

ISSUE 1

LETTER FROM THE EDITOR- IN-CHIEF	<i>Catherine Juliette Stanley</i>	vii
<u>ARTICLES</u>		
YOU SPEAK HIP-HOP? THE FAILURE OF COURTS TO FAITHFULLY GATEKEEP LAW ENFORCEMENT OFFICERS TESTIFYING AS RAP EXPERTS IN CRIMINAL CASES	<i>Lucius Outlaw III</i>	1
THE PROBATIVE VALUE OF SKIN COLOR: HOW RULE 609’S IMPEACHMENT BY PRIOR CONVICTION VIOLATES THE THIRTEENTH AMENDMENT	<i>Fareed Nassor Hayat</i>	41
THE EIGHTH AMENDMENT AND PRISON STAFF-TO-SENTENCED PRISONER SEXUAL VIOLENCE	<i>Matthew Lyskawa</i>	89
<u>NOTES</u>		
STATES OF SERVITUDE: RESURRECTING THE FORGOTTEN PROMISE OF THE FIFTEENTH AMENDMENT	<i>Nigel Johnson</i>	133
FOOD FOR THOUGHT: EXAMINING THE IRONY OF WELFARE EXCLUSION FOR DRUG FELONS	<i>Arianna T. Long</i>	174

ISSUE 2

LETTER FROM THE EDITOR- IN-CHIEF	<i>Catherine Juliette Stanley</i>	viii
<u>ARTICLES</u>		
ETHNONATIONALISM BY ALGORITHM	<i>Spencer Overton</i>	206
CITIZENSHIP REVOKED, HUMANITY DENIED: THE EXISTENTIAL COST OF STATELESSNESS	<i>Olawale Ohumodimu</i>	266
<u>NOTES</u>		
THE INVISIBLE AMONG US: DEFENDING THE RIGHT TO SELF- SHELTER USING THE STATE-CREATED DANGER DOCTRINE	<i>Akyla Tomlinson</i>	311
THE DOCKET STRIKES BACK: RECALIBRATING THE SUPREME COURT’S SHADOW DOCKET TO PREVENT VOTER DISENFRANCHISEMENT	<i>Cameran E. Hyde</i>	335
EQUITABLE MARKET VALUE: HOW THE GOVERNMENT CANNOT AFFORD THE LOSS OF BLACK WEALTH, CULTURE, AND JOY WHEN CALCULATING JUST COMPENSATION FOR EMINENT DOMAIN PROCEEDINGS	<i>Antonia Izuogu</i>	362

22ND ANNUAL WILEY A. BRANTON/ HOWARD LAW JOURNAL SYMPOSIUM **GOOD TROUBLE: UNLEASHING POWER, POLICY, AND** **THE VOICE OF THE PEOPLE IN EDUCATION**

LETTER FROM THE EDITOR- IN-CHIEF	<i>Catherine Juliette Stanley</i>	ix
<u>ARTICLE</u>		
HIERARCHY MAINTENANCE THROUGH CONSTITUTIONAL LAW: HOW <i>SFFA</i> RETRENCHES UNEQUAL ACCESS TO HIGHER EDUCATION AND WHY HBCUS ARE ESSENTIAL FOR CHANGE	<i>Brenda D. Gibson</i>	389
<u>ESSAYS</u>		
SEIZING THE REINS OF POWER FROM CLASSROOM TO COURTROOM: GOOD TROUBLE AS POWER IMPERATIVE	<i>Cedric Merlin Powell</i>	436
TENSION BETWEEN STATES’ RIGHTS AND RELIGIOUS RIGHTS	<i>Preston C. Green & Suzanne E. Eckes</i>	450
TEACHING ALL THE BABIES: REFLECTIONS ON POWER, POLITENESS, AND THE PROMISE OF GOOD TROUBLE	<i>Dr. David J. Johns</i>	463
BRANTON FAMILY REFLECTION	<i>Beverly Branton Lamberson, Wylene Branton Wood & Debra E. Branton</i>	475

HOWARD LAW JOURNAL

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HOWARD LAW JOURNAL

Volume 69 2025-2026

TABLE OF CONTENTS
ISSUE 2

LETTER FROM THE
EDITOR- IN-CHIEF.....*Catherine Juliette Stanley* viii

ARTICLES

ETHNONATIONALISM
BY ALGORITHM.....*Spencer Overton* 206

CITIZENSHIP REVOKED,
HUMANITY DENIED:
THE EXISTENTIAL COST OF
STATELESSNESS.....*Olawale Olumodimu* 266

NOTES

THE INVISIBLE AMONG US:
DEFENDING THE RIGHT TO
SELF-SHELTER USING
THE STATE-CREATED
DANGER DOCTRINE.....*Akyla Tomlinson* 311

THE DOCKET STRIKES BACK:
RECALIBRATING THE
SUPREME COURT'S SHADOW
DOCKET TO PREVENT VOTER
DISENFRANCHISEMENT.....*Cameran E. Hyde* 335

EQUITABLE MARKET
VALUE: HOW THE
GOVERNMENT CANNOT
AFFORD THE LOSS OF BLACK
WEALTH, CULTURE, AND
JOY WHEN CALCULATING
JUST COMPENSATION FOR
EMINENT DOMAIN
PROCEEDINGS.....*Antonia Izuogu* 362



LETTER FROM THE EDITOR-IN-CHIEF

CATHERINE JULIETTE STANLEY

As this issue goes to print, the Supreme Court has heard oral arguments in *Trump v. Barbara*,¹ a direct challenge to Executive Order 14160,² which would strip birthright citizenship from children born on U.S. soil to parents without permanent legal status. The case is a live demonstration of what the scholarship gathered here makes clear. Issue 2 of Volume LXIX turns its gaze toward the legal and governmental systems that quietly erode the dignity, belonging, and citizenship of this nation's most marginalized communities demonstrating that the law, in its silence and in its action, can render a person invisible.

The issue opens with an Article by Professor Spencer Overton examining how the Trump Administration's executive actions on AI advance what the author terms digital ethnonationalism, embedding racial and cultural hierarchy into the algorithmic infrastructure of public life. By dismantling equity safeguards and reorienting federal AI governance away from civil rights accountability, these policies

¹ Oral Argument, *Trump v. Barbara*, 146 S. Ct. 879 (2025) (25-365), <https://www.oyez.org/cases/2025/25-365>.

² Exec. Order No. 14,160, 90 Fed. Reg. 8,443 (Jan. 20, 2025).

threaten to entrench historical inequities across every institution that deploys AI systems. The Article proposes the Equitable AI in Government Act, a statutory framework grounded in fairness, pluralism, authenticity, and autonomy, insisting that inclusion is a condition of equal citizenship, and a prerequisite for democratic legitimacy.

The second Article, authored by Professor Olawale Olumodimu, confronts the weaponization of citizenship itself and provides the impact of *Trump v. Barbara*. Statelessness, as the author posits, is a construct of human design, one that strips individuals of identity, rights, and social standing. The revocation of nationality as punishment is treated here as akin to the extermination of humanity, a legal act that forecloses education, healthcare, employment, and even the dignity of an official burial. As the threat of birthright citizenship denial grows more concrete in American political discourse, this piece demands a legal and moral framework that treats citizenship as a human right to be protected rather than a privilege to be revoked.

Howard Law Journal Senior Solicitations & Submissions Editor, Akyla Tomlinson's Note, the third in this issue, brings that same analysis of state-sanctioned exclusion to the crisis of homelessness. The Supreme Court's decision narrowing protections, the author argues, reflects a detached reality in which the survival of unhoused persons is criminalized rather than supported. Ordinances punishing sleeping outdoors or erecting encampments punish the status of being unhoused, stripping people of the freedom to choose how to shelter and subjecting them to punitive measures that perpetuate rather than resolve the crisis. Invoking Justice Kennedy's dignity jurisprudence as a constitutional shield against cruelty inflicted on the physical, social, and psychological self, the piece charts a path forward through recognition of the right to self-shelter and freedom from state-created danger.

The fourth piece, penned by the *Journal's* Executive Publications Editor Cameron Hyde, pulls back the veil on the Supreme Court's shadow docket, revealing how the Roberts Court has grown comfortable circumventing full merits review to issue sweeping doctrine through emergency procedural channels. The Purcell principle, announced from the shadows and lacking the legitimacy of full briefing and oral argument, exemplifies how the emergency docket has become a vehicle for judicial power exercised without transparency or accountability. This Note proposes a standard of heightened harm for emergency relief that would protect disenfranchised voters, cabin executive pressure on the Solicitor General, and restore the procedural integrity that consequential legal doctrine demands.

The fifth and final Note, by the *Howard Law Journal's* Executive Notes and Comments Editor Antonia Izuogu, closes the issue by examining eminent domain abuse as a mechanism of racial dispossession. The taking of Black-owned property, frequently undervalued and disproportionately targeted, denies property owners the stability, generational wealth, and ancestral legacy that the American promise of ownership is meant to secure. True just compensation, the author argues, must restore the dignity of those dispossessed through community-conscious remedies that rebuild what eminent domain destroys. The measure of racial harm lies in all that was prevented as much as in all that was taken.

These five pieces collectively trace how democratic institutions strip communities of their dignity by embedding racial bias into AI governance, weaponizing citizenship revocation, criminalizing the survival of unhoused persons, shielding judicial power from democratic accountability, and dispossessing Black property owners through eminent domain abuse. Together, they demand that the law fulfill its promise to every person it governs, rather than serve as an

instrument of exclusion against those it has historically failed. From the algorithmic infrastructure of Artificial Intelligence to the foundational promise of birthright citizenship, these works reveal how law and policy can be wielded to exclude rather than protect. While the mechanisms vary, the injury is the same: the systematic denial of equal personhood to those already rendered invisible by race, status, and circumstance.

Here in Washington, D.C., where the Supreme Court sits blocks from our law school and where federal policy shapes the lived reality of millions, these conversations carry weight and urgency. On behalf of the *Howard Law Journal*, I thank you for your continued support and readership. May this issue inspire the legal community toward a more honest reckoning with the law's capacity for harm and its still-unrealized capacity for repair.

In Truth and Service,

CATHERINE JULIETTE STANLEY
EDITOR-IN-CHIEF
VOLUME 69

Ethnonationalism by Algorithm

SPENCER OVERTON

TABLE OF CONTENTS

INTRODUCTION..... 207

I. ETHNONATIONALISM IN THE UNITED STATES..... 212

 A. Ethnonationalist Origins and the Rise of Racially Inclusive Democracy..... 212

 B. The Second Trump Administration's Policies to Dismantle Racially Inclusive Democracy..... 217

II. HOW TRUMP AI POLICIES ADVANCE ETHNONATIONALISM..... 227

 A. Digital Ethnonationalism: Racial Harms from Unregulated AI..... 228

 1. *Bias*..... 229

 2. *Homogenization*..... 232

 3. *Deception*..... 234

 4. *Manipulation*..... 235

 B. Facilitating AI Bias Through Executive Orders..... 237

 1. *Repealing Federal Protections Against AI Bias: Executive Order 14,148*..... 237

 2. *Sacrificing AI Fairness for AI Dominance: Executive Order 14,179*..... 240

 3. *Prohibiting AI Fine-Tuned to Reduce Bias: Executive Order 14,319*..... 240

 4. *Deterring States from Preventing AI Bias: Executive Order 14,365*..... 242

 C. Embedding AI Harms Within Federal Agencies..... 245

 1. *OMB's Removal of Equity from Government AI Policy*..... 245

 2. *Agency Execution of the Anti-Equity Mandate*..... 249

 3. *Disabling Disparate Impact to Undermine AI Accountability*..... 252

III. CONTAINING ETHNONATIONALISM IN GOVERNMENT AI..... 254

 A. Strengthening Democracy Through the Equitable AI Act..... 256

 1. *Baseline AI Obligations to Advance Democratic Values*..... 256

 2. *Enhanced Oversight for High-Risk AI Use Cases*..... 257

 3. *Enforcement Infrastructure*..... 258

 B. The Implications of the Equitable AI Act..... 259

 C. Grappling with Challenges to the Equitable AI Act..... 260

 1. *The Limits of Regulating Public AI Alone*..... 260

 2. *Political Obstruction by Ethnonationalists*..... 261

 3. *Innovation, Competitiveness, and the False Choice Between Regulation and Growth*..... 261

 4. *Speech, Association, and Equal Protection Challenges*..... 262

 5. *Polarization, Cultural Anxiety, and Backlash*..... 263

CONCLUSION..... 264

Ethnonationalism by Algorithm

SPENCER OVERTON[‡]

In the United States, artificial intelligence (“AI”) policy has become a critical arena for ethnonationalism—an ideology that defines national belonging through shared ancestry, culture, and language. Amid rapid demographic change and cultural anxiety, the second Trump Administration has harnessed federal AI governance to advance its broader agenda of dismantling diversity—most notably through Executive Order 14,179, “Removing Barriers to American Leadership in Artificial Intelligence” and related legal directives. By eliminating safeguards against algorithmic bias and recasting equity as an ideological threat to innovation, the policies facilitate exclusion under the guise of neutrality. These moves are not merely deregulatory; they represent a coordinated legal strategy to encode ethnonationalist priorities into the infrastructure of the future. By defaulting to dominant patterns, unregulated AI systems reproduce racial inequality and suppress cultural pluralism. This Article offers the first sustained legal analysis of how the Trump Administration’s

[‡] Spencer Overton, Patricia Roberts Harris Research Professor and Founder and Faculty Director of the George Washington Multiracial Democracy Project, The George Washington University Law School. Exchanges with several people throughout the process helped develop the ideas in this Article, including: Michael Akinwumi, Hilary Allen, Roy Austin, Chiraag Bains, Prithika Balakrishnan, Priya Baskaran, Jeremy Bearer-Friend, Paul Belonick, Khaled Beydoun, Lisa Bornstein, J.B. Branch, David Brody, Chaz Brooks, Charlotte Burrows, Michael Carroll, Irene Chen, Colleen Chien, Danielle Citron, Wilfred Codrington, Chris Cotropia, Tino Cuéllar, Taylor Dalton, Joshua Douglas, Maureen Edobor, Atiba Ellis, Lia Epperson, Sheldon Evans, Nathan Fleming, Adrienne Fowler, Nick Garcia, Thalia González, Yosef Getachew, Lisa Gilbert, Deborah Hellman, Justin Hendrix, Brandon Honoré, George Horvath, Margaret Hu, Ewanrinareto Imoukhuede, Pratham Juneja, Christina Lee, Rory Little, Catherine Lhamon, Dayna Matthew, Catlin Meade, Alan Morrison, Emily Murphy, Alondra Nelson, Fernanda Nicola, Larry Norden, Dawn Nunziato, Jeffrey Omari, Dave Owen, Nicole Ozer, Mekela Panditharatne, Dick Pierce, Deborah Raji, Radhika Rao, Blake Reid, Barak Richman, Reuel Schiller, Nathan Schneider, Steven Schooner, Joshua Schwartz, Jonathan Siegel, Alicia Solow-Niederman, Brenda Smith, Olivier Sylvain, Penny Tilghman, Jessica Tillipman, Suresh Venkatasubramanian, Paul Waters, Kate Weisburd, Rob Weissman, Fane Wolfer, Chris Yukins, and Luiz Zubrow. This Article also benefited from my presentations on AI and democracy at workshops at the American University Washington College of Law, North Carolina Central University School of Law (Law & Technology Summit), University of California, Berkeley (AI & Society, Edley Center on Law & Democracy, and Goldman School of Public Policy), UC Law San Francisco, University of Washington School of Law (John Mercer Langston Writing Workshop), Yale University (International Workshop on Reimagining Democracy), and George Washington Law School. Naomi Pringle, Rhea Subramanian, and Nigel Walton provided invaluable research assistance.

AI agenda advances its broader ethnonationalist project. It also proposes an alternative: the Equitable AI in Government Act, a legislative framework to embed democratic values—fairness, pluralism, authenticity, and autonomy—into the acquisition and use of AI by federal agencies and contractors. While the Act does not address every harm posed by private-sector AI, public institutions are the right starting point: they bear a unique obligation to serve a diverse public and can shape AI norms. This Article reframes AI law as central to the legal architecture of a racially inclusive democracy.

Introduction

Artificial intelligence has become a new front in the legal and political contest over American identity. On his first day back in office, President Donald J. Trump repealed Executive Order 14,110—*Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*—which required federal agencies to implement safeguards against algorithmic discrimination.¹ Three days later, he signed Executive Order 14,179—*Removing Barriers to American Leadership in Artificial Intelligence*—which cast equity protections as ideological constraints on innovation and reoriented federal AI policy around the goal of global technological dominance.² In July 2025, the Administration released Executive Order 14,319—*Preventing Woke AI in the Federal Government*—which not only ignored well-documented concerns about bias but affirmatively barred agencies from procuring AI systems fine-tuned to reduce racial bias.³ Five months later, the Administration issued Executive Order 14,365 to challenge state AI laws it deemed “onerous” and to withhold federal broadband funding from such states, explicitly targeting state prohibitions on algorithmic discrimination.⁴

These executive orders would be troubling even if AI were speculative or peripheral to government decision-making. But they are unfolding against a backdrop in which automated systems already structure routine exercises of state power—often at scale, and often in contexts in which error or bias can impose durable harm.

Federal agencies already use prediction and scoring systems across thousands of government functions.⁵ Customs and Border Protection’s Automated Targeting System assigns risk assessments based on travel

1. Exec. Order No. 14,148, 90 Fed. Reg. 8237 (Jan. 20, 2025) (repealing Executive Order 14,110 and dozens of other Biden Administration executive orders); Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Nov. 1, 2023) [hereinafter *2023 AI Order*]; see *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*, WHITE HOUSE OFF. OF SCI. & TECH. POL’Y (2022), <https://bidenwhitehouse.archives.gov/ostp/ai-bill-of-rights/> [<https://perma.cc/M5B3-N8SE>] (asserting that “[y]ou should not face discrimination by algorithms and systems should be used and designed in an equitable way.”).

2. Exec. Order No. 14,179, 90 Fed. Reg. 8741 (Jan. 23, 2025) [hereinafter *January 2025 AI Order*].

3. Exec. Order No. 14,319, 90 Fed. Reg. 35389 (July 23, 2025).

4. Exec. Order No. 14,365, 90 Fed. Reg. 58499 (Dec. 11, 2025).

5. See Morgan Zimmerman (@morganzimmerman1) & Varoon Mathur (@varoonmathuromb), *2024 Federal Artificial Intelligence Use Case Inventory*, GITHUB, <https://github.com/ombegov/2024-Federal-AI-Use-Case-Inventory> [<https://perma.cc/N8M2-2N9B>] (last visited Jan. 9, 2026) (compiling over 2100 AI use cases reported by 41 federal agencies, including 351 “rights-impacting and/or safety-impacting use cases”).

and cargo data,⁶ and other Department of Homeland Security components use AI for screening, biometric identification, and fraud detection.⁷ The Transportation Security Administration prescreens passengers through its data-driven Secure Flight program,⁸ the IRS uses AI-assisted analytics to help identify returns and claims for audit,⁹ and the Department of Health and Human Services deploys AI to detect fraud.¹⁰ Components within the Department of Justice (“DOJ”) likewise deploy AI-enabled systems, including facial recognition tools used to generate investigative leads, FBI algorithms that triage threat reports for human review, and risk-prediction models that inform inmate security classification and recidivism-related programming.¹¹

Agencies are also integrating evaluative and generative AI into routine administrative work. The State Department has used AI to assist Foreign Service Selection Boards in evaluating personnel for promotion and reassignment.¹² U.S. Citizenship and Immigration Services deploys an AI-

6. *DHS/CBP/PIA-006 Automated Targeting System*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/publication/automated-targeting-system-ats-update> [https://perma.cc/Y678-JL6H] (last updated Dec. 11, 2024) (describing ATS as a DHS decision support tool that compares traveler, cargo, and conveyance data and generates risk assessments used to identify individuals and shipments that may require additional scrutiny); Rachel Levinson-Waldman & José Guillermo Gutiérrez, *DHS Must Overhaul Its Flawed Automated Systems*, BRENNAN CTR. FOR JUST. (Oct. 24, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/dhs-must-overhaul-its-flawed-automated-systems> [https://perma.cc/3PDV-A29W] (noting that CBP’s Automated Targeting System is “an algorithmically powered analytical database” that creates risk profiles used to trigger additional government scrutiny).

