discipline systems. When restorative processes are applied, students are much less likely to be punished again.³² For instance, when the Chicago Public School system implemented restorative practices, there was an eighteen percent decline in suspensions and a thirty-five percent decrease in student arrests.³³ These findings indicate that restorative strategies can reduce reliance on exclusionary discipline and decrease student contact with law enforcement. Although this evidence does not explicitly measure school safety, it suggests that schools can maintain order without the use of punitive disciplinary approaches. This is significant because it suggests schools can provide security without resorting to punitive measures like suspension or expulsion, as proven by the instances in which restorative justice programs were successfully carried out.

In addition to reducing instances of punishment, restorative justice also transforms how school systems approach students' behavior. Many restorative justice programs utilize a model that includes trauma-informed approaches, training for educators, and partnership with families and community agencies as key elements. According to studies, restorative methods tend to be used in conjunction with other initiatives at school, which include social and emotional learning (SEL), trauma-informed schools, and multi-tiered system of supports, highlighting the

³¹Sujatha Jain et al., *Restorative Justice in Oakland Schools: Implementation and Impacts* (Oakland Unified Sch. Dist. 2014); Michael D. Sumner, Carol J. Silverman & Matthew L. Frampton, *School-Based Restorative Justice as an Alternative to Zero-Tolerance Policies: Lessons from West Oakland* (Univ. of Cal., Berkeley Sch. of Law 2010).

³²Yolanda Anyon et al., *Restorative Interventions and School Discipline Outcomes in a Large Urban School District*, 53 AM. EDUC. RES. J. 1663 (2016).

³³Mara Schiff, *Dignity, Disparity and Desistance: Effective Restorative Justice Strategies to Plug the "School-to-Prison Pipeline"* (UCLA Civil Rts. Project 2013); Univ. of Chi. Educ. Lab, *Restorative Practices in Chicago Public Schools* (2023).

importance of relationships, intervention, and community involvement in discipline change.³⁴ For example, when trauma-informed and restorative practices are considered together, there is a strong emphasis on tackling the reasons behind student behavior, which include stressful or difficult experiences, through the use of strategies such as structured dialogue and peer mediation.³⁵ This integration is a clear indication that restorative justice is not an isolated practice, but one within a larger structural strategy of dealing with disciplinary issues in schools.

In this context, restorative justice does not constitute any single action, but rather a transformational process that reflects a change in approach taken by schools towards disciplinary processes. Restorative justice, as it seeks accountability, encourages and engages communities in a way that makes it easy to achieve better results without the need for exclusionary disciplinary measures. With all these factors, the continued reliance on exclusionary disciplinary practices becomes difficult to justify when other options have proven effective.

V. Legal Implications and Policy Reform

The continuation of racial disparities within exclusionary school discipline also raises legal questions regarding the obligations of the public educational institutions for reform. Not only does the school have the responsibility of maintaining order, but it also must provide equal opportunity for learning and promoting student success. If a disciplinary process results in some students being excluded from their classes more than others, one may question whether or not the school is fulfilling its duties.

Research continues to show that suspensions, expulsions and law enforcement referrals disproportionately impact marginalized students, with data showing that Black students, boys,

³⁴Andrea A. Joseph-McCatty & Rebecca J. Hnilica, *Restorative Practices: The Application of Restorative Circles in a Case Study School*, TEACH. & TEACHER EDUC. (2022), <https://doi.org/10.1016/j.tate.2022.103935>.

³⁵Dayna Sedillo-Hamann, *Trauma-Informed Restorative Justice Practices in Schools*, 44 CHILD. & SCH. 98 (2022).

and students with disabilities are disciplined at higher rates across various categories of school discipline. This data shows Black students represent approximately 15.5% of public school populations, yet about 39% are suspended from school.³⁶ The continued use of these disciplinary systems may create concerns under both the Equal Protection Clause of the Fourteenth Amendment and the federal civil rights law. Although schools hold the authority to regulate student conduct, it is important to note that the authority must operate within constitutional limits that protect students from discriminatory treatment. School discipline must adhere to minimum standards of procedures, must be reasonable, and not violate fundamental fairness. *Goss v. Lopez* (1975) and *New Jersey v. T.L.O* (1985) have set precedent that school discipline must also conform to the requisites of due process and reasonableness.³⁷

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying any person equal protection under the law.³⁸ As state actors, public school systems are required to administer policies in a way that is consistent with principles of fairness and equality. Even though many disciplinary policies are written in race-neutral terms, the fact that we can consistently see racially disparate outcomes creates concerns about whether these policies weaken equal access to education.

Taking into account constitutional concerns, it is also important to mention that exclusionary discipline practices may also compromise federal civil rights protections under Title VI of the Civil Rights Act of 1964. This act prohibits discrimination based on race in programs receiving federal funding. Public school districts rely more heavily on punitive disciplinary systems that often show evidence of disproportionate impacts, which may cause an increasing

³⁶ U.S. Gov't Accountability Off., *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities*, GAO-18-258 (2018).

³⁷ *Goss v. Lopez*, 419 U.S. 565 (1975); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

³⁸ U.S. Const. amend. XIV, § 1.

amount of investigation about whether these policies produce discriminatory outcomes in practice. While Title VI claims generally require proof of intentional discrimination, there are other issues raised by the continued prevalence of racial inequities in school discipline that go beyond just intention. If disciplinary practices show a pattern of discrimination in school policies, even if it results from unintentional action, it may nonetheless subject the system to federal investigation or consideration of potential policy changes in order to address the problem, especially when there is an alternative method that is more efficient in reducing these racial disparities. For instance, if other strategies for achieving similar ends as punitive discipline policies have proven to be successful in addressing school discipline problems without discriminating based on race, then these policies might be seen as inconsistent with equal protection laws.

The fact that there are alternatives that are effective increases the complication in the continued use of exclusionary discipline. Empirical research on restorative justice programs has shown that schools can maintain order and accountability without relying only on suspensions and expulsion. Studies have shown that restorative practices can lower suspension rates, improve school climate, and encourage constructive responses to student misconduct. In particular, the introduction of restorative justice programs resulted in a significant decrease in suspensions in the Oakland Unified School District, while expulsions became rare events.³⁹ In the same way, one school in Baltimore managed to reduce the number of suspensions from eighty-six to just ten per year after implementing the program.⁴⁰ When there are less punitive and more equitable disciplinary approaches available, the justification for maintaining systems that produce significant disparities becomes increasingly difficult to defend.

³⁹Sujatha Jain et al., *Restorative Justice in Oakland Schools: Implementation and Impacts* (Oakland Unified Sch. Dist. 2014).

⁴⁰Laura Mirsky, "Building Safer, Saner Schools," *Educational Leadership* (2011).

Restorative justice represents more than just a policy preference or optional reform strategy. Ideally, it would function as a framework that is capable of addressing the structural inequalities that exclusionary practices have resulted in. By prioritizing structured, school-based interventions rather than removal, restorative practices allow schools to address misconduct while preserving students' access to education, offering an approach that is more consistent with principles of equal access and fairness in public education. In this way, restorative justice offers a model of discipline that aligns more with constitutional principles of fairness and equality.

While concerns about discriminatory discipline practices continue to grow, policymakers and legal scholars have questioned whether the existing disciplinary systems are adequately satisfying the legal obligations required for public schools. This prompts the question of whether exclusionary discipline practices consistently show unequal outcomes, while there are strong alternatives that exist, then the continued use and reliance of such systems require reconsideration.

Based on these considerations and the effectiveness of the methods mentioned above, the authorities must make more resolute efforts toward tackling exclusionary discipline in schools. It is important to note that when tackling racial differences in relation to the matter under discussion, it is vital not just to recognize the problem, but also to find effective ways of addressing it. At the institutional level, it is critical to avoid using the mentioned disciplinary practices when violations are subjective in nature and do not pose any threat to security, namely defiance and disruption. Moreover, school districts should not have a choice in deciding whether they would adopt restorative justice approaches to discipline problems; instead, it should be mandatory. It will mean funding, training, and implementing strategies like trauma-informed care to build restorative programs at schools. Essentially, reporting on the results of punishments and

collecting data on racial, disability, and economic disparities in disciplining students must become mandatory.

At the national level, current civil rights laws need to be enforced better. Bodies like the Department of Education's Office for Civil Rights could conduct investigations into the discrimination against students and guide institutions on how to conform to Title VI in their attempts to curb discrimination. Ultimately, for public schools to fulfill their obligations in terms of both constitutional and civil rights, they have to shift from excluding students to inclusion.

VI. Conclusion

Exclusionary school discipline continues to create environments in public schools that disproportionately harm students of color, students with disabilities, and students from low-income communities. This paper has shown that suspensions, expulsions, and law enforcement referrals are not neutral responses to student behavior and, in practice, they reinforce patterns of inequality within schools. These inequalities contribute to long-term educational and legal consequences for students who are already marginalized.

Restorative justice should be treated as more than an optional approach, but instead as an obligation schools have to their students to uphold the promise the Department of Education makes: "promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access".⁴¹ When exclusionary disciplinary systems create a cycle of racially disparate outcomes and ignore the existence of less harmful and more equitable alternatives, legal concerns are formed under the Equal Protection Clause and Title VI of the Civil Rights Act. Restorative justice offers a different approach; this approach centers

⁴¹U.S. Dep't of Educ., *Mission of the U.S. Department of Education*, <https://www.ed.gov/about/ed-overview/mission-of-the-us-department-of-education> (last visited Apr. 19, 2026).

accountability, dialogue, and community repair while still protecting students' needs and access to education.

In practice, treating restorative justice as discretionary truly undermines both the documented harms of punitive discipline and the legal implications of allowing those harms to continue. Assuming that public schools are committed to fairness, equality, and educational access, then they truly have to move beyond disciplinary systems that are rooted in exclusion and transition to frameworks that address harm without reproducing injustice.



NEAR PERFECT SURVEILLANCE: ANALYZING THE CONSTITUTIONALITY OF GEOFENCE WARRANTS AND PREPARING FOR A TECHNOLOGICAL FUTURE

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ABSTRACT

Investigative techniques bolstered by technological innovations have progressively tested the bounds of the Fourth Amendment's protection against search and seizure; recent cases have raised doubt on the constitutionality of geofence warrants. A geofence warrant compels location service providers such as Google to disclose identifying information of mobile devices that entered a specified location during a predetermined frame of interest. The emergence of geofence warrants considers the trade-off between constitutionally protected privacy pursuant to the Fourth Amendment and investigative efficiency. The Fourth Circuit Court in *United States vs. Chatrue* held that — under the premise of the Third-Party Doctrine — there is no reasonable expectation of privacy in the information collected by location service providers. In *United States vs. Smith*, however, the Fifth Circuit Court ruled that the searches were unconstitutional, warning of “near perfect surveillance.” In recent years, geofence warrant requests have skyrocketed, as data shows an increase from 982 in 2018 to 11,500 in 2020. Reports from 2021 indicate that such applications constituted around a quarter of all warrants. This article first assesses the current legal situation regarding such warrants. It then posits the argument that, while parts are constitutional, geofence warrants as a whole are unconstitutional, for they contain advanced privacy searches unauthorized by the initial warrant. The article will then attempt to answer the question: how can the government write legislation that proactively accommodates technological innovations?

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I. INTRODUCTION

In 1927, federal agents wiretapped the private conversations of Ray Olmstead, a suspected bootlegger during Prohibition.¹ The Supreme Court of the United States later presided over Olmstead's case, holding that due to a lack of physical trespass and seizure of material items, federal agents had not infringed upon Mr. Olmstead's Fourth Amendment protection against search and seizure.² In many ways, this case marked the beginning of what has become a long relationship between investigative technological innovations and privacy rights, the latest phase of which is the creation of geofence warrants. Often referred to as a reverse warrant, a geofence warrant is used when law enforcement agents do not have a clear suspect in an investigation. Thus, officers compel location service providers such as Google to release devices, in the form of anonymized data points, that entered a predesignated location during a specific time interval, from which law enforcement pares to discover suspects.³ To find devices, Google conducts an exhaustive search of the Sensorvault, a vast repository of data containing the full location history collected on user devices that opt-in to Google's location services.⁴

The importance of privacy rights extends far beyond everyday life. The right to privacy is vital to the very structure of democracy. A system devoid of such rights crowds out the possibility for independent thought: the dynamic and subjective perspectives that are essential for a self-governing democracy.⁵ Privacy lawyer and author Julia Cohen warns against this kind of "modulated democracy" where citizens "lack the ability to form and pursue meaningful agendas for human flourishing."⁶ If individuals are subject to incessant surveillance, there is little room for original, subversive thought for fear of the consequences of breaking the

¹ *Olmstead v. United States*, 277 U.S. 438 (1928), overruled by *Katz v. United States*, 389 U.S. 347 (1967).

² *Id.*

³ *United States v. Chatrue*, 107 F.4th 319 (4th Cir. 2024).

⁴ *Id.*

⁵ Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904 (2013).

⁶ *Id.*

status quo, thus rendering communities controllable, predictable, and entirely stagnant. Communities as such are highly susceptible to both sly and forthright authoritarian efforts that generate democratic backsliding due to a lack of the necessary intellectual capacity to challenge systemic norms.

This article assesses the newest phase of the interplay between investigative innovations and privacy rights. Part II will analyze the text of the Fourth Amendment, highlighting the technicalities of the Particularity Clause, while exploring relevant historical interpretations such as the Third-Party Doctrine. The importance of the court rulings in *United States v. Chatric* (2023)⁷ and *United States v. Smith* (2024),⁸ as examined in Part III, proves essential to the debate surrounding reverse warrants, as the courts provide modern legal arguments on both sides. Subsequently, Part IV considers the aforementioned cases and presents a framework for how future rulings might consider the constitutionality of geofence warrants. Looking towards the future, Part V will ponder the question: how are courts to prepare for a complex investigative future, while respecting citizens' privacy rights? Ultimately, this article argues that geofence warrants, in the manner of their current usage, are unconstitutional pursuant to the Fourth Amendment because their advanced stages constitute additional searches that do not uphold the Particularity Clause. To rectify this, law enforcement must obtain further authorization to continue the reverse-warrant process after step one.

II. TEXT AND HISTORY OF THE FOURTH AMENDMENT

A. *Overview and General History*

⁷Chatric, 1 F.4th at 130

⁸United States v. Smith, 110 F. 4th 817 (Court of Appeals, 5th Circuit 2024).

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”⁹

The Fourth Amendment’s warrant requirement traditionally contains three primary clauses which detail a constitutionally valid warrant and search: issuance by a neutral magistrate, probable cause, and particularity.¹⁰ The stipulation of particularity that a valid warrant must “particularly describe the place to be searched, and the persons or things to be seized” — is of central focus to this article.¹¹ In 1967, the Supreme Court heard *Warden v. Hayden*; the case centered around a ‘hot pursuit’ police entry into a house to arrest an armed robbery suspect without a warrant, which established that the Fourth Amendment protects privacy rather than physical property.¹² The Court affirmed the purpose of the particularity requirement, elaborating that the scope of a search must be “strictly tied to and justified by” the circumstances which generated the possibility of its inception.¹³ In *Marron v. United States* (1979), the Court considered just how far the boundaries of the warrant requirement extend: specifically, if officers could confiscate items not particularly listed in the initial warrant.¹⁴ When delivering the opinion of the Court, Justice Pierce Butler held that this doctrine is fundamentally intended to “make

⁹ U.S. CONST. amend. IV.

¹⁰ *Fourth Amendment*, U.S. CONST., Justia Law, <https://law.justia.com/constitution/us/amendment-04/> (last visited Feb. 22, 2026).

¹¹ U.S. CONST. amend. IV.

¹² *Warden v. Hayden*, 387 U.S. 294 (1967)

¹³ *Id.*

¹⁴ *Marron v. United States*, 275 US 192 (Supreme Court 185 AD).

general searches under them [the warrants] are impossible and prevent the seizure of one thing under a warrant describing another.”¹⁵ The articulation indicates the Fourth Amendment’s preventative nature against “general searches,” revealing the particularity requirement’s ultimate aim: limiting officer discretion as to what is to be searched.

As it relates to personal privacy on an individual’s cellular device, a key interpretive case of the Fourth Amendment came in *Riley v. California* (2014).¹⁶ On August 22, 2009, law enforcement stopped David Leon Riley for a traffic violation in San Diego, California.¹⁷ An officer, immediately following the arrest, confiscated a cell phone from Riley’s pocket.¹⁸ Upon searching the device, the officer found repetitive text messages utilizing a term associated with a local street gang.¹⁹ Later, at the police station, a detective further examined the digital contents, including photographs and videos, which were used to connect Riley to a shooting that had occurred weeks prior.²⁰ Riley moved to suppress all evidence found on his phone pursuant to his Fourth Amendment rights, but the trial court rejected this motion, and the denial was affirmed on appeal.²¹ The Supreme Court then granted a writ and held that digital information stored on a cell phone was of a qualitative difference to other forms of evidence they had reviewed in past cases, therefore placing the search of Riley’s phone under the Fourth Amendment.²² Specifically, Chief Justice John Roberts, in delivering the opinion of the Court, noted how, for many Americans, cell phones hold “the privacies of life.”²³ One such privacy concern is location history, which can track an individual’s precise movements “down to the minute, not only around town but also within a particular building,”²⁴ providing an almost perfect depiction of someone’s actions. The

¹⁵ *Id.*

¹⁶ *Riley v. California*, 573 US 373 (Supreme Court 2014).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

Fourth Amendment's fundamental purpose is to protect the "privacies of life" by ensuring that law enforcement may only intrude on an individual's privacy when a detached magistrate has approved all decisions.

B. *The Third-Party Doctrine and the Fourth Amendment*

Concerning the Fourth Amendment, the Court's property-based jurisprudence had historically required a physical trespass into a constitutionally protected area for a search to be deemed illegal. Notwithstanding, the Court in *Katz v. United States* (1967) overturned this methodology.²⁵ The case centered around federal agents' use of eavesdropping devices on Charles Katz's private conversations conducted from a public telephone booth; it prompted the Court to consider whether the traditional philosophy necessitating physical intrusions into a constitutionally protected area was still valid with regard to the Fourth Amendment.²⁶ They reversed previous rulings, establishing that the Fourth Amendment "protects people, not places."²⁷ Put simply, the Court's decision in *Katz* recognized a new standard for privacy: the protection against search and seizure extended beyond locations, but protected that which one may reasonably presume to have privacy in. This decision effectively created the ensuing Katz test, which presents a twofold requirement that first assesses whether a person has "exhibited an actual (subjective) expectation of privacy," and second, if such expectation is "one that society is prepared to recognize as 'reasonable.'"²⁸ Evidently, searches that fail the Katz test are legally valid, while those that pass are unconstitutional pursuant to the Fourth Amendment.²⁹

²⁵*Katz v. United States*, 389 U.S. 347 (1967).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

Through multiple cases, the Court has elucidated this test by clarifying the bounds of privacy expectations that society might deem reasonable in certain situations. Put simply, various rulings have examined whether an individual has a reasonable expectation of privacy in information provided to other parties, such as phone companies or banks. The prevailing consensus, articulated in *United States v. Miller* (1976), is that individuals lack the reasonable expectation of privacy detailed by *Katz* in the information they release to third parties, thus authorizing law enforcement to seize such evidence without a warrant.³⁰

From 2010-2011, the FBI obtained 12,898 cell-site location information (CSLI) points on interstate robbery suspect Timothy Carpenter's phone across 127 days; Carpenter moved to suppress this data in court, but his motion was denied.³¹ The Supreme Court granted a writ and heard *Carpenter v. United States* (2018), addressing whether the Third-Party Doctrine included cell-site location information gathered by the FBI.³² The Court, applying the precedent set in *Riley*, ruled that CSLI records indeed intrude upon the reasonable expectation of privacy that individuals have "in the whole of their physical movements."³³ The Court's decision designated the CSLI-types of information collected by the government "near perfect surveillance,"³⁴ of the potentially pervasive implications of this data and its successors. The holding further negated the argument of Third-Party Doctrine, recognizing that the ubiquity of cell phones in quotidian life and the lack of affirmative actions on the user's part to authorize location tracking cause the *Miller* precedent to topple: "cell phone location information is not truly 'shared' as the term is normally understood."³⁵ In *Carpenter*, the court first recognized the evident privacy intrusion

³⁰ *United States v. Miller*, 425 US 435 (Supreme Court 1976).