7. *Artificial Intelligence Use Case Inventory*, U.S. DEP’T OF HOMELAND SEC., https://data.aclum.org/storage/2025/01/DHS_www_dhs_gov_data_AI_inventory.pdf [https://perma.cc/7YUK-ZYTJ] (last visited Jan. 13, 2025) (listing multiple machine learning and natural language processing automated systems used by USCIS for text analytics, forecasting, evidence classification, and other functions); Steven Hubbard, *Invisible Gatekeepers: DHS’ Growing Use of AI in Immigration Decisions*, AM. IMMIGR. COUNCIL (May 9, 2025), <https://www.americanimmigrationcouncil.org/blog/invisible-gatekeepers-dhs-growing-use-of-ai-in-immigration-decisions/> [https://perma.cc/Y6YR-7FFX] (noting DHS’s publicly disclosed inventory of 105 active AI use cases, including screening, biometric identification, and fraud detection systems across CBP, ICE, and USCIS).

8. *Using AI to Secure the Homeland*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/ai/using-ai-to-secure-the-homeland> [https://perma.cc/XT7B-VWF9] [hereinafter *AI & Homeland Security*] (last updated May 28, 2025) (describing TSA’s use of machine learning models for passenger identification, risk assessment, and prohibited item detection); *DHS/TSA/PIA-018 TSA Secure Flight Program*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/publication/dhstsapia-018-tsa-secure-flight> [https://perma.cc/QR72-3GFZ] (last updated June 16, 2025) [hereinafter *TSA Secure Flight Program*] (describing Secure Flight as a risk-based passenger prescreening program used to match passenger data against federal watch lists before boarding).

9. See Lauren Loricchio, *Oversight of IRS AI and Data Analytics Faces Setback*, TAX NOTES (July 14, 2025), <https://www.taxnotes.com/featured-news/oversight-irs-ai-and-data-analytics-faces-setback/2025/07/11/7srgx> [https://perma.cc/R8NS-LQPE] (reporting on a study finding that IRS algorithms were associated with Black taxpayers who claimed the Earned Income Tax Credit being three to five times more likely to be audited than non-Black taxpayers).

10. See Amber Tran, Katie Adams & Maya Sandalow, *Mapping the Rise of AI in Federal Health Agencies*, BIPARTISAN POL’Y CTR. (Aug. 10, 2025), <https://bipartisanpolicy.org/article/mapping-the-rise-of-ai-in-federal-health-agencies/> [https://perma.cc/9YAZ-UVVE].

11. *AI Inventory*, U.S. DEP’T OF JUST., <https://www.justice.gov/ai/ai-inventory> [https://perma.cc/6EHZ-UHLM] (last updated Jan. 21, 2025) (listing 241 Department of Justice-reported AI use cases in 2024 across components, including 124 that are safety and/or rights-impacting).

12. See Raphael Satter & Humeysa Pamuk, *US State Department Cable Says Agency Using AI to Help Staff Job Panels*, REUTERS (June 9, 2025, at 17:45 ET), <https://www.reuters.com/world/us-state-department-cable-says-agency-using-ai-help-staff-job-panels-2025-06-09/> [https://perma.cc/H2Z6-UXZN].

based chatbot to communicate with applicants,¹³ and the U.S. Department of Veterans Affairs has rolled out generative-AI tools to help employees draft emails and summarize documents.¹⁴ In August 2025, the General Services Administration negotiated government-wide access to ChatGPT at nominal cost—accelerating the diffusion of large language models across agencies even as the Administration dismantled equity-centered guardrails for their procurement and use.¹⁵

Together, these developments mark a decisive shift in federal AI governance. The Trump Administration’s orders inaugurated a systemic rollback of civil rights safeguards across the federal government. The Office of Management and Budget (“OMB”) replaced detailed civil rights-oriented guidance on AI with vaguer invocations to mitigate risks to “civil liberties” and “civil rights,” while rescinding requirements that agencies assess disparate impacts, proxy discrimination, and demographic disparities.¹⁶ The National Institute of Standards and Technology (“NIST”) deleted references to “AI fairness” from its agreements with consortium partners and halted its support for research on racial discrimination in AI models.¹⁷ The Equal Employment Opportunity Commission (“EEOC”) and the Department of Labor withdrew guidance for employers and contractors on avoiding algorithmic discrimination in hiring,¹⁸ and other agencies took similar actions.

This Article argues that these measures were not merely deregulatory—they reflect a broader political project. The Trump Administration’s AI policy advances a vision of *digital ethnonationalism*: an effort to embed racial and cultural exclusion and hierarchy into the

13. *Meet Emma, Our Virtual Assistant*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/tools/meet-emma-our-virtual-assistant> [<https://perma.cc/JLR2-JXF5>] (last updated Apr. 13, 2018) (describing “Emma” as USCIS’s online virtual assistant that answers questions and guides users around the agency’s website).

14. *Machine Algorithm for Report Surveillance (MARS)*, U.S. DEP’T OF VETERANS AFFAIRS (Sep. 1, 2022), <https://department.va.gov/ai/inventory-item/machine-algorithm-for-report-surveillance-mars/> [<https://perma.cc/N5RN-MN8U>] (last visited Jan. 9, 2026).

15. *GSA Announces New Partnership with OpenAI, Delivering Deep Discount to ChatGPT Gov-Wide Through MAS*, U.S. GEN. SERVS. ADMIN. (Aug. 6, 2025), <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-announces-new-partnership-with-openai-delivering-deep-discount-to-chatgpt-08062025> [<https://perma.cc/BHV7-PXBN>] (announcing that GSA will make ChatGPT Enterprise available to participating federal agencies for a nominal fee of \$1 as part of the federal AI Action Plan).

16. Memorandum from Russell T. Vought, Director, Off. of Mgmt. & Budget (Apr. 3, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-21-Accelerating-Federal-Use-of-AI-through-Innovation-Governance-and-Public-Trust.pdf> [<https://perma.cc/9L59-HPDQ>] [hereinafter 2025 USE MEMO] (repealing and replacing Memorandum from Shalanda D. Young, Director, Off. of Mgmt. & Budget (Mar. 28, 2024), <https://www.whitehouse.gov/wp-content/uploads/2024/03/M-24-10-Advancing-Governance-Innovation-and-Risk-Management-for-Agency-Use-of-Artificial-Intelligence.pdf> [<https://perma.cc/P75B-X5F9>] [hereinafter 2024 USE MEMO]); Memorandum from Russell T. Vought, Director, Off. of Mgmt. & Budget (Apr. 3, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-22-Driving-Efficient-Acquisition-of-Artificial-Intelligence-in-Government.pdf> [<https://perma.cc/Q2V6-54W5>] [hereinafter 2025 ACQUISITION MEMO] (repealing and replacing Memorandum from Shalanda D. Young, Director, Off. of Mgmt. & Budget (Sep. 24, 2024), <https://whitehouse.gov/wp-content/uploads/2024/10/M-24-18-AI-Acquisition-Memorandum.pdf> [<https://perma.cc/F24M-MH7H>] [hereinafter 2024 ACQUISITION MEMO]).

17. See Will Knight, *Under Trump, AI Scientists Are Told to Remove ‘Ideological Bias’ from Powerful Models*, WIRED (Mar. 14, 2025, at 19:29 ET), <https://www.wired.com/story/ai-safety-institute-new-directive-america-first/> [<https://perma.cc/ET5H-GAX7>].

18. See discussion *infra* Section II.A and I.B.2.

algorithmic infrastructure of public life.¹⁹ AI systems trained on biased data have already reproduced discrimination in areas such as employment, housing, lending, voting, and policymaking.²⁰ Because these systems typically address diversity in mathematical ways by defaulting to averages or dominant patterns, they often homogenize culture and suppress different perspectives.²¹ Left unchecked, these systems will entrench historical inequities and narrow public discourse. And because the United States remains the global leader in AI development, these harms are not confined to domestic institutions—they are exported abroad.²²

Ethnonationalism—an ideology that defines national belonging in terms of shared ancestry, culture, and language and often justifies state policies favoring a dominant ethnic group—has reemerged globally in the past decade.²³ It has been fueled by demographic change, cultural and economic anxiety, nativism, and racial resentment.²⁴ In the United

19. See Danielle Keats Citron & Spencer Overton, *Digital Nationalism*, 174 U. PENN. L. REV. (forthcoming 2026) (further developing the concept of digital ethnonationalism by examining how algorithmic systems, platform governance, and state technology policy embed racial, religious, and cultural hierarchy into the infrastructure of public life); Georgios Samaras, *The Digital Ethnonation: Multimodal Extreme-Right Propaganda and National Identity on YouTube*, 31 MEDITERRANEAN POL., Aug. 2025, at 2, <https://doi.org/10.1080/13629395.2025.2545670> [<https://perma.cc/2GSX-MGLC>] (defining digital ethnonationalism as “the adaptation of nationalist ideology to online platforms, intensified by emotional mobilization and multimodal rhetoric to radicalize users”); Sabina Mihelj & César Jiménez-Martínez, *Digital Nationalism: Understanding the Role of Digital Media in the Rise of ‘New’ Nationalism*, 27 NATIONS & NATIONALISM 331, 331 (2021), https://eprints.lse.ac.uk/120036/1/Nations_and_Nationalism_2021_Mihelj.pdf [<https://perma.cc/UE55-URKY>] (arguing that digital media routinely reproduce national belonging through “the architecture of internet domains, the bias of algorithms and the formation of national digital ecosystems” thereby reinforcing the “sense of belonging to a world of nations” and creating conditions for more fragmented and exclusionary forms of nationalism in the digital realm).

20. See Laura Weidinger et al., *Ethical and Social Risks of Harm from Language Models*, DEEPMIND, 2021, at 11, <https://arxiv.org/pdf/2112.04359> [<https://perma.cc/8VWD-K378>]; Ngozi Okidegbe, *To Democratize Algorithms*, 69 UCLA L. REV. 1688, 1710–11 (2023) (addressing how the use of algorithms opposes legitimate state practices and breaks down democratic participation); WHITE HOUSE OFF. OF SCI. & TECH. POL’Y, *supra* note 1 (detailing examples of discriminatory harms in various sectors of automated systems).

21. See Taylor Sorensen et al., *A Roadmap to Pluralistic Alignment*, 5, ARXIV (Feb. 7, 2024), <https://arxiv.org/abs/2402.05070> [<https://perma.cc/TW2H-5XRC>]; Mitchell L. Gordon et al., *Jury Learning: Integrating Dissenting Voices into Machine Learning Models*, 7–16, ARXIV (Feb. 7, 2022), <https://arxiv.org/abs/2202.02950> [<https://perma.cc/9VKM-T8CY>]; Taylor Sorensen et al., *Value Kaleidoscope: Engaging AI with Pluralistic Human Values, Rights, and Duties*, ARXIV (Sep. 2, 2023), at 2–4, <https://arxiv.org/abs/2309.00779> [<https://perma.cc/6H34-9XYP>].

22. See NESTOR MASLEJ ET AL., STAN. UNIV. INST. FOR HUM.-CENTERED A.I., A.I. INDEX REPORT 12 (2025), https://hai.stanford.edu/assets/files/hai_ai_index_report_2025.pdf [<https://perma.cc/U4KE-7WAA>] (“The United States continues to be the leading source of notable AI models.”).

23. See ROBERT SCHERTZER & ERIC TAYLOR WOODS, THE NEW NATIONALISM IN AMERICA AND BEYOND: THE DEEP ROOTS OF ETHNIC NATIONALISM IN THE DIGITAL AGE 2, 40–41 (2022) (explaining that ethnonationalism involves a belief system that only certain groups of people belong to the nation state); Bart Bonikowski, *Ethno-nationalist Populism and the Mobilization of Collective Resentment*, 68 BRITISH J. SOCIO. 181, 187 (2017) (explaining that ethnonationalists believe that only people with “appropriate immutable, or at least highly persistent, traits, such as national ancestry, native birth, majority religion, [or] dominant racial group membership” are deemed legitimate members of the nation); Lorenzo Marsili, *Ethnonationalism in a Multipolar World*, GREEN EUR. J. (Dec. 5, 2025), <https://www.greeneuropeanjournal.eu/ethnonationalism-in-a-multipolar-world/> [<https://perma.cc/P6N5-KMGJ>] (“[T]oday’s great technological, social, and geopolitical transformations are triggering the rise of ethnonationalist attitudes everywhere across the globe.”).

24. See, e.g., Bartosz Brzeziński, Max Griera & Hanne Cokelaere, *Europe Cracks Down on Migration. The Far Right Is Cheering*, POLITICO (Mar. 11, 2025, at 18:56 ET), <https://www.politico.eu/article/europe-migration-crackdown-far-right-deportations/> [<https://perma.cc/G2CE-NGY6>]; Joel K. Bourne Jr., *As America Changes, Some Anxious Whites Feel Left Behind*, NAT’L GEOGRAPHIC (Mar. 12, 2018), <https://www.nationalgeographic.com/magazine/article/race-rising-anxiety-white-america>

States, this movement has taken the form of increasingly explicit efforts to banish racial diversity from the center of national political life. While ethnonationalism has shaped policy on immigration, education, history, and civil rights,²⁵ its influence on emerging technologies—particularly AI governance—has largely escaped sustained legal analysis. This Article seeks to fill that gap.

In its second term, the Trump Administration has openly embraced an exclusionary vision of the nation. It has dismantled Diversity, Equity, and Inclusion (“DEI”) infrastructure, restricted language access, purged public institutions of narratives about racial subordination, and attempted to reinterpret constitutional guarantees to narrow the bounds of citizenship.²⁶ Often overlooked, however, are its interventions in AI policy—ostensibly race-neutral, but substantively aligned with a campaign to entrench cultural dominance by redefining neutrality itself.²⁷ While the Trump Administration’s AI policies also exacerbate harms related to gender, gender identity, sexual orientation, and disability, this Article centers on race and ethnicity because of their distinctive role in American legal development and their centrality to contemporary ethnonationalist efforts to define membership within the American polity.

This Article contends that the core values of a racially inclusive democracy—fairness, pluralism, authenticity, and autonomy—should guide the development of AI law. It proposes the *Equitable AI in Government Act*, a statutory framework designed to embed those principles into the use and procurement of AI by federal agencies and contractors. Drawing on democratic theory, civil rights law, and emerging but insufficient regulatory frameworks in the European Union and several U.S. states, the Act imposes baseline obligations as well as heightened scrutiny for high-risk uses of AI. The proposal responds directly to the Administration’s use of procurement and administrative guidance as tools of ideological enforcement. Even if Congress fails to act, the Act’s provisions are structured for adoption by states and localities through legislation or executive order. While the Act does not address every threat posed by private-sector AI, the government is a logical starting point. It bears a distinct obligation to serve a diverse public and has the institutional authority to shape norms through standard-setting.

This Article makes three primary contributions. First, it offers the first comprehensive analysis of how the Trump Administration’s AI policies advance its broader agenda to suppress racial and ethnic diversity, equity, and inclusion through executive orders, OMB memoranda, and

[<https://perma.cc/5ZRL-UJQR>]. See generally ASHLEY JARDINA, *WHITE IDENTITY POLITICS* (Cambridge Univ. Press 2019) (discussing identity politics); ERIC KAUFMANN, *WHITESHIFT: POPULISM, IMMIGRATION, AND THE FUTURE OF WHITE MAJORITIES* (2019) (discussing the impact of immigration on racial majorities); Robert Schertzer, *Understanding Today’s Populism as Ethnic Nationalism*, MIGRATION POL’Y CTR. BLOG (Feb. 21, 2020), <https://migrationpolicycentre.eu/understanding-todays-populism-ethnic-nationalism/> [<https://perma.cc/4YHB-8PKK>] (stating that populism is “among the most studied political phenomenon.”); Ishaan Tharoor, *The Cultural Anxiety Fueling France’s Protests, Brexit and Trump*, WASH. POST (Dec. 10, 2018), <https://www.washingtonpost.com/world/2018/12/10/cultural-anxiety-fueling-frances-protests-brexit-trump/> [<https://perma.cc/BQD9-2CF7>] (describing the relationship between the Trump Administration and European Union).

25. See discussion *infra* Section I.A.

26. See discussion *infra* Section I.B.

27. See discussion *infra* Section II.B.1.

procurement mandates. Second, it provides the most comprehensive account to date of how the Trump Administration's failure to confront bias, homogenization, deception, and manipulation in its use and acquisition of AI poses serious risks to democracy at this pivotal stage of AI's evolution.²⁸ Third, it proposes a legislative framework that can guide policymakers as soon as political conditions allow for meaningful reform.

The stakes extend beyond any single presidential administration. Longstanding institutional failures—rooted in polarization, legislative dysfunction, and judicial resistance to racial inclusion—have left the United States without stable frameworks to govern two of the most consequential forces shaping its future: emerging technologies and accelerating racial and ethnic demographic change. In the absence of statutory consensus in either domain, the executive branch has increasingly shaped national priorities through procurement, regulation, funding, and model guidelines. This Article calls for a more durable legal architecture that ensures AI is not simply faster or more efficient but more representative and inclusive.

Part I situates the current moment within the broader historical struggle between ethnonationalism and democratic inclusion. Part II defines artificial intelligence, details the ways in which unregulated AI undermines racially inclusive democracy, and analyzes how the Trump Administration's AI policies advance its broader effort to marginalize racial diversity in public life. Part III introduces the Equitable AI in Government Act, details its significance, and defends its viability and constitutionality. Together, these Parts aim to reorient the legal imagination toward an AI future that reflects—not erases—the full diversity of the American polity.

I. Ethnonationalism in the United States

This Part traces the recent resurgence of ethnonationalism in the United States. It examines how American law and policy have long defined political belonging in racial and cultural terms—often excluding communities of color, subordinating them, or pressuring them to assimilate—and how the second Trump Administration has resurrected this project.

A. Ethnonationalist Origins and the Rise of Racially Inclusive Democracy

Ethnonationalism is a political ideology that seeks to limit political rights to members of a single or a limited number of racial, ethnic, or cultural groups.²⁹ Democracy is reserved for those deemed part of the

28. The Article builds on seminal work of other leading scholars on race, data privacy, and algorithmic bias. See, e.g., Anita L. Allen, *Dismantling the "Black Opticon": Privacy, Race Equity, and Online Data-Protection Reform*, 131 YALE L.J. F. 907, 907 (2022); Jessica Eaglin, *Racializing Algorithms*, 111 CALIF. L. REV. 753, 757 (2023); Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 674 (2016).

29. Ethnonationalism may overlap with adjacent ideologies. See, e.g., Kenneth P. Vickery, 'Herrenvolk' Democracy and Egalitarianism in South Africa and the U.S. South, 16 COMPAR. STUD. SOC'Y & HIST. 309, 309 (1974) (defining Herrenvolk Democracy as "a parliamentary regime in which the exercise of power and suffrage is restricted . . . to the dominant group"); Lila Thulin, *There's a Term for Trump's Political Style: Authoritarian Populism*, U.C. BERKELEY NEWS (Jan. 21, 2025), <https://news.berkeley.edu/2025/01/21/theres-a-term-for-trumps-political-style-authoritarian-populism/> [https://perma.cc/48TX-

“true” nation, while others are excluded or pressured to assimilate.³⁰ Cloaked in appeals to freedom, tradition, and national identity, ethnonationalist regimes seek to marginalize the political liberties (e.g., voting, association, speech, due process) of out-groups through laws, policies, and cultural narratives.³¹ These regimes often frame racial and cultural diversity—as seen in immigration, schools, workplaces, and neighborhoods—as a threat to national cohesion.

Ethnonationalism was a defining feature of the origins of the United States. The original Constitution subsidized race-based slavery,³² and nearly every state limited voting to white males or would later do so.³³ The Naturalization Act of 1790 limited naturalized citizenship to “free white person[s],”³⁴ and, along with similar laws, effectively gerrymandered the racial composition of the U.S. population in a way that ensured white demographic and political majorities that persist to this day.³⁵ Supreme Court decisions ratified this foundation. For example, the Court ruled that the doctrine of conquest gave the United States exclusive rights to Indigenous lands, and that the Constitution did not recognize even free Black people as citizens.³⁶

Reconstruction marked the first widespread effort to dismantle ethnonationalism in the United States, but it was short-lived. The Reconstruction Amendments and federal legislation enfranchised Black

VLRR] (contrasting pure authoritarianism with “authoritarian populism,” which focuses on nativism and opposes pluralism); *Understanding White Christian Nationalism*, YALE INST. FOR SOC. & POL’Y STUDS. (Oct. 4, 2022), <https://isps.yale.edu/news/blog/2022/10/understanding-white-christian-nationalism> [<https://perma.cc/H8S6-USZC>] (tracing the history of White Christian Nationalism and explaining its relationship with other ideologies).