³¹ *Carpenter v. US*, 585 US 296 (Supreme Court 2017).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

caused by law enforcement's tracking of personal location as it relates to the Third-Party Doctrine.

III. THE CURRENT LEGAL LANDSCAPE

Before assessing the arguments in the two landmark cases concerning geofence warrants, a precise, analytical definition of the warrant process is required.

Google stores all location history in its Sensorvault database, a vast repository that assigns approximately 592 million individual accounts with a unique identification number and maintains the location history associated with each device.³⁶ When law enforcement, after having ascertained a geofence, compels Google to provide such location history, they follow the three-step process created by the tech giant to limit the potential for pervasive, general searches.³⁷ In step one, Google scrutinizes the Sensorvault to provide the police with an anonymized list of users whose location history reports them to be within the scope of the warrant.³⁸ A user profile at step one includes an anonymized device number, timestamp, coordinates of given location points, a confidence interval (Google aims for an average of 68% accuracy), and the source from which the location was derived (e.g., GPS or Wi-Fi).³⁹ For step two, the warrant gives law enforcement full discretionary ability in that they review the provided information and urge Google to provide additional location coordinates for a list of users if deemed necessary.⁴⁰ Such additional information is unbridled by the bounds of the original geographical and temporal limits of the warrant; for any identified user, police can track movements inside and out of the geofence over a sweeping period.⁴¹ Finally, at step three,

³⁶Chatrie, 1 F.4th at 130.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

investigators procure a list of users and force Google to de-anonymize them, typically providing names and email addresses.⁴²

A. A Bank Robber and A Constitutional Warrant

On May 20, 2019, Okello Chatrie robbed a bank in Midlothian, Virginia, of 195,000 dollars in cash.⁴³ When Detective Joshua Hylton's initial search, reviewing surveillance footage and interviewing witnesses, failed, he turned to Google with a geofence warrant.⁴⁴ The geofence involved a 150-metre radius covering the bank, and a window of thirty minutes before and after the robbery occurred for Google to provide user location history.⁴⁵ At step one, Google provided 209 data points from 19 accounts; for step two, the list was pared to nine accounts from which law enforcement obtained 680 data points from an extended two-hour period; ultimately, Detective Hylton required information on three accounts, one of which belonged to Okello Chatrie.⁴⁶

On September 17, 2019, a grand jury in the Eastern District of Virginia indicted Chatrie.⁴⁷ He later moved to suppress the evidence obtained, arguing the geofence warrant violated his Fourth Amendment rights.⁴⁸ The district court denied this motion on the premise of the good-faith exception.⁴⁹ This exception allows for the admission of evidence seized in violation of the Fourth Amendment, given that it was collected by officers who reasonably believed their actions to be lawful.⁵⁰ The court further refused to address whether the warrant did indeed violate the Fourth Amendment.⁵¹

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *United States v. Leon*, 468 US 897 (Supreme Court 1984).

⁵¹ Chatrie, 1 F.4th at 130.

The Court of Appeals for the Fourth Circuit ruled again against Chatric, considering two primary bases for their decision: the nature of the information sought and the voluntary exposure of this nature.⁵² The court declined to extend the *Carpenter* decision (that tracking an individual's location constitutes a Fourth Amendment search) to Chatric, for the two hours of his location history were far from an "all-encompassing record of [Chatric's] whereabouts ... provid[ing] an intimate window into [his] person[al] life."⁵³ Tracking one trip that Chatric took was therefore much less revealing than searches that had been considered in the past, such as that of *Carpenter*. The court asserted that the information obtained was not sufficient for police to secure a picture of Chatric's life: that which Chatric "does repeatedly, what he does not do, and what he does ensemble."⁵⁴ Furthermore, the court evaluated the voluntary nature of Google's location history process, implicating the Third-Party Doctrine. By default, Google's location history is off; it requires an affirmative act by the user to activate the tracking and storing of one's information.⁵⁵ In fact, Google provides notice of the nature of this setting before it allows a user to enable location history by prompting the user with text that informs them about what the tracking does with the information and their ability to change the data.⁵⁶ Per the Court of Appeals for the Fourth Circuit, the location history reviewed in *Chatric* was not nearly as pervasive and socially necessitated as that of *Carpenter*, for the activation of location history is ultimately unnecessary, and Chatric voluntarily decided to opt in; thus, he had no reasonable expectation of privacy in the information.⁵⁷

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

B. A Postage Robber and An Unconstitutional Warrant

On February 5, 2018, three individuals robbed United States Postal Service Driver Sylvester Cobbs, assaulting him and stealing \$60,706 from mail bags that contained cash receipts.⁵⁸ Postal Inspector Steven Matthews began his investigation three days after the occurrence; he obtained surveillance footage that included what he believed to be one of the assailants utilizing a cell phone.⁵⁹ By November of 2018, Inspector Todd Matney and Steven Matthews testified that they had much difficulty identifying the individuals involved in the robbery, which is when they turned to a geofence warrant to locate potential suspects.⁶⁰ In response to the warrant, Google provided the investigators with a list of eleven accounts located within the approximately 378,278 square meter area in one hour, from five to six pm on the night of the incident.⁶¹ Through the next two steps, inspectors Matney and Matthews paired the list to three accounts that were then identified as belonging to Jamarr Smith, Gilbert McThunel, and a third, deemed irrelevant by the investigators.⁶² Later, after conducting further searches on Smith and McThunel, law enforcement also identified Thomas Iroko Ayodele as a suspect.⁶³

Smith, McThunel, and Ayodele were indicted on October 27, 2021.⁶⁴ The district court denied their motion to suppress on the grounds of an intrusion into their privacy and violation of the Fourth Amendment. However, after expert testimony from the prosecution, all three individuals were found guilty.⁶⁵

In the Fifth Circuit Court of Appeals' ruling that the geofence warrant was indeed a Fourth Amendment search, the court addressed two main topics: a reasonable expectation of

⁵⁸ Smith, 110 F.4th 817.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

privacy and general constitutionality. Citing the ruling in *Carpenter* and referring to previous decisions, the court reaffirmed that individuals have “a reasonable expectation of privacy in the whole of their physical movements,” not to be infringed upon by investigative searches without a warrant.⁶⁶ The court disagreed with the application of the Third-Party Doctrine, which holds that one gives up their right to privacy by voluntarily releasing information. Instead, they warned of the “potential intrusiveness of even a snapshot of precise location data,” which often reveals an individual’s most personal orientations at the “click of a button.”⁶⁷ This location tracking easily follows people into the spaces that they regard as the “most private and intimate,” such as a house or place of worship.⁶⁸ Because the court deemed the information afforded to Google “hardly informed, and, in many instances, ... not even voluntary,” they declined to implement the Third-Party Doctrine.⁶⁹ The Fifth Circuit Court then considered the general constitutionality of these warrants, finding them akin to the “general warrants” that the amendment originally sought to eliminate; this is because law enforcement, when requesting a geofence warrant, “have no idea who they are looking for,” and only a brief snapshot where a suspect might turn up.⁷⁰ In sum, the court in *Smith* reiterated the dangers of searching location tracking information, ruling that the use of geofence warrants was unconstitutional, upholding the privacy standard set in *Carpenter*.

IV. THE (UN)CONSTITUTIONALITY OF GEOFENCE WARRANTS

This section will posit an argument for the unconstitutionality of geofence warrants founded in their inherent structure. This article holds that the anonymized list of users, which constitutes the first step of a geofence warrant, is constitutional, but that such constitutionality

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

dissipates at the second and third steps. It will also address other notable topics related to geofence warrants, namely, *Chatrie*'s arguments of the Third-Party Doctrine and the good faith exception.

A. *Primary Discussions*

The particularity requirement of the Fourth Amendment necessitates that a valid warrant must “particularly [describe] the place to be searched, and the persons or things to be seized.”⁷¹ Per the Court in *Marron*'s relevant interpretation, this clause primarily aims to limit officer discretion in what is to be searched.⁷²

At its first step, a geofence warrant is constitutionally permissible because the initial procurement of data is limited to an anonymized list of users within a strict location and time frame. As elucidated in *Chatrie*, this phase lies on the distinction between raw location data and identifiable accounts.⁷³ This distinction provides the locations of users within the specified window, but presents them in a manner that makes it impossible for the direct identification of an individual. Indeed, this nuance creates a stark contrast with the expansive CSLI information obtained in *Carpenter*,⁷⁴ for it is not only limited in scope but in the traceability of the users involved. However — regarding the framework established in *Katz* — the court has maintained that there is yet a reasonable expectation of privacy in one's precise, personal location history, for it often reveals incredibly personal affiliations.⁷⁵ Therefore, the privacy intrusion in step one is minimized to the extent that it limits officer discretion towards the desired information, as it is effectively controlled by a warrant issued by a detached magistrate. The “things to be seized”

⁷¹ U.S. CONST. amend. IV.

⁷² *Marron*, 275 U.S. 192.

⁷³ *Chatrie*, 1 F.4th at 130.

⁷⁴ *Carpenter*, 138 S. Ct. 2206.

⁷⁵ *Smith*, 110 F.4th 817.

particularly described by the warrant, which rendered the initiation of the search possible, are thus only in compliance with the particularity in step one.⁷⁶

At steps two and three, such constitutional permissibility fails for two primary reasons: the undue discretion afforded to law enforcement and shortcomings of the *Katz* standard.

As established by the court in *Johnson v. United States* (1948), the Fourth Amendment's protection of privacy subsists not in making confidential realms entirely unreachable by investigators.⁷⁷ Instead, it requires that the "inferences which reasonable men draw from evidence" to intrude upon an individual's privacy must "be drawn by a neutral and detached magistrate," rather than law enforcement officers.⁷⁸ Put simply, the court in *Johnson* made plain that the Fourth Amendment is meant not to stop investigators entirely, but to limit their discretion regarding what is to be seized, placing this power in the hands of a warrant that has been issued by a judge. Evidently, when analyzing which users to select for further examination in a geofence warrant, law enforcement has the ability to make, validate, and act upon their own inferences, though acting only upon one warrant granted by a judge. Awarding this discerning power to officers is constitutionally unreasonable. Under one geofence warrant, law enforcement essentially conducts three different searches: of the specified window (step one), of a specific user's location (step two), and finally, of a user's personal account information (step three). These three searches are all loosely tied together and authorized by a warrant only particularly describing the evidence to be seized in step one, placing judgment in the hands of officers rather than a judge. In brief, when officers conduct the advanced privacy searches, which the second

⁷⁶ U.S. CONST. amend. IV.

⁷⁷ *Johnson v. United States*, 333 US 10 (Supreme Court 329 AD).

⁷⁸ *Id.*

and third steps of a geofence warrant consist of, they act in a manner founded on the inferences drawn not by a detached magistrate but by an officer.

Furthermore, it is the contention of this article that the advanced steps of a geofence warrant satisfy the *Katz* test, rendering them unconstitutional. Made brief, the *Katz* test is intended to determine whether any government surveillance constitutes a Fourth Amendment search, enunciating the principle that the amendment protects “people, not places.”⁷⁹ The test presents two questions: whether an individual exhibited a reasonable expectation of privacy, and if this expectation was one that society might recognize as reasonable.⁸⁰

Under the premise of this test, the second and third steps of a geofence warrant are further deemed unconstitutional: there is indeed a reasonable expectation of privacy, exhibited by an individual and recognized by society, in one’s precise location, which is intruded upon by geofence warrants. As demonstrated by the court in *Smith*, there is a foundational recognition of one’s reasonable expectation “of privacy in the whole of their physical movements.”⁸¹ In various cases, the court has further maintained the notion that the modern cell phone often contains “the privacies of life” for the American people.⁸² Assuredly, this constitutes a significant privacy interest for many individuals, as even a small window of exact location data may reveal to law enforcement the most personally intimate places, affiliations, and interests of an individual.⁸³

In *Kyllo v United States* (2001), the Court deliberated on a case of law enforcement officers utilizing the then novel technology of thermal imaging to collect evidence on a suspect in his house.⁸⁴ The Court deemed it unconstitutional under the Fourth Amendment, specifically

⁷⁹ *Katz*, 389 U.S. 347.

⁸⁰ *Id.*

⁸¹ *Smith*, 110 F.4th 817.

⁸² *Riley v. California*, 573 U.S. 373.

⁸³ *Smith*, 110 F.4th 817.

⁸⁴ *Kyllo v. United States*, 533 US 27 (Supreme Court 2001).

noting information that gave police an insight into a constitutionally protected area that would not have been otherwise possible without a physical intrusion in their reasoning.⁸⁵ Granted, law enforcement gains a relatively limited view of the home when comparing geofence warrant searches to the thermal imaging seen in *Kyllo*. Even so, investigators nonetheless gain information — that is, those locations and affiliations which are the most intimate⁸⁶ — from precise, personal location history, information that would be impossible to obtain if not for a physical infringement. Law enforcement is further able to make deductions about those places where an individual exercises their most personal affiliations, for example, the “abortion clinic, AIDS treatment center ... mosque, synagogue, or church”⁸⁷ among many other possibilities. These deductions concerning the most personal information would only otherwise be possible with significant physical action concerning an individual’s personal affiliations. Made brief, the ensuing steps of a geofence warrant are akin to the warrantless, “general, exploratory rummaging”⁸⁸ that the Fourth Amendment was originally intended to prevent, and therefore unconstitutional.

B. *Secondary Discussions*

In the present examination of the apparent unconstitutionality of geofence warrants, the most common argument to this contention of this article must be addressed: the application of the Third-Party Doctrine from the Court in *Chatrie*. For reference, the Court held that because Okello Chatrie’s decision to opt in to Google’s location history was seemingly voluntary, he had no reasonable expectation in his location information as it was freely lent to a third party.⁸⁹ Be that as it may, the Fourth Circuit’s assertion of voluntary agreement comes into question when

⁸⁵ *Id.*

⁸⁶ Smith, 110 F.4th 817.

⁸⁷ Haley Amster & Brett Diehl, *Against Geofences*, 74 STAN. L. REV. 385 (2022).

⁸⁸ Smith, 110 F.4th 817.

⁸⁹ Chatrie, 1 F.4th at 130.

weighed against the common mental state of individuals when they make the aforementioned decision.

As George Washington Law Professor and privacy expert Daniel Solove contends, there are four main reasons why this consent may in fact be involuntarily given: one, people do not read privacy agreements; two, if they read the agreements, they do not understand them; three, if people have the two former abilities, they often lack the background information required to make an informed choice; four, if an individual has all such capabilities, their rational choice may still be influenced by many decision-making factors such as the framing of choices.⁹⁰ Solove continues, noting how “bounded rationality,” the human inability to apply knowledge to complex situations, often prevents rational decisions.⁹¹ The choice one makes when considering their privacy is not formed abstractly, but in the context of the world in which they exist.⁹² This reality consists of mental processing errors and judgment mistakes that indeed make it sufficient to negate the *Chatrle* court’s affirmation of voluntary agreement.

The court in *Smith*, moreover, indicates how such opt-in systems “may not even be voluntary” due to location tracking requests that do not clearly articulate the full situation, promising “app optimization” in return for an individual’s location history to be stored by Google.⁹³ These misleading promises of “app optimization” often do not reflect the full pervasiveness of location tracking. Thus, the *Chatrle* court’s reliance on voluntary consent is cast into doubt by the not-uncommon circumstance that people lack the necessary information to apply their knowledge and provide a wholly informed and voluntary decision.

⁹⁰ Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARVARD LAW REVIEW 1880 (2013).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Smith*, 110 F.4th 817.

It is further important to note recent applications of the good-faith exception to justify the validity of evidence obtained under a geofence warrant, founded in the Court's ruling on *United States v. Leon* (1984).⁹⁴ In *Leon*, police obtained and acted upon a warrant that was later deemed invalid for an insufficiency of probable cause, meaning law enforcement technically seized evidence illegally.⁹⁵ When *Leon* reached the Supreme Court, the justices established the good-faith exception.⁹⁶ At its essence, the exception protects evidence seized in violation of the Fourth Amendment and permits its admission in trial, provided the information was collected by officers who reasonably believed themselves to be acting lawfully.⁹⁷ Appellants often argue for the implementation of the circumstances in *Leon* where the good-faith exception does not apply amidst a heap of denials to suppress evidence obtained by geofence warrants.⁹⁸ In invoking this for geofence warrants, as outlined in *Smith*, courts have recently relied on the justification that, as long as officers act in reasonable accordance with the extent of their knowledge in obtaining the warrant and collecting information, the good-faith exception still applies.⁹⁹ This application takes into account officers' circumstances and relies on the novelty of the geofence warrants, as the Supreme Court has yet to establish a clear precedent. The existing application hinges on the fact that geofence warrants are an emerging technology, a status that will soon fade away. While legally valid, the rationale cannot stand the test of time, which places incredible importance on the Supreme Court's decision on *Chatrrie*. The Court must articulate a definitive answer to the good-faith exception as it pertains to geofence warrants to plot a clear future for the way that law enforcement handles evidence collected by such warrants.

⁹⁴ *United States v. Leon*, 468 US 897 (Supreme Court 1984).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Smith*, 110 F.4th 817.

⁹⁹ *Id.*

V. PREPARING FOR A TECHNOLOGICAL FUTURE

So, what are the courts to do? Technological innovations offer no promises of future curtailment, and, in many ways, they must not. If not for forensic evidence inventions such as DNA and fingerprint analysis, hundreds of criminal cases may have gone unsolved.¹⁰⁰ Even so, the *Katz* and *Carpenter* decisions make plain an interplay between investigative efficiency and constitutional privacy rights. The nature of the law necessitates that this line, which dictates the interchange, is ever-changing to accommodate new inventions or restrict them in the name of privacy.

The objective then is to understand this line's adjustment: how courts contemplate technological change. To address this, Stanford Law Professor Orin Kerr posits the Equilibrium-Adjustment theory in his publication *The Digital Fourth Amendment: Privacy and Policing in Our Online World*.¹⁰¹ Per Kerr, when a new technological efficiency "disrupts the function of the old rule," courts ought to reform doctrine so that the function of the old rule is maintained "in the world of new facts."¹⁰² This reactionary posture aligns with the idea of sociological jurisprudence, which maintains that the social effects of legal doctrines and practices should inform the application of the law.¹⁰³ By looking at the impact that new surveillance techniques have on the "privacies of life,"¹⁰⁴ courts can more effectively adjust the law to protect the independent thought necessary for a self-governing democracy.

How this line must be adjusted for geofence warrants, and for future technology to come, is for the Supreme Court to consider in *Chatrpie*. This issue is of special urgency, as, from January

¹⁰⁰ Joseph Peterson et al., *The Role and Impact of Forensic Evidence in the Criminal Justice Process*.

¹⁰¹ ORIN S. KERR, *THE DIGITAL FOURTH AMENDMENT: PRIVACY AND POLICING IN OUR ONLINE WORLD* (2025).

¹⁰² *Id.*

¹⁰³ E. F. Albertsworth, *Program of Sociological Jurisprudence*, 8 AMERICAN BAR ASSOCIATION JOURNAL 393 (1922).

¹⁰⁴ *Riley v. California*, 573 US 373 (Supreme Court 2014).

to June of 2025, Google received almost 290,000 requests for geofence warrants, implicating around 665,000 individual, personal, and most importantly, private location accounts.¹⁰⁵ Considering there is a 68% chance that a user is indeed within the coordinates provided by Google,¹⁰⁶ there could potentially be up to 212,000 people whose location history records them to be somewhere where they were not.

Along with geofence warrants, future courts will have to evaluate how artificial intelligence might interact with surveillance.¹⁰⁷ Recent reports reveal a lump sum of 30 million dollars paid to Palantir by the United States Immigration and Customs Enforcement Agency for an artificial intelligence-driven surveillance system delivering the “near real-time visibility” of individuals.¹⁰⁸ Future rulings must walk the line between enabling growth and adhering to the Fourth Amendment, striking a balance between upholding privacy standards and providing for technological innovations.

VI. CONCLUSION

Considering their recent utilization, geofence warrants are unconstitutional because their advanced stages constitute searches of private information not particularly described by the warrant that rendered the search possible. Drawing upon the modern privacy jurisprudence as asserted in *Riley* and *Carpenter* and the framework established in *Katz*, these warrants create an unconstitutional window into an individual’s intimate life that would have been highly unlikely if not for a physical trespass. The warrant further affords law enforcement discretion in excess of

¹⁰⁵ *Requests for User Information – Google Transparency Report*, <https://transparencyreport.google.com/user-data/overview?hl=en> (last visited Mar. 15, 2026).

¹⁰⁶ Chatrue, 1 F.4th at 130.

¹⁰⁷ While artificial intelligence-based forms of surveillance are outside the scope of this article’s discussion regarding geofence warrants, they represent the next logical step in the “near perfect surveillance” warned about in *Carpenter*. See *Carpenter v. US*, *supra* note 30.

¹⁰⁸ Rosemarie Ho, *ICE Just Ordered \$30 Million Worth of New Technology from Palantir to Track Immigrants*, BUSINESS INSIDER, <https://www.businessinsider.com/ice-palantir-new-technology-30-million-visa-overstays-self-deportation-2025-4> (last visited Mar. 15, 2026).

that which the Fourth Amendment permits, as it is ultimately the judgment of an officer to select what accounts will be further investigated.

The implications of this are substantial. As law enforcement continues to rely on massive stores of location data, the deeply intimate aspects of an individual's life are to continue and if the power to expose an individual's risk. If the status quo is permitted to privacy is vested in an investigator's decision, society may eventually come to function as a "modulated democracy" in which the liberal thought that free society necessitates is oppressed by incessant and ubiquitous surveillance.¹⁰⁹ Citizens, in fear of the revelation of their precise location history by law enforcement, may be hesitant to travel to those most personal locations where their identity and dynamism are best expressed and developed. In the present case, legislation proves far too inefficient in responding to a "world of new facts,"¹¹⁰ which places special importance on how the Court interprets the application of the Fourth Amendment regarding geofence warrants. To preserve an individual's constitutional protections, the Court must act swiftly in enforcing a requirement for additional authorization to progress a geofence warrant.

¹⁰⁹ Cohen, *supra* note 5.

¹¹⁰ ORIN S. KERR, *THE DIGITAL FOURTH AMENDMENT: PRIVACY AND POLICING IN OUR ONLINE WORLD* (2025).



REVIEWING THE DEMOCRATIC LEGITIMACY OF THE HOUSE OF LORDS: LEGISLATION PROPOSAL

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ABSTRACT

The House of Lords is the second chamber of the United Kingdom's parliament, serving as a constitutional check by revising legislation through its expertise. However, the current institutional design and legal framework of the House of Lords lacks democratic legitimacy. This framework is defined by the Life Peerages Act of 1958 and the House of Lords Act 1999, which allows the House of Lords to include hereditary peers and operate as an unelected chamber. This article examines the crucial role of the House of Lords, arguing that the current legal framework requires reform and that new legislation should be implemented to completely remove hereditary peers, cap the second chamber's size, and allow for a cross-party parliamentary committee to be established to ensure that appointments are representative of all political parties within parliament and there is no prime ministerial influence.

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I. ROLE OF THE HOUSE OF LORDS

The House of Lords is the upper chamber of the Parliament of the United Kingdom, helping shape the country's laws. This second chamber plays a role in the legislative process of the UK government by examining the bills proposed in the House of Commons and helping to improve "the quality of legislation due to the Lords' legislative expertise"¹ through their specialist knowledge from a range of professional backgrounds. The upper chamber is granted legal power to "suggest new amendments and alter the existing ones."² The House of Lords is designed as a "delaying chamber", meaning that it "may only reject bills or amendments made by the Commons or propose an amendment" but it can not implement it without the House of Commons.³ The legal reasoning behind the institutional structure of the House of Lords is its "substantial role in the legislative process" and how the chamber is granted powers from the UK constitution to check the legislature through expertise and revision.⁴

The current institutional structure of the House of Lords arose from a complex history of UK governance. While other countries' parliaments have a defining founding moment, "the English parliament emerged gradually, and evolved over centuries into the UK parliament that exists today."⁵ What would eventually become the House of Lords developed starting in the fourteenth century, with the chamber that was "presided over by the king's chief minister, the Lord Chancellor."⁶ Throughout the next couple of centuries, the House of Lords underwent structural changes in size. In 1603, James I allowed for the "creation of new peerages after the

¹ Solomon Lartey, *The Role of the UK House of Lords and Commons in the Legislative Process and Its Impact on Governance*, RESEARCHGATE (2024), https://www.researchgate.net/publication/384446897_The_Role_of_the_UK_House_of_Lords_and_Commons_in_the_Legislative_Process_and_Its_Impact_on_Governance.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Meg Russell, *A Brief History of the House of Lords*, in *THE CONTEMPORARY HOUSE OF LORDS: WESTMINSTER BICAMERALISM REVISED 14* (Oxford University Press 2013), <https://doi.org/10.1093/acprof:oso/9780199671564.003.0002>.

⁶ *Id.* at 16.

long period of restraint under Elizabeth.”⁷ Charles would abolish the chamber during the seventeenth century. However, the chamber would be reestablished as, in 1657, there was a “re-creation of a bicameral parliament.”⁸ While the history of the House of Lords is tumultuous, by the nineteenth century, the House of Lords had “reached a very recognizable form” and “Parliament’s policy-making role was well established.”⁹ The role of the House of Lords, as established by the UK constitution in the present day, is to spend half of its time considering bills, as all bills must be passed through both the House of Commons and the House of Lords to become law.¹⁰ The Lords utilise their “extensive individual experience” to provide insights on policies in select committees, where a significant portion of their work takes place.¹¹ The UK parliament describes how the House of Lords has been “making a difference in recent years” and highlights the chamber's importance in driving policy change.¹²

However, the House of Lords has been described by critics and scholars as being “deeply controversial” as the Lords are “an almost all-appointed upper chamber.”¹³ Reform groups have called the House of Lords a “cosy club for the privileged few” and that the chamber is “outdated and unrepresentative.”¹⁴ There are currently ninety-one lords who sit in the House and inherited their seats from family members.¹⁵ This system is institutionally outdated in comparison to other modern democracies, as the “UK remains one of just two countries in the world with a hereditary element in its legislature.”¹⁶ The democratic legitimacy of the House of Lords has been

⁷ *Id.* at 18.

⁸ *Id.*

⁹ *Id.* at 21.

¹⁰ *What Does the House of Lords do?*, UK PARLIAMENT,

<https://www.parliament.uk/business/lords/work-of-the-house-of-lords/what-the-lords-does/>. (last visited Apr. 4, 2026).

¹¹ *Id.*

¹² *Id.*

¹³ Sonail Campion, Sean Kippon, *HOW UNDEMOCRATIC IS THE HOUSE OF LORDS?*, in *THE UK'S CHANGING DEMOCRACY: THE 2018 DEMOCRATIC AUDIT*, LONDON: LSE PRESS, PP. 182-192 (Patrick Dunleavy & Alice Park, Ros Taylor 2022), <https://doi.org/10.31389/book1.m>.

¹⁴ *Electing a Modern Second Chamber*, ELECTORAL REFORM SOCIETY, <https://electoral-reform.org.uk/campaigns/elected-house-of-lords/>, (last visited April 4, 2026).

¹⁵ Hereditary Peers, UK PARLIAMENT, <https://www.parliament.uk/site-information/glossary/hereditary-peers/> (last visited April 4, 2026).

¹⁶ Cabinet Office, et al., *Removal of hereditary peers from Parliament moves a step closer with Second Reading in the House of Commons*, GOV.UK, (Oct. 15, 2024),

<https://www.gov.uk/government/news/removal-of-hereditary-peers-from-parliament-moves-a-step-closer-with-second-reading-in-the-house-of-commons#:~:text=This%20Bill%20is%20the%20first,of%20the%20House%20of%20Lords.>

questioned by parliament itself as attempts at reform have been laid out over the years, such as introducing a “fairer and more sustainable appointments system” in 2023.¹⁷ These appointments are important because Lords are allowed to sit and work in the chamber for life. Today, the House remains unelected, which raises questions about the democratic nature of the House of Lords.¹⁸

The House of Lords is not unnecessary to the law-making process, but strong reforms are needed to improve the chamber. The House of Lords plays a role in “passing and scrutinising legislation” from the House of Commons, which provides a check on the Commons’ power.¹⁹ The House of Lords “reviews and amends proposed legislation,” which allows lords to question ministers and have productive debates about a piece of legislation.²⁰ This ensures that ministers in the Commons are not able to pass any legislation without proper scrutiny. The House of Commons would become more powerful without the House of Lords, as there would be no extra check on its policy agenda. The House of Lords also provides a range of specialists who look over legislation, as lords have had “successful careers in business, culture, sports, academia, law, health, public service or politics.”²¹ It would be difficult to completely abolish the House of Lords due to the checks it provides, which is why reforms are necessary to allow lords to check power without the chamber being an unelected, hereditary, and life peer-dominated body of government. The chamber does play a role “in checking and challenging the decisions and actions of the government through questions and debates.”²² The UK government recognizes the issues with the House of Lords and has passed reforms to mitigate the chamber's undemocratic

¹⁷ UK Parliament, *Lord Speaker's committee on size of the house publish fifth report*, UK PARLIAMENT (July 17, 2023), <https://committees.parliament.uk/committee/369/lord-speakers-committee-on-the-size-of-the-house/news/196464/lord-speakers-committee-on-size-of-the-house-publish-fifth-report>.

¹⁸ Campion & Kippin, *supra* note 13, at 184.

¹⁹ Alice Lilly, Emanuela Marku and Joshua Jakupi, *House of Lords*, INSTITUTE FOR GOVERNMENT (October 17, 2023), <https://www.instituteforgovernment.org.uk/explainer/house-of-lords>.

²⁰ *Id.*

²¹ *Id.*

²² *Checking and Challenging Government*, UK PARLIAMENT, <https://www.parliament.uk/business/lords/work-of-the-house-of-lords/checking-and-challenging-government/>. (last visited Apr. 4, 2026).

and outdated nature. The government understands the concerns about the chamber, but cannot abolish the House of Lords because of its role in checking the House of Commons. The current legal framework of the House of Lords is dictated by the Life Peerages Act of 1958 and the House of Lords Act 1999.

This article argues that the existing legal structure of the Life Peerages Act of 1958 and the House of Lords Act 1999 does not create the democratic legitimacy that is present in other modern parliamentary democracies. While the House of Lords does provide a constitutional role in revising legislation, the existing legal framework allows for an executive power overstep through appointments and a hereditary peer system that undermines the democratic legitimacy of the UK. This article proposes reforms to the current legal landscape by creating new legislation that combats democratic legitimacy issues by removing hereditary peers and restricting executive appointments to allow for modern democratic ideals to be instilled in a necessary institution of Parliament.

This article will proceed in three parts. Part I will discuss the current legal framework for the House of Lords established by these acts and amendments. The second part will analyze how the House of Lords lacks democratic legitimacy due to the current UK Parliament's legal framework. The third part will discuss attempted reform and propose new legislation to democratically reform the House of Lords.

II. CURRENT LEGAL FRAMEWORK

The Life Peerages Act of 1958 is the foundation for the current legal framework of the House of Lords. This act proposed the “introduction of life peers in 1958” and persisted “until

the removal of (most) hereditary peers in 1999.”²³ However, the implications of this act are still prevalent today since the House of Lords still includes life peers. The House of Lords Act 1999 included the “removal of the hereditary peers from the second chamber.”²⁴ However, there was an exception for “92 hereditary Peers to sit in the House of Lords by virtue of an inherited (hereditary) peerage.”²⁵ The UK government is distinctive as it is “one of only three nations that does not have a codified constitution.”²⁶ This means that there is not one single document that outlines the country’s laws, but rather “there is a body of laws (statutes and common law), conventions and practices that have developed over time” that set a precedent.²⁷ These statutes are criticized because they set the precedent for the House of Lords to be “an almost all-appointed upper chamber.”²⁸ Acts would be introduced to build on the Life Peerages Act of 1958, with the Reform Act of 2014. This act allowed members of the House of Lords to retire permanently, and members who did not attend or were convicted of serious crimes should cease to be members.²⁹ This reform strengthened the democratic legitimacy of the House of Lords by ensuring that those convicted of crimes were not allowed to sit as members. It also ensured a way to decrease the overall number of lords and allowed new people in by setting up a system of permanent retirement.

Another step towards accountability within the House of Lords came in 2015 with the Expulsion and Suspension Act, which gave the House of Lords power to expel or suspend members.³⁰ This act addressed concerns around accountability, as a legal framework was needed

²³ Pete Dorey, *Change in Order to Conserve: Explaining the Decision to Introduce the 1958 Life Peerages Act*, 28 *Parliamentary Hist.* 246 (2009), <https://doi.org/10.1111/j.1750-0206.2009.00109>.

²⁴ Alexandra Kelso, *Stages and Muddles: The House of Lords Act 1999*, 30 *PARLIAMENTARY HISTORY*: 101-113 (2011), <https://doi.org/10.1111/j.1750-0206.2010.00238.x>.

²⁵ Key Dates, UK PARLIAMENT, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/houseoflords/parliamentacts/keydates/>. (last visited Apr. 4, 2026).

²⁶ Phillip Norton, *BRITAIN’S UNCODIFIED CONSTITUTION*, in *Governing Britain: Parliament, Ministers and Our Ambiguous Constitution* (Manchester Univ. Press 2020), <https://doi.org/10.7765/9781526150240.00005>.

²⁷ *Id.*

²⁸ Campion & Kippin, *supra* note 13.

²⁹ *House of Lords Reform Act 2014*, UK PARLIAMENT: HOUSE OF COMMONS LIBRARY (Jul. 1, 2016), <https://commonslibrary.parliament.uk/research-briefings/SN06832/>.

³⁰ *House of Lords (Expulsion and Suspension) Act 2015*, UK PARLIAMENT (2015), <https://bills.parliament.uk/bills/1382>.

to remove members permanently or temporarily based on their actions or extenuating circumstances. This act showed that there is accountability within the House of Lords in terms of having a legal framework for suspending or expelling members. It did not get to addressing the issue of hereditary peers or the appointment system that undermines democratic accountability within the second chamber. While this was a step towards partial modernization, the reform did not address the more serious issues of lifetime membership and the appointment system.

III. DEMOCRATIC LEGITIMACY ISSUES IN THE CURRENT LEGAL FRAMEWORK

The institutional design of the House of Lords creates questions surrounding the democratic legitimacy of its legal framework. The Liberal-Democratic-Conservative coalition government, in 2012, pushed “a bill proposing an 80 percent elected chamber.”³¹ The government claimed that ““the fundamental democratic principle”” is that ““those who make the laws of the land should be elected by those to whom those laws apply.””³² Although this bill was withdrawn due to significant opposition, the statements made by this government reveal how both the public and the Commons believe that the House of Lords lacks democratic legitimacy. While all politicians can use their position to gain unequal power, “equal autonomy” is especially “undermined when unelected civil servants use their position to gain superior political influence.”³³

The lifetime appointment system is also flawed, as members of parliament have called for a reform to include an “appointing body to justify new appointments”, as part of a “commitment

³¹ Adam Lovett, *Should the House of Lords Be More Democratic?*. LSE: DEPARTMENT OF PHILOSOPHY, NEWS (November 10, 2023), <https://www.lse.ac.uk/philosophy/news/should-the-house-of-lords-be-more-democratic>.

³² *Id.*

³³ Tine Hindkjaer Madsen, *The Moral Roles of Democratically Elected Politicians and Civil Servants*, TAYLOR & FRANCIS ONLINE (Aug. 19, 2024), <https://www.tandfonline.com/doi/epdf/10.1080/13698230.2024.2380220?needAccess=true>.

to greater diversity.”³⁴ This proposal stems from the stark lack of diversity within the House of Lords, which is largely attributed to the life peer system. The House of Lords is sixty-nine percent male, with the median age of those males being seventy-two.³⁵ The chamber is male-dominated, with very little age diversity because of the life peer system in place. Studies show that “descriptive representation can crucially support the principles of democracy”, as the people in power represent their society in terms of diversity.³⁶ While no parliament is fully representative of its constituents, the House of Lords falls short of representing the UK in terms of gender and age.

The appointment process also leaves behind a prime minister’s views long after they have been voted out because prime ministers can “appoint as many peers to the second chamber as they wish during their tenure.”³⁷ Former Prime Minister Liz Truss appointed thirty-two life peers during her tenure. This means that “for every one and a half days that Liz Truss was in power, she created a peer.”³⁸ These appointed lords will be in the chamber, dictating UK policy, for as long as they wish. For such a brief stint as Prime Minister, Liz Truss has left a lasting impression on UK policy through the House of Lords. This questions the democratic legitimacy of the UK government, as executives who have been voted out of office still affect policy change through their appointments.

The “UK remains one of just two countries in the world” with this hereditary system in place, as this system is not standard in other democratic countries.³⁹ In early forms of British government, the House of Lords was a “playground for the King’s friends” as Lords would

³⁴ *House of Lords urged to axe 200 peers and boost diversity*, THE GUARDIAN (Nov. 18, 2018), <https://www.theguardian.com/politics/2018/nov/19/house-of-lords-urg>.

³⁵ *House of Lords data dashboard: Current membership of the House*, UK PARLIAMENT: HOUSE OF LORDS LIBRARY (Jan. 14, 2026), <https://lordslibrary.parliament.uk/house-of-lords-data-dashboard-membership-of-the-house/>.

³⁶ Sveinung Arnesen & Yvette Peters, *The Legitimacy of Representation: How Descriptive, Formal, and Responsiveness Representation Affect The Acceptability of Political Decisions*, 51 Comp. Pol. Stud. 868 (2017).

³⁷ Rose Whiffen, *The Current Status Quo of the House of Lords Leaves Too Many Corruption Risks Unchecked*, TRANSPARENCY INTERNATIONAL UK (Apr. 3, 2024), <https://www.transparency.org.uk/news/current-status-quo-house-lords-leaves-too-many-corruption-risks-unchecked>.