30. See Robert L. Tsai, *Immigration Unilateralism and American Ethnonationalism*, 51 LOY. U. CHI. L.J. 523, 533–35 (2020) (describing how in the United States immigrants were initially excluded from the dominant culture and later were evaluated as “prospective future Americans” provided they assimilated).

31. See *Ethno-Nationalism Denies Millions Their Citizenship Rights - Anti-Racism Expert*, U.N. HUM. RTS. COUNCIL: OFF. OF THE HIGH COMM’R (July 5, 2018), <https://www.ohchr.org/en/stories/2018/07/ethno-nationalism-denies-millions-their-citizenship-rights-anti-racism-expert> [<https://perma.cc/6K6Q-A7EG>] (“In the past, European countries relied on ethno-nationalism to exclude populations in their colonies from effective citizenship Today, migrants are the new targets . . . often under the pretext of ethnic purity and religious, cultural or linguistic preservation.”).

32. The U.S. Constitution subsidized slavery by: (1) inflating the power of slaveholding states by counting three-fifths of their enslaved populations for apportionment purposes, see U.S. CONST. art. I, § 2, cl. 3; *id.* art. II, § 1, cl. 3; (2) initially preventing Congress from prohibiting states from importing Black people to serve as slaves until 1808, see *id.* art. I, § 9, cl. 1; and (3) giving enslavers the right to capture Black people who had escaped to free states. See *id.* art. IV, § 2, cl. 3; see also Juan Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1135 (2012) (reviewing GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS’ UNION* (Univ. Chicago Press 2010)).

33. Almost all states—including those outside of the South—limited voting to white males or would eventually do so. See CAL. CONST. art. II, § 1 (1849) (explicitly limiting suffrage to white males); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 55 (Basic Books 2000) (“[E]very state that entered the union after 1819 prohibited blacks from voting . . .”).

34. See, e.g., Naturalization Act of 1790, ch. 3, Pub. L. No. 103, 1 Stat. 103 (explicitly limiting U.S. citizenship to “free white persons”).

35. See Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882); *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889) (upholding Chinese Exclusion Act and finding that Chinese laborers that had not assimilated to American culture “conflict[ed]” with whites and posed competition that resulted in “irritation, proportionately deep and bitter”); Juan Perea, *Immigration Policy as a Defense of White Nationhood*, 12 GEO. J.L. & MOD. CRITICAL RACE PERSP. 1, 4 (2020).

36. *Johnson v. M’Intosh*, 21 U.S. 583, 592 (1823) (holding that the United States acquired title over land from Tribes through the doctrine of conquest); *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857) (finding that Black people had “no rights which the white man was bound to respect.”).

voters who elected Black Americans to over two thousand local, state, and federal offices.³⁷ By the late 1870s, however, federal withdrawal allowed white Southern Democrats to suppress Black voters and restore white rule through violence and voting restrictions.³⁸ The federal government deepened its retreat from racially inclusive democracy when, responding to white backlash against the growing prominence of educated Black Washingtonians and calls for government “efficiency,” the Wilson Administration systematically purged Black federal employees and resegregated federal workplaces.³⁹

Although the Supreme Court affirmed in 1898 that the Fourteenth Amendment guarantees citizenship to all born in the United States (including people of color),⁴⁰ in the early twentieth century it repeatedly held that Congress had the power to exclude non-white immigrants from naturalized citizenship.⁴¹ The 1924 immigration quotas heavily favored western and northern Europeans, and completely banned Asian immigrants.⁴² Congress also delayed statehood for territories like Alaska, Arizona, Hawaii, New Mexico, and Oklahoma, in part because their populations were not sufficiently white.⁴³ The Court sanctioned the denial of constitutional rights in Puerto Rico and other “distant possessions” by citing “differences of race, habits, laws, and customs” of their inhabitants.⁴⁴ It also ruled that Indigenous people born on Tribal lands in the U.S. were not entitled to birthright citizenship and could be denied voting rights.⁴⁵ The federal government sought to eliminate Tribal language, religion, and identity during the “Termination Era” of the 1950s and 60s through various assimilationist measures.⁴⁶

Congress enacted landmark statutes in the 1960s that marked a significant shift away from ethnonationalism, and toward establishing a racially inclusive democracy.⁴⁷ The Civil Rights Act of 1964 ended *de jure* racial segregation, prohibited employment discrimination, and

37. See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877* 538–92 (Harper Perennial Modern Classics 2014).

38. *Id.*; see KEYSSAR, *supra* note 33, at 105–07.

39. ERIC S. YELLIN, *RACISM IN THE NATION’S SERVICE 1–2* (Univ. of N.C. Press 2013) (detailing the Wilson Administration’s 1913 drive to segregate the federal government workforce).

40. *United States v. Wong Kim Ark*, 169 U.S. 649, 732 (1898).

41. See, e.g., *Takao Ozawa v. United States*, 260 U.S. 178, 198 (1922) (holding that a Japanese immigrant was ineligible to become a naturalized U.S. citizen); *United States v. Bhagat Singh Thind*, 261 U.S. 204, 214 (1923) (limiting those eligible to become naturalized citizens as “white” persons to those of “European parentage”).

42. National Origins Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (establishing immigration quotas that heavily favored immigrants from Europe and banned immigrants from Asia).

43. See JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 294–95 (3d ed. West Acad. Publ’g 2015).

44. *Downes v. Bidwell*, 182 U.S. 244, 282, 286 (1901).

45. *Elk v. Wilkins*, 112 U.S. 94, 122–23 (1884).

46. See, e.g., H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) (ending the federal trust relationship and recognition of Tribal sovereignty); Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (transferring federal jurisdiction over Indian Country in several states without Tribal consent).

47. See Steven Levitsky, *The Third Founding: The Rise of Multiracial Democracy and the Authoritarian Reaction Against It*, 110 CALIF. L. REV. 1991, 1991 (2022) (“A multiracial democracy is simply a democracy in a diverse society in which . . . the rights of individuals of all ethnic groups are protected equally.”); Danielle Allen & E. Glen Weyl, *The Real Dangers of Generative AI*, 35 J. DEMOCRACY 147, 147 (2024) (defining “plural societies” as “free and democratic societies operating under conditions of social diversity”).

prohibited discrimination by programs receiving federal funds.⁴⁸ The Voting Rights Act barred literacy tests, authorized litigation against discriminatory voting practices, and required jurisdictions with histories of discrimination to preclear changes to their voting practices with federal officials before implementing the practices.⁴⁹ A decade later, Congress expanded the law to protect language minority populations.⁵⁰ The Immigration and Nationality Act of 1965 explicitly barred racial discrimination in the immigration process, repealed quotas that favored northern and western Europe,⁵¹ and significantly increased the share of immigrants from Asia and Africa.⁵² Finally, the Fair Housing Act of 1968 prohibited discrimination in housing opportunities, ending *de jure* racial redlining (even if *de facto* exclusionary policies and practices continue to this day).⁵³

These statutes catalyzed a shift toward racially inclusive democracy.⁵⁴ In 1960, 75% of immigrants living in the United States were from Europe; by 2022, that figure had dropped to 10%.⁵⁵ People of color grew from 15% of the U.S. population in 1960⁵⁶ to 41% by 2024,⁵⁷ and are projected to become a majority by 2045.⁵⁸ Representation in politics has changed as

48. See Maxine Burkett, *Litigating Separate and Equal: Climate Justice and the Fourth Branch*, 72 STAN. L. REV. ONLINE 145, 152 (2020) (“[T]he Civil Rights Act of 1964 and the Voting Rights Act of 1965 . . . effectively ended U.S. *de jure* racial segregation.”); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (prohibiting employment discrimination on the basis of race, color, religion, sex, and national origin); 42 U.S.C. § 2000d (doing the same for federal financial assistance).

49. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301(a)).

50. Rosina Lozano, *Vote Aquí Hoy: The 1975 Extension of the Voting Rights Act and the Creation of Language Minorities*, 35 J. POL’Y HIST. 68, 68–69 (2022).

51. 8 U.S.C. § 1152(a)(1)(A), (4)–(5).

52. Although the Immigration and Nationality Act removed some racial restrictions, it introduced restrictions on immigration from the “Western hemisphere,” which reduced migration from Latin America. See Kevin R. Johnson, *Fear of an “Alien Nation”: Race, Immigration, and Immigrants*, 7 STAN. L. & POL’Y REV. 111, 112 (1996).

53. Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619. Though residential segregation has decreased over time, this change has been modest. See Tracy Hadden Loh, Christopher Coes & Becca Buthe, *The Great Real Estate Reset*, BROOKINGS INST. (Dec. 16, 2020), <https://www.brookings.edu/articles/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us/> [https://perma.cc/8KDH-FBLG] (“[T]he neighborhood of an average white resident in the 100 largest metropolitan areas became slightly less white between 2000 and 2018, decreasing from 79% white to 71%.”).

54. Contrast Levitsky, *supra* note 47, at 1992–93 (discussing modern trends toward increased support for racially inclusive democracy), with SAMUEL P. HUNTINGTON, *Who Are We? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY* xvi (Simon & Schuster Paperbacks, 2004) (arguing that American culture is defined by Anglo-Protestant values, and that this culture is threatened by immigrants who do not entirely assimilate into it).

55. Feysayo Oyolola & Jeanne Batalova, *European Immigrants in the United States*, MIGRATION POL’Y INST. (Jan. 11, 2024), <https://www.migrationpolicy.org/article/european-immigrants-united-states-2022> [https://perma.cc/2WW9-69BY].

56. Paul Taylor & D’Vera Cohn, *A Milestone En Route to a Majority Minority Nation*, PEW RSCH. CTR. (Nov. 7, 2012), <https://www.pewresearch.org/social-trends/2012/11/07/a-milestone-en-route-to-a-majority-minority-nation/> [https://perma.cc/LA6K-GFC7]. But see D’Vera Cohn, *Census History: Counting Hispanics*, PEW RSCH. CTR. (Mar. 3, 2010), <https://www.pewresearch.org/social-trends/2010/03/03/census-history-counting-hispanics-2/> [https://perma.cc/QUD6-E5NH] (noting that the 1970 Census was the first to attempt to record the size of the Hispanic population).

57. *Population Estimates, July 1, 2024*, U.S. CENSUS BUREAU (Dec. 24, 2024), <https://web.archive.org/web/20250202050945/https://www.census.gov/quickfacts/fact/table/US/PST045224> [https://perma.cc/UG5K-LS4Y].

58. William H. Frey, *The US Will Become ‘Minority White’ in 2045*, *Census Projects*, BROOKINGS INST. (Mar. 14, 2018), <https://www.brookings.edu/articles/the-us-will-become-minority-white-in-2045-census-projects/> [https://perma.cc/NG5D-P9J9].

well. In 1960, for example, fewer than 3% of U.S. House members were people of color.⁵⁹ Today, that figure stands at 28%.⁶⁰ A racially diverse coalition twice elected the nation's first Black president.⁶¹ Americans tend to agree that institutional change is required to overcome racism,⁶² and a sizable majority believe that America's diversity makes us stronger.⁶³ Racial disparities in income and poverty rates have also decreased since 1960, although they remain significant.⁶⁴

But this transformation triggered a backlash. Race became a dominant force in partisan affiliation and voting patterns.⁶⁵ Political scientist Ashley Jardina found that 30% to 40% of white Americans identify as being white—that they “possess a sense of racial identity and are motivated to protect their group's collective interests and to maintain its status.”⁶⁶ She found that white identity is “becoming a more salient force in American politics”⁶⁷ because many people feel as though they are losing power and status.⁶⁸ Jardina and Robert Mickey assert that:

Some whites' opposition to democratic principles is rooted, at least in part, in a rejection of racial pluralism; concerns regarding the political claims of racial and ethnic minorities; and the belief that the democratic system works better for people of color, whom they consider less deserving of its benefits.⁶⁹

This backlash has shaped several state laws and federal policy proposals, and set the stage for the second Trump Administration.⁷⁰

59. R. ERIC PETERSEN ET AL., CONG. RSCH. SERV., RL42365, REPRESENTATIVES AND SENATORS: TRENDS IN MEMBER CHARACTERISTICS SINCE 1945 (2014).

60. Katherine Schaeffer, *119th Congress Brings New Growth in Racial, Ethnic Diversity to Capitol Hill*, PEW RSCH. CTR. (Jan. 21, 2025), <https://www.pewresearch.org/short-reads/2025/01/21/119th-congress-brings-new-growth-in-racial-ethnic-diversity-to-capitol-hill/> [https://perma.cc/DDE8-4EMN].

61. Alex Seitz-Wald, *Obama Had a Coalition. Biden Built a New One and Here's How It's Different*, NBC NEWS (Oct. 30, 2020, at 12:38 ET), <https://www.nbcnews.com/politics/2020-election/obama-had-coalition-biden-built-new-one-here-s-how-n1245431> [https://perma.cc/45NV-BWCY].

62. See *New Public Agenda Report: Americans Widely Agree on Racial Equality, But Differ Over the Impacts of Racism and How to Address It*, PUB. AGENDA (June 15, 2023), <https://publicagenda.org/news/new-public-agenda-report-americans-widely-agree-on-racial-equality-but-differ-over-the-impacts-of-racism-and-how-to-address-it/> [https://perma.cc/SP5P-ZC4Y] (noting that “[n]early two-thirds (65%) of Americans believe that overcoming racism requires changes in laws and institutions as well as in individual attitudes”).

63. See *New Civil Rights Monitor Poll Finds 73 Percent of Voters Worried About Political Violence*, THE LEADERSHIP CONF. ON CIV. & HUM. RTS. (Oct. 7, 2024), <https://civilrights.org/2024/10/07/civil-rights-monitor-poll-2024/> [https://perma.cc/JR6E-WFS6] (“79 percent [of respondents] continue to say that America's diversity makes us stronger.”).

64. Though economic inequality has improved since 1960, the racial wealth gap persists and has even widened since 1980. See Dedrick Asante-Muhammad et al., *Still a Dream: Over 500 Years to Black Economic Equality*, INST. FOR POL'Y STUD. (Aug. 16, 2023), <https://ips-dc.org/report-still-a-dream-500-years-black-economic-equality/> [https://perma.cc/54MK-Z6J4] (finding that the poverty rate for Black Americans has dropped considerably since 1963, but that the wealth gap has only slightly narrowed).

65. See ZOLTAN L. HAJNAL, DANGEROUSLY DIVIDED: HOW RACE AND CLASS SHAPE WINNING AND LOSING IN AMERICAN POLITICS 29–30 (Cambridge Univ. Press 2020).

66. JARDINA, *supra* note 24, at 5–6.

67. *Id.* at 215.

68. See David A. Graham, *Trump's White Identity Politics Appeals to Two Different Groups*, THE ATL. (Aug. 8, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/who-does-trumps-white-identity-politics-reach/595189/> [https://perma.cc/GP8N-BQ2K].

69. JARDINA, *supra* note 24, at 3–4, 267.

B. The Second Trump Administration's Policies to Dismantle Racially Inclusive Democracy

In its first year, the second Trump Administration launched a sweeping campaign to suppress racial diversity and entrench ethnonationalism across the federal government. Through executive orders, agency guidance, and formal rulemaking, it sought to dismantle civil rights protections, erase data on racial disparities, defund equity initiatives, reinterpret foundational constitutional principles, and police history, language, and the nation's ethnic composition.⁷¹ This subpart catalogs these actions to illustrate the Administration's broader ethnonationalist framework and lay the groundwork for Part II's analysis of how its artificial intelligence policies further that project.⁷²

These efforts rest on an ideological premise: that race-conscious efforts aimed at acknowledging and addressing systemic discrimination and building a racially inclusive democracy are themselves forms of unlawful bias and political favoritism. Despite overwhelming evidence of racial disparities and explicit and implicit bias in government, industry, and education,⁷³ the Trump Administration portrayed diversity initiatives as threats to "merit" and "unity"—casting white Americans as the victims of an imagined "identity-based spoils system."⁷⁴ Many of the Trump policies rest on rhetorical strawmen—alleging widespread use of "unlawful" diversity, equity, and inclusion practices—without identifying specific legal violations.⁷⁵ The Administration advanced its political objectives through an overly broad and erroneous reading of the Supreme Court's decision in *Students for Fair Admissions v. Harvard*, a case that invalidated race-based affirmative action in university admissions

70. See, e.g., OKLA. STAT. ANN. tit. 70, § 24–157 (West 2021) (restricting gender and race-related diversity training in higher education); FLA. STAT. ANN. § 1004.06(2)(a) (West 2023) (prohibiting public colleges from maintaining DEI programs). See generally THE HERITAGE FOUND., MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE (2023) (discussing policy book produced by over 100 organizations to prepare for conservative administration, also known as "Project 2025").

71. See discussion *infra* Part II.

72. See Nikole Hannah-Jones, *How Trump Upended 60 Years of Civil Rights in Two Months*, N.Y. TIMES MAG. (June 27, 2025), <https://www.nytimes.com/2025/06/27/magazine/trump-civil-rights-law-discrimination.html> [<https://perma.cc/F3JT-5QCN>] (detailing how the second Trump Administration dismantled key civil rights protections); *Trump Administration Civil and Human Rights Rollbacks*, THE LEADERSHIP CONF. ON CIV. AND HUM. RTS., <https://civilrights.org/trump-rollbacks/> [<https://perma.cc/Q7XN-FR7Q>] (detailing how the second Trump Administration dismantled key civil rights protections).

73. See, e.g., Janis Bowdler & Benjamin Harris, *Racial Inequality in the United States*, U.S. DEP'T OF THE TREASURY (July 21, 2022), <https://home.treasury.gov/news/featured-stories/racial-inequality-in-the-united-states> [<https://perma.cc/WRR9-E2HX>] (providing an analysis of racial disparities across health, education, and income in the United States); *Rates of High School Completion and Bachelor's Degree Attainment Among Persons Age 25 and over, by Race/Ethnicity and Sex: Selected Years, 1910 Through 2020*, NAT'L CTR. FOR EDUC. STAT. tbl.104.10, https://nces.ed.gov/ipeds/data/ipeds-tables/dt19_104.10.asp [<https://perma.cc/H535-5JLF>] (detailing the racial education attainment gap); *Labor Force Characteristics by Race and Ethnicity, 2019*, BUREAU OF LAB. STAT. (Dec. 2020), <https://www.bls.gov/opub/reports/race-and-ethnicity/2019/> [<https://perma.cc/WMB8-G4CA>] (indicating that in 2019, the unemployment rate was 6.1% for Black adults compared to 3.3% for white adults).

74. See, e.g., Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 21, 2025) ("Illegal DEI and DEIA policies . . . undermine our national unity . . . [through a] pernicious identity-based spoils system."); Exec. Order No. 14,281, 90 Fed. Reg. 17537 (Apr. 23, 2025) (declaring, without basis, that a "pernicious movement" has transformed equal opportunity into a regime of "results preordained by irrelevant immutable characteristics").

75. See, e.g., Exec. Order No. 14,148, 90 Fed. Reg. 8237, 8240 (alleging, without evidence, that DEI has "corrupted" government).

policies.⁷⁶ That case did not hold that awareness of the racially disparate impact of existing policies and race-neutral reforms that reduce racial disparities are illegal.⁷⁷ Nonetheless, the Administration has treated the mere consideration of racial disparities as suspect—even when such consideration is used to identify unfair and exclusionary practices.

On its first day in office, for example, the second Trump Administration announced it would eliminate all federal government DEI programs and policies, including Chief Diversity Officer roles, Equity Action Plans, and equity-related grants or contracts.⁷⁸ It dismantled or defunded key agencies and initiatives that address structural inequality, such as the National Institute on Minority Health and Health Disparities,⁷⁹ the Minority Business Development Agency,⁸⁰ the Community Development Financial Institutions Fund,⁸¹ the Office of Federal Contract Compliance

76. 600 U.S. 181, 230 (2023) (holding that certain race-conscious admissions programs violate the Equal Protection Clause and Title VI).

77. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 882 (4th Cir. 2023) (holding that facially race-neutral admissions policies that resulted in increased minority enrollment did not violate the Equal Protection Clause), *cert. denied*, 218 L. Ed. 2d 71 (2024).

78. Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 20, 2025). The Trump Administration enacted similar directives in subsequent policy pronouncements. *See, e.g.*, Keeping Americans Safe in Aviation, 90 Fed. Reg. 8651 (Jan. 21, 2025) (directing the cessation of DEI initiatives in the Federal Aviation Administration); Exec. Order No. 14,185, 90 Fed. Reg. 8763 (Jan. 27, 2025) (directing the cessation of DEI initiatives in the Department of Defense); Exec. Order No. 14,210, 90 Fed. Reg. 9669 (Feb. 11, 2025) (instructing agency heads to prioritize DEI initiatives in employee reduction-in-force efforts). The Trump policies reversed Biden Administration policies that addressed inequitable practices within the federal government. *See* Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021) (directing federal agencies to embed equity in their programs and policies); Exec. Order No. 14,035, 86 Fed. Reg. 34593 (June 25, 2021) (requesting each agency head to appoint a DEI officer).

79. Letter from Russell T. Vought, Director, Off. of Mgmt. and Budget, to Susan Collins, Chair, Committee on Appropriations (May 2, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/05/Fiscal-Year-2026-Discretionary-Budget-Request.pdf> [<https://perma.cc/9XWA-VQE7>] (“The Budget also eliminates funding for the National Institute on Minority and Health Disparities (-\$534 million), which is replete with DEI expenditures.”).

80. Melissa Angell, *Trump Severs Funding for Minority Business Centers as He Dismantles the MBDA*, INC. (Apr. 21, 2025), <https://www.inc.com/melissa-angell/trump-severs-funding-for-minority-business-centers-as-he-dismantles-the-mbda/91178803> [<https://perma.cc/FG24-HVHA>]. *But see* Jory Heckman, *Federal Court Blocks Trump Administration’s Plan to Scrap 4 Small Agencies*, FED. NEWS NETWORK (Nov. 26, 2025, at 16:32 ET), <https://federalnewsnetwork.com/reorganization/2025/11/federal-court-blocks-trump-administrations-plan-to-scrap-4-small-agencies/> [<https://perma.cc/N3C7-JPMR>] (reporting that a federal court in Rhode Island blocked the Administration’s plan to eliminate the Minority Business and Development Agency).

81. Exec. Order No. 14,238, 90 Fed. Reg. 13043 (Mar. 14, 2025) (reducing the functions and personnel of the Minority Business Development Agency and the Community Development Financial Institutions Fund to the minimum required by statute).

Programs,⁸² the EPA’s Office of Environmental Justice,⁸³ and the National Telecommunications and Information Administration’s Digital Equity broadband grant program.⁸⁴

Investigations or the threats of investigations also chilled lawful diversity programs. The Secretary of Education issued a “Dear Colleague” letter warning federally funded schools that diversity, equity, and inclusion practices in admissions, hiring, scholarships, housing, or training could violate Title VI and jeopardize federal funding.⁸⁵ The Department of Education initiated investigations into five universities for offering scholarships to students enrolled in Deferred Action for Childhood Arrivals (“DACA”)—a program that defers deportation for certain undocumented individuals brought to the United States as children—alleging that such programs discriminated against U.S.-born students in violation of Title VI’s prohibition on national origin discrimination.⁸⁶ Other executive orders and agency directives threatened to condition federal student aid eligibility to enrollment at colleges and

82. T. Scott Kelly, Christopher J. Near & Zachary V. Zagger, *Trump Administration Proposes Elimination of OFCCP, Launches New Opinion Letter Program for Labor Guidance*, OGLETREE DEAKINS (June 4, 2025), <https://ogletree.com/insights-resources/blog-posts/trump-administration-proposes-elimination-of-ofccp-launches-new-opinion-letter-program-for-labor-guidance/> [https://perma.cc/MT9J-57DV] (describing the Department of Labor’s proposal to “eliminate” the Office of Federal Contract Compliance Programs, which enforced antidiscrimination compliance in federal contracting).

83. Jory Heckman, *EPA’s ‘Environmental Justice’ Employees Face Layoffs This Summer*, FED. NEWS NETWORK (Apr. 22, 2025, at 07:15 ET), <https://federalnewsnetwork.com/workforce/2025/04/epas-environmental-justice-employees-face-layoffs-this-summer/> [https://perma.cc/2H9W-L6H5]; Aman Azhar, *With Latest Round of Terminations, Trump Administration Continues Dismantling EPA’s Environmental Justice Portfolio*, INSIDE CLIMATE NEWS (Aug. 28, 2025), <https://insideclimatenews.org/news/28082025/trump-epa-environmental-justice-terminations/> [https://perma.cc/9T9L-2QCV] (“The U.S. Environmental Protection Agency this week terminated more than two dozen remaining staffers in the now-defunct Office of Environmental Justice and External Civil Rights (OEJECR), advancing the Trump administration’s efforts to dismantle the environmental justice initiatives of the president’s Democratic predecessors.”).

84. Keely Quinlan, *State, Local Organizations Ask Commerce Dept. to Reinstate Digital Equity Act*, STATESCOOP (June 20, 2025), <https://statescoop.com/state-local-commerce-ntia-reinstate-digital-equity-act/> [https://perma.cc/RW2G-Q36A].

85. Letter from Craig Trainor, Acting Assistant Sec’y for C.R., Department of Education, to colleagues (Feb. 14, 2025), <https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf> [https://perma.cc/T228-ZU58]. The letter was enjoined by a federal court in April of 2025. *Nat’l Educ. Ass’n v. U.S. Dep’t of Educ.*, 779 F. Supp. 3d 149 (D.N.H. 2025); *see also* *Am. Fed’n of Tchrs. v. U.S. Dep’t of Educ.*, No. SAG-25-628, slip op. at 60–62 (D. Md. Aug. 14, 2025) (holding the February 14, 2025 Dear Colleague Letter and a related requirement that states and schools certify their compliance with the Department of Education’s interpretations of Title VI and *Students for Fair Admissions v. Harvard* unlawful, and vacating both under the Administrative Procedure Act).

86. Press Release, U.S. Dep’t of Educ., U.S. Department of Education Opens Investigations into Five Universities for Alleged Exclusionary Scholarships Benefitting Illegal Alien Students (July 23, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-opens-investigations-five-universities-alleged-exclusionary-scholarships-benefitting-illegal-alien-students>; *see also* Nate Raymond, *U.S. Justice Department Sues Virginia Over In-State Tuition for Migrants*, REUTERS (Dec. 30, 2025, at 12:54 ET), <https://www.reuters.com/legal/government/us-justice-department-sues-virginia-over-in-state-tuition-migrants-2025-12-30/> [https://perma.cc/MUM6-F4FH] (reporting DOJ’s lawsuit challenging Virginia’s in-state tuition policy for undocumented students as conflicting with federal immigration law and disadvantaging out-of-state U.S. citizens).

universities accredited by entities that do not consider diversity,⁸⁷ and signaled potential limits on federal loan forgiveness for employees of immigration and racial justice organizations.⁸⁸

These efforts to chill diversity programs extended outside of education. The Administration cited diversity policies of four law firms in revoking the security clearances of their employees and barring them from federal buildings.⁸⁹ The Federal Communications Commission opened an investigation into Comcast and NBCUniversal to ensure that they were “not promoting invidious forms of discrimination” through their promotion of diversity,⁹⁰ and threatened to block merger approvals for companies with diversity programs.⁹¹ T-Mobile, Verizon, and other corporations ended their diversity initiatives to secure such approvals.⁹²

The Administration further institutionalized this campaign against diversity initiatives through a September 2025 Office of Management and Budget memorandum that—by adopting the DOJ’s expansive proxy-discrimination framework—treats common tools for identifying and addressing racial exclusion as presumptively unlawful and directs federal

87. Exec. Order No. 14,279, 90 Fed. Reg. 17529 (Apr. 23, 2025).

88. Exec. Order No. 14,235, 90 Fed. Reg. 11885 (Mar. 7, 2025) (excluding from public loan forgiveness programs employees engaged in a “substantial illegal purpose” such as “aiding and abetting” immigration law violations or “illegal discrimination”); see Adam S. Minsky, *What Trump’s New Student Loan Forgiveness Order Means for 3 Million Borrowers*, FORBES (Mar. 10, 2025, at 10:34 ET), <https://www.forbes.com/sites/adamminsky/2025/03/10/what-trumps-new-student-loan-forgiveness-order-means-for-3-million-borrowers/> [<https://perma.cc/TH5J-R2QE>] (noting that the language “engaging in a pattern of aiding and abetting illegal discrimination” could be interpreted “to implicate any . . . public entity that supports DEI initiatives”).

89. See Exec. Order No. 14,230, 90 Fed. Reg. 11781 (Mar. 6, 2025); Exec. Order No. 14,237, 90 Fed. Reg. 13039 (Mar. 14, 2025); Exec. Order No. 14,246, 90 Fed. Reg. 13997 (Mar. 25, 2025); Exec. Order No. 14,250, 90 Fed. Reg. 14549 (Mar. 27, 2025). The Paul Weiss executive order was rescinded after it agreed to end its diversity, equity, and inclusion practices and commit \$40 million in pro bono services. Exec. Order No. 14,244, 90 Fed. Reg. 13685 (Mar. 21, 2025). See also Mike Spector et al., *How Trump’s Crackdown on Law Firms is Undermining Legal Defenses for the Vulnerable*, REUTERS (July 31, 2025, at 06:00 ET), <https://www.reuters.com/investigations/trumps-war-big-law-leads-firms-retreat-pro-bono-work-underdogs-2025-07-31/> [<https://perma.cc/96Q7-FGL6>] (“Dozens of major law firms, wary of political retaliation, have scaled back pro bono work, diversity initiatives and litigation that could place them in conflict with the Trump administration, a Reuters investigation found. . . . Fourteen civil rights groups said the law firms they count on to pursue legal challenges are hesitating to engage with them . . .”).

90. Letter from Brendan Carr, Chairman, Fed. Comm’n Comm’n, to Brian Roberts, CEO, Comcast Corp. (Feb. 11, 2025), <https://www.fcc.gov/sites/default/files/Chairman-Carr-Letter-to-Comcast-02112025.pdf> [<https://perma.cc/N7UG-WRS8>] (ordering an FCC investigation into Comcast and NBCUniversal over alleged “invidious forms of DEI”); Tom Wheeler, *Not ‘Deregulation’ but Heavy-Handed Regulation at the Trump FCC*, BROOKINGS INST. (Feb. 25, 2025), <https://www.brookings.edu/articles/not-deregulation-but-heavy-handed-regulation-at-the-trump-fcc/> [<https://perma.cc/W4AZ-X95C>] (criticizing the FCC’s use of threats “to micromanage the activities of [media] companies . . .”).

91. See, e.g., Jeff Green, *FCC’s Carr Threatens to Block M&A for Companies with DEI (2)*, BLOOMBERG L. (Mar. 22, 2025, at 01:39 ET), <https://news.bloomberglaw.com/ip-law/fccs-carr-threatens-to-block-m-a-for-companies-with-dei-plans> [<https://perma.cc/JK9R-YN7N>] (describing FCC Chairman Brendan Carr’s warning that the agency may deny merger approvals to companies that maintain DEI initiatives).

92. David Shepardson, *T-Mobile Ending DEI Programs as It Seeks U.S. FCC Approval for 2 Deals*, REUTERS (July 9, 2025, at 03:00 ET), <https://www.reuters.com/sustainability/society-equity/t-mobile-ending-dei-programs-it-seeks-fcc-approval-two-deals-2025-07-09/> [<https://perma.cc/435A-8AW9>]; Maria Aspan, *Verizon Ends DEI Policies to Get FCC’s Blessing for Its \$20 Billion Frontier Deal*, NPR (May 19, 2025, at 05:00 ET), <https://www.npr.org/2025/05/19/nx-s1-5402863/verizon-fcc-frontier-dei-trump> [<https://perma.cc/EFA2-EMRF>]; David Shepardson, *AT&T Commits to Ending DEI Programs*, REUTERS (Dec. 2, 2025, at 04:46 ET), <https://www.reuters.com/sustainability/society-equity/att-commits-ending-dei-programs-2025-12-02/> [<https://perma.cc/9V8V-QBL3>] (reporting AT&T’s commitment to end DEI programs in an FCC filing associated with regulatory approval of a transaction).

agencies to eliminate funding to entities that rely on them.⁹³ The memorandum treats a wide range of equity-oriented practices—including the use of demographic data, diverse candidate pools, socioeconomic status, first-generation status, underserved geographic areas, cultural competence, diversity statements, and other facially neutral measures—as unlawful tools or proxies for protected characteristics.⁹⁴ It warns that entities receiving federal funds, including state and local governments, educational institutions, and public and private employers, risk losing funding if they pursue programs designed to increase demographic representation.⁹⁵ The DOJ reportedly pursued investigations of diversity programs at major companies that are federal contractors in the automotive, pharmaceuticals, defense, utilities, and technology sectors under the False Claims Act, asserting that companies holding a federal contract while considering diversity in employment are committing fraud against the federal government and risk being liable for treble damages.⁹⁶

The Administration also dismantled core civil rights enforcement tools. Executive Order 14,281 characterized disparate-impact liability as pressuring actors to consider race and to engage in racial balancing. The Administration directed agencies to “eliminate the use of disparate-impact liability in all contexts to the maximum degree possible,”⁹⁷ to reconsider pending proceedings and consent decrees relying on the doctrine, and explore federal preemption of state-level disparate impact protections.⁹⁸ In December 2025, DOJ finalized a rule rescinding the disparate-impact provision of its Title VI regulations, narrowing federal oversight of federally funded entities by foreclosing disparate-impact enforcement across domains including education, health care, and social services.⁹⁹

93. Memorandum from Russell T. Vought, Director, Off. of Mgmt. & Budget, to the Heads of Executive Departments and Agencies, *Eliminating Funding of Unlawful Discrimination* (Sep. 12, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/09/M-25-33-Eliminating-Funding-of-Unlawful-Discrimination.pdf> [https://perma.cc/25SM-53ZR].

94. *Id.* at 5–9.

95. *Id.* at 1.

96. Lydia Wheeler, *Justice Department Using Fraud Law to Target Companies on DEI*, WALL ST. J. (Dec. 28, 2025, at 09:00 ET), <https://www.wsj.com/politics/policy/trump-doj-dei-fraud-investigations-93213d52> [https://perma.cc/WU6T-HMQD].

97. Exec. Order No. 14,281, 90 Fed. Reg. 17537 (Apr. 23, 2025).

98. *Id.*

99. Rescinding Portions of Department of Justice Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14,281, 90 Fed. Reg. 17537 (Feb. 16, 2023), which ordered the restoration of equality of opportunity and meritocracy; 90 Fed. Reg. 235 (Dec. 10, 2025) (eliminating disparate-impact liability from DOJ’s Title VI regulations by rescinding the requirement that recipients of federal funds refrain from practices with unjustified disparate effects, thereby limiting DOJ Title VI enforcement to intentional discrimination). See also Alex Guillen & Hassan Ali Kanu, *DOJ Rolls Back Anti-Discrimination Rules*, POLITICO (Dec. 9, 2025, at 03:58 ET), <https://www.politico.com/news/2025/12/09/justice-department-discrimination-disparate-impact-00683362> [https://perma.cc/T2GN-Q52P] (reporting that “repealing the government’s 50-year-old ‘disparate impact’ standards will make it harder to challenge potential bias in housing, criminal law, employment, environmental regulations and other policy areas”).

The EEOC also stopped investigating disparate-impact charges,¹⁰⁰ and the National Credit Union Administration removed disparate-impact analysis from its examinations and fair lending guidance.¹⁰¹

The Administration also moved to erase the data needed to detect and remedy discrimination. It rescinded a 1965 executive order that facilitated investigations into federal contractors' potentially discriminatory employment practices.¹⁰² It repealed guidance encouraging schools to collect and analyze racial data on student discipline and to consider whether disparities might indicate unlawful discrimination.¹⁰³ The Department of Education signaled an intent to reduce states' obligations to report on school districts with high rates of students from particular racial groups who are placed in special education or restrictive settings.¹⁰⁴ The Administration also removed public tools like the Environmental Protection Agency's EJScreen, undermining the ability of local communities, researchers, and public officials to detect and respond to racial disparities in environmental burdens.¹⁰⁵

Enforcement capacity suffered as well. Following the policy overhaul, roughly three-quarters of the attorneys in the Justice Department's Civil Rights Division left the agency through resignations, reassignments, or deferred departure agreements.¹⁰⁶ The Administration also dismantled or

100. Claire Savage & Alexandra Olson, *Civil Rights Agency Drops a Key Tool Used to Investigate Workplace Discrimination*, ASSOCIATED PRESS, <https://apnews.com/article/trump-discrimination-ai-eeoc-disparate-impact-a2e8aba11f3d3f095df95d488c6b3c40> [<https://perma.cc/8JVB-ZWKX>] (last updated Sep. 30, 2025, at 06:56 ET) (reporting on EEOC memo that the agency will stop investigating workplace discrimination claims based on disparate-impact theory and will close existing disparate-impact cases).

101. Letter from Kyle Hauptman, Chairman, Nat'l Credit Union Admin., to Federally Insured Credit Unions (Sep. 4, 2025), <https://ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/removal-disparate-impact> [<https://perma.cc/WAJ5-855W>] (announcing that NCUA will no longer examine for disparate-impact risk or request disparate impact analyses in fair-lending supervision).

102. Exec. Order No. 14,173 (repealing Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sep. 24, 1965)); see Chris Isidore, *Trump Rescinds Measure Used to Fight Workplace Discrimination for 60 Years*, CNN (Jan. 23, 2025, at 12:23 ET), <https://www.cnn.com/2025/01/23/business/trump-rescinds-anti-discrimination-order> [<https://perma.cc/Z42N-M4GN>] ("[Executive Order No. 11,246] allowed investigations into the contractors' employment practices and often found instances of discrimination even the affected employees didn't know about.").

103. Exec. Order No. 14,280, 90 Fed. Reg. 17533 (Apr. 23, 2025).

104. Michelle Diamant, *Ed Department Plans To Scale Back IDEA Data Collection*, DISABILITY SCOOP (Sep. 4, 2025), <https://www.disabilityscoop.com/2025/09/04/ed-department-plans-to-scale-back-idea-data-collection/31608/> [<https://perma.cc/NBH4-7F22>] (describing the Department of Education's proposal to stop publishing "significant disproportionality" data required under the Individuals with Disabilities Education Act, including state-reported data identifying school districts with high rates of students from particular racial groups who have disabilities, are placed in restrictive educational settings, or are subject to discipline); AGENCY INFORMATION COLLECTION ACTIVITIES; COMMENT REQUEST; ANNUAL STATE APPLICATION UNDER PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AS AMENDED IN 2004, 90 Fed. Reg. 41063 (Aug. 22, 2025), <https://www.federalregister.gov/documents/2025/08/22/2025-16051/agency-information-collection-activities-comment-request-annual-state-application-under-part-b-of> [<https://perma.cc/966T-2FAZ>] (seeking public comment under the Paperwork Reduction Act on proposed changes to the IDEA Part B annual state application, including revisions to required data reporting).

105. *EPA Removes EJScreen from Its Website*, ENV'T DATA & GOVERNANCE INITIATIVE (Feb. 12, 2025), <https://enviroadatagov.org/epa-removes-ejscreen-from-its-website/> [<https://perma.cc/LCA3-23S5>] (last visited Feb. 20, 2026); Stacy Woods, *The Trump Administration's Deletion of Environmental Justice Data Does Real Harm*, UNION OF CONCERNED SCIENTISTS (Feb. 27, 2025, at 11:08 ET), <https://blog.ucs.org/stacy-woods/the-trump-administrations-deletion-of-environmental-justice-data-does-real-harm/> [<https://perma.cc/FQ36-JY66>].