³⁸ *Id.*

³⁹ Cabinet Office, et al., *supra* note 16.

“inherit hereditary power together” as the King’s peers.⁴⁰ This system was established during the fourteenth century, when the “two distinct houses of parliament began to emerge.”⁴¹

The number of lords within the chamber also raises concerns over outdated practices. The House of Lords currently has 859 members, making it “by far the largest second chamber in the world.”⁴² Betty Boothroyd, former Congress speaker, stated that “the chamber’s ‘inflated size fosters [its] laughing-stock image.’”⁴³ This, along with prime ministerial appointments, “drag the Lords, parliament, and politics more generally into disrepute.”⁴⁴ The large number of lords by prime ministerial appointment is outdated, and reform has “been decades (even centuries) in the making.”⁴⁵ The public supports this shrinking movement, as when asked “whether the prime minister should have unlimited appointment powers, or be restricted to appointing no more members than those who leave”, only four percent agreed with the current situation, while “79% wanted change.”⁴⁶ With the largest second chamber in the world and one of only two countries with a hereditary peerage, the House of Lords has become largely outdated. The chamber needs reform to be on par with other democratic countries with a bicameral parliamentary system.

IV. REFORM AND LEGISLATION PROPOSAL

Reform to the House of Lords would need to include a reduction in the number of peers, removal of hereditary peers, and an amendment to the appointment system. The first reform that

⁴⁰ Lilian Trickey, *Time to Embrace Democracy: The Case for Removing Hereditary Peers from the House of Lords or a Potential Risk to Democratic Balance?*, U. OXFORD FACULTY OF LAW (Sep. 19, 2024, at 11:00:07 AM), <https://www.jurist.org/commentary/2024/09/time-to-embrace-democracy-the-case-for-removing-hereditary-peers-from-the-house-of-lords-or-a-potential-risk-to-democratic-balance/>.

⁴¹ *Id.*

⁴² UCL Constitution Unit, *Public Wants House of Lords Reform to Go Further: to Limit Appointments and Size of Chamber*, UCL Soc. & Hist. Scis. (June 2025), <https://www.ucl.ac.uk/social-historical-sciences/news/2025/jun/public-wants-house-lords-reform-go-further-limit-appointments-and-size-chamber> (last visited Apr. 15, 2026).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

needs to be passed is one that was already proposed in 1999 with the House of Lords Act, which ended the right “of all but 92 hereditary Peers to sit in the House of Lords by virtue of an inherited (hereditary) peerage.”⁴⁷ The next step would be to enact the “House of Lords (Hereditary Peers) Bill 2024-25”, which is legislation from the Labour government that “would remove all remaining hereditary peers from the House of Lords and abolish the House of Lords’ jurisdiction in relation to claims to hereditary peerages.”⁴⁸ This reform would completely abolish the outdated hereditary peer system in the House of Lords, modernizing the chamber. Legislation passed to remove all hereditary peers is feasible, as seen by the “House of Lords (Hereditary Peers) Bill 2024-25.”⁴⁹ This new legal framework would allow for more democratic legitimacy by ensuring that a position of government can not be passed down without some form of merit. This matters because it means that lords have to be somewhat qualified to make political decisions instead of getting the position passed down through a family connection.

The next reform to modernize the House of Lords would be to reduce the number of Lords in the chamber. While the hereditary peers bill would reduce the number in the House of Lords, the chamber should be capped. In 2017, the “Lord Speaker’s Committee on the Size of the House (the ‘Burns committee’)” proposed that “the size of the chamber should be limited to no larger than the House of Commons.”⁵⁰ This committee also proposed that “the Prime Minister should initially be restricted in making appointments to ‘two-out-one-in’ to bring the chamber down to that size, and then to ‘one-out-one-in’, to keep it there.”⁵¹ This would be a way to modernize the House of Lords by reducing the number of peers and maintaining a capped size. By reducing the number of peers, democratic accountability is increased as members are more

⁴⁷ UK Parliament, *supra* note 25.

⁴⁸ *House of Lords (Hereditary Peers) Bill 2024-25: Progress of the bill*, UK PARLIAMENT (Dec. 19, 2025), <https://commonslibrary.parliament.uk/research-briefings/cbp-10219/>.

⁴⁹ *Id.*

⁵⁰ UCL Constitution Unit, *supra* note 42.

⁵¹ *Id.*

easily recognizable to the public, and it does not allow for responsibility to diffuse since the number would be more concentrated. This would also alleviate the democratic concern of the prime minister appointing a large number of lords while in office, as if the prime minister were allowed to appoint a large number of lords, their ideology would last far longer than their term through the lord they appoint. If this is allowed to occur, it is anti-democratic as the will of voters is not being performed since an ideology that was voted out is continued through appointments in the second chamber.

The last reform on the legislative structure would be to push for the House of Lords to change its appointment system and install term limits. This would increase democratic legitimacy and keep lords from spending decades in the chamber. It would also lower the median age, allowing for more diversity. One argument for proposed legislation would be for the House of Lords to become a fully elected body. However, there are arguments against this reform, as lords being unelected can be seen as a positive aspect, as it would “free them from the constraints that infringe upon representatives seeking re-election.”⁵² This means that lords would not be pressured by an election to make a certain policy decision. There are also a lot of issues that entail installing an election system in the House of Lords. Legislation has to be specific about how exactly an election would work for the House of Lords. The first problem the government in power would run into is deciding which voting system to adopt.⁵³ There would have to be a vote on what election system to use, as the “simple plurality (first past the post)” system used for the House of Commons would “merely create a second chamber elected on a very similar basis as the House of Commons.”⁵⁴ This would take away the expert role of the House of Lords and only

⁵² Conor Farrington, *Unelected Upper Chambers can Play a Legitimate Democratic Role in Wider Political Systems*, LSE BLOGS (Aug. 20, 2015), <https://blogs.lse.ac.uk/politicsandpolicy/unelected-upper-chambers-can-play-a-legitimate-democratic-role-in-wider-political-systems/>.

⁵³ Peter Dorey, *Elected or Selected? The Continuing Constitutional Conundrum of House of Lords Reform*, 94 POL. Q. 402-411 (2023), <https://doi.org/10.1111/1467-923X.13298>.

⁵⁴ *Id.*

create a second House of Commons. However, if a different election system is used, such as proportional representation, then questions would be raised about “why should the upper house be elected by an arguably fairer or more representative electoral system” be used if the House of Commons is not elected this way.⁵⁵ The next issue would be the timing of the election cycle. If the House of Lords and House of Commons elections are on the same cycle, then this increases the “likelihood of duplicating the result of a general election,” meaning that the House of Lords and House of Commons are represented by the same party.⁵⁶ If elections were held on a different cycle, then there is the possibility that “a different party (from the government) might prove more popular and thus win more seats.”⁵⁷ This would make it harder for parliament to pass legislation if there is gridlock. The third issue that elections would have is that “the vast reservoir of expertise which the second chamber currently enshrines” would ultimately be lost because “candidates for election(whatever the method) would almost inevitably be adopted or selected for party political reasons.”⁵⁸ A possible solution to this issue, according to Peter Dorey, a Professor of British Politics, would be for the House of Lords Appointments Commission (HOLAC) to be strengthened.⁵⁹ This committee recommends the Lords to the Parliament, and Dorey believes that HOLAC should become “solely responsible for selecting 80 per cent of members of the second chamber.”⁶⁰ The other twenty percent accounts for problems “in terms of party leaders and the Prime Ministers submitting nominations.”⁶¹ This system ensures that there are fewer political appointments and that election issues are not present. Those appointed by HOLAC would be “in accordance with clear and transparent criteria, instead of being party

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 406.

⁵⁹ *Id.* at 410.

⁶⁰ *Id.*

⁶¹ *Id.*

political appointees or products of prime ministerial patronage.”⁶² However, an act could be proposed that goes a step further by having members in HOLAC not being appointed by the Prime Minister at all. An independent cross-party parliamentary committee could fully appoint the members of the second chamber. There would be no prime ministerial discretion in who gets appointed to the House of Lords. This cross-party parliamentary committee would comprise members from all political parties in the House of Commons and would collectively determine who is appointed to the second chamber. This would allow people across the political spectrum to have a say in who gets appointed, without it being directly the choice of the Prime Minister and the political party they represent. It would also allow for HOLAC to be more representative of parliament and not the ideology of the Prime Minister at the time. This committee would include members from the House of Commons and allow for all political parties to be represented without one having full power of choosing who is appointed. This reform act could completely take away the Prime Minister’s ability to appoint people to the House of Lords while also keeping parliamentary sovereignty with a new cross-party committee. The vast reservoir of expertise is considered the House of Lords’ greatest asset, and the cross-party committee and reforms that would strengthen HOLAC would allow for a middle-ground solution to be found where this reform preserves merit while removing political patronage. This would create a solution for the appointment system without creating further issues with elections and diminishing the role of the House of Lords.

Overall, this article proposes that legislation be drafted for the House of Lords to include an appointment system, reduction of members, and hereditary peer reform, ensuring more democratic legitimacy in the UK government. This legislation would include the removal of the hereditary peer system completely from the House of Lords. This means that there would be no

⁶² *Id.* at 411.

position to inherit from an existing member. These reforms would also cap the House of Lords at the same number of members as the House of Commons. It would enforce the “two-out-one-in” policy for prime ministerial appointments to reduce the number of peers until this number is at the capped amount.⁶³ After the number is capped, the legislation would then create a system that uses the HOLAC appointment framework proposed by Peter Dorey. It would also allow for a cross-party parliamentary committee to be established within HOLAC to ensure that appointments are representative of all political parties within parliament and there is no prime ministerial influence. There would also be specific term limits enforced in this law. This legislation would create more democratic legitimacy within the House of Lords and for the UK government as a whole by increasing diversity and establishing a fairer appointment system.

⁶³ UCL Constitution Unit, *supra* note 42.



**STATE RESISTANCE OF *KENNEDY V. LOUISIANA* (2008) AND THE FUTURE
OF CAPITAL PUNISHMENT**

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ABSTRACT

The legal landscape of capital punishment in the United States is undergoing a structural transformation. Since 2023, six states, including Florida, Tennessee, Idaho, Oklahoma, Arkansas, and Alabama, have enacted statutes authorizing the death penalty for non-homicide sexual offenses against children, directly challenging the U.S. Supreme Court's ruling in *Kennedy v. Louisiana* (2008). This case held that the Eighth Amendment prohibits capital punishment in cases where the offense did not result in the victim's death. This article examines the constitutionality of capital punishment statutes and analyzes whether the legislative actions of these few states can transform the trajectory of the national "evolving standards of decency" test, a doctrine that ensures punishment is applied in accordance with contemporary society's views. It also evaluates how a more originalist Supreme Court may exercise independent judgment on the proportionality of capital punishment for non-homicide crimes. This article ultimately argues that the survival of the *Kennedy* precedent depends on one question: whether the Supreme Court continues to treat the Eighth Amendment as an instrument for protecting human dignity that restricts the death penalty's applicability, or whether it yields to expanding state legislative discretion. The current trajectory suggests that the categorical limits of capital punishment are more vulnerable to revision than they have been in nearly half a century.

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I. INTRODUCTION

In 2008, the U.S. Supreme Court confronted a question that would alter the trajectory of Eighth Amendment jurisprudence: Does the Cruel and Unusual Punishment Clause bar the imposition of the death penalty upon perpetrators of child rape? The Eighth Amendment states that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹ The Eighth Amendment prohibits the federal government from imposing unreasonably severe punishments or bail amounts on those accused or convicted of crimes.² In this respect, the landmark U.S. Supreme Court case, *Kennedy v. Louisiana* (2008), found that a state cannot impose the death penalty for the rape of a child when the crime did not result in the victim’s death. In a narrow five-to-four decision, the majority opinion voiced by Justice Kennedy reasoned that the application of the death penalty in such a case would constitute a violation of the Eighth Amendment’s Cruel and Unusual Punishments Clause. This decision built upon the precedents of proportionality and “evolving standards of decency” established in *Coker v. Georgia* (1977) and *Atkins v. Virginia* (2002).

However, the constitutional protection against disproportionate punishment, as set by *Kennedy*, is fragile. Since 2023, several states, namely Florida, Tennessee, Idaho, Oklahoma, Arkansas, and Alabama, have sought to broaden the applicability of the death penalty by passing legislation that allows capital punishment for perpetrators of child rape.³ Florida began this wave of *Kennedy* backlash, passing a bill that permits the death penalty for the non-homicide rape of a child under twelve.⁴

¹ U.S. Const. amend. VIII

² Bryan A. Stevenson & John F. Stinneford, *Interpretation: The Eighth Amendment*, NATIONAL CONSTITUTION CENTER, <https://constitutioncenter.org/the-constitution/amendments/amendment-viii/clauses/103> (last visited Apr. 19, 2026).

³ *Death Penalty for Child Sexual Abuse that Does Not Result in Death*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/facts-and-research/background/crimes-punishable-by-death/death-penalty-for-child-sexual-abuse-that-does-not-result-in-death> (last visited Apr 3, 2026).

⁴ Alexandra L. Klein, *Kennedy v. Louisiana and the Future of the Eighth Amendment*, 52, PEPPERDINE L. REV. 293 (2015).

These legislative actions pose an increasingly poignant risk to the Eighth Amendment and its protections against cruel and unusual punishments by demonstrating an emerging trend among states of expanding the categories of capital punishment, specifically to include child rape. These states' actions also threaten the Supreme Court's longstanding, evolving standards of decency framework by indicating a movement in the opposite direction of limiting the scope of capital punishment.⁵ This legislation is compounded by the originalist nature of the current Court, which has shown a trend of interpreting the Constitution as it was understood at the time of adoption, prioritizing history and tradition in its decisions. The current legislative trend of states expanding the death penalty suggests the fragility of the protections enshrined within the Eighth Amendment surrounding the issue of capital punishment.⁶ With the continued establishment of state legislation that expands capital punishment in direct violation of the *Kennedy* precedent, the protections of dignity and proportional punishment provided under the Eighth Amendment will become more vulnerable to eventual collapse than they have been in the last half-century.

This article examines the evolving landscape of death penalty legislation across the states. It also examines whether *Kennedy v. Louisiana* (2008) will survive in light of this ongoing legislation and the current originalist court's jurisprudence. Part II traces the doctrinal lineage of the modern reduction of capital punishment from *Coker* to *Atkins*, culminating in *Kennedy*. It will also highlight the reasoning behind Justice Alito's influential dissent in response to the *Kennedy* majority's decision, which supports the growing trend of expanded capital punishment eligibility at the state level. Part III provides an expansive overview of current state legislation expanding the death penalty to crimes of child rape and sexual assault. Part IV will assess the

⁵ William W. Berry III, *Eighth Amendment Stare Decisis*, 98 S. CAL. L. REV. 255 (2024).

⁶ Meghan J. Ryan, *The Death of the Evolving Standards of Decency*, 51, FLA. ST. U. L. REV. 255 (2024).

possibility that a nationwide state legislative transformation can alter the federal constitution. It will apply the evolving standards of decency test and the court's originalist philosophy to determine whether a new national consensus is forming, thereby prompting the U.S. Supreme Court to overturn *Kennedy*. Part V considers the consequences of overturning *Kennedy*, particularly in expanding the categorical applications of the death penalty to crimes and groups of individuals for which it has been previously restricted by precedent. Part VI concludes with an examination of the *Kennedy* precedent's survivability and the implications for the future of the Eighth Amendment.

II. JUDICIAL PRECEDENT: FROM COKER TO KENNEDY

A. *Coker v. Georgia* (1977): Establishing Proportionality

The first major Supreme Court precedent regarding the constitutionality of non-homicide capital punishment was in *Coker v. Georgia* in 1977. The case responded to the question of whether the application of the death penalty was disproportionate for the rape of an adult woman, which the Eighth Amendment prohibits. In a decision of plurality, the Court found that capital punishment was “grossly disproportionate” for the crime of rape, as it did not involve homicide.⁷ The Court also noted that there was no national consensus on this matter at the time, as Georgia was the only state that authorized the death penalty for the rape of an adult woman. Thus, the Court found broad societal disapproval of such punishment.⁸

Despite its clear constitutional decision to bar the death penalty for the rape of an adult woman, the *Coker* decision left unclear the constitutionality of capital punishment when the victim is a child.⁹ This lack of clarity led many states to view the decision as limiting capital

⁷ *Coker v. Georgia*, Oyez, <https://www.oyez.org/cases/1976/75-5444> (last visited Apr 3, 2026).

⁸ *Id.*

⁹ Rosemary Ardman, Child Rape and The Death Penalty, 2, Idaho L. Rev. 61 (2025)

punishment to homicide offenses. Meanwhile, others, including Louisiana, Montana, South Carolina, Oklahoma, Georgia, and Texas, enacted statutes authorizing the death penalty for sexual assault against minors, viewing the *Coker* decision as solely applying to adult victims.¹⁰

B. *Atkins v. Virginia* (2002) and the Evolving Standards of Decency

The methodological framework that would govern *Kennedy* crystallized in *Atkins v. Virginia* (2002). This case challenged the constitutionality of applying capital punishment to those who have an intellectual disability. In a majority decision, the Court held that the execution of intellectually disabled individuals constitutes “cruel and unusual punishments” under the Eighth Amendment.¹¹ The Court expressed concern that the motives of retribution and deterrence, which underpin the use of the death penalty, did not apply to mentally impaired offenders.¹²

Atkins relied heavily on a methodological framework that the Court would increasingly rely on in its capital punishment decisions: the evolving standards of decency test (ESD). This test arose from *Trop v. Dulles* (1958), a case in which the Court stated that its decisions would reflect the preferences of an evolving society and that capital punishment would progress in one direction, toward humane punishments.¹³ As the voice of the majority opinion in *Trop*, Chief Justice Warren articulated this framework, writing that the Eighth Amendment should uphold the dignity of man and “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁴ The ESD has two frameworks: one in which the Court objectively assesses the national consensus through an objective indicia analysis, and another in

¹⁰ *supra* note 3.

¹¹ *Atkins v. Virginia*, Oyez, <https://www.oyez.org/cases/2001/00-8452> (last visited Apr 3, 2026).

¹² *Id.*

¹³ Ryan, *supra* note 6 at 257.

¹⁴ *Trop v. Dulles*, Oyez, <https://www.oyez.org/cases/1956/70> (last visited Apr 3, 2026).

which it applies its own judicial independence to the decision.¹⁵ A national consensus may be defined as the Court's evaluation of whether a punishment practice coincides with evolving societal values.¹⁶ In *Atkins*, the Court applied both the objective test of finding a national consensus on the issue, in which there was a consensus against executing the intellectually disabled, and the subjective test of determining that none of the purposes of punishment would be served by executing these individuals.¹⁷

A critical facet of the ESD is its emphasis on a “one way ratchet,” or, as outlined by Chief Justice Warren in *Trop*, the development of ESD in one direction, toward more humane punishments.¹⁸ When the Court categorically prohibits a punishment practice, no subsequent state legislature can re-adopt said practice, as that action would go against the meaning of the ESD test. Therefore, a national consensus cannot form in favor of a punishment practice previously banned by the U.S. Supreme Court.¹⁹ If the ESD moved in both directions, the whole doctrine would break down, thereby dismantling codified constitutional protections of proportional punishment and human dignity and inverting the entire Eighth Amendment.²⁰

The U.S. Supreme Court must also abide by stare decisis, a foundational legal doctrine that guides justices to defer to precedent when making decisions, assuming the binding nature of a prior decision, except in cases of correcting an incorrect decision.²¹ The Eighth Amendment has its own unique stare decisis doctrine, one that moves in the progressive direction of more humane punishment practices.²² The meaning of the Eighth Amendment changes over time as it expands to bar punishments that were once constitutional but are now considered draconian.²³ In

¹⁵ Ryan, *supra* note 6 at 268.

¹⁶ Ian P. Farrell, *Abandoning Objective Indicia*, 122 YALE L.J., 303 (2013).

¹⁷ Berry, *supra* note 5 at 274-275.

¹⁸ Ryan, *supra* note 6 at 257.

¹⁹ *Id.* at 276.

²⁰ Berry, *supra* note 5.

²¹ *Id.* at 258.

²² *Id.* at 260.

²³ *Id.*

this regard, state legislation allowing engagement with barred punishment is unconstitutional and violates the doctrinal purpose of the ESD.²⁴

Atkins prominently established the Court's use of the evolving standards of decency test in its decisions on capital punishment cases. However, it marked a transition in the Court's measure of the "national indicia" of a national majority.²⁵ After *Atkins*, the Court no longer relied on counting the states for a simple majority to achieve national consensus, as fewer than half the states were against imposing the death penalty on the intellectually impaired at the time.²⁶ The Court instead relied on an evaluation of punishment practices in the context of decency standards in modern society.²⁷ This language commits the Court to a dynamic interpretive approach in which evidence of societal values is paramount in decisions.

Atkins established the methodological framework for the Supreme Court's Eighth Amendment jurisprudence, especially by strengthening the trend of using ESD to direct punishment in a more humane direction. If categorical cases such as *Atkins*, which represent landmarks in the development of Eighth Amendment jurisprudence, are challenged, jurisprudence could be reshaped, and the protections it now provides could be forever lost.²⁸ If the predominant state legislative trend authorized, rather than banned, particular punishment practices, the same ESD framework could be used to expand the permissible scope of capital punishment.

C. *Kennedy V. Louisiana (2008): The Homicide Constraint*

²⁴ *Id.* at 269.

²⁵ Joanna H. D'Avella, *Death Row for Child Rape - Cruel and Unusual Punishment under the Roper-Atkins Evolving Standards of Decency Framework*, 92 COLUMBIA L.REV, 130 (2007).

²⁶ *Id.*

²⁷ Farrell, *supra* note 16.

²⁸ Klein, *supra* note 4 at 365.

The 2008 landmark Supreme Court case *Kennedy v. Louisiana* (2008) stands as a vital symbol of Eighth Amendment jurisprudence, narrowing the scope and applicability of the death penalty.²⁹ Justices on the *Kennedy* case were faced with the question: Does a state's imposition of capital punishment on perpetrators of child rape violate the Eighth Amendment's protection against cruel and unusual punishment? This case responded to a Louisiana court finding Patrick Kennedy guilty of raping his eight-year-old stepdaughter, after which he was sentenced to death. The Louisiana Supreme Court affirmed the use of capital punishment in this case, arguing that in *Coker*, the U.S. Supreme Court had struck down the use of capital punishment for the rape of an adult woman, but did not extend that ban to the rape of a child. After testing the national consensus, the Louisiana Supreme Court determined that this punishment was justified by the fact that five other states had adopted similar laws. The Court also found that this punishment was proportionate, given that children are uniquely vulnerable.³⁰

The U.S. Supreme Court disagreed. Writing for a five-justice majority, Chief Justice Kennedy determined that the Eighth Amendment prevents states from imposing capital punishment for the rape of a child in which the crime did not result in the victim's death. Applying the death penalty to such cases would violate the Eighth Amendment's protections against cruel and unusual punishment.³¹ Justice Kennedy argued that the clause has been interpreted to ensure proportionality between crime and punishment. Under this ideology of the court, death is an excessive punishment for the rape of a child who does not lose their life.³² This punishment also violated the national consensus on this issue, as Justice Kennedy notes that five states cannot constitute a nationwide agreement.³³

²⁹ Klein, *supra* note 4.

³⁰ *Kennedy v. Louisiana*, Oyez, <https://www.oyez.org/cases/2007/07-343> (last visited Apr 3, 2026).

³¹ *Id.*

³² Ardman, *supra* note 9 at 161.

³³ Kennedy, *supra* note 30.

Kennedy represents the U.S. Supreme Court's most recent decision in applying the ESD to prohibit capital punishment for non-homicide offenses.³⁴ Using the ESD's first standard of objective analysis, the Court found national consensus against applying the death penalty in such cases, as only six states authorized it and no individual had been executed for raping a child since 1964.³⁵ Applying the ESD's second standard of subjective analysis, independent judgment, the Court found that capital punishment is a disproportionate punishment for non-homicide crimes, as the punishment function of retribution would be over-served.³⁶

The Court's decision to use the ESD's independent decision function played a paramount role in the *Kennedy* decision. The majority Justices first argued that child rape occurs more than first-degree murder, so the expansion of capital punishment into this realm would produce a greater number of arbitrary death sentences.³⁷ Additionally, the number of reported child sexual assault and rape cases may decrease, as children may be reluctant to testify against perpetrators, who are often acquaintances and family members, if they may be put to death.³⁸ Furthermore, imposing the death penalty in these cases would not deter the crime from occurring in the first place. Rather, it might inhibit deterrence by removing an incentive for rapists not to kill their victims, as they would face no greater punishment for doing so and could eliminate the only witness to their crime.³⁹

The precedent set by *Kennedy* established a categorical framework that clearly delineates the constitutional boundary of capital punishment: homicide offenses. It is a vital linchpin to the Eighth Amendment in its clarification that non-homicide crimes should not result in the death

³⁴ Klein, *supra* note 4 at 302-303.

³⁵ *Id.* at 305-306.

³⁶ *Id.* at 307.

³⁷ *Id.*

³⁸ *Id.* at 308.

³⁹ D'Avella, *supra* note 25 at 153.

penalty. However, this constraint on the death penalty's limits would later become the target of contradictory state legislation.

D. The Dissent: Justice Samuel Alito's Challenge

Justice Alito wrote the dissent in the contentious *Kennedy* decision, providing the foundation for future state legislative defiance. The dissent advanced three interlocking arguments that continue to gain traction in the post-*Kennedy* legislative debate.

Justice Alito first challenged the claim that no national consensus had been reached. Justice Alito argued that state laws punishing child rape with the death penalty reflect an increasing social concern about child sex offenses sweeping the nation.⁴⁰ The majority decision to ban child rape as a permissible crime to be punished with the death penalty would prevent states from developing a national consensus in this area, as he argued a trend in that direction was already forming.⁴¹

Secondly, Justice Alito argued that many states did not adopt the death penalty for child rape, not because they opposed it, but because they misread *Coker* to believe that the precedent had prevented such legislation.⁴² In this light, the Court had caused the majority consensus it had found by creating ambiguity in its Eighth Amendment decisions, thereby preventing state legislatures from passing laws that actually represent their evolving standards of decency.⁴³

Building off the concern that the Court suppressed the true national consensus, Justice Alito thirdly argued that the Court became a “super-legislature” as it substituted its independent moral judgments for the opinions of the democratic legislatures.⁴⁴ Additionally, the Court's

⁴⁰ Klein, *supra* note 4 at 348.

⁴¹ *Id.*

⁴² *Id.* at 309.

⁴³ *Id.* at 309, 353-354.

⁴⁴ *Id.* at 313.

concerns for the victim’s impact were deemed “policy arguments” unfit for a judicial decision.⁴⁵ Justice Alito asserted that this role acted as an overreach of the Court’s power and that it was inconsistent with the fundamental understanding of the Eighth Amendment. These arguments, particularly Justice Alito’s third, resonate powerfully with the methodological commitments of the current U.S. Supreme Court’s originalist majority.

III. STATE LEGISLATIVE DEFIANCE: A CASE-BY-CASE ANALYSIS

Between 2023 and 2026, six states enacted formal legislation in direct opposition to the *Kennedy* decision. Each statute reflects particular state political contexts, yet they all share common structural features: authorization of capital punishment for defined categories of child sexual abuse, explicit or implicit knowledge of the *Kennedy* constraint, and drafting designed to maximize the prospects of Supreme Court review. The following sections analyze each statute, culminating in a cumulative examination of their constitutional significance.

A. *Florida House Bill 1297 (2023)*

Florida enacted House Bill 1297 in May 2023, becoming the first state since *Kennedy* to authorize capital punishment for child sexual battery. The statute amends Florida’s death penalty provisions to permit the imposition of capital punishment for the sexual battery of a child under twelve if two “aggravating factors” specific to sexual crime are found.⁴⁶ The bill passed with bipartisan support after Florida Governor Ron DeSantis encouraged lawmakers to adopt capital punishment for such crimes.⁴⁷ At a news conference, DeSantis criticized the Court’s *Kennedy* decision as wrongly decided and asserted the current Supreme Court would not uphold such a

⁴⁵ *Id.* at 310.

⁴⁶ H.B. 1297, Reg. Sess. (Fla. 2023).

⁴⁷ Klein, *supra* note 4 at 322.

ruling, so Florida will find ways to use the death penalty for the worst offenders.⁴⁸ Furthermore, DeSantis explicitly stated that Florida's new statute will challenge the *Kennedy* precedent and that the U.S. Supreme Court will uphold Florida's law.⁴⁹ Florida prosecutors first sought capital punishment for sexual battery of a child under twelve on December 12, 2023; however, in February 2024, the defendant pleaded guilty and was sentenced to life in prison without parole.⁵⁰

Florida's 2023 legislation is notable for its deliberate strategy to test the constitutional boundaries established by the Court in *Kennedy v. Louisiana* (2008). The statute indicated a legislative finding that child rape warrants a punishment reserved for the worst crimes: capital punishment. As of early 2026, the Florida Supreme Court has not yet ruled on the constitutionality of this bill, and no person has yet been sentenced to death under this amendment.

B. Tennessee Code of Law Title 39 (2024)

In 2024, Tennessee passed a law extending capital punishment to the rape and aggravated rape of a child under thirteen, even when no homicide occurs.⁵¹ The law took effect on July 1, 2024, and individuals convicted under this new legislation could be sentenced to death, life imprisonment without parole, or life imprisonment with parole.⁵² Tennessee's legislation reflects another example of direct state opposition to the federal precedent set by *Kennedy*, encouraging the U.S. Supreme Court to reconsider *Kennedy* in the future.

C. Idaho House Bill 380 (2025)

⁴⁸ *supra* note 3.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ TENN. CODE ANN. § 39-13-522 (2024).

⁵² *supra* note 3.

In March 2025, Idaho passed a bill authorizing the death penalty as punishment for aggravated lewd conduct with a child under twelve without a homicide needing to occur.⁵³ This new policy is extremely broad, with “aggravated lewd conduct” being defined as “any lewd or lascivious act or acts on or with the body of any part or member thereof.”⁵⁴ To apply the death penalty, the jury must find at least three aggravating conditions, including the defendant’s “position of trust,” use of “force or coercion,” and sexual penetration “however slight.”⁵⁵ The broad coverage of this bill raises concern that if the U.S. Supreme Court overturned *Kennedy*, Idaho could widely apply the death penalty using its independent measures of proportionality. Idaho’s statute demonstrates an implicit attempt to appeal the current Court’s interpretation of the Eighth Amendment’s Cruel and Unusual Punishments Clause to expand the categorical boundaries of capital punishment.

D. Oklahoma Senate Bill 599 (2025)

Oklahoma Senate Bill 599, enacted in 2025, authorizes capital punishment for the rape of a child under fourteen for first-time offenses.⁵⁶ Oklahoma state law had already required individuals previously convicted of child rape to be eligible for capital punishment.⁵⁷ As Oklahoma was one of the states that had previously authorized the death penalty for child rape before *Kennedy*, this reenactment of such legislation represents a reassertion of state legislative judgment. Oklahoma’s rejection of perceived judicial overreach aligns with the current Court’s originalist behavior and preferences, posing a risk to the future of the *Kennedy* precedent and Eighth Amendment protections.

⁵³ H.B. 380, 68th Leg., 1st Reg. Sess. (Idaho 2025).

⁵⁴ *Id.*

⁵⁵ Ardman, *supra* note 9 at 176.

⁵⁶ S. 599, 60th Leg., 1st Reg. Sess. (Okla. 2025).

⁵⁷ *supra* note 3.

E. Arkansas Act 662 (2025)

In March 2025, Arkansas enacted legislation under Act 662 that permits the imposition of the death penalty for capital rape of a child thirteen years or younger.⁵⁸ Any adult convicted would face either the death penalty or life in prison without parole.⁵⁹ This state legislation illustrates another unconstitutional state action: expanding the applicability of capital punishment, furthering the state legislative attempt to challenge the precedent set by *Kennedy*.

F. Alabama Child Predator Death Penalty Act (2026)

Most recently, as of January 2026, Alabama enacted the Child Predator Death Penalty Act, which expands the categories of capital offenses against children, including first-degree rape, first-degree sodomy, and sexual torture, which are all punishable by death if committed against children under twelve years old.⁶⁰ Alabama's legislation demonstrates the evolving nature of state legislation in expanding the boundaries of capital punishment beyond what is constitutionally acceptable under the *Kennedy* precedent and the Eighth Amendment. Should states continue to enact formal legislation expanding the horizons of the death penalty, the federal landscape of capital punishment jurisprudence would be inextricably altered.

While only these six states have passed legislation expanding the application of the death penalty to perpetrators of child rape and sexual battery, since 2025, several additional states have proposed legislation to expand their application of capital punishment. These states include Kentucky, Mississippi, Missouri, South Carolina, Texas, and Virginia.⁶¹ These states are leading the charge in a national trend of states pushing death penalty-centered legislation to eventually bring a case to the U.S. Supreme Court to overturn *Kennedy v. Louisiana* (2008). While only six

⁵⁸ S. 375, 95th Leg., 1st Ref. Sess. (Ark. 2025).

⁵⁹ *supra* note 3.

⁶⁰ S.B. 17, Reg. Sess. (Ala. 2026)

⁶¹ *supra* note 3.

states have enacted formal legislation, the growing number of representatives pushing for such legislation may begin to constitute the national consensus the Court will use to overturn *Kennedy*.

IV. CAN STATE LEGISLATION SHIFT THE CONSTITUTIONAL LANDSCAPE?

A. *Is a New National Consensus Forming?*

A central question regarding the survivability of the *Kennedy* precedent is whether six states' legislative enactments constitute a meaningful shift in the national consensus. The Court's objective indicia analysis of society's changing standards makes the Eighth Amendment's meaning dependent on state legislative action. The more states that support expanding the death penalty to perpetrators of child rape, the more this first ESD test would support the constitutionality of the states' legislation.⁶² As in previous capital punishment cases, such as *Atkins*, the Court found a national consensus against executing the intellectually disabled based on eighteen states having enacted such prohibitions, representing a majority trend, even though fewer than half the states were explicitly opposed to imposing the death penalty on such individuals.⁶³ Similarly, in *Roper v. Simmons* (2005), the Court used the ESD to find that the national consensus had evolved to prohibit the execution of juveniles, after extracting evidence that thirty states already prohibited this punishment type.⁶⁴

Applying these benchmark capital punishment cases to the current situation of states' implementation of capital punishment for child rape, six states' legislation appears unlikely to satisfy the Court's requirement for society's changing standards of decency, at least as it has been historically applied. A post-*Kennedy* Court reviewing the issue would observe that the

⁶² Farrell, *supra* note 16.

⁶³ D'Avella, *supra* note 25.

⁶⁴ Ryan, *supra* note 6 at 270.

overwhelming majority of states with capital punishment still do not authorize the death penalty for non-homicide child rape, that no individual has been sent to death row for this offense, and that no execution for such an offense has been carried out. Under the traditional consensus analysis, these facts would support, rather than undermine, the *Kennedy* holding.

However, the reality of the consensus-forming may be more dynamic than the traditional analysis suggests. The ESD's objective indicia analysis is not completely objective. The Court has broad discretion in determining how many states are required to form a consensus. This flexibility provides an opportunity for Justices to apply their own personal values to their decision in such cases.⁶⁵ Beyond the six state-enacted statutes, at least six additional death penalty states have considered capital rape legislation since 2025.⁶⁶ If these additional efforts succeed, the legislative count could shift meaningfully, presenting the Supreme Court with a picture of a faster-moving trend than any it has encountered in prior categorical cases. The Court may apply the ESD's objective test to argue for the existence of a trend of an expanded death penalty, thereby exercising its subjective analysis of a consensus.

A Court that is receptive to reconsideration of *Kennedy* might also manipulate the framing of this issue. It could first count the national majority as only the twenty-seven out of fifty states that retain the death penalty, using that as the relevant denominator. Through this lens, if twelve out of the twenty-seven states authorize the death penalty for child rape, a significant majority will be on its way to being reached, and a trend will be demonstrated. The Court could secondly emphasize the swiftness with which states have enacted this legislation, with statutes advancing in rapid succession since 2023 and the trend continuing into 2026. This legislation suggests that public opinion is rapidly shifting to favor expanded capital punishment.

⁶⁵ Farrell, *supra* note 16.

⁶⁶ *supra* note 3.

With the states' growing death penalty legislation, it is evident that the Court plays a vital role in determining the future of capital punishment as outlined by *Kennedy*, and, more broadly, the Eighth Amendment. A Court that is receptive to the overturn of *Kennedy* would demonstrate one that significantly departs from the established jurisprudential methodology in following the ESD. But as the current Court has demonstrated in its originalist approach, this situation may become increasingly likely.

B. The Role of an Originalist Court

Whether the current U.S. Supreme Court continues to uphold the two-prong ESD test established by *Trop* will determine the future of the *Kennedy* precedent and the protections under the Eighth Amendment. The ESD test is based on a living constitution approach, rather than an originalist approach to judicial interpretation.⁶⁷ The living constitution is a legal interpretive approach that holds that the U.S. Constitution can evolve without formal amendments and should be understood in the context of modern society.⁶⁸ Under the ESD, the Court considers changing societal views on punishment, with the Eighth Amendment being the only area in which it applies this approach.⁶⁹

Contrary to the living constitutionalism embodied in the ESD, the current Court more broadly embraces originalism. Originalism is a legal interpretive approach that emphasizes consulting the history of the Constitution's drafting and ratification to understand the meaning of certain provisions. In other words, this approach focuses on interpreting the Constitution in its original context rather than in the context of modern society.⁷⁰ The current makeup of the Court

⁶⁷ Ryan, *supra* note 6 at 256.

⁶⁸ Tyler Biscontini, *Living Constitution*, EBESCO (April 3, 2026, at 5:25 ET), <https://www.ebsco.com/research-starters/law/living-constitution>.

⁶⁹ Ryan, *supra* note 6 at 255.

⁷⁰ *Id.* at 273.

has demonstrated a move away from making decisions based on the evolving standards of decency; rather, it has chosen to emphasize history and tradition in its interpretive theory.