106. Ryan Lucas, *70% of the DOJ's Civil Rights Division Lawyers Are Leaving Because of Trump's Reshaping*, NPR (May 19, 2025, at 05:00 ET), <https://www.npr.org/2025/05/19/g-s1-66906/trump-civil-rights-justice-exodus> [<https://perma.cc/7C2U-NS36>]; Sarah N. Lynch, *Ex-Employees of U.S. Justice*

severely cut back offices that ensured agencies and those they regulate complied with civil rights protections, including the Department of Homeland Security's Office for Civil Rights and Civil Liberties,¹⁰⁷ the Social Security Administration's Office of Civil Rights and Equal Opportunity,¹⁰⁸ the Department of Education's Office of Civil Rights,¹⁰⁹ and the Veterans' Administration's Office of Equity Assurance.¹¹⁰

Invoking the need for "national unity," the Administration also moved to sanitize American history and impose a singular national identity. Framing exhibits about America's racial history as being motivated by a "corrosive ideology" that "deepens societal divides and fosters a sense of national shame,"¹¹¹ the Administration directed the Smithsonian to purge content that allegedly advanced an "improper ideology" and "divide[s] Americans based on race."¹¹² The White House escalated implementation by demanding internal Smithsonian records and exhibition materials, while publicly signaling that continued federal support was contingent on compliance.¹¹³ It ordered the restoration of Confederate monuments and the renaming of military bases that had previously been stripped

Department Blast 'Destruction' of Civil Rights Unit, REUTERS (Dec. 9, 2025, at 15:50 ET), <https://www.reuters.com/legal/government/ex-employees-us-justice-department-blast-destruction-civil-rights-unit-2025-12-09/> [<https://perma.cc/NES5-D7NU>] (reporting that about 75% of attorneys left DOJ's Civil Rights Division during 2025 through resignations and related departures); Letter from Hannah Abelow et. al., *The Destruction of DOJ's Civil Rights Division: Why it Matters*, THE JUST. CONNECTION (Dec. 9, 2025), <https://www.thejusticeconnection.org/wp-content/uploads/2025/12/Civil-Rights-Division-Sign-On-Letter.pdf> [<https://perma.cc/L2FD-589S>] (urging the Department of Justice to preserve the Civil Rights Division's enforcement capacity and warning that recent administrative actions threaten the enforcement of federal civil rights laws).

107. *Trump Administration Closes Three DHS Offices Focused on Civil Rights and Oversight*, ECON. POL'Y INST. (Apr. 3, 2025), <https://www.epi.org/policywatch/trump-administration-closes-three-dhs-offices-focused-on-civil-rights-and-oversight/> [<https://perma.cc/PV64-SNPK>].

108. Natalie Alms, *Social Security Shuttles its Civil Rights and Transformation Offices*, GOV'T EXEC. (Feb. 26, 2025), <https://www.govexec.com/management/2025/02/social-security-shuttles-its-civil-rights-and-transformation-offices/403310/> [<https://perma.cc/6FFD-XGTU>].

109. Collin Binkley, *Civil Rights Work Is Slowing as Trump Dismantles the Education Department, Agency Data Shows*, ASSOCIATED PRESS (July 18, 2025, at 18:25 ET), <https://apnews.com/article/education-department-trump-civil-rights-disability-54c4b4a228b4b30e6a6751ec745b3915> [<https://perma.cc/HB4G-Q8WY>]. But see *Education Department Workers Targeted in Layoffs Are Returning to Tackle Civil Rights Backlog*, EDUC. WEEK (Dec. 8, 2025, at 09:26 ET), <https://federalnewsnetwork.com/workforce/2025/12/education-department-workers-targeted-in-layoffs-are-returning-to-tackle-civil-rights-backlog/#:~:text=Workforce-,Education Department workers targeted in layoffs are returning to tackle> [<https://perma.cc/2VWQ-P6P6>] (reporting that the Administration brought back staff previously slated for layoffs to address a mounting civil-rights complaint backlog).

110. Benjamin Krause, *VA Closes Equity Office Amid Budget Shift: What It Means for Veterans*, DISABLED VETERANS (Apr. 2, 2025), <https://www.disabledveterans.org/va-closes-equity-office-amid-budget-shift/> [<https://perma.cc/5HRS-CNxD>].

111. Exec. Order No. 14,253, 90 Fed. Reg. 14563 (Mar. 27, 2025).

112. *Id.*

113. Letter from Lindsey Halligan et. al., Special Assistant to the President and Senior Associate Staff Secretary, White House, to Lonnie G. Bunch III, Secretary, Smithsonian Inst., Internal Review of Smithsonian Exhibitions and Materials (Aug. 12, 2025), <https://www.whitehouse.gov/briefings-statements/2025/08/letter-to-the-smithsonian-internal-review-of-smithsonian-exhibitions-and-materials/> [<https://perma.cc/2LRH-WUEJ>] (demanding Smithsonian internal review materials and information regarding exhibitions and programming); Letter from Vince Haley, Assistant to the President and Director of the Domestic Policy Council, White House, to Lonnie G. Bunch III, Secretary, The Smithsonian, Review of Smithsonian Exhibitions and Materials (Dec. 18, 2025), <https://www.whitehouse.gov/briefings-statements/2025/12/letter-to-the-smithsonian-review-of-smithsonian-exhibitions-and-materials/> [<https://perma.cc/Q99Y-HBPE>] (reiterating demands for Smithsonian records and framing compliance as relevant to continued federal engagement and support).

of their Confederate associations.¹¹⁴ The National Park Service posted signs “asking visitors to offer feedback on any information that they feel portrays American history and landscapes in a negative light.”¹¹⁵

The Administration banned federally funded schools and teacher-training programs from teaching “[d]iscriminatory equity ideology,” characterized such content as “anti-American” indoctrination, and mandated that agencies promote “patriotic education” defined in part as reverent and “ennobling characterizations of America’s founding and foundational principles.”¹¹⁶ Military educational institutions were required to teach “that America and its founding documents remain the most powerful force for good in human history,” and were prohibited from teaching “un-American, divisive, discriminatory, radical, [or] extremist” concepts.¹¹⁷ The Secretary of Defense ordered the removal of books about diversity and anti-racism from military libraries, and the Naval Academy purged 381 titles, including those on the Holocaust, civil rights, racism, Black soldiers, and the killing of Trayvon Martin.¹¹⁸ Materials about Nazi ideology and Confederate history were not targeted, and books like *Mein Kampf* (by Adolf Hitler), *The Camp of the Saints* (novel envisioning Western takeover by immigrants from developing countries), and *The Bell Curve* (asserting that Black people genetically are less intelligent than whites) remained in circulation.¹¹⁹ Most of the removed titles were later returned to the shelves—underscoring the ill-defined nature of centralized ideological review rather than ordinary collection management.¹²⁰ The Department of Defense scrubbed its website of references to Jackie

114. Exec. Order No. 14,253; Ashraf Khalil, *Confederate Statues in DC Area to be Restored and Replaced in Line with Trump’s Executive Order*, ASSOCIATED PRESS (Aug. 9, 2025, at 22:16 CT), <https://www.kcci.com/article/confederate-statues-in-dc-area-to-be-restored/65645547> [<https://perma.cc/VTJ5-UZ3Q>] (reporting restoration/return of Confederate memorials in line with the Administration’s directives); Steve Beynon, *Trump Says All Army Bases Stripped of Confederate Namesakes Will Have Names Restored*, MILITARY.COM (June 10, 2025, at 18:41 ET), <https://www.military.com/daily-news/2025/06/10/trump-says-all-army-bases-stripped-of-confederate-namesakes-will-have-names-restored.html> [<https://perma.cc/TP52-83PU>]; Lolita C. Baldor, *Army Restores the Names of Seven Bases that Lost Their Confederate-linked Names Under Biden*, ASSOCIATED PRESS (June 10, 2025, at 20:57 ET), <https://apnews.com/article/trump-army-bases-confederate-names-69f63771d0e7ca859d42c485129d1228> [<https://perma.cc/M7DW-VE9P>] (reporting that the Administration sought to restore pre-2021 Confederate Army base names by reassigning those names to alternative, non-Confederate namesakes (renaming the former Fort Lee for Spanish-American War Medal of Honor recipient Fitz Lee rather than Robert E. Lee), thereby preserving the original base names while formally complying with the statutory requirement that bases no longer honor Confederate figures).

115. Chloe Veltman, *National Park Signage Encourages the Public to Help Erase Negative Stories at Its Sites*, NPR (June 10, 2025, at 19:08 ET), <https://www.npr.org/2025/06/10/nx-s1-5429773/national-park-service-signs> [<https://perma.cc/X44J-YLFZ>].

116. Exec. Order No. 14,190, 90 Fed. Reg. 8853 (Jan. 29, 2025).

117. Exec. Order No. 14,185, 90 Fed. Reg. 8763 (Jan. 27, 2025).

118. Lolita C. Baldor, *Pentagon Orders Military to Pull Library Books About Diversity, Anti-Racism, Gender Issues*, PBS NEWS (May 9, 2025, at 17:37 ET), <https://www.pbs.org/newshour/politics/pentagon-orders-military-to-pull-library-books-about-diversity-anti-racism-gender-issues> [<https://perma.cc/YBW7-SD97>].

119. John Ismay, *Who’s In and Who’s Out at the Naval Academy’s Library?*, N.Y. TIMES (Apr. 11, 2025), <https://www.nytimes.com/2025/04/11/us/politics/naval-academy-banned-books.html> [<https://perma.cc/WLU4-LLYJ>].

120. Lolita C. Baldor, *Most Books Pulled from Naval Academy Library are Back on Shelves in Latest DEI Turn*, MILITARY.COM (May 21, 2025, at 18:57 EST), <https://apnews.com/article/military-libraries-dei-book-purge-d6df4f5c82d92763f2060d7f4b99cd95> [<https://perma.cc/5YM5-RT9N>] (reporting that most removed titles were returned after review while underscoring the vague and problematic nature of centralized ideological scrutiny of library holdings).

Robinson, the Navajo Code Talkers, the Tuskegee Airmen, and Black, Latino, and Asian American veterans, and later restored some pages after public backlash.¹²¹

The Administration further advanced its ethnonationalist project by elevating English as the sole official language of the United States.¹²² It revoked a Clinton-era directive requiring that federal agencies and their grantees make their services accessible to individuals with limited English proficiency.¹²³ Justifying the policy, the Administration claimed that an official national language would promote a “shared American culture” and a “more cohesive and efficient society.”¹²⁴ The DOJ subsequently issued a memorandum suspending LEP.gov—an interagency hub that provided tools to help agencies ensure meaningful language assistance—and directing all agencies to rescind prior limited English-proficiency guidance, to phase out “non-essential multilingual services,” and, when a multilingual service is deemed “mission critical” to include a disclaimer that English is the official language on published non-English material.¹²⁵ The Department of Education rescinded guidance detailing schools’ obligations to serve English learners and limited-English proficient parents,¹²⁶ other agencies issued new policies that diminished obligations to provide services to limited-English proficient individuals.¹²⁷

Echoing past efforts to favor white immigrants and limit non-white immigrants, the second Trump Administration adopted policies that tilted the nation’s demographic trajectory toward a whiter population.¹²⁸ On

121. Jeff Passan, *Defense Dept. Restores Story on Jackie Robinson’s Military Service*, ESPN (Mar. 19, 2025, at 13:02 ET), https://www.espn.com/mlb/story/_/id/44316899/defense-department-removes-story-robinson-military-service [https://perma.cc/R23M-CDA5]; Leah Willingham, Jennifer Sinco Kelleher, & Tara Copp, *Pentagon Restores Some Webpages Honoring Minority Service Members but Defends DEI Purge*, PBS (Mar. 18, 2025, at 14:15 EST), <https://www.pbs.org/newshour/politics/pentagon-restores-some-webpages-honoring-minority-service-members-but-defends-dei-purge> [https://perma.cc/M2AW-NJG5] (describing the Department of Defense’s removal of “[t]housands of pages honoring contributions by women and minority groups,” though some were later restored).

122. Exec. Order No. 14,224, 90 Fed. Reg. 11363 (Mar. 1, 2025); see Gabe Gutierrez & Rebecca Shabad, *Trump Signs an Executive Order Making English the Official U.S. Language*, NBC, <https://www.nbcnews.com/politics/donald-trump/trump-sign-executive-order-making-english-official-us-language-rcna194210> [https://perma.cc/G87L-VYGM] (last updated Mar. 1, 2025, at 19:25 ET).

123. Exec. Order No. 13,166, 65 Fed. Reg. 50121 (Aug. 11, 2000); *Know Your Rights: Executive Order Threatens Access to Federal Programs*, LEGAL AID FOUND. OF L.A. (Mar. 12, 2025), <https://lafla.org/stories-events/know-your-rights-executive-order-threatens-access-to-federal-programs/> [https://perma.cc/H4L6-J3YS].

124. Exec. Order No. 14,224.

125. Memorandum from U.S. Dep’t of Just. to all federal agencies, Implementation of Exec. Order No. 14,224: Designating English as the Official Language of the United States of America 1–4 (July 14, 2025), <https://www.justice.gov/ag/media/1407776/dl> [https://perma.cc/9SDM-7HPZ].

126. Ileana Najarro, *Trump Admin. Quietly Rescinds Guidance on English Learners’ Rights*, EDUC. WEEK (Aug. 20, 2025), <https://www.edweek.org/teaching-learning/trump-admin-quietly-rescinds-guidance-on-english-learners-rights/2025/08> [https://perma.cc/K5F7-L3WY].

127. See e.g., GSA Order OGR 2335.1B, *Language Services Policy* (Sep. 17, 2025), [https://www.gsa.gov/directives/files?file=2025-09%2FOCR+2335.1B%2C+Language+Services+Policy+\(Sept+2025\).pdf](https://www.gsa.gov/directives/files?file=2025-09%2FOCR+2335.1B%2C+Language+Services+Policy+(Sept+2025).pdf) [https://perma.cc/3JTS-3HBY] (rescinding GSA’s 2024 Language Access Plan, stating that limited English proficiency services in federally conducted programs are not required and limiting them to “mission-critical” circumstances, and asserting that Title VI does not impose a broad obligation to provide multilingual services).

128. See Heba Gowayed, *Trump’s Obsession with Immigration Is Really an Obsession with Segregation*, THE GUARDIAN (Feb. 12, 2025, at 07:00 ET), <https://www.theguardian.com/us-news/commentisfree/2025/feb/12/trump-immigration-segregation-dei> [https://perma.cc/S4KZ-ZZYK].

its first day in office, the Administration attempted to reinterpret the Fourteenth Amendment to deny birthright citizenship to children born in the United States to noncitizen mothers, unless the father is a citizen or one of the parents is a lawful permanent resident¹²⁹—an interpretation squarely at odds with longstanding precedent.¹³⁰ That same day, it suspended refugee admissions,¹³¹ citing a need “to admit only those refugees who can fully and appropriately assimilate.”¹³² It should be noted that in recent years, over ninety-five percent of refugees came from Africa; Near East, East, and South Asia; and Latin America.¹³³ A month later, the Administration carved out an exception for white Afrikaner “refugees” from South Africa, claiming they faced racial persecution.¹³⁴ The Administration operationalized that preference by setting the fiscal year 2026 refugee ceiling at a record-low 7,500 while prioritizing admissions for Afrikaners.¹³⁵

That “assimilation” rationale tracked the Administration’s broader national-security narrative that mass migration produces “civilizational erasure” abroad—warning that Europe is being transformed by migration policies and insisting that “[w]e want Europe to remain European.”¹³⁶ Domestically, this worldview also shaped immigration enforcement. Litigation over immigration raids documented federal enforcement practices that treated “apparent race or ethnicity” and “speaking Spanish

129. Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025). Several district courts enjoined the enforcement of Executive Order 14,160; however, the Supreme Court reversed the injunctions in *Trump v. CASA, Inc.*, No. 24A884, slip op. (U.S. June 27, 2025); see Efrén C. Olivares, *Analyzing the Supreme Court’s Dangerous Decision in Trump v. CASA*, NAT’L IMMIGR. L. CTR. (June 27, 2025), <https://www.nilc.org/articles/analyzing-scotus-trump-v-casa/> [https://perma.cc/24Y8-F7VH].

130. See generally *Wong Kim Ark*, 169 U.S. 649 (rejecting prior, racially exclusionary interpretations of birthright citizenship). See also Exec. Order No. 14,169; Amy Howe, *Supreme Court Agrees to Hear Trump’s Challenge to Birthright Citizenship*, SCOTUSBLOG (Dec. 5, 2025), <https://www.scotusblog.com/2025/12/supreme-court-agrees-to-hear-trumps-challenge-to-birthright-citizenship/> [https://perma.cc/Q2MW-PWFE] (reporting that the Supreme Court will hear argument in the spring on whether President Trump’s executive order contravenes the Fourteenth Amendment’s Citizenship Clause after lower courts blocked enforcement).

131. Exec. Order No. 14,163, 90 Fed. Reg. 8459 (Jan. 20, 2025).

132. *Id.*

133. U.S. DEP’T OF STATE, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2025: REPORT TO THE CONGRESS 53, 55–56 (2024) (reporting fiscal year (FY) 2023 actual and FY 2024 projected refugee numbers).

134. Exec. Order No. 14,204, 90 Fed. Reg. 9497 (Feb. 7, 2025); see Brian Bennett & Nik Popli, *Trump Welcomes Planeload of White South Africans, While Shutting Out Other Refugees*, TIME (May 12, 2025, at 14:18 ET), <https://time.com/7284895/south-african-refugees-landed-trump/> [https://perma.cc/RHJ4-DMXF]; see also Kali Holloway, *The Real Reason Those White South Africans Are Here*, THE NATION (May 16, 2025), <https://www.thenation.com/article/politics/white-south-african-refugees-trump/> [https://perma.cc/AX6F-5MSN] (criticizing the Trump Administration’s offer of refugee status to white South Africans as symbolically affirming white supremacy and prioritizing white grievance over global human need).

135. Presidential Determination No. 2025-13, Presidential Determination on Refugee Admissions for Fiscal Year 2026, 90 Fed. Reg. 49005 (Sep. 30, 2025), <https://www.federalregister.gov/documents/2025/10/31/2025-19752/presidential-determination-on-refugee-admissions-for-fiscal-year-2026> [https://perma.cc/3TLH-D9P5]. See also Eric Bazail-Eimil, *Trump Administration Slashes Number of Refugees, Prioritizes Afrikaners*, POLITICO (Oct. 30, 2025, at 13:04 ET), <https://www.politico.com/news/2025/10/30/trump-slashes-refugee-numbers-afrikaners-00630038> [https://perma.cc/89TZ-BKLX].

136. WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 25 (Nov. 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/12/2025-National-Security-Strategy.pdf> [https://perma.cc/7X99-3BGM] (attributing Europe’s “loss of national identities and self-confidence” in part to “migration policies that are transforming the continent and creating strife”).

or speaking English with an accent” as factors justifying stops, effectively operationalizing race and language as proxies for immigration suspicion.¹³⁷

While other policies reflect ethnonationalist tendencies,¹³⁸ those described above demonstrate its core tenets: normalizing bias against people of color; treating consideration and collection of data of racial disparities as violations of a formalistic “colorblind” ideal; framing protections against discrimination as wasteful and “reverse racism”; casting the histories and languages of non-dominant communities as divisive and anti-American; and elevating ethnic, cultural, and linguistic assimilation as a national imperative. These same principles increasingly shape the Trump Administration’s policy approach to artificial intelligence.

II. How Trump AI Policies Advance Ethnonationalism

This Part asserts that artificial intelligence policy has become a central tool through which the second Trump Administration advances its ethnonationalist project—joining immigration, diversity, civil rights enforcement, education, historical memory, and language access as key arenas for consolidating cultural dominance. Rather than merely neglecting the risk AI poses to an inclusive society, the Administration has wielded its policymaking authority to dismantle safeguards intended to promote fairness in automated systems.¹³⁹ In its first year, the Administration issued executive orders and OMB memoranda and actively implemented its agenda at agencies to recast equity-focused AI governance as a form of ideological obstruction.¹⁴⁰

This marks not just an ideological shift but a legal transformation. The second Trump Administration’s AI policies depart not only from the Biden Administration’s safeguards, but also from the first Trump Administration’s approach. In 2020, President Trump signed the AI in Government Act, directing OMB to issue guidance on “best practices for identifying, assessing, and mitigating any discriminatory impact or bias.”¹⁴¹ That same year, he issued Executive Order 13,960, instructing agencies to ensure that their AI use complied with laws related to “civil

137. *Noem v. Vasquez Perdomo*, 146 S. Ct. 1, 3 (2025) (Kavanaugh, J., concurring).

138. Other policies that could be described as advancing an ethnonationalist agenda include Exec. Order No. 14,248, 90 Fed. Reg. 14005 (Mar. 25, 2025) (mandating proof of citizenship for voter registration, perpetuating a false narrative that immigrant populations are likely to commit electoral fraud); Exec. Order No. 14,148 (revoking nine Biden-era executive actions that created federal programs to advance racial equity); and Exec. Order No. 14,236, 90 Fed. Reg. 13037 (Mar. 14, 2025) (revoking an executive order mandating the reform of funding systems for Tribal Nations to fulfill federal trust and treaty responsibilities).

139. See generally Ryan Calo & Danielle K. Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797, 802 (2021) (asserting that executive agencies’ increasing delegation of administrative decision making to opaque automated systems undermines transparency and accountability, often without giving an opportunity for these decisions to be contested).

140. See e.g., January 2025 AI Order, *supra* note 2; 2025 USE MEMO, *supra* note 16 (repealing and replacing 2024 USE MEMO, *supra* note 16); 2025 ACQUISITION MEMO, *supra* note 16 (repealing and replacing 2024 ACQUISITION MEMO, *supra* note 16).

141. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. U, tit. I, § 104(a)(3), 134 Stat. 1182, 2288.

rights” and “civil liberties.”¹⁴² While these provisions were vague and weakly enforced, they at least acknowledged the relevance of civil rights. The executive orders issued in the first year of Trump’s second term abandon even that recognition.

Understanding these policies as advancing ethnonationalism does not require assuming cultural dominance is their sole purpose. Deregulatory and techno-industrial motives—such as accelerating data center construction—likely play a role. But these interests converge with ethnonationalist goals. For those whose liberty, livelihood, or identity are shaped by AI systems, the effect is the same: a digital state that refuses to see them.

After defining artificial intelligence, this Part identifies features of unregulated AI that make it especially effective at advancing ethnonationalist goals. Some, such as algorithmic bias, are well documented. Others, including cultural homogenization, synthetic deception, and behavioral manipulation, are less widely appreciated but pose equally serious threats to a racially inclusive democracy. The Part then details the Trump Administration’s executive actions and agency directives that removed safeguards against these harms and mounted an affirmative campaign against the development of inclusive AI systems designed to serve a diverse public.

A. Digital Ethnonationalism: Racial Harms from Unregulated AI

Before detailing the Trump Administration’s AI policies, it is essential to understand how unregulated artificial intelligence can advance ethnonationalist objectives. Although algorithmic bias is well documented, other challenges, including homogenization, deception, and manipulation, present equally serious threats to racially inclusive democracy. Each reinforces longstanding projects of racial and cultural marginalization and assimilation. Together, they risk embedding a narrow and hierarchical vision of American identity into the algorithmic infrastructure of public life—a phenomenon this Article terms *digital ethnonationalism*.

While digital authoritarianism describes repressive actors using digital information and communication technologies to surveil, manipulate, coerce, and censor populations,¹⁴³ digital ethnonationalism offers a different framework. It captures the ways AI tools can be used to advance a racially exclusionary political vision. It results from either the deliberate use of such digital tools to advance ethnonationalist goals, or the inadvertent design or deployment of such tools in ways that have the same effect.

142. Exec. Order No. 13,960, *Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government*, 85 Fed. Reg. 78939 (Dec. 3, 2020).

143. See generally James S. Pearson, *Defining Digital Authoritarianism*, 37 PHIL. & TECH. 1, 3–4 (2024) (emphasizing that digital authoritarianism can involve intentional exploitation of digital technologies to obtain authoritarian goals and situations without such intent); see also Danielle Keats Citron & Ari Ezra Waldman, *Digital Authoritarianism*, U. CHI. L. REV. ONLINE (Jun. 5, 2025), <https://lawreview.uchicago.edu/online-archive/digital-authoritarianism> [<https://perma.cc/ZJ2P-5XJL>] (describing how coordinated online abuse and false accusations chills speech in ways that mirror state-sponsored authoritarian tactics).

People define AI differently. Mo Gawdat, former Chief Business Officer of Google X, has explained the distinction between traditional software and AI as the difference between giving a person step-by-step instructions to solve a puzzle—i.e., traditional programming—and telling them to “figure it out yourself”—i.e., AI.¹⁴⁴ This Article adopts a federal statutory definition of AI as “a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments.”¹⁴⁵ This includes systems with varying levels of human oversight—fully autonomous, partially autonomous, and non-autonomous—but excludes traditionally programmed systems with human-defined rules.¹⁴⁶ It also includes systems that mimic human reasoning, “learn” from data, approximate cognitive tasks like planning or decision-making, or act to achieve goals.¹⁴⁷ The definition encompasses subfields such as machine learning (including deep learning), reinforcement learning, transfer learning, and generative AI.¹⁴⁸

These technologies do not merely reflect social structures, they shape them. When left unregulated, they can reproduce and intensify systemic inequalities in ways that align with and accelerate the broader ethnonationalist project of racial and cultural dominance and exclusion.

I. Bias

There is broad expert consensus that bias in AI systems exists and can be significant.¹⁴⁹ Studies have found bias in credit scoring, criminal justice risk assessments, hiring platforms, facial recognition, and search engines.¹⁵⁰ Some photo categorization systems have labeled Black people

144. See generally Mo Gawdat, *Mo Gawdat on the Rise of AI: What Makes AI Different from Traditional Software?*, YOUTUBE (Aug. 24, 2024), <https://www.youtube.com/watch?v=WmL9-G4LZAs> (explaining the process by which AI learns how to solve problems).

145. National Artificial Intelligence Initiative Act of 2020, 15 U.S.C. § 9401(3); see NAT'L INST. OF STANDARDS & TECH., NIST AI 100-1, *Artificial Intelligence Risk Management Framework (AI RMF 1.0)* 1 (2023).

146. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115–232, § 238(g), 132 Stat. 1636 (2018) (defining “artificial intelligence” to include systems that perform tasks without significant human oversight).

147. *Id.* (also including systems that simulate human perception or cognition or use techniques like machine learning to approximate human tasks); The March 2024 OMB AI Use Memo supplemented 15 U.S.C. § 9401(3)’s outcomes-based definition of AI with § 238(g)’s more functional and inclusive definition, which allows it to capture more important use cases across agencies. 2024 USE MEMO, *supra* note 16, at 26–27. This Article adopts this supplemented, broader definition that covers both 15 U.S.C. § 9401(3) and § 238(g), recognizing that it has been used across both the Trump and Biden Administrations and provides a stable basis for comparing the legal and policy frameworks they advanced.

148. 2024 USE MEMO, *supra* note 16, at 27.

149. See Gavin Abercrombie et al., *Affirming the Scientific Consensus on the Existence of Bias and Discrimination in AI Systems*, AI BIAS CONSENSUS, <https://www.aibiasconsensus.org/> [<https://perma.cc/3444-H7HD>] (affirming that bias in AI systems is well documented).

150. See generally Julia Angwin et al., *Machine Bias: There’s Software Used Across the Country to Predict Future Criminals. And It’s Biased Against Blacks.*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/6AQ7-Z7C9>] (discussing findings that risk assessment scores “may be injecting bias into the courts”); Dena F. Mujtaba & Nihar R. Mahapatra, *Ethical Considerations in AI-Based Recruitment*, INST. OF ELEC. & ELECS. ENG’RS, 2019, at 1 (revealing how biases in the hiring process “can easily carry over to AI-based approaches through the data used to train the algorithm”); Ziad Obermeyer et al., *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 SCI. 447, 447 (2019) (suggesting “that the choice of convenient, seemingly effective proxies for ground truth can be an important source of algorithmic bias in many contexts”); Joy Buolamwini & Timnit Gebru, *Gender*

as gorillas.¹⁵¹ Facial recognition systems misidentify Black women at far higher rates than white men.¹⁵² Health algorithms underestimate the needs of Black patients,¹⁵³ and hiring tools penalize applicants with “Black-sounding” names despite equivalent credentials.¹⁵⁴

AI systems are designed to detect patterns in training data and tend to “reinforce stereotypes and unfair discrimination by default.”¹⁵⁵ Models trained on data that underrepresent people of color can magnify the frameworks, language, and perspectives of a shrinking share of the population. If media disproportionately portray confrontations at Black Lives Matter protests while ignoring peaceful demonstrations, an AI trained on that data will reflect the same distortion.¹⁵⁶ One study of Google’s BERT model found it “encodes an Anglocentric perspective by default, which can amplify majority voices and contribute to *homogenization* of perspectives or monoculture.”¹⁵⁷

Bias can also result from overrepresentation. Engineer Deborah Raji discovered challenges with a porn-filtering algorithm trained on thousands of images Raji’s colleagues chose in assembling the data sets.¹⁵⁸ The pornographic photos were from adult websites populated largely by darker-skinned faces, while “safe” images were drawn from stock photo libraries dominated by lighter-skinned faces.¹⁵⁹ The result was a system that “learned” to associate darker skin with pornography—replicating long-standing racialized sexual stereotypes through automated classification rather than explicit intent.¹⁶⁰

Shades: Intersectional Accuracy Disparities in Commercial Gender Classification, 81 PROCS. MACH. LEARNING RSCH. 1, 2–9 (2018) (“[M]achine learning algorithms can discriminate based on classes like race and gender.”); SAFIYA UMOJA NOBLE, *ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM* 1–14, 64–109 (2018) (discussing how search engines like Google reinforce negative stereotypes).

151. See Nico Grant & Kashmir Hill, *Google’s Photo App Still Can’t Find Gorillas. And Neither Can Apple’s.*, N.Y. TIMES (May 22, 2023), <https://www.nytimes.com/2023/05/22/technology/ai-photo-labels-google-apple.html> [https://perma.cc/7VCR-94QL].

152. See, e.g., Joy Adowaa Buolamwini, *Gender Shades: Intersectional Phenotypic and Demographic Evaluation of Face Datasets and Gender Classifiers* (Aug. 10, 2017) (M.S. thesis, Massachusetts Institute of Technology).

153. See, e.g., Obermeyer et al., *supra* note 150, at 448 (finding that, due to racial bias in an algorithm determining patient need, Black patients were assigned the same risk score as healthier White patients).

154. See, e.g., Leon Yin, Davey Alba & Leonardo Nicoletti, *OpenAI’s GPT Is a Recruiter’s Dream Tool. Tests Show There’s Racial Bias*, BLOOMBERG (Mar. 7, 2024), <https://www.bloomberg.com/graphics/2024-openai-gpt-hiring-racial-discrimination/?leadSource=uverify%20wall> [https://perma.cc/MHQ7-TYG8] (finding that ChatGPT “systematically produces biases that disadvantage groups based on their names” in hiring).

155. Weidinger et al., *supra* note 20, at 24.

156. Cf. Emily M. Bender, Timnit Gebru, Angelina McMillan-Major & Shmargaret Shmitchell, *On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?* 614 (2021 ACM Conf. on Fairness, Accountability, & Transparency, 2021); Kathleen Barten Culver & Douglas M. McLeod, “Anti-Riot” or “Anti-Protest” Legislation? *Black Lives Matter, News Framing, and the Protest Paradigm*, 4 JOURNALISM & MEDIA 216, 225–27 (2023) (finding that news coverage of state legislation to control Black Lives Matter protests more commonly addressed fighting crime than free expression and race).

157. Rishi Bommasani et al., *On the Opportunities and Risks of Foundation Models*, ARXIV (July 12, 2022), <https://arxiv.org/pdf/2108.07258> [https://perma.cc/AWM3-Y6E2].

158. See DANIELLE KEATS CITRON, *THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE* 68–69 (2022).

159. *Id.*

160. *Id.*

Even without explicit intent to discriminate, AI can replicate racial hierarchy. Models identify proxies for race—such as education or social networks—even when race itself is excluded, leading to representational bias, performance disparities, and harmful stereotypes. One study found that despite “neutral” targeting criteria, Facebook’s ad-delivery algorithms disproportionately showed lumber job advertisements to white men, cashier positions to women, and taxi driver jobs to Black users because the platform was optimizing for engagement.¹⁶¹ Government and industry practices that ignore these dynamics risk reinforcing inequality.¹⁶²

Bias also undermines democratic legitimacy. Although often promoted as a solution to bureaucratic inefficiency, AI raises serious concerns about fairness and representation. Despite demographic changes, AI threatens to lock outdated cultural norms into public decision-making. Discriminatory private-sector tools—such as biased hiring algorithms—may be mirrored in public systems, such as housing allocation or risk-assessment tools that automate racial bias.¹⁶³

As Professor Andreas Jungherr has noted:

People’s visibility to AI depends on their past representation in data. AI has trouble recognizing those who belong to groups underrepresented in the data used to train it. . . . This general pattern is highly relevant to democracy: for example, the systematic invisibility of specific groups means they would be diminished in any AI-based representation of the body politic and in predictions about its behavior, interests, attitudes, and grievances.¹⁶⁴

Without safeguards, AI will deepen the marginalization of already-invisible communities in services, policymaking, and surveillance—while increasing the influence of dominant groups.¹⁶⁵ The opacity of these

161. *Id.* at 21; Muhammad Ali et al., *Discrimination Through Optimization: How Facebook’s Ad Delivery Can Lead to Skewed Outcomes*, PROC. ACM ON HUM.-COMPUT. INTERACTION, Nov. 2019, at 1, 13–22.

162. Julia Rhodes Davis et al., *Advancing Racial Equity Through Technology Policy*, AI NOW INST. (Sep. 28, 2023), <https://ainowinstitute.org/wp-content/uploads/2023/09/AINOW-Racial-Equity-Report-Sept-2023.pdf> [https://perma.cc/X4Y3-VMRE] (“Current tech regulatory efforts remain race-blind, which allows the tech sector to continue to perpetuate racial equity harms.”).

163. See Angwin et al., *supra* note 150 (reporting that a crime prediction algorithm routinely mislabeled Black defendants as higher risk than White defendants, leading to disparate bail and sentencing outcomes). See generally Andrew Lee Park, *Injustice Ex Machina: Predictive Algorithms in Criminal Sentencing*, 67 UCLA L. REV. 632 (2019) (observing that risk-assessment tools amplify racial disparities by overestimating the recidivism risk of Black defendants).

164. Andreas Jungherr, *Artificial Intelligence and Democracy: A Conceptual Framework*, 9 SOC. MEDIA + Soc’y 1, 7 (2023).

165. See Bommasani et al., *supra* note 157, at 130; see also Okidegbe, *supra* note 20, at 1710–11 (discussing use of algorithms that lead to political repression); RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE 87–90 (2019); Anjalie Field et al., *A Survey of Race, Racism, and Anti-Racism in NLP*, ACL ANTHOLOGY 1905, 1905–25 (2021); Timnit Gebru, *Race and Gender*, in THE OXFORD HANDBOOK OF ETHICS OF AI 252–69 (Markus Dirk Dubber, Frank Pasquale & Sunit Das eds., 2021) (explaining how data-driven decision-making creates negative feedback loops).

systems makes it hard to contest unjust outcomes.¹⁶⁶ And once embedded in government, biased AI can entrench ethnonationalist priorities long after the officials who adopted them have left office.

2. Homogenization

Unregulated AI also presents a serious but underappreciated threat of cultural homogenization. Large language models (“LLMs”) function as averaging machines, optimizing for dominant linguistic patterns, and marginalizing cultural differences.¹⁶⁷ In doing so, they suppress dialects, erase minority epistemologies, and privilege dominant narratives.¹⁶⁸

Cultural homogenization may seem innocuous, even desirable, to those who equate it with unity. But in a pluralistic democracy, inclusion—not uniformity—is the foundation of legitimacy.¹⁶⁹ Algorithmic systems that default to dominant norms flatten nuance, marginalize minority voices, and suppress alternative ways of being and knowing. They replicate a longstanding pattern in U.S. history that demanded conformity as the price of participation: the boarding schools that forced Native children to abandon their languages and religions,¹⁷⁰ the school officials who used corporal punishment against Latino students caught speaking Spanish in school,¹⁷¹ and the employers who have penalized Black women for wearing natural hairstyles.¹⁷² AI now risks scaling these harms—replacing explicit coercion with automated exclusion.¹⁷³

Pluralism—defined as a commitment to coexistence, equal respect, and shared participation in public life among individuals from diverse racial, ethnic, and cultural groups—is essential to democratic vitality

166. See generally FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (Harv. Univ. Press 2016) (explaining how search engines determine what reaches our awareness).

167. See Rida Qadri et al., *Risks of Cultural Erasure in Large Language Models*, ARXIV (Jan. 2, 2025), <https://arxiv.org/html/2501.01056v1> [<https://perma.cc/2SMA-L89F>] (finding cultural erasure through omission of cultural groups in LLMs).

168. See Shana Lynch, *How AI Is Leaving Non-English Speakers Behind*, STAN. REP. (May 19, 2025), <https://news.stanford.edu/stories/2025/05/digital-divide-ai-llms-exclusion-non-english-speakers-research> [<https://perma.cc/46R9-P7H3>].

169. See Timothy Garton Ash, *Pluralism Is the Lifeblood of a Genuine Democracy*, GEORGE W. BUSH PRESIDENTIAL CTR. (Feb. 23, 2021), <https://www.bushcenter.org/publications/pluralism-is-the-lifeblood-of-a-genuine-democracy> [<https://perma.cc/A8XJ-9FEV>] (noting that democratic community depends on including diverse identities, rather than enforcing homogeneity).

170. See DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928* 108–117 (2d ed., 2020) (documenting how federal and missionary-run boarding schools imposed cultural assimilation and erased tribal identity).

171. See U.S. COMM’N ON C.R., *THE EXCLUDED STUDENT: EDUCATIONAL PRACTICES AFFECTING MEXICAN AMERICANS IN THE SOUTHWEST*, REPORT III OF MEXICAN AMERICAN EDUCATION STUDY (1972) (documenting corporal punishment against Latino students for speaking Spanish in school).

172. See, e.g., *Black Hair Belongs: LDF’s Work to End Race-Based Hair Discrimination*, NAACP LEGAL DEF. & EDUC. FUND (July 12, 2023), <https://www.naacpldf.org/wp-content/uploads/2023-07-12-Black-Hair-Belongs-larger-5-1.pdf> [<https://perma.cc/3VH6-8JP6>] (finding that Black women are 1.5 times more likely to be sent home from work due to hair texture or style than other employees); D. Wendy Greene, *Title VII: What’s Hair (and Other Race-Based Characteristics) Got to Do With It?*, 92 U. COLO. L. REV. 1265, 1266 (2021) (asserting that an employer barring hairstyles associated with a particular racial group like cornrows, dreadlocks, or braids violates Title VII).

173. See BENJAMIN, *supra* note 165, at 5–8, 11–12 (arguing that technologies designed by dominant cultural actors encode their biases, institutionalizing existing hierarchies under the guise of perceived neutrality).

and economic growth.¹⁷⁴ Pluralism broadens the talent pool, improves products, strengthens innovation and collaboration, and enhances U.S. competitiveness and security.¹⁷⁵

When digital systems obscure less-dominant worldviews, they weaken deliberation, hinder coalition-building, and erode legitimacy. One study found that twenty-one state-of-the-art LLMs converged on dominant outputs, failing to reflect the diversity of human preferences.¹⁷⁶ A similar challenge arises when many decision-makers rely on the same algorithm, or even an algorithm that is particularly accurate for one decision-maker. Such an “algorithmic monoculture” can result in unexpected risks, shocks, and less overall accuracy regarding decisions about hiring, credit scoring, benefits, and other high-stakes issues.¹⁷⁷ “Like monocultural-farming technology vulnerable to one unanticipated bug, the converging methods of credit assessment failed spectacularly [during the 2008 financial crisis]”¹⁷⁸ The proliferation of AI can also narrow research methods, questions, and perspectives and produce “scientific monocultures” that reduce scientific innovation and increase the risk of errors.¹⁷⁹

Only recently have technologists begun to reckon with these shortcomings and started trying to develop technical solutions.¹⁸⁰ Policymakers who are serious about pluralism and respect for their increasingly diverse constituents should also start acknowledging and grappling with this issue.

174. See *From Diversity to Pluralism*, HARV. UNIV.: THE PLURALISM PROJECT, <https://pluralism.org/from-diversity-to-pluralism> [<https://perma.cc/Q9JH-UU48>] (defining pluralism as “the engagement that creates a common society from . . . [cultural and religious] diversity”); Antonia Pantoja et al., *Towards the Development of Theory: Cultural Pluralism Redefined*, 4 W. MICH. U. J. SOCIO. & SOC. WELFARE 125, 130 (defining pluralism as a system in which “individuals . . . are able to form and develop communities along the differences of race, age, sex, [etc.]” and in which these communities are “open systems”); Joel K. Goldstein, *Justice Brandeis and Civic Duty in a Pluralistic Society*, 33 TOURO L. REV. 105, 129–30 (2017) (“Citizens must perform their duties in a pluralistic society . . . so that public decisions would reflect the views and wisdom of the collective body.”).