The last case in which the ESD was cited favorably by the majority in a Court decision was *Moore v. Texas* (2017), in which the Court affirmed that Texas’s application of nonclinical factors when assessing a claim of mental impairment under *Atkins* violated the Eighth Amendment.⁷¹⁷² Voicing the majority opinion, Justice Ginsburg wrote that the Court reached its decision using the evolving standards of decency test to protect human dignity.⁷³ While the current Court has not explicitly repudiated the ESD test, it is quietly sweeping it aside in a process of “stealth overruling.”⁷⁴ “Stealth overruling” refers to the Court’s actions of limiting the reach of Eighth Amendment precedent by ignoring it and exploring new directions, all the while not expressly rejecting the ESD.⁷⁵

The current Court’s decision in *City of Grants Pass, Oregon v. Johnson* (2024) is the key indicator of this change. The case concerns whether the city of Grants Pass violated the Eighth Amendment by imposing civil and criminal penalties for violating restrictions on camping in public places.⁷⁶ Writing for the majority, Justice Gorsuch focused on the origins of the Cruel and Unusual Punishments Clause and concluded that the city’s sanctions did not constitute cruel or unusual punishment.⁷⁷ The Court reached its decision in this case solely by relying on tradition and history, without mentioning *Trop* or the ESD.

Another indicator of *Kennedy*’s fragility under the current originalist Court is its willingness to flout stare decisis to overrule well-established precedents, such as *Dobbs v. Jackson Women’s Health Organization* (2022). The majority decision reached in *Dobbs*, as

⁷¹ *Moore v. Texas*, Oyez, <https://www.oyez.org/cases/2016/15-797> (last visited Apr 19, 2026).

⁷² Jeffery Wald, *Has SCOTUS Evolved Beyond the Evolving Standards of Decency?*, Vol. 99, No. 2, Florida Bar. J. (2025).

⁷³ *Id.*

⁷⁴ Klein, *supra* note 4 at 339-340.

⁷⁵ *Id.*

⁷⁶ *City of Grants Pass v. Johnson*, Oyez, <https://www.oyez.org/cases/2023/23-175> (last visited Apr 19, 2026).

⁷⁷ Wald, *supra* note 72.

authored by Justice Alito, was that the Constitution does not mention abortion, as it is an issue not deeply rooted in the nation's history.⁷⁸ Additionally, to overturn a precedent, one of five criteria must be met: the democratic process was obstructed, the original decision lacked grounding in the constitution, the tests established were not "workable," the precedent distorted the law in other realms, or overruling the precedent would not upend reliance interests.⁷⁹ *Dobbs* especially mirrors *Kennedy*'s vulnerability, as the reasoning the Court relied on to overturn *Dobbs* may apply with equal force to *Kennedy*.⁸⁰ In light of the recent *Dobbs* decision, the current Supreme Court may use the same reasoning to overturn *Kennedy* if the opportunity arises.

Thus, an originalist Court that grounds its decisions in constitutional history and tradition and has no problem overturning time-tested precedent poses a uniquely dangerous threat to the survival of the *Kennedy* precedent. Although the Court has not expressly renounced the evolving standards of decency test, it has demonstrated its willingness to silently abandon its methodology by turning to traditionalism rather than responding to society's changing needs.⁸¹ And, while courts that have relied upon the ESD in the past have overturned precedent, the current Court overturns precedent to return to an original interpretation of the Constitution: one that does not account for unique societal needs not imagined during the Founding era. When combined, these facets of the current Supreme Court may result in the reversal of *Kennedy v. Louisiana* (2008) and the revocation of protections against capital punishment that have been in place for half a century.

V. THE FUTURE OF *KENNEDY*

⁷⁸ *Dobbs v. Jackson Women's Health Organization*, Oyez, <https://www.oyez.org/cases/2021/19-1392> (last visited Apr 3, 2026).

⁷⁹ *Id.*

⁸⁰ Klein, *supra* note 4 at 343.

⁸¹ *Id.* at 339-340.

A. *The Consequences of Overturning Kennedy*

The consequences of overturning *Kennedy* would be significant and multidimensional. It would immediately validate the existing state statutes expanding the death penalty and extend the opportunity for additional states to pass legislation on applying capital punishment to perpetrators of child sexual assault. Beyond confirming state legislative actions, overturning *Kennedy* would have multiple other consequences.

One dimension of the consequences of overturning *Kennedy* is the impact this decision would have on victims of sexual assault. Firstly, the number of reported child rape and sexual battery cases may decrease, as children may be put in the position of having to testify in a case that could lead to the death of a family member.⁸² For juvenile victims, ninety-three percent know their abuser, and thirty-four percent of abusers are the victim's family member (RAINN). The prevalence of child victims knowing or being related to their abuser leads to rape and sexual battery cases being underreported, an issue the Court factored into their 2008 *Kennedy* decision.⁸³ If capital punishment is expanded to include perpetrators of child sexual assault, the number of cases reported may further decrease, which would hamper the law's deterrence function.⁸⁴

Furthermore, expanding the death penalty to include perpetrators of child rape and sexual assault may remove an incentive for abusers not to kill their victims, as the punishment for murder would be equal to that of the sexual battery.⁸⁵ Perpetrators would not only face no greater punishment for killing their victims, but in doing so, they would also remove the only witness to

⁸² *Id.* at 308.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ D'Avella, *supra* note 25 at 153.

their crime.⁸⁶ Thus, the law's deterrence function would not be served, as perpetrators of these crimes may believe they are likely to get away with their crimes, further endangering victims.

A second dimension of the consequences of overturning *Kennedy* is the likely increase in arbitrary death sentences handed to defendants. An arbitrary punishment is one that is imposed on some individuals, but not others, with no reasoning behind the differing application of the punishment.⁸⁷ As applied to capital punishment, factors other than the severity of the crime and guilt of the defendant may impact the imposition of death sentences: race, geography, gender, access to counsel, and jury misperceptions.⁸⁸ Furthermore, the current system of capital punishment across states unevenly applies the death penalty to individuals based on a mix of these factors, rather than to the few individuals guilty of the worst crimes or who have the longest criminal records.⁸⁹ The expansion of crimes eligible for capital punishment to perpetrators of child sexual assault and battery would largely increase the rate of arbitrary punishments, which would further weaken the Eighth Amendment's protections against cruel punishment. If more individuals are handed the death sentence, there will be more opportunities for this punishment to be applied disproportionately on individuals because of their race, geographical location, and socioeconomic status.

A third dimension of consequences that would arise if *Kennedy* is overturned is the expansion of death penalty eligibility to apply to vulnerable groups previously protected from this punishment, such as juveniles and the intellectually disabled. In 2002, the Supreme Court applied the ESD test to bar the imposition of capital punishment on mentally impaired individuals.⁹⁰ Then, in 2005, the Supreme Court used the ESD to ban the execution of minors

⁸⁶ *Id.*

⁸⁷ *Arbitrariness*, DEATH POLICY INFORMATION CENTER (April 3, 2026, at 5:25 ET), <https://deathpenaltyinfo.org/policy-issues/policy/arbitrariness>

⁸⁸ *Legally Irrelevant Factors Impact Death Sentencing*, DEATH POLICY INFORMATION CENTER (April 3, 2026, at 5:25 ET), <https://deathpenaltyinfo.org/policyissues/policy/arbitrariness/evidence-of-arbitrariness>

⁸⁹ *supra* note 87.

⁹⁰ *supra* note 11.

under capital punishment.⁹¹ If the current originalist court, as demonstrated by cases such as *Grants Pass* (2024) and *Dobbs* (2022), continues to disregard previous Courts' loyalty to the ESD and instead makes decisions based on the Constitution's original meaning, the forms of punishment deemed constitutional could increase.⁹² The potential for this expansion of punishment hinges on the Court's interpretation of the Eighth Amendment's Punishments Clause.⁹³ The current Court's position on the Eighth Amendment is visible in cases such as *Graham v. Florida* (2010), in which Justice Thomas argued that the Cruel and Unusual Punishments Clause prohibits what were deemed torturous methods of punishment at the time of the Bill of Rights' adoption.⁹⁴⁹⁵ In addition to this narrow view of the Eighth Amendment's protections against punishment methods, originalist Justices also challenge the proportionality of punishments.⁹⁶ In *Graham*, Justice Thomas contended that the Cruel and Unusual Punishments Clause does not contain language indicating that punishments must be proportionate.⁹⁷⁹⁸ In light of these originalist arguments, if Justices begin to view only some punishment methods as unconstitutional, case law protecting vulnerable groups such as juveniles and the intellectually impaired may dissolve.⁹⁹ Therefore, if *Kennedy* is overturned, Eighth Amendment jurisprudence that has been building for over half a century would likely disintegrate.¹⁰⁰

VI. CONCLUSION

This article sought to answer the question of whether the stability of the Eighth Amendment will be upheld in the midst of increasing state legislation attempting to overturn

⁹¹ *Roper v. Simmons*, Oyez, <https://www.oyez.org/cases/2004/03-633> (last visited Apr 3, 2026).

⁹² Ryan, *supra* note 6.

⁹³ *Id.* at 301.

⁹⁴ *Graham v. Florida*, Oyez, <https://www.oyez.org/cases/2009/08-7412> (last visited Apr 19, 2026).

⁹⁵ Ryan, *supra* note 6 at 300.

⁹⁶ *Id.* at 301.

⁹⁷ *supra* note 94.

⁹⁸ Ryan, *supra* note 6 at 301.

⁹⁹ *Id.* at 301-302.

¹⁰⁰ *Id.* at 302.

Kennedy by imposing capital punishment on perpetrators of child rape and sexual assault. After a thorough analysis of the evidence, it is evident that the current limits to capital punishment as provided by the Cruel and Unusual Punishments Clause are extremely vulnerable to expansion. Legislation in death penalty states such as Florida, Tennessee, Idaho, Oklahoma, Arkansas, and Alabama challenges the Supreme Court's ruling in *Kennedy v. Louisiana* (2008) to repeal this federal precedent. However, as this article has argued, the future of *Kennedy* and Eighth Amendment protections does not rest with the states, but with an originalist Supreme Court.

If a case to overturn *Kennedy* is brought before the Supreme Court, the Court may take several routes in handing down its decision. The Court has demonstrated the behavioral trend of ignoring the ESD in favor of an originalist interpretation and disregarding precedent in its decision-making. Therefore, one route the Court may take in deciding on a potential *Kennedy* overturning case is to disregard the emerging national consensus on the issue of capital punishment for child sexual battery. The Court could, however, overturn *Kennedy* because the Justices do not find a provision against child rape in the Constitution as it was developed at the time of the Founding. The Court may also disregard the standard of proportional punishment in this decision, finding that the Constitution does not mention a standard of proportionality; thus, the death penalty for child rape and sexual assault cannot be disproportionate. In this regard, the Court may overturn *Kennedy* on the basis of its independent, originalist judgment.

Conversely, the Court may apply the first test of the ESD, finding that a national consensus has formed among death penalty states in favor of the punishment, as justification for its decision to overturn *Kennedy*. If the Court were to use the ESD to determine a growing national trend in support of the death penalty for perpetrators of child rape and sexual assault, the “one way ratchet” of the ESD would be decimated.¹⁰¹ Rather than moving in one direction to

¹⁰¹ *Id.* at 257.

promote more humane punishment practices, this decision would mark a new era for the ESD, moving in both directions by dismantling proportional punishment and the constitutional protections guaranteed under the Eighth Amendment. A decision such as this would upend the Eighth Amendment and endanger the vitality of the Cruel and Unusual Punishments Clause. Even so, this outcome is very unlikely. The Court's ignorance of the ESD in prior cases demonstrates the unlikelihood that it will reverse its originalist ideology to use the ESD as a justification for overturning *Kennedy*.

The ongoing state legislation expanding the death penalty eligibility to apply to perpetrators of child rape and sexual assault may provide the ideal catalyst for the Supreme Court to overturn *Kennedy v. Louisiana* (2008). Rather than utilize the argument that there is a growing national consensus among states with capital punishment to expand its application to non-homicide crimes, the Court would more likely use the opportunity of the case to exert its originalist ideology. If such an event were to occur, the Court could reduce punishment restrictions that protect individual rights under the Eighth Amendment, instead widening these categories to reflect what it sees in the context of the Founding era. The United States may be on the precipice of entering an era in which the Court's disregard for precedent and originalist ideology will lead to an inevitable loss of time-tested individual protections.



**FROM ANTI-SUBORDINATION TO ANTI-CLASSIFICATION: THE DOCTRINAL
TRANSFORMATION OF EQUAL PROTECTION IN *STUDENTS FOR FAIR***

ADMISSIONS V. HARVARD

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ABSTRACT

The Supreme Court's decision in *Students for Fair Admissions v. Harvard* marks the culmination of a broader doctrinal shift in Equal Protection jurisprudence from an anti-subordination framework to an anti-classification framework, a move that negates the intentions and remedial purposes intended by the Clause's framers. While the Equal Protection Clause was originally understood during Reconstruction as permitting race-conscious remedies aimed at dismantling racial hierarchy, the Court now interprets it as requiring formal colorblindness for neutral application across all jurisdictions. Drawing on the historical foundation of the Fourteenth Amendment, this Article traces how the Court's reasoning departs from the remedial logic embedded in Civil Rights Era jurisprudence and reframes structural inequality as individual disadvantage. Using the theoretical frameworks of Derrick Bell and Robert Cover, I argue the decision reflects a jurispactic act—one that suppresses competing interpretations of equality while preserving existing power structures. The elimination of affirmative action demonstrates how formally neutral legal frameworks can reproduce inequality while appearing to promote fairness, ultimately redefining constitutional equality in a manner detached from historical context and lived experience. Absent careful scrutiny, this doctrinal shift risks entrenching a regressive understanding of equality, placing the law at the center of the very inequalities it purports to resolve.

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I. INTRODUCTION

American law operates on the premise that legislation is binding and applied evenly across the population. Chief Justice Roberts famously stated in *Parents Involved in Community Schools v. Seattle School District No. 1* that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹ This statement reflects a commitment to formal neutrality, treating equal application as synonymous with equality itself. However, this raises a critical question: what happens when laws are drafted without considering the perspectives of the minorities historically excluded from shaping them?

Affirmative action is at the heart of this debate. Originating in the Civil Rights Era with President John F. Kennedy’s Executive Order 10925, it required government contractors to “take affirmative action” to dismantle discrimination.² Today, it is utilized in college admissions to mitigate lived inequality. Yet, recent rulings frame formally neutral eligibility requirements as fairness-enhancing rather than exclusionary, often by invoking the Equal Protection Clause. In practice, these regulations often function as mechanisms that preserve existing hierarchies rather than producing a neutralizing effect. Such results stem from the interpretation of the Equal Protection Clause through two competing frameworks: anti-classification, in which all classifications based on race are unconstitutional, and anti-subordination, in which the Constitution prohibits laws that create or reinforce racial hierarchy.³

This analysis examines the Supreme Court's decision in *Students for Fair Admissions v. Harvard* through established jurisprudential frameworks. I argue that the Court’s analysis reflects

¹ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

² *Exec. Order No. 10925*, 26 *Fed. Reg.* 1977 (Mar. 8, 1961), <https://www.presidency.ucsb.edu/documents/executive-order-10925-establishing-the-presidents-committee-equal-employment-opportunity> (last visited Feb. 27, 2026).

³ Abigail Nurse, *Anti-Subordination in the Equal Protection Clause: A Case Study*, 89 *N.Y.U. L. Rev.* 293 (2014).

a retreat from the historically grounded, inclusive interpretations of constitutional equality rooted in the Civil Rights Era. By refusing to account for disparate starting positions, formally neutral systems recast structural inequality as individual failure.

To understand this shift, this Review first traces the original purpose of the Equal Protection Clause during Reconstruction. It then follows the development of affirmative action through the Johnson administration, analyzes the doctrinal evolution leading to *Students for Fair Admissions v. Harvard* (SFFA), and situates the decisions as a jurispathic act. Finally, it argues that the Court's reasoning has created an avalanche of precedents that systematically perpetuate injustice under the language of formal neutrality across recent judicial decisions.

This analysis ultimately asks how legal neutrality reshapes constitutional purpose: whether the enforcement of laws should be applied horizontally in a culturally sensitive manner, or vertically and uniformly to all citizens stripped of historical context. This article argues that *Students for Fair Admissions v. Harvard* represents the culmination of a doctrinal transformation in Equal Protection jurisprudence that facilitates the dismantling of an anti-subordination approach to law. Where the Equal Protection Clause was originally understood as permitting race-conscious remedies to dismantle racial hierarchy, the Court now treats all racial classifications as constitutionally suspect, regardless of purpose. In doing so, *SFFA* completes the Court's shift from race-conscious and remedial to anti-classification, redefining equality as formal colorblindness rather than structural redress, which is now reflected throughout legislation today.

II. THE REMEDIAL ROOTS OF THE EQUAL PROTECTION CLAUSE

To understand the erosion of the Equal Protection Clause’s original purpose, this section traces its origins in the 1860s. During the Reconstruction Era, after the Civil War, Southern states enacted Black Codes to restrict property ownership, contract rights, movement, and access to courts.⁴ In response, Congress passed the Civil Rights Act of 1866, which was explicitly race-conscious and remedial, guaranteeing that formerly enslaved persons were afforded the same rights as white citizens.⁵ Congress subsequently constitutionalized this commitment to remedial equality through the Fourteenth Amendment and the establishment of the Equal Protection Clause.

At the time, however, the scope of equality remained contested. Lawmakers often distinguished between civil, political, and social rights, with the strongest consensus surrounding the protection of civil rights—such as the right to contract, hold property, and access courts—rather than full social integration. Even within this limited framework, Reconstruction-era measures were explicitly race-conscious and remedial.⁶ Although the framers may not have envisioned complete social equality, they nonetheless recognized that formally neutral laws would be insufficient to dismantle the entrenched racial hierarchy.

The Equal Protection Clause provides: “No state shall... deny to any person within its jurisdiction the equal protection of the laws.”⁷ Rather than embodying abstract colorblindness, the Clause emerged in response to the explicit racial hierarchy following the Civil War. This intent is reflected in Senator Jacob M. Howard’s speech introducing the Fourteenth Amendment, where he stated that “whatever law protects the white man shall afford ‘equal’ protection to the

⁴ William J. F. Meredith, *The Black Codes*, 3 NEGRO HIST. BULL. 76 (1940).

⁵ Civil Rights Act of 1866, Ch. 31, 14 Stat. 27.

⁶ Ilan Wurman, *Reconstructing Reconstruction-Era Rights*, 109 Va. L. Rev. 885 (2023).

⁷ *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NATIONAL ARCHIVES (Sept. 7, 2021), <https://www.archives.gov/milestone-documents/14th-amendment>.

black man.”⁸ While the Civil Rights Act of 1866 spoke explicitly in racial terms, guaranteeing formerly enslaved persons the same rights “as enjoyed by white citizens,” the Equal Protection Clause adopted universal language, protecting “any person” within a state’s jurisdiction. This linguistic shift marks a move from explicit racial reference to abstraction. While the Clause was enacted to protect formerly enslaved persons, its neutral phrasing later allowed courts to detach the provision from its remedial origins.

The Equal Protection Clause did not evolve in a vacuum; around the same time, the Freedmen’s Bureau was established to provide food, education, housing, and legal assistance specifically for formerly enslaved persons.⁹ This race-conscious legislation demonstrates that the same Congress responsible for drafting the Fourteenth Amendment did not understand equal protection to prohibit targeted remedial measures. Rather, race-conscious intervention was viewed as necessary to dismantle the racial hierarchy that the Amendment sought to abolish in post-Civil War American society.

One of the first times the Equal Protection Clause was narrowly interpreted was in the *Slaughter-House Cases* (1873). When deciding whether a state-granted monopoly violated the Privileges or Immunities Clause, the Court upheld the monopoly, effectively stating that primary authority over civil rights resides within the states unless discrimination fits a narrow description.¹⁰ These decisions narrowed not only the Equal Protection Clause but also the Privileges or Immunities Clause, creating a distinction between national and state remedial potential. Rather than functioning as a robust safeguard against state-imposed racial hierarchy, the Fourteenth Amendment was redefined as offering only minimal protection against a narrow

⁸ Sen. Jacob M. Howard, Speech Introducing the Fourteenth Amendment, Congressional Globe, 39th Cong., 1st Sess. 2764-66 (May 23, 1866).

⁹ *The Freedmen’s Bureau*, NATIONAL ARCHIVES (Aug. 15, 2016), <https://www.archives.gov/research/african-americans/freedmens-bureau>.

¹⁰ *Slaughterhouse Cases*, 83 U.S. 36 (1872), JUSTIA LAW, <https://supreme.justia.com/cases/federal/us/83/36/> (last visited Feb. 27, 2026).

set of abuses. By stripping the Privileges or Immunities Clause of much of its intended force, the Court rendered the Fourteenth Amendment far less effective in protecting civil rights against state interference. Essentially, the Court's decision redirected power away from federal protection of rights, weakening Reconstruction-era protections and forcing subsequent decisions to rely on a more abstract interpretation of the Equal Protection Clause.

This narrowing opened the door to subsequent rulings such as *United States v. Cruikshank* (1876). Following the Colfax Massacre, the Court determined that the Fourteenth Amendment only restricts state action and not the actions of private individuals. The Court dismissed the federal government's efforts to prosecute white supremacists who had killed Black citizens.¹¹ By defining its power as limited to stopping discrimination by states, not private citizens, the Court effectively permitted private racial violence from organizations like the Ku Klux Klan to persist with minimal federal intervention.

Furthermore, in *Plessy v. Ferguson* (1896), the majority articulated the doctrine of "separate but equal," writing that separation does not necessarily imply the inferiority of either race.¹² Writing for the majority, Justice Brown rejected the criticism that segregation imposed a "badge of inferiority," claiming that if any such perception arose, it stemmed not from the law but from the personal interpretation of those affected.¹³ In doing so, the Court reframed racial inequity as a subjective experience rather than a structural condition.

Taken together, these decisions reflect a judicial retreat from the Reconstruction-era vision of equality through a progressive narrowing of the Fourteenth Amendment's scope: first by limiting the Privileges or Immunities Clause, and later by redefining racial inequality as a

¹¹ *United States v. Cruikshank*, 92 U.S. 542 (1876).

¹² *Plessy v. Ferguson*, 163 US 537 (Supreme Court 210 AD).

¹³ *Id.*

matter of subjective perception rather than structural harm. The Court departed from the Amendment's original remedial purpose and instead embraced an anti-classification framework that diverged sharply from anti-subordination principles.

The foundation for applying heightened scrutiny in racial discrimination cases was later suggested in *United States v. Carolene Products Co.* (1938), which noted that laws directed at “discrete and insular minorities” might necessitate more rigorous judicial review.¹⁴ *Brown v. Board of Education* (1954) illuminated this principle force when it rejected formal symmetry in favor of focusing on structural harm.¹⁵ Thereby rejecting formal symmetry in favor of examining structural harm.¹⁶ In *Loving v. Virginia* (1967), the Court declared that racial classifications are “odious to free people” and must withstand the “most rigid scrutiny.”¹⁷ Triggering strict scrutiny forces defendants to bear the burden of demonstrating that their policies serve a compelling governmental interest and are narrowly tailored to achieve that interest.¹⁸

In practice, however, the Court's use of strict scrutiny reflects two competing and often incompatible understandings of equality. The fundamental constitutional debate is not between equality and discrimination, but between whether the Constitution requires the remediation of racial hierarchy or simply enforces a formal prohibition on racial classification. One vision, defined as anti-subordination, is structural, remedial, and historically conscious, seeking to vertically integrate all individuals by dismantling racial hierarchy. The opposing view, anti-classification, is formalist, colorblind, and abstract, emphasizing a legally neutral approach. The Court frequently oscillates between these two distinct interpretations of the Equal Protection

¹⁴ *United States v. Carolene Products Co.*, 304 US 144 (Supreme Court 640).

¹⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁶ *Id.*

¹⁷ *Loving v. Virginia*, 388 US 1 (Supreme Court 395 AD).

¹⁸ Robin L. West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 YALE J.L. & HUMAN. 129 (1988).

Clause. This doctrinal inconsistency reflects not only competing definitions of equality but also competing theories about who has the authority to define constitutional meaning.

Scholar Robin West reveals how allegiance is maintained through those whose voices are allowed to shape legal meaning.¹⁹ She distinguishes between textual communities and interactive communities. In textual communities, legal interpretation is closed off to those outside traditional power structures, causing the law to become static and detached from evolving moral understandings. Interactive communities, by contrast, imply that real justice requires the inclusion of all voices, especially those historically excluded. West warns that marginalized individuals risk becoming “nonspeakers”—those subject to the law but never its authors—thereby stripping them of agency in shaping the legal reforms that govern their lives.²⁰ Such a framework reveals how legal texts can become morally hollow when they exclude the very communities they are meant to protect.

Anti-subordination requires attention to lived experience, which necessarily demands the inclusion of the voices of those who have borne the weight of racial hierarchy. When the Court embraces anti-classification under the Equal Protection Clause, it distances constitutional meaning from social context and returns to abstraction, treating equality as a matter of symmetrical language rather than structural reality. Although the Fourteenth Amendment’s universal phrasing was originally enacted to secure remedial protections for formerly enslaved persons, its analytic reduction has enabled later courts to detach the Clause from its race-conscious origins. This shift privileges West’s textual community over the interactive community the Clause was intended to protect.

¹⁹ *Id.*

²⁰ *Id.*

III. HISTORY OF AFFIRMATIVE ACTION

The Reconstruction history of the Equal Protection Clause reveals that its framers did not equate equality with colorblindness; rather, anti-classification emerged as a later doctrinal development. The Clause was adopted alongside explicitly race-conscious legislation, as evidenced by the Civil Rights Act of 1866.²¹ In a similar vein, a century later, during the Civil Rights Movement, the federal government again employed race-conscious measures through executive action to remedy structural inequality, reflecting a continuation of the remedial logic embedded in the Fourteenth Amendment's historical purpose. Modern doctrine thus reflects not a rejection of equality, but a conflict over what equality requires.

The phrase “affirmative action” was first introduced in Executive Order 10925, in which President John F. Kennedy required federal contractors to “take affirmative action” to ensure nondiscrimination in employment. The order applied only to federal contractors, grounded in the federal government's authority over contracting and the expenditure of federal funds. This early framework did not require numerical quotas or mandate race-based hiring, but rather emphasized good-faith compliance and oversight.²²

Although initially limited in public visibility and scope, the concept of affirmative action evolved from a vague executive directive into an enforceable standard within the Civil Rights Act of 1964.²³ Under the Act, Title VI prohibited discrimination in federally funded programs, reinforcing the nondiscrimination principle that had previously applied to federal contractors under Executive Order 10925.²⁴ Furthermore, Title VII of the Civil Rights Act of 1964

²¹Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

²² Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

²³ National Academies of Sciences, Engineering, and Medicine, *America Becoming: Racial Trends and Their Consequences*, vol. 1 2001, <https://www.nationalacademies.org/read/9599/chapter/12>.

²⁴ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

prohibited employment discrimination and created the Equal Employment Opportunity Commission (EEOC), a federal agency tasked with enforcing anti-discrimination laws and issuing regulatory guidance.²⁵ Both Title VI and Title VII of the Civil Rights Act of 1964 initially relied on “soft” enforcement, including complaint-based and prohibitory enforcement mechanisms, rather than explicit diversity mandates.²⁶

Under Presidents Lyndon B. Johnson and Richard Nixon, policies shifted. Executive Order 11246 expanded Kennedy’s original order by requiring proactive measures.²⁷ Enforcement was placed under the Department of Labor, giving the order more regulatory teeth.²⁸ Johnson’s 1965 commencement address at Howard University framed affirmative action as a necessary response to structural inequity. In that speech, he famously invoked the image of a runner who has been shackled for years, explaining that it is not enough to simply declare “you are free to compete with all the others” if that individual has been held back for most of their life.²⁹

From this point, modern affirmative action policy began to take shape. This development did not represent a break from congressional action but reflected an evolution in how statutory commitments were enforced. The Civil Rights Act of 1964 established a legal framework grounded in nondiscrimination, but reliance on prohibitions and complaint-based enforcement did not, on its own, require the affirmative steps needed to dismantle entrenched patterns of exclusion. Nixon’s approval of the Philadelphia Plan marked the turning point where affirmative action shifted from mere nondiscrimination to results-oriented enforcement. The plan required construction trades to establish specific hiring “goals and timetables” for minority workers.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

²⁸ *Id.*

²⁹ Lyndon B. Johnson, *Commencement Address at Howard University: To Fulfill These Rights* (June 4, 1965), THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights>.

Supporters believed that merely prohibiting discrimination was insufficient because entrenched exclusion in industries would persist without active intervention.³⁰ Nixon extended Johnson's Executive Order 11246 to include goal-oriented requirements for federally funded contractors.³¹ Accordingly, while the legal foundation for nondiscrimination originated in Congress, the shift toward outcome-conscious affirmative action emerged through executive enforcement. This evolution lies at the center of contemporary constitutional debate: whether race-conscious policies constitute permissible remedial measures or impermissible discrimination.

IV. THE BUILDING OF *STUDENTS FOR FAIR ADMISSIONS V. HARVARD* DECISION

Few recent cases test the meaning of constitutional equality more directly than *Students for Fair Admissions v. Harvard* (2023).³² In this case, the Court examined the race-conscious admissions practices of Harvard and the University of North Carolina at Chapel Hill (UNC). Harvard used an “overall” admissions category that considered race and geography as heavily weighted factors to prevent significant drop-offs in minority representation. In the final “lop list” stage, race, legacy status, and athletic recruitment were key determinants. Similarly, UNC made race a “plus” factor that significantly increased the chance of admission during the group review.

The lawsuit, initiated by Edward Blum on behalf of rejected applicants, challenged the universities’ practices as being discriminatory against Asian American applicants, arguing that they decreased the chances of admission and raised the bar higher for Asian American applicants than for other races. Ultimately, the Court ruled that the use of race in these admissions processes violated constitutional limits on race-based decision-making.³³

³⁰ Paul Marcus, *The Philadelphia Plan and Strict Racial Quotas in Federal Contracts*, 17 UCLA L. REV. 817, 817-836 (1970) (the Philadelphia Plan and construction trades).

³¹ Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965); see also Exec. Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969).

³² *Students for Fair Admissions, Inc v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

³³ *Id.*

The Supreme Court held that race-conscious admissions practices violated the Equal Protection Clause and Title VI of the Civil Rights Act. Drawing on a doctrinal framework developed from *Regents of the University of California v. Bakke* (1978) to *Fisher v. University of Texas*, which has increasingly privileged anti-classification principles, the Court determined that federally funded universities could not sustain race-conscious admissions as compatible with the Constitution's prohibition on racial discrimination. Such policies, the Court held, failed to satisfy strict scrutiny.³⁴

The decision in *SFFA* is markedly different from other historical cases in the same vein. In *Bakke*, the Court permitted race to be used as a “plus” factor in admissions while holding racial quotas unconstitutional.³⁵ UC Davis Medical School had been reserving 16 of the 100 available seats in its classes for minority applicants. The central tension in *Bakke* was not the legitimacy of diversity as a goal, but about rejecting the use of fixed quotas. Several Justices, including Brennan, Marshall, and White, defended quotas as being constitutionally permissible, believing that it is “not a quota to keep someone out – it's a quota to get someone in.”³⁶ Epstein and Knight argue that *Bakke* helped create the “diversity rationale,” where race may be considered in admissions provided that individualized review replaces rigid numerical quotas.³⁷ *Bakke* also marked an early articulation of the Equal Protection Clause's application to admissions, with Justice Stewart arguing that any discrimination based on race violated the Clause.³⁸ Most importantly, Justice Powell's opinion marked a shift from an anti-subordination rationale grounded in remedying past harms to a broader emphasis on diversity.³⁹

³⁴ *Id.*

³⁵ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

³⁶ Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of Regents of the University of California v. Bakke*, 19 YALE L. & POL'Y REV. 341, 341-379 (2001) (defense of quotes by Supreme Court Justices).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

Next came *City of Richmond v. J.A. Croson Co.* (1989), where a business set-aside program required 30% of public construction contract dollars to be awarded to minority business enterprises.⁴⁰ A contractor challenged the program after failing to meet the participation requirement. The Supreme Court ruled that the race classifications Richmond employed in its program failed to show sufficient evidence of past or present discrimination to meet the criteria for strict scrutiny and subsequently struck down the program. This was a sharp contrast to *Wygant v. Jackson Board of Education* (1986),⁴¹ which suggested that affirmative action must be tied to prior discrimination by the specific governmental unit.⁴² That principle was later formalized in *Adarand Constructors, Inc v. Peña* (1995), where the Court held that all racial classification—whether federal, state, or local—should be analyzed under strict scrutiny.⁴³ In these cases, the Court made clear that even if programs are remedial, they are still racial classifications that trigger strict scrutiny. A local government may only act if it has been a “passive participant” in a system of private discrimination, publicly funded operations that reinforce exclusion, or if there is a significant statistical disparity.⁴⁴

A formalized goal regarding racial classifications was presented in *Grutter v. Bollinger* (2003), where it was decided that diversity is a compelling enough interest for schools to allow affirmative action. The court found that the University of Michigan Law School used a holistic review process that was intended to produce a “critical mass” of diverse perspectives through individualized review rather than fixed quotas.⁴⁵ The Court found Michigan’s framework to be within constitutional bounds but shifted affirmative action from a remedial purpose to one of educational diversity and institutional benefit more formally than *Bakke* did. Since *Grutter*, many

⁴⁰ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

⁴¹ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁴² Derek M. Alphan, *Proving Discrimination after Croson and Adarand: “If It Walks Like a Duck,”* 37 U.S.F. L. REV. 887, 887-970 (2003).

⁴³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁴⁴ Derek, *supra* note 42.

⁴⁵ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

colleges have adopted this diversity rationale, framing affirmative action as enhancing the learning mission rather than correcting past injustice.⁴⁶ The Court specifically flagged that affirmative action as a temporary measure, expected to fulfill its goal of achieving meaningful academic diversity within twenty-five years.⁴⁷ Scholar Wendy Parker argues that the Court initially applied a deferential version of strict scrutiny that relied heavily on the law school's judgment.⁴⁸

That softening changed with *Fisher v. University of Texas* (2013, 2016)⁴⁹ coupled with *Parents Involved in Community Schools v. Seattle School District No. 1* (2007).⁵⁰ *Parents Involved* resolved the tensions where parents challenged school districts' student assignment plans that used racial classifications to prevent resegregation and promote diversity.⁵¹ The Court ruled that the school districts failed strict scrutiny and therefore violated the Equal Protection Clause, siding with an anti-classification framework.⁵² *Parents Involved* explicitly stated the case failed because it was "outside of higher education," a distinction later reflected in *Fisher*.⁵³ However, *Fisher* concluded by placing the burden on universities to demonstrate that race-based admissions policies are both necessary and tailored. In 2013, the Court acknowledged the decision in *Grutter* was too deferential, and by 2016, it emphasized that universities must continually reassess whether race is still necessary.⁵⁴ Scholar Norma Riccucci argues that the Court's focus on "critical mass" was a "red herring" allowing conservative justices to express deep skepticism toward race-conscious admissions without immediately overturning *Grutter*.

⁴⁶Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins*, SSRN ELECTRONIC JOURNAL 1, 1-24 (2006).

⁴⁷ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁴⁸ *Id.*

⁴⁹ *Fisher v. University of Texas*, 570 U.S. 297 (2013, 2016).

⁵⁰ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Andrew Sterritt, *New Originalist Interpretation of Parents Involved*, 15 Geo. J.L. & Pub. Pol'y 433 (2017).

⁵⁴ *Fisher v. University of Texas*, 570 U.S. 297 (2013, 2016).

Justice Kennedy stated that deference is “antithetical to strict scrutiny,” highlighting a marked doctrinal tightening.⁵⁵

Students for Fair Admissions v. Harvard marks the latest tension within the Court's affirmative action jurisprudence. In contrast to the decision in *Bakke* regarding the constitutionality of a “plus” factor, the court in *SFFA* reframed this framework, concluding that race functioned as a “negative” factor for some applicants, particularly Asian Americans.⁵⁶ The majority reasoned that because college admissions operate as a zero-sum process, granting a benefit to one group necessarily imposes a burden on others.

In *SFFA*, the Court found that Harvard and UNC failed to articulate a defined endpoint for their use of race undermining claims of narrow tailoring. The Court concluded that the universities failed to meet their burden of justification under the structure outlined in *Fisher*.⁵⁷ The Court further rejected the assumption that race could serve as a proxy for shared viewpoints, reasoning that such generalizations collapse applicants’ individuality into racial classifications.⁵⁸ The Court also found that universities’ asserted goals, including training leaders in diverse education environments, were too vague and immeasurable to justify a race-based decision-making. Harvard’s “lop list” and UNC’s “plus factor” were deemed too broad and inconsistently applied, specifically in their treatment of Asian applicants as a monolithic group. As a result, UNC was found to have violated the Equal Protection Clause, and Harvard was found to have violated Title VI.⁵⁹

⁵⁵Norma M. Riccucci, *Fisher v. University of Texas and the Status of Affirmative Action: Implications for Social Equity*, 37 Rev. Pub. Pers. Admin. 23 (2017).

⁵⁶ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

⁵⁷ *Fisher v. University of Texas*, 570 U.S. 297 (2013, 2016).

⁵⁸ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

⁵⁹ *Id.*

V. DIRECT IMPLICATIONS

The Supreme Court's decision in *Students for Fair Admissions v. Harvard* held, by a 6–3 majority, that the race-conscious admissions programs at Harvard and UNC were unconstitutional and violated the Equal Protection Clause and Title VI of the Civil Rights Act.⁶⁰ Although the ruling significantly limits the use of race in admissions, it leaves open the possibility for universities to consider an applicant's experiences with race, provided they relate directly to individual character or achievement.

The dissenting opinions, delivered by Justices Sonia Sotomayor and Ketanji Brown Jackson, forcefully challenged the majority's reasoning. Justice Sotomayor, joined by Justice Elena Kagan, argued that the Equal Protection Clause does not mandate colorblindness but rather permits race-conscious policies to address systemic inequality.⁶¹ Justice Jackson reinforced this concern, emphasizing that a colorblind approach ignores the real-world consequences of race and the enduring legacy of discrimination.⁶² Both justices highlighted how the *Students for Fair Admissions* ruling adopts a formal equality framework that ignores lived inequality. In stark contrast to Chief Justice Roberts' statement in *Parents Involved*, Sotomayor warned that “ignoring race will not equalize a society that is racially unequal,” while Jackson asserted that “deeming race irrelevant in law does not make it so in life.”⁶³ By adopting a framework of legal neutrality on issues of race and equality, the Court becomes an active participant in maintaining structural inequality, undermining the “passive participant” principle articulated in *Adarand*

⁶⁰ *Id.*

⁶¹ Olivia B. Waxman, Read Justice Sotomayor and Jackson's Dissents in the Affirmative Action Case, TIME (Jun. 29, 2023), <https://time.com/6291230/affirmative-action-dissent-jackson-sotomayor/>.