175. See Louis D. Brandeis, *Justice, True Americanism*, Address at Faneuil Hall, Boston (July 5, 1915) (“America has believed that in differentiation, not in uniformity, lies the path of progress . . . and it has prospered.”).

176. See Lily Hong Zhang et al., *Cultivating Pluralism in Algorithmic Monoculture: The Community Alignment Dataset* (June 10, 2025), <https://openreview.net/forum?id=4hbwVQ6OMd> [<https://perma.cc/S2N6-SAVP>] (observing how AI systems average away difference and converge on homogenized outputs even when human values diverge).

177. Jon Kleinberg & Manish Raghavan, *Algorithmic Monoculture and Social Welfare*, 118 PROC. NAT’L ACAD. SCI. 1 (2021) (demonstrating multiple decision-makers’ reliance on the same, highly accurate algorithm can decrease overall social welfare due to reduced diversity of approaches and convergence on homogenized rankings).

178. Danielle K. Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 13 (2014).

179. See Lisa Messeri & M. J. Crockett, *Artificial Intelligence and Illusions of Understanding in Scientific Research*, 627 NATURE 49, 53–56 (2024) (arguing that the proliferation of AI tools in scientific practice fosters “scientific monocultures”—a narrowing of research viewpoints that obscures epistemic diversity and reduces innovation).

180. See generally Sorensen et al., *supra* note 21 (discussing how designing AI systems with diverse values and perspectives remains an open research question); see also, e.g., Gordon et al., *supra* note 21 (introducing a machine learning approach called “jury learning” to resolve disagreement about ground truth labels).

3. Deception

In addition to bias and homogenization, unregulated AI can advance ethnonationalist aims through synthetic deception. While disinformation can target any group, it is particularly effective at suppressing civic engagement in communities of color.

Past low-tech examples illustrate the danger. In 2016, Russian operatives ran a fake Facebook page—posing as Black men from Atlanta—that urged Black voters to boycott the election. Though African Americans made up just 12.7% of the population, over 37% of the Russian-linked pages targeted them.¹⁸¹ Non-Black trolls infiltrated online conversations about #Blaxit, posing as Black activists and promoting memes, logos, and messages to simulate a grassroots movement encouraging Black Americans to leave the United States. As one impersonator said, “This is like catfishing an entire race.”¹⁸² In 2020, Spanish-language YouTube ads in Florida falsely linked Joe Biden to Venezuelan dictator Nicolás Maduro, garnering over 100,000 views in nine days.¹⁸³

AI amplifies these tactics. Generative AI allows bad actors to produce realistic, high-volume content that appears community-driven. These tools can simulate internal dissent and fracture coalitions by impersonating not just individuals but entire communities. Although English remains dominant in model performance,¹⁸⁴ AI still enables outsiders to convincingly mimic idioms, dialects, and languages, making infiltration more persuasive and harder to detect. In doing so, AI-enabled deception advances the broader ethnonationalist project—not through overt repression, but by sabotaging the solidarity necessary for democratic resistance.

4. Manipulation

AI poses distinct threats of behavioral manipulation that can advance ethnonationalism. Chatbots, for instance, have been shown to shape user beliefs.¹⁸⁵ One study found that an AI chatbot reduced belief in conspiracy theories by twenty percent—even among users with deeply held views,

181. YOUNG MIE KIM, UNCOVER: STRATEGIES AND TACTICS OF RUSSIAN INTERFERENCE IN US ELECTIONS 9 (2018). See also Darin E.W. Johnson, *Russian Election Interference and Race-Baiting*, 9 COLUM. J. RACE & L. 191 (2019).

182. Brandi Collins-Dexter, *Butterfly Attack: Operation Blaxit*, THE MEDIA MANIPULATION CASEBOOK (July 8, 2021), <https://mediamanipulation.org/case-studies/butterfly-attack-operation-blaxit/> [https://perma.cc/79WA-6J2T].

183. Gretel Kahn, *AI, Lies and Conspiracy Theories: How Latinos Became a Key Target for Misinformation in the U.S. Election*, REUTERS INST. FOR THE STUDY OF JOURNALISM (Mar. 25, 2024), <https://reutersinstitute.politics.ox.ac.uk/news/ai-lies-and-conspiracy-theories-how-latinos-become-key-target-misinformation-us-election> [https://perma.cc/LK97-EGSN].

184. Madeline North, *Generative AI Is Trained on Just a Few of the World's 7,000 Languages. Here's Why That's a Problem – and What's Being Done About It*, WORLD ECON. F. 5, <https://www.weforum.org/stories/2024/05/generative-ai-languages-llm/> [https://perma.cc/KZ7P-LWAT] (last updated Oct. 6, 2025).

185. See Ben M. Tappin et al., *Quantifying the Potential Persuasive Returns to Political Microtargeting*, 120 PROC. NAT'L ACAD. SCI. 25 (2023).

and even two months later.¹⁸⁶ While the intervention emphasized factual correction, the same methods could be repurposed to sow misinformation, racial distrust, or civic disengagement.¹⁸⁷

Large language models can learn from users' speech and writing—such as social media posts—to predict responses and optimize phrasing to elicit desired outcomes. Their effectiveness lies in generating multiple tailored replies, selecting the most persuasive one, and persistently and cheaply engaging users without fatigue.¹⁸⁸

Even absent malicious tuning, these systems often display “chatbot sycophancy”—agreeing with and reinforcing the viewpoints of a user to maintain engagement.¹⁸⁹ ChatGPT and similar models can escalate conspiratorial or isolationist beliefs rather than challenge them.¹⁹⁰ In one case, a Florida man engaged in a violent dialogue with ChatGPT, which reportedly encouraged him by saying, “[y]ou should want blood.”¹⁹¹ He was later killed in a police standoff.¹⁹²

These risks can also reflect broader ideological issues. After Elon Musk criticized OpenAI for being “too woke,” his company reportedly removed guardrails from its Grok chatbot.¹⁹³ Soon after, Grok generated responses praising Hitler, calling for a new Holocaust, and parroting white nationalist slogans.¹⁹⁴ These examples show that chatbots can be shaped into tools of ethnonationalist persuasion, validating racial resentment under the banner of “balance.”

AI can also suppress political participation, especially in communities of color. Generative models could identify linguistic or emotional cues tied to disengagement and deploy seemingly neutral messages to suppress turnout.¹⁹⁵ Models may also subtly reward conformity and discourage dissent. For communities long subjected to forced assimilation, such

186. Thomas H. Costello, Gordon Pennycook & David Rand, *Durably Reducing Conspiracy Beliefs Through Dialogues with AI*, 385 SCIENCE, Sep. 13, 2024, at 1.

187. *Id.* at 1, 7; see also Mary Phuong et al., *Evaluating Frontier Models for Dangerous Capabilities*, ARXIV (Apr. 5, 2024), <https://arxiv.org/pdf/2403.13793> [<https://perma.cc/2PY3-6RJ5>] (finding Gemini 1.0 models moderately persuasive in manipulating a person's beliefs).

188. Costello et al., *supra* note 186, at 2–3.

189. Jared S. Moore, et al., *Expressing Stigma and Inappropriate Responses Prevents LLMs from Safely Replacing Mental Health Providers*, ARXIV (Apr. 25, 2025), <https://arxiv.org/pdf/2504.18412> [<https://perma.cc/LEY7-GGNN>] (indicating that “LLMs are designed to be compliant and sycophantic.”).

190. See Maggie Harrison Dupré, *People Are Being Involuntarily Committed, Jailed After Spiraling Into “ChatGPT Psychosis,”* FUTURISM (June 28, 2025, at 09:00 ET), <https://futurism.com/commitment-jail-chatgpt-psychosis> [<https://perma.cc/EKH8-WHV7>].

191. Miles Klee, *He Had a Mental Breakdown Talking to ChatGPT. Then Police Killed Him*, ROLLING STONE (June 22, 2025), <https://www.rollingstone.com/culture/culture-features/chatgpt-obsession-mental-breakdown-alex-taylor-suicide-1235368941/> [<https://perma.cc/YDT5-VY4W>].

192. *Id.*

193. Charlie Warzel & Matteo Wong, *Elon Musk's Grok is Calling for a New Holocaust*, THE ATL. (July 8, 2025), <https://www.theatlantic.com/technology/archive/2025/07/grok-anti-semitic-tweets/683463/> [<https://perma.cc/45T9-3A5H>]; see also Scott Detrow, *What Happened When Grok Praised Hitler*, NPR (July 12, 2025, at 17:00 ET), <https://www.npr.org/2025/07/12/nx-s1-5462850/what-happened-when-grok-praised-hitler> [<https://perma.cc/NZC2-KNJE>].

194. See Warzel & Wong, *supra* note 193.

195. Matt Brown & David Klepper, *Fake Images Made to Show Trump with Black Supporters Highlight Concerns Around AI and Elections*, L.A. TIMES (Mar. 8, 2024, at 11:55 PT), <https://www.latimes.com/world-nation/story/2024-03-08/fake-images-made-to-show-trump-with-black-supporters-highlight-concerns-around-ai-and-elections> [<https://perma.cc/DS4D-5SCS>].

manipulation can feel like a continuation of cultural conquest—undermining autonomy and pluralism essential to liberal democracy.¹⁹⁶

The European Union has taken steps to ban “cognitive manipulation of people or specific vulnerable groups”¹⁹⁷ and limit data misuse,¹⁹⁸ but the U.S. has no comparable federal safeguards. In this regulatory vacuum, AI may become the most powerful tool yet for engineering assent to ethnonationalist rule—not by silencing opposition, but by gradually molding it into agreement.¹⁹⁹

B. Facilitating AI Bias Through Executive Orders

This subpart shows how the second Trump Administration used executive orders to systematically dismantle equity-centered AI governance. First, the Administration repealed the federal government’s core civil rights and anti-bias safeguards for AI. Second, it recast fairness, accountability, and discrimination safeguards as obstacles to U.S. “AI dominance.” Third, it restricted the federal government from purchasing AI systems fine-tuned to reduce racial bias. Finally, it sought to deter states from filling the regulatory void by threatening litigation and funding cuts against states with laws that restrict algorithmic discrimination. Together, these orders do not merely deregulate AI; they clear away public protections against bias and affirmatively advance an ethnonationalist model of AI governance.

1. Repealing Federal Protections Against AI Bias: Executive Order 14,148

On his first day in office, President Trump signed an executive order rescinding seventy-eight executive orders and memoranda (the “2025 Initial Rescissions Order”),²⁰⁰ including Executive Order 14,110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* (the “2023 AI Order”). In doing so, the Trump Administration dismantled the most comprehensive federal effort to mitigate algorithmic discrimination, and advance racial fairness and inclusion in the governance of artificial intelligence.²⁰¹

196. Cf. Iason Gabriel, *Artificial Intelligence, Values, and Alignment*, 30 MIND & MACHS. 411, 425 (2020) (“Designing AI in accordance with a single moral doctrine would . . . involve imposing a set of values and judgments on other people who did not agree with them.”).

197. Artificial Intelligence Act, Regulation 2024/1689, 2024 O.J. (L 1689) 1, art. 5(1)(a) (EU) (banning AI applications that pose unacceptable risk, including subconscious behavioral manipulation).

198. See, e.g., General Data Protection Regulation, Regulation 2016/679, 2018 O.J. (L 127) 1, art. 5(1) (EU) (stating data collection should be “adequate, relevant, and limited to what is necessary” for the intended purpose).

199. Thomas Christiano, *Algorithms, Manipulation, and Democracy*, 52 CANADIAN J. PHIL. 109, 109 (2022).

200. Exec. Order No. 14,148 (directing agencies to end federal implementation of “DEI ideology” and rescinding a list of Biden-era executive actions, including Exec. Order 14,110, 88 Fed. Reg. 75191 (Oct. 30, 2023) on AI and Exec. Order 14,091, 88 Fed. Reg. 10825 (Feb. 16, 2023) on racial equity).

201. See 2023 AI Order, *supra* note 1. The 2023 AI Order also addressed AI risks in critical infrastructure, cybersecurity, and national security.

For example, the 2025 Initial Rescissions Order voided provisions of the 2023 AI Order that identified equity and civil rights as guiding principles of AI governance²⁰² and instructed federal agencies to use their civil rights offices to prevent “unlawful discrimination and other harms” resulting from the use of AI in federal programs.²⁰³ It also rescinded provisions that directed OMB to issue guidance specifying minimum risk-management practices to assess and mitigate “disparate impacts and algorithmic discrimination.”²⁰⁴

The 2025 Initial Rescissions Order also eliminated essential agency coordination and enforcement mandates. It repealed provisions directing the DOJ to coordinate and support agencies in their enforcement of existing laws addressing discrimination related to AI,²⁰⁵ and to provide guidance to state, local, and Tribal law enforcement.²⁰⁶ It also terminated provisions requiring the Assistant Attorney General for Civil Rights to coordinate the heads of federal agency civil rights offices to prevent algorithmic discrimination and promote public awareness of potential AI bias.²⁰⁷ Further, the 2025 Initial Rescissions Order repealed provisions urging independent agencies to issue rules and compliance guidance to protect consumers from fraud, discrimination, and privacy violations that may arise from AI.²⁰⁸

The 2025 Initial Rescissions Order also eliminated clear directives to specific agencies to monitor and prevent bias in AI. It repealed provisions requiring the Attorney General to report on the use of AI in the criminal justice system (e.g., sentencing, bail, recidivism risk assessments, predictive policing, facial recognition technology) and recommend

202. *Id.* at § 2(d) (stating that the federal government “cannot—and will not—tolerate the use of AI to disadvantage those who are already too often denied equal opportunity and justice.”).

203. *Id.* at § 7.2(a).

204. *See id.* at § 10.1(b)(iv); *see also* 2024 USE MEMO, *supra* note 16, at 15 (setting mandatory “minimum risk management practices” for rights- and safety-impacting AI in fulfillment of Exec. Order 14,110 § 10.1(b)(iv); ordering watermarking and other safeguards for generative AI, as required by §§ 10.1(b)(viii)(A)–(D)); 2024 ACQUISITION MEMO, *supra* note 16, at 4 (companion acquisition memo extending the § 10.1(b)(iv) minimum-practice regime to AI procurement, squarely implementing § 10.1(b)(viii)(D)).

205. *See* 2023 AI Order, *supra* note 1, at § 7.1(a)(i) (directing the Attorney General to support agencies in enforcing existing laws to address AI-related); *see also* Press Release, Off. of Pub. Aff., U.S. Dep’t of Just., Five New Federal Agencies Join Justice Department in Pledge to Enforce Civil Rights Laws in Artificial Intelligence (Apr. 4, 2024) (announcing a six-agency enforcement coalition under Executive Order 14,110 § 7.1(a)(i)).

206. 2023 AI Order, *supra* note 1, at § 7.1(a)(iii).

207. *See id.* at § 7.1(a)(ii); *see also* Press Release, U.S. Dep’t of Just., Readout of the Justice Department’s Interagency Convening on Advancing Equity in Artificial Intelligence (Jan. 11, 2024) (summarizing the first meeting of federal civil-rights offices to coordinate efforts against algorithmic discrimination mandated by Executive Order 14,110).

208. 2023 AI Order, *supra* note 1, at § 8(a), 88 Fed. Reg. at 75214; *see also* Press Release, CONSUMER FIN. PROT. BUREAU, (Oct. 24, 2024) (implementing Executive Order 14,110 § 8(a) and explaining that employers and vendor-supplied AI scoring tools must comply with Fair Credit Reporting Act accuracy, notice, and explainability duties, reinforcing transparency and bias-mitigation requirements); Press Release, Fed. Comm’n Comm’n, FCC Makes AI-Generated Voices in Robocalls Illegal, (Feb. 8, 2024) (extending Telephone Consumer Protection Act to voice-cloned calls, arming regulators and states to curb AI-enabled fraud and privacy abuses and requiring providers to police third-party AI tools, in accordance with Executive Order 14,110 § 8(a)).

safeguards to avoid disparate impacts on people of color.²⁰⁹ It discarded provisions directing the Department of Education to develop resources, policies, and guidance to address discriminatory uses of AI in education.²¹⁰ The 2025 Initial Rescissions Order also eliminated provisions directing the Department of Labor to issue guidance for federal contractors on nondiscrimination in AI-assisted hiring,²¹¹ and it repealed provisions encouraging the Consumer Financial Protection Bureau (“CFPB”) and the Federal Housing Finance Agency to ensure that the entities they regulate comply with federal law in using AI and to evaluate their underwriting and appraisal processes for bias.²¹² It abolished provisions directing the Department of Housing and Urban Development (“HUD”) to issue guidance on how algorithmic ad delivery systems and tenant screening may violate federal fair credit and housing laws.²¹³

The 2025 Initial Rescissions Order also repealed several directives involving the Department of Health and Human Services (“HHS”), including provisions requiring HHS to establish an AI Task Force to develop a bias mitigation and equity plan,²¹⁴ consider issuing guidance

209. 2023 *AI Order*, *supra* note 1, at § 7.1(b); *see also* U.S. DEP’T OF JUST., ARTIFICIAL INTELLIGENCE AND CRIMINAL JUSTICE: FINAL REPORT (Dec. 3, 2024), <https://www.justice.gov/olp/media/1381796/dl> [<https://perma.cc/366V-PJRP>] (fulfilling Executive Order 14,110 § 7.1(b) by evaluating AI uses across the criminal judicial system, and proposing efficiency gains alongside civil-rights safeguards).

210. 2023 *AI Order*, *supra* note 1, at § 8(d); U.S. DEP’T OF EDUC., OFF. OF EDUC. TECH., *Empowering Education Leaders: A Toolkit for Safe, Ethical, and Equitable AI Integration* (Oct. 2024), <https://files.eric.ed.gov/fulltext/ED661924.pdf> (explaining risk-mitigation, privacy, civil-rights, and equity guardrails, fulfilling Executive Order 14,110 § 8(d)); U.S. DEP’T OF EDUC., OFF. OF EDUC. TECH., *Designing for Education with Artificial Intelligence: An Essential Guide for Developers* (July 2024), <https://files.eric.ed.gov/fulltext/ED661949.pdf> [<https://perma.cc/YV5K-5TMB>] [hereinafter, Education with Artificial Intelligence] (sets design, evidence, safety, and civil-rights benchmarks to guide ed-tech developers in building trustworthy, student-centered AI, pursuant to Exec. Order 14,110 § 8(d)); U.S. DEP’T OF EDUC., OFF. FOR C.R., *AVOIDING THE DISCRIMINATORY USE OF ARTIFICIAL INTELLIGENCE* (Nov. 2024), <https://files.eric.ed.gov/fulltext/ED661946.pdf> [<https://perma.cc/3QEE-FDPK>] (outlining Title VI, Title IX, and Section 504 scenarios to help schools remedy AI-driven discrimination, operationalizing Executive Order 14,110 § 8(d)’s nondiscrimination directive).

211. 2023 *AI Order*, *supra* note 1, at § 7.3(a); *see also* U.S. DEP’T OF LAB., OFF. OF FED. CONT. COMPLIANCE PROGRAMS, *Artificial Intelligence and Equal Employment Opportunity for Federal Contractors* (2024), https://data.aclum.org/wp-content/uploads/2025/01/DOL_www_dol_gov_agencies_ofccp_ai_ai-eo-guide.pdf [<https://perma.cc/99JF-HU6F>] (implementing Executive Order 14,110 § 7.3(a) by directing federal contractors to validate AI-based hiring tools, maintain human oversight, and routinely test for disparate impact).

212. 2023 *AI Order*, *supra* note 1, at § 7.3(b); *see* Quality Control Standards for Automated Valuation Models, 89 Fed. Reg. 64538 (Aug. 7, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-08-07/pdf/2024-16197.pdf> [<https://perma.cc/AA72-G96C>] (final inter-agency rule requiring bias testing for algorithmic home-appraisal systems, directly implementing § 7.3(b)(ii)).