⁶² *Id.*

⁶³ *Id.*

Constructors, Inc. v. Peña, which presumes that the government must avoid even inadvertent participation in racial harm.⁶⁴

Notably, the dissenting opinions were authored by justices whose perspectives may reflect lived experience with racial inequality, underscoring how such experience can shape constitutional interpretation.⁶⁵ These rulings carry significant implications for a broad range of stakeholders. Black and Latinx students, who are historically most likely to benefit from affirmative action, stand to progressively lose access to elite educational spaces that have historically excluded them. Asian American applicants, whose stereotype-based disadvantages were central to the case, may gain some procedural relief; however, without broader reform, the ruling risks reinforcing racial divisions. White applicants may experience shifts in competitive dynamics, though their existing structural advantages remain largely intact. Finally, elite universities face the loss of legal flexibility to cultivate diverse educational environments, raising questions about how inclusion can be meaningfully pursued going forward.

This uncertainty is already evident in current admissions practices. One scholar points to a pattern of “secret admissions” in which several lived experience factors are considered without being clearly defined in terms of their weight or classification. These universities are now in limbo, trying to balance the negative consequences of secrecy while retaining the strengths of individualized review to achieve their diversity missions.⁶⁶ While such approaches may be procedurally defensible, they are often difficult to administer consistently and require admissions officers to make subjective determinations that lack transparency. This ambiguity raises concerns that implicit bias may affect admissions outcomes, particularly for Asian American applicants.⁶⁷

⁶⁴ Derek, *supra* note 42.

⁶⁵ Olivia, *supra* note 61.

⁶⁶ Vinay Harpalani, *Secret Admissions*, 48 J.C. & U.L. 325 (2023).

⁶⁷ Patrick Hornbeck, *Implicit Bias against Asian Americans: A Blind Spot in the Harvard Admissions Case*, 52 J.L. & Educ. 123 (2023).

Furthermore, post-*SFFA*, high-achieving underrepresented minority (URM) students (including Native Americans, Black, Hispanic, and Pacific Islanders) were up to 10% less likely to enroll in highly selective colleges in fall 2024 compared to fall 2023.⁶⁸ In response, many of these students cascaded into less selective colleges with lower graduation rates, while non-URM students experienced little change in their enrollment probabilities across segments.⁶⁹

VI. RIPPLING FORWARD

If *Students for Fair Admissions v. Harvard* represents the Court’s full embrace of the anti-classification principle, then the constitutional significance of racial inequality shifts: disparate outcomes become legally irrelevant so long as government action remains facially neutral. This narrowing of legal meaning has already begun to ripple outward. Lower federal courts have been left to determine the outer limits of this reasoning as litigants attempt to apply the decision to other race-conscious policies.

Post-*SFFA*, courts have begun to apply similar reasoning in *Jeffery Nuziard et al. v. Minority Business Development Agency* (2024). The United States District Court for the Northern District of Texas applied the *SFFA* reasoning to a federal race-based business program, holding that the agency’s statutory racial classification violates the Equal Protection Clause by defining “disadvantaged individuals” in racial terms.⁷⁰ Scholars fear that federal race-conscious economic programs long justified as remedial are now set to endure heightened scrutiny.⁷¹

⁶⁸ *Id.*

⁶⁹ Michael D. Bloem et al., *College Enrollment Patterns After SFFA v. Harvard*, EDWORKINGPAPER No. 26-1392 ANNENBERG INST. AT BROWN UNIV 1 (2026), <https://doi.org/10.26300/6a7w-bq06>.

⁷⁰ *Nuziard v. Minority Bus. Dev. Agency*, No. 4:23-cv-00278-P N.D. Tex. (2024).

⁷¹ Ralph Capio & Erin M. Carr, *Assessing the Potential Consequences of Students for Fair Admissions, Inc. (SFFA) on the Small Business Development Program*, 60 CAL. W. L. REV. 525 (2024).

During President Donald Trump’s first term, he issued Executive Order 13950, which restricted certain Diversity, Equity, and Inclusion (DEI) initiatives within federal agencies by targeting what it described as “anti-American race and sex stereotyping.”⁷² This order was quickly reversed by President Joe Biden, signaling that systematic barriers still needed to be addressed from an anti-subordination lens.⁷³ However, attacks on affirmative action have ramped up aggressively within the past year. Executive Order 14151 ordered the termination of DEI programs, offices, and training across federal agencies once again, with implications for grants and programs that promote DEI concepts.⁷⁴ Furthermore, Executive Order 14173 eliminated requirements that federal contractors take affirmative actions, revoking Executive Order 11246 during Nixon’s presidency.⁷⁵ The goal was to ensure merit-based hiring, requiring submissions of compliance before receiving federal funding.⁷⁶ Such orders now trickle down to K-12 schools, where public institutions are being told federal funding will be withheld if DEI programming persists.⁷⁷

Finally, President Trump has mandated DOJ compliance reviews of schools like Stanford University and several University of California campuses to ensure they are following protocol post-*SFFA*.⁷⁸ As institutions retreat from race-conscious review, many have returned to ostensibly “objective” criteria such as standardized testing and other quantifiable admissions metrics. Although SAT and ACT scores are race-neutral at face-value, decades of empirical

⁷² Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020).

⁷³ Dawn Siler-Nixon, Nancy Van der Veer Holt & Cymoril M. White, *A Systematic Approach: Biden Revokes Trump's EO 13950 and Calls for a "Whole-of-Government" Racial Equity Agenda*, FordHarrison (Jan. 22, 2021), <https://www.fordharrison.com/a-systematic-approach-biden-revokes-trumps-co-13950>.

⁷⁴ Exec. Order No. 14,151, 90 Fed. (January 20, 2025).

⁷⁵ Exec. Order No. 14,173, 90 Fed. (January 21, 2025); Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

⁷⁶ Luc Cohen, *Judge Blocks Trump's Labor Department from Requiring Grant Recipients to Abandon DEI*, Reuters (Mar. 27, 2025), <https://www.reuters.com/world/us/judge-blocks-trumps-labor-department-requiring-grant-recipients-abandon-dei-2025-03-27/>.

⁷⁷ Collin Binkley, *K-12 Schools Must Sign Certification Against DEI to Receive Federal Money, Administration Says*, Associated Press (Apr. 3, 2025), <https://apnews.com/article/dei-trump-school-discrimination-federal-funding-7d1025753b9bd924711ace4069fca399>.

⁷⁸ U.S. Department of Justice, *Attorney General Pamela Bondi launches compliance review investigation into admissions policies at Stanford University and several University of California schools, advancing President Trump's mandate to end illegal DEI policies* (Mar. 27, 2025) <https://www.justice.gov/opa/pr/attorney-general-pamela-bondi-launches-compliance-review-investigation-admissions-policies>.

research demonstrate their strong correlation with household income, parental education, and access to preparatory resources.⁷⁹ Yet, because they do not classify by race, they may not trigger Equal Protection scrutiny, even as they reproduce existing hierarchies.

A similar form of formal neutrality is exhibited in H.R. 1, *An Act to Provide for Reconciliation Pursuant to Title II of H. Con. Res. 14*, more casually known as the One Big Beautiful Bill Act (OBBBA), signed into law on July 4, 2025. Under this law, graduate and professional students are capped at a lifetime borrowing limit of \$100,000 and \$200,000, respectively.⁸⁰ The bill also begins the phase-out of the Graduate PLUS loan program.⁸¹ The stated purpose was fiscal restraint to reduce federal student lending risk.⁸² Although formally neutral, the OBBBA obscures the unequal access to intergenerational financial capital that made public financing necessary.⁸³ By capping financing, OBBBA disproportionately burdens students without access to intergenerational wealth. Although the OBBBA does not evoke the Equal Protection Clause, it operationalizes the same neutrality logic endorsed in *SFFA*. In both contexts, formally equal rules treat unequal conditions as irrelevant, converting structural disadvantage into individual failure while insulating the government from responsibility.

Taken together, these developments illustrate how the Court's reasoning in *Students for Fair Admissions* extends well beyond the admissions office. Whether through judicial decisions striking down remedial economic programs, executive orders dismantling diversity initiatives, or legislation framed in formally neutral fiscal terms, the same logic reappears: inequality is treated

⁷⁹ Audrey Amrein-Beardsley et al., *A Validation Review of the SAT and ACT for College and University Admissions Decisions*, 33 EDUCATION POLICY ANALYSIS ARCHIVES 1 (2025).

⁸⁰ H.R. 1, *One Big Beautiful Bill Act*, 119th Cong. (2025–2026), <https://www.congress.gov/bill/119th-congress/house-bill/1>.

⁸¹ S. 308, 119th Cong. (2025).

⁸² *Id.*

⁸³ Madeline Brighthouse Glueck, *Beyond a bachelor's: Stratification in graduate school enrollment*, 96 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 1 (2025).

as legally irrelevant so long as the rule itself does not explicitly classify by race. What emerges is not merely a shift in admissions policy, but a broader constitutional reorientation in which structural disadvantage disappears from legal analysis. In this framework, laws that reproduce racial hierarchy remain constitutionally permissible so long as they operate through ostensibly neutral mechanisms. The ripple effects of *SFFA* therefore illuminate the deeper transformation this Article identifies: a move away from the Equal Protection Clause's anti-subordination foundations toward a rigid anti-classification doctrine that prioritizes formal neutrality over the dismantling of entrenched inequality. In doing so, the Court reshapes constitutional equality itself, redefining it not as a tool to remedy historical injustice, but as a principle that treats unequal conditions as irrelevant to the law.

VII. JURISPATHIC AND JURISGENIC USES OF THE EQUAL PROTECTION CLAUSE

At the core of *Students for Fair Admissions v. Harvard* lies a harsh irony: the Equal Protection Clause, once a safeguard for racial justice, is now being used to abolish policies designed to dismantle systemic inequality. Robert Cover describes two ends of a spectrum: jurispathic (law-killing) and jurisgenic (law-creating).⁸⁴ A jurispathic act extinguishes competing legal interpretations by declaring a single authoritative meaning, whereas a jurisgenic act sustains evolving interpretations.⁸⁵ Cover argues that when law loses its connection to the communities and moral visions that give it life, it creates a destruction of the moral universe and argues for a society that fights for jurisgenic justice.

The Justices' dissent in *SFFA* contrasts starkly with landmark rulings like *Brown v. Board of Education* and *Loving v. Virginia*, signaling a jurisgenic ideology. *Brown* explicitly rejected the

⁸⁴ Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV L. REV 4.

⁸⁵ *Id.*

“separate but equal” doctrine of *Plessy*.⁸⁶ ⁸⁷ *Loving* struck down anti-miscegenation laws, with the Court arguing that although races were punished the same, the statute was designed to maintain White Supremacy.⁸⁸ These decisions acknowledged that segregation was a system of racial hierarchy, interpreted in light of contemporary conditions.

In contrast, certain cases use the Equal Protection Clause not to expand constitutional meaning, but to foreclose it. These moves reflect the broader dismantling of race-conscious policies across education, employment, and government, threatening to roll back decades of civil rights gains. What distinguishes *Brown* and *Loving* is their framing within the current interests of those in power. Scholar Derrick Bell’s theory of interest convergence and racial sacrifice covenants suggests racial progress is tolerated only when it aligns with dominant institutional interests.⁸⁹ In *SFFA*, the Court framed affirmative action as a zero-sum game that harmed white and Asian American applicants.⁹⁰ This framing depends on treating whiteness as the baseline for fairness. Bell argues that racial hierarchy is often maintained through the perseverance of neutrality in the name of procedural law. This case shows how formal equality can be used as a cover to uphold existing power structures.

Significantly, Asian American applicants have been positioned as victims of race-conscious admissions, primarily through claims that such practices limited the number of highly qualified Asian American candidates—a narrative that brought *Students for Fair Admissions v. Harvard* before the Court. However, the logical structure of this argument relies upon comparing Asian American outcomes to those of white applicants, effectively treating

⁸⁶ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁸⁷ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁸⁸ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁸⁹ Derrick Bell, *The Racial-Sacrifice Covenants*, in *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* 27–48 (2004).

⁹⁰ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

whiteness as the normative baseline for fairness. The underlying claim posited that Asian American applicants would experience higher admission rates if they were treated identically to white applicants, with some estimates suggesting an increase in admission probability of up to 19% under such a framework.⁹¹ This framing of whiteness as the standard for fairness obscures the fact that Asian American applicants are neither treated as fully advantaged nor as historically subordinated; instead, they occupy an unstable position that allows their experiences to be selectively mobilized. Even when Asian American applicants are compared to white applicants as a benchmark, they do not receive the same structural advantages associated with whiteness, meaning that formal inclusion within a “majority” category fails to produce equivalent outcomes.

In light of Derrick Bell’s theory of interest convergence, this positioning appears deliberate; it suggests that the recognition of Asian American disadvantage becomes legally salient only to the extent that it supports dismantling affirmative action, rather than ensuring a meaningful increase in Asian American admission rates. Although Asian American enrollment increased modestly following *Students for Fair Admissions*, these gains were neither uniform nor substantial, and they did not correspond with any meaningful decline in white enrollment.⁹²⁹³

Thus, a case ostensibly brought to produce justice for one minority group, Asian Americans, ultimately proved harmful to other minority groups—particularly Black and Latinx applicants—while offering limited benefit to the plaintiffs themselves. This outcome reveals a broader pattern consistent with the preservation of white structural advantage at the expense of collective minority progress.

⁹¹ Peter Arcidiacono, Josh Kinsler & Tyler Ransom, *Asian American Discrimination in Harvard Admissions*, 144 EUR. ECON. REV. 104079 (2022).

⁹² James S. Murphy, *The Future of Fair Admissions: A First Look at College Enrollment Outcomes After the End of Affirmative Action* (Class Action, Feb. 2026), <https://www.joinclassaction.us/post/a-first-look-at-college-enrollment-outcomes-after-the-end-of-affirmative-action>.

⁹³ Michael T. Nietzel, *Five Things the New Data About Race-Conscious College Admissions Tell Us*, *Forbes* (Feb. 4, 2026), <https://www.forbes.com/sites/michaelt Nietzel/2026/02/04/five-things-the-new-data-about-race-conscious-college-admissions-tell-us/>.

From Derrick Bell's perspective, *Students for Fair Admissions* does not stand alone as a jurispathic act; instead, it reframes affirmative action as racial discrimination, elevates colorblindness as a constitutionally defensible claim, and narrows the consideration of race to individual narrative within admissions. What began as a judicial retreat from inclusion now threatens to reshape national policy by reframing efforts to address inequality as forms of unfairness or illegality. The crucial realization is that the text of the Equal Protection Clause itself has not changed from *Brown* to *Loving* and now *SFFA*; rather, the Court's authoritative narrative about equality has shifted. Instead of confronting enduring disparities, these legal and political shifts redefine the language of fairness in a way that excludes the very communities that affirmative action was originally meant to uplift.

VIII. CONCLUSION

While the majority opinion in *Students for Fair Admissions v. Harvard* may appear doctrinally grounded, it raises serious concerns about the Court's capacity to account for structural inequality. The decision marks a turning point in constitutional interpretation and reflects a broader retreat from racial justice within Equal Protection jurisprudence. Although the ruling was framed as a commitment to equal treatment, it betrays the original intent of the Equal Protection Clause by foreclosing the very forms of race-conscious legal interpretation that the Clause was designed to support. The central argument of this review is not merely about the place of affirmative action in admissions, but rather how the Court chose to review its legality and why that methodology is harmful to a remedial system of justice.

The Court's interpretation of the Equal Protection Clause in *SFFA v. Harvard* reflects a narrow, text-bound approach to justice that upholds formal equality while disregarding the

historical purpose and lived realities the Clause was meant to address. The Court’s decision invalidated affirmative action by aligning itself with the textual community—applying the Equal Protection Clause through a colorblind lens to uphold a constitutional standard of equal treatment for all citizens.⁹⁴ However, this formal approach ignored the fundamental purpose of the Equal Protection Clause: to secure genuine equality, particularly for those who have historically faced systemic discrimination.

Ratified during the Reconstruction Era following the Civil War, the Equal Protection Clause was explicitly designed to protect the rights of formerly enslaved Black Americans and to prevent states from enacting discriminatory laws, such as the Black Codes, that restricted their newly gained freedoms.⁹⁵ It was written in the direct context of remediating racial injustice, yet the Court has now used the literal text—which mandates equal protection of the laws for all persons—to justify an abstracted application of the amendment. In doing so, the Court failed to account for the lived experiences and ongoing struggles of Black Americans who still face systemic discrimination. The decision in *SFFA* is reflective of a misunderstanding of equality similar to that seen in *Plessy*, only occurring at a current stage with far less temporal distance from the historical conditions it purports to address. This ongoing inequality is vividly reflected in disparities such as disproportionately lower high school graduation rates, significantly reduced median household incomes, and higher poverty rates among Black Americans.

By dismissing these lived experiences of American citizens, the Court systematically places Black communities in the role of Robin West’s so-called “nonspeakers,” denying them not only recognition of their distinct struggles but also the ability to influence how legal principles

⁹⁴ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

⁹⁵ SUPREME COURT HISTORICAL SOCIETY, SUPREME COURT DECISIONS AND WOMEN’S RIGHTS: INTERPRETING THE EQUAL PROTECTION CLAUSE (last visited March 27, 2026), <https://supremecourthistory.org/classroom-resources-teachers-students/decisions-womens-rights-equal-protection-clause/>.

like equality are defined and applied.⁹⁶ The fact that the majority of justices striking down affirmative action were white, while the dissenting justices included only people of color, underscores the deep racial divide in how the stakes and meaning of race-conscious policies are understood within the judicial process itself.⁹⁷ This exclusion removes Black Americans from shaping the law's meaning, thereby reinforcing a system where those in power control legal interpretation while the lived experiences of marginalized communities are systematically ignored.

The Court failed to take an interactive approach—one that moves beyond the explicit language of the Equal Protection Clause to acknowledge the historically silenced voices of Black Americans. An interactive reading would have recognized Black students as moral participants in the legal community: individuals whose experiences should inform what equality means in practice through an anti-subordination reading of the Equal Protection Clause. Such an approach would have honored the original intent behind the Clause and affirmed its continuing relevance in addressing systemic inequality today.

Without such an approach, and given the ripple effect this decision has caused in minority communities' access to education, the Court has effectively adopted a jurispathic lens. In practical terms, *SFFA* establishes that race-conscious policies are presumptively unconstitutional unless they can be justified without reference to race as a category. Under this framework, courts are less concerned with whether a policy mitigates structural inequality and more concerned with whether it employs explicit racial classifications, regardless of remedial intent. As a result, the

⁹⁶ Robin L. West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 YALE J.L. & HUMAN. 129 (1988).

⁹⁷ Olivia B. Waxman, Read Justice Sotomayor and Jackson's Dissents in the Affirmative Action Case, TIME (Jun. 29, 2023), <https://time.com/6291230/affirmative-action-dissent-jackson-sotomayor/>.

Equal Protection Clause now operates primarily as a constraint on classification rather than as a tool for addressing entrenched inequality. If law is to serve as a bridge between justice and injustice, it must remain responsive to history and the voices of those who have long been excluded from shaping its meaning. Without such responsiveness, formal equality risks becoming a mechanism of exclusion cloaked in the language of neutrality.⁹⁸

⁹⁸ Disclaimer: The author, in support of academic transparency, discloses that artificial intelligence (primarily ChatGPT & Claude.ai) was used to review and expand initial outlines, to locate additional references supporting the author's researched sources, to format footnotes, and to provide draft section language. Just as authors would carefully review any work by a human research assistant, all generative AI content was reviewed, edited, and verified by the author to ensure accuracy and integrity.