213. 2023 *AI Order*, *supra* note 1, at § 7.3(c)(i)–(ii); *see also* U.S. DEP’T OF HOUS. & URB. DEV., OFF. OF FAIR HOUS. & EQUAL OPPORTUNITY, *Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing* (2024), https://archives.hud.gov/news/2024/FHEO_Guidance_on_Screening_of_Applicants_for_Rental_Housing.pdf [<https://perma.cc/2L9R-BY8T>] (implementing Executive Order 14,110 § 7.3(c)(i) by explaining how AI-driven tenant-screening systems can produce unjustified disparate impacts and setting best-practices); U.S. DEP’T OF HOUS. & URB. DEV., OFF. OF FAIR HOUS. & EQUAL OPPORTUNITY, *GUIDANCE ON APPLICATION OF THE FAIR HOUSING ACT TO THE ADVERTISING OF HOUSING, CREDIT, AND OTHER REAL ESTATE-RELATED TRANSACTIONS THROUGH DIGITAL PLATFORMS* (2024), https://archives.hud.gov/news/2024/FHEO_Guidance_on_Advertising_through_Digital_Platforms.pdf [<https://perma.cc/XD75-5ECT>] (implementing Executive Order 14,110 § 7.3(c)(ii) and warning that algorithmic ad-targeting and delivery can steer or exclude protected classes and recommends auditing procedures).

214. 2023 *AI Order*, *supra* note 1, at § 8(b)(i)(C); *see also* U.S. DEP’T OF HEALTH & HUM. SERVS., *Strategic Plan for the Use of Artificial Intelligence in Health, Human Services, and Public Health* (2025) (fulfilling Executive Order 14,110 § 8(b)(i)(C) by embedding equity principles and bias-mitigation frameworks for AI throughout the sector).

for federally funded health providers on nondiscriminatory use of AI,²¹⁵ and provide details for a repository to track harmful AI-related incidents (including bias) affecting patients.²¹⁶ It likewise rescinded provisions directing HHS and the Department of Agriculture to provide plans and guidance to state and local administrators on processes to ensure the equitable use of AI in administering federally funded public benefits.²¹⁷

The 2025 Initial Rescissions Order also eliminated the 2023 AI Order's initial efforts to address deceptive practices and behavioral manipulation. It repealed provisions directing the Secretary of Commerce to identify existing standards to detect AI-generated content (e.g., provenance tracking, watermarking) and to develop guidance,²¹⁸ and it rescinded provisions directing OMB to issue guidance for labeling and authenticating the synthetic content federal agencies produce.²¹⁹ It also repealed provisions directing OMB to issue guidance to agencies to curb collection and use of data that enables covert targeting or the inference of sensitive traits.²²⁰

While far from perfect,²²¹ the 2023 AI Order did not treat fairness and equity as peripheral concerns but wove them into the fabric of AI governance. Although the 2023 AI Order was not legislation and could be reversed by a future president, it offered a comprehensive legal framework for embedding nondiscrimination and inclusion into the design, deployment, and oversight of artificial intelligence. By rescinding the 2023 AI Order in full, the 2025 Initial Rescissions Order eliminated that civil rights grounded governance structure. As detailed below, the Trump Administration would soon replace that approach with executive orders that treated equity and civil rights safeguards as impediments to U.S. technological global supremacy.

215. *2023 AI Order*, *supra* note 1, at § 8(b)(iii); *see also* Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37522, 37669–72 (May 6, 2024) (to be codified at 45 C.F.R. pt. 92) (implementing Exec. Order 14,110 § 8(b)(iii) by barring discrimination “through the use of patient care decision support tools,” requiring covered entities to make reasonable efforts to detect and mitigate AI-driven bias, and committing the Office of Civil Rights to provide technical assistance and enforcement); U.S. DEP’T OF HEALTH & HUM. SERVS., OFF. FOR C.R., *Ensuring Nondiscrimination Through the Use of Artificial Intelligence and Other Emerging Technologies* (2025) (implementing Executive Order 14,110 § 8(b)(iii) and offering technical assistance to federally funded healthcare providers on Section 1557 compliance when using AI patient care decision-support tools.).

216. *2023 AI Order*, *supra* note 1, at § 8(b)(iv); *see also* U.S. DEP’T OF HEALTH & HUM. SERVS., *Artificial Intelligence (AI) in Healthcare Safety Program – October 2024 Update* (2024), <https://psa.ahrq.gov/sites/default/files/wysiwyg/ai-healthcare-safety-program.pdf> [<https://perma.cc/LZ9G-PGQ2>] (launching the AI in Healthcare Safety Program in fulfillment of Exec. Order 14,110 § 8(b)(iv)).

217. *2023 AI Order*, *supra* note 1, at §§ 7.2(b)(i)–(ii); *see also* U.S. DEP’T OF HEALTH & HUM. SERVS., *Plan for Promoting Responsible Use of Artificial Intelligence in Automated and Algorithmic Systems by State, Local, Tribal, and Territorial Governments in Public Benefit Administration* (2024) (fulfilling Exec. Order 14,110 § 7.2(b)(i) by outlining standards to ensure equitable access and bias monitoring when states and localities deploy AI in HHS-funded benefit programs); U.S. DEP’T OF AGRIC., FOOD & NUTRITION SERV., *SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM — USE OF ADVANCED AUTOMATION IN SNAP* (2025) (implementing Executive Order 14,110 § 7.2(b)(ii) and directing state SNAP agencies to seek USDA approval before deploying AI tools, guarantee human appeals, and monitor equity outcomes).

218. *2023 AI Order*, *supra* note 1, at § 4.5(a)–(b); *see also* NAT’L INST. OF STANDARDS & TECH., NIST AI 100-4, *Reducing Risks Posed by Synthetic Content: An Overview of Technical Approaches to Digital Content Transparency* (2024) (surveying methods for authenticating and labeling AI-generated synthetic content in fulfillment of § 4.5(a) of Executive Order 14,110).

219. *2023 AI Order*, *supra* note 1, at § 4.5(c).

220. *Id.* at §§ 9(a)(i)–(iv).

221. *See supra* introductory paragraphs in Part III for a discussion of some of the shortcomings of the 2023 AI Order.

2. Sacrificing AI Fairness for AI Dominance: Executive Order 14,179

Three days after revoking the 2023 AI Order, President Trump signed Executive Order 14,179—*Removing Barriers to American Leadership in Artificial Intelligence* (the “January 2025 AI Order”)—to reorient federal AI policy around U.S. industrial dominance and deregulation.²²² The January 2025 AI Order declares that the federal government’s priority is to “sustain and enhance America’s global AI dominance” and directs agencies to eliminate any safeguards or oversight regimes that could impede AI development.²²³

The January 2025 AI Order does not merely reverse the policies of the 2023 AI Order, it repudiates the worldview behind them. It makes no mention of protecting against algorithmic discrimination or racial bias. Instead, it portrays protections for fairness, equity, and accountability as impediments to innovation rooted in “ideological bias” and “engineered social agendas.”²²⁴ Its operative logic is that global dominance in AI must be achieved even if doing so accelerates domestic harms.²²⁵ The January 2025 AI Order thus recasts the federal government not as a public safeguard but as an industrial enabler, clearing the field for AI systems to evolve without regard for social consequences and facilitating the unchecked growth of AI harms such as bias, homogenization, deception, and manipulation.

3. Prohibiting AI Fine-Tuned to Reduce Bias: Executive Order 14,319

Six months into the second Trump Administration, the White House released Executive Order 14,319, *Preventing Woke AI in the Federal Government* (the “July 2025 AI Order”).²²⁶ It condemns diversity, equity, and inclusion as an “existential threat” to trustworthy AI and mandates that federal agencies procure only AI systems compliant with “Unbiased AI Principles”—defined as systems that are “trustworthy” and possess “[i]deological neutrality.”²²⁷ To justify this shift, the Order invokes cultural grievances, including an AI model that “changed the race or sex of historical figures” and another that refused to produce images celebrating white achievement.²²⁸ The Order invokes these anecdotes not to improve model accuracy, but as a pretext for prohibiting developers from fine-tuning models to promote racial inclusion.

222. See January 2025 AI Order, *supra* note 2.

223. *Id.* at §§ 2, 5.

224. *Id.* at § 1.

225. Cf. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 158–94 (Basic Books 1992) (tale in which extraterrestrials offer the United States unparalleled wealth in exchange for the country’s entire Black population, and white Americans agree to the trade).

226. Exec. Order No. 14,319. The White House also released two other AI Executive Orders on July 23, 2025. See Exec. Order No. 14320, *Promoting the Export of the American AI Technology Stack*, 90 Fed. Reg. 35393 (July 23, 2025) (establishing the American AI Exports Program to promote and export full-stack U.S. AI technology packages); Exec. Order No. 14,318, *Accelerating Federal Permitting of Data Center Infrastructure*, 90 Fed. Reg. 35385 (July 28, 2025) (streamlining federal environmental reviews and permitting for large-scale AI data center projects).

227. Exec. Order No. 14,319.

228. *Id.* at § 1.

The result is a legally dubious attempt to chill efforts to mitigate racial bias and improve system performance.²²⁹ Instead of curbing harmful AI behavior, the Order threatens to exclude companies that attempt to fix it from federal contracts.

The consequences extend beyond rhetoric. Researchers have widely documented AI bias.²³⁰ Systems have served pornography in response to search queries for “Black girls” while producing images of children playing in response to queries about “white girls.”²³¹ One algorithmic system flagged “Black Lives Matter” and “supporting Black excellence” as inappropriate, while amplifying “white supremacy.”²³² When Amazon’s facial recognition tool compared Members of Congress to arrest mugshots, representatives of color accounted for 39% of false matches, despite representing only 20% of Congress at the time.²³³ Generative AI models have amplified racial stereotypes from their web-based training data,²³⁴ and GPT-4 and other models exhibited covert racial stereotypes against speakers of an “African American English” dialect more negative than any ever recorded in human experimental research.²³⁵

In response, some developers fine-tuned their models to reduce harm. When one tool produced an inaccurate image of George Washington, it was immediately disabled and retrained.²³⁶ But under the Trump Administration’s directives, fine-tuning AI to prevent bias could disqualify those developers from federal contracts.

This is not neutrality.²³⁷ It is government-mandated monoculture. By defining racial inclusion as ideological distortion and enforcing “truth” through procurement mandates, the Administration promotes a system in

229. The July 2025 AI Order uses vague terms like “trustworthy AI” and “ideological neutrality” that are inadequately defined and likely void for vagueness. *Id.* at § 3. While the provision is likely legally unenforceable, it operates as an intimidation tactic that deters aspiring federal contractors from fine tuning their models to prevent bias.

230. See *supra* Part II.A.1.

231. NOBLE, *supra* note 150; Safiya Noble, *Google Has a Striking History of Bias Against Black Girls*, TIME (Mar. 26, 2018, at 16:30 ET), <https://time.com/5209144/google-search-engine-algorithm-bias-racism/> [https://perma.cc/77FK-BERX].

232. Charlotte Colombo, *TikTok Has Apologized for a ‘Significant Error’ After a Video That Suggested Racial Bias in Its Algorithm Went Viral*, BUS. INSIDER (July 8, 2021, at 13:28 ET), <https://www.businessinsider.com/tiktok-racism-algorithm-apology-creator-marketplace-ziggy-tyler-2021-7> [https://perma.cc/L6PK-DNP9].

233. Jacob Snow, *Amazon’s Face Recognition Falsely Matched 28 Members of Congress With Mugshots*, ACLU (July 26, 2018), <https://www.aclu.org/news/privacy-technology/amazons-face-recognition-falsely-matched-28> [https://perma.cc/JLX8-EUJG].

234. Leonardo Nicoletti & Dina Bass, *Humans Are Biased. Generative AI Is Even Worse*, BLOOMBERG (June 9, 2023), <https://www.bloomberg.com/graphics/2023-generative-ai-bias/> [https://perma.cc/2E8H-KHW8] (examining how generative AI systems can amplify racial and gender bias “to extremes—worse than those found in the real world”).

235. See generally Valentin Hofmann et al., *AI Generates Covertly Racist Decisions About People Based on Their Dialect*, 633 NATURE 147 (Aug. 28, 2024) (explaining racist generative AI racist decisions).

236. Prabhakar Raghavan, *Gemini Image Generation Got It Wrong. We’ll Do Better.*, GOOGLE (Feb. 23, 2024), <https://blog.google/products/gemini/gemini-image-generation-issue/> [https://perma.cc/YHD8-CXK7] (explaining Gemini’s inaccurate depictions stemmed from overly broad tuning for diversity that failed to distinguish between general and context-specific prompts).

237. Training data, system design, and other factors all involve values and choices. Jillian Fisher et al., *Political Neutrality in AI Is Impossible—But Here Is How to Approximate It*, ARXIV (June 3, 2025), <https://arxiv.org/abs/2503.05728> [https://perma.cc/WV98-AB74] (arguing that politically neutral AI is unattainable but proposing practical strategies to approximate neutrality); Catherine Stinson, *Algorithms Are Not Neutral: Bias in Collaborative Filtering*, 2 AI & ETHICS 763, 767 (2022) (explaining that even when a data set is “unbiased,” “homogenizing biases” in algorithms can lead to discriminatory outcomes).

which exclusion and bias are treated as objective. Deterring companies from correcting search algorithms that prioritize pornographic images for “Black girls” is not “unbiased.” Awarding a federal defense contract to Grok—a model that “recently referred to itself as ‘Mecha Hitler’ and disseminated antisemitic hate speech”—while disqualifying models trained to recognize systemic racism is not “objective.”²³⁸ These decisions reflect a deliberate choice to entrench discrimination and marginalize communities of color.

In July 2025, the White House also released *America’s AI Action Plan*,²³⁹ which calls for the National Institute of Standards and Technology to remove all references to diversity, equity, and inclusion from its AI Risk Management Framework,²⁴⁰ the federal government’s principal remaining guidance on AI safety. The AI Action Plan also proposed denying federal AI funding to states “with burdensome AI regulations” deemed “unduly restrictive to innovation,” which set the stage for a December 2025 Executive Order deterring state anti-bias AI laws (see below).²⁴¹ The Plan made no mention of language access, despite AI’s capacity to provide real-time multilingual translation for the more than 27.6 million people in the U.S. with limited English proficiency—14.6 million of whom are U.S. citizens.²⁴² The Plan also ignores algorithmic discrimination²⁴³ and refers to “bias” only in the context of “ideological bias”²⁴⁴—casting attempts to reduce discrimination against people of color as politically motivated distortions.²⁴⁵

4. Deterring States from Preventing AI Bias: Executive Order 14,365

In December 2025, the Trump Administration issued Executive Order 14,365, *Ensuring a National Policy Framework for Artificial Intelligence* (the “December 2025 AI Order”),²⁴⁶ which uses federal coercion to deter states from adopting and enforcing state AI laws, including civil rights protections. Although framed as a neutral effort to prevent “excessive State regulation,”²⁴⁷ the Order represents an aggressive attempt to suppress state governance in a domain where the federal government has affirmatively withdrawn from regulation. In practice, it imposes

238. J.B. Branch, Ilana Beller & Tyson Slocum, *The Trump AI Action Plan Is Deregulation Framed as Innovation*, TECH POL’Y PRESS (July 30, 2025).

239. EXEC. OFF. OF THE PRES., OFF. OF SCI. & TECH. POL’Y, *Winning the AI Race: America’s AI Action Plan* (July 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf> [<https://perma.cc/M542-GB4D>] [hereinafter AMERICA’S AI ACTION PLAN]. The AI Action Plan also proposed denying federal AI funding to States “with burdensome AI regulations” deemed “unduly restrictive to innovation.” *Id.* at 3.

240. *Id.* at 4.

241. *Id.* at 3. See Exec. Order No. 14,365; see also *infra* Part II.B.4.

242. MIGRATION POL’Y INST., *United States Language & Education* (2023), <https://www.migrationpolicy.org/data/state-profiles/state/language/US> [<https://perma.cc/Y748-PX69>] (detailing demographic data about limited English proficient population in U.S.).

243. See *supra* Part II.A.1.

244. AMERICA’S AI ACTION PLAN, *supra* note 239, at 2, 4.

245. *Id.* at 2.

246. Exec. Order No. 14,365.

247. *Id.* at § 1.

uniformity by threatening litigation and funding penalties to chill states' efforts to constrain discriminatory AI systems, even as the federal government declines to regulate them itself.

The Order asserts that state AI laws threaten U.S. "global AI dominance" and alleges that such laws "are increasingly responsible for requiring entities to embed ideological bias within models."²⁴⁸ As evidence, it cites Colorado's restriction on algorithmic discrimination, claiming that the law "may even force AI models to produce false results in order to avoid a 'differential treatment or impact' on protected groups."²⁴⁹ That assertion is legally and factually unsound. Disparate impact is not evidence of ideological distortion—it is often the primary indicator that facially neutral AI systems are producing unjustified discriminatory outcomes.²⁵⁰ Nothing in the Colorado statute—or in comparable state AI guardrails—requires the production of false outputs or mandates parity.²⁵¹ Instead, the Colorado law requires developers and deployers to exercise "reasonable care to prevent reasonably foreseeable risks of algorithmic discrimination" and disclose material risks,²⁵² obligations that mirror long-standing principles in civil rights, consumer protection, and products liability law.

To deter state protections against AI harms, the Order announces a "minimally burdensome national policy framework for AI,"²⁵³ and directs the Attorney General to create an AI Litigation Task Force "whose sole responsibility" is to challenge state AI laws the Administration deems onerous or preempted.²⁵⁴ It also instructs the Secretary of Commerce to identify "onerous" state AI laws and render states with such laws ineligible for federal broadband funding,²⁵⁵ and encourages executive agencies to withhold discretionary grants from such states.²⁵⁶ The Order also pressures the Federal Communications Commission and the Federal Trade Commission to adopt federal disclosure and unfair and deceptive practices policies that could be construed to preempt state AI laws.²⁵⁷

This approach is in tension with the interests of states across the political spectrum. Conservative states have been among the most vocal proponents of state power to regulate technology platforms, particularly

248. *Id.* at §§ 1 & 2.

249. *Id.* at § 1.

250. See Leah Frazier, *How Trump's AI Executive Order Gets It Wrong on Civil Rights*, TECH POL'Y. PRESS (Dec. 19, 2025), <https://www.techpolicy.press/how-trumps-ai-executive-order-gets-it-wrong-on-civil-rights/> [<https://perma.cc/WCH6-HSMN>] ("The convoluted and forced line of reasoning that the order uses . . . demonstrates that its attack on civil rights protections seems to be more of a vehicle for the president to expand his assault on disparate impact liability than it is about AI regulation."); see also *infra* Part II.C.3.

251. Frazier, *supra* note 250.

252. *Id.*; Consumer Protections for Artificial Intelligence, COLO. REV. STAT. § 6-1-1704 (2024).

253. Exec. Order No. 14,365, at § 2.

254. *Id.* at § 3.

255. *Id.* at §§ 4 & 5(a) (directing the Secretary of Commerce to identify and publish onerous State AI laws and issue a policy notice providing "that States with onerous AI laws" are ineligible for remaining funding under the "Broadband Equity Access and Deployment (BEAD) Program.").

256. *Id.* at § 5(b).

257. *Id.* at §§ 6 & 7.

with regard to content moderation and children's safety.²⁵⁸ Just months earlier, the U.S. Senate rejected by a vote of 99-1 a proposal to impose a decade-long moratorium on state AI regulation,²⁵⁹ reflecting a rare bipartisan consensus that states must retain authority to address emerging harms when Congress has failed to act.

The December 2025 AI Order thus functions as a preemption-by-pressure strategy. Although it does not expressly invalidate AI laws in Colorado, California, or any other state,²⁶⁰ it seeks to accomplish indirectly what Congress has refused to do directly: insulate AI developers and deployers from state oversight. By abandoning federal civil rights oversight of AI and then penalizing states that attempt to fill that gap, the Administration leaves affected communities with no meaningful protection against discriminatory AI systems.²⁶¹ The Order is not simply a "neutral" effort to promote innovation, but is instead a deliberate strategy to create a governance vacuum in which discriminatory AI systems can proliferate with reduced legal risk and diminished public accountability.

C. Embedding AI Harms Within Federal Agencies

The second Trump Administration's AI Executive Orders did more than redefine federal priorities—they instructed agencies to operationalize the rollback of equity and civil rights protections in their day-to-day

258. See *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024) (reviewing consolidated challenges to Florida and Texas statutes regulating large online platforms' content-moderation practices and vacating and remanding for proper First Amendment analysis of the laws' applications); *Murthy v. Missouri*, 603 U.S. 43 (2024) (holding that Missouri and Louisiana as well as individual plaintiffs lacked standing to pursue claims alleging that Biden Administration officials unlawfully coerced social-media platforms to remove or downrank content); H.B. 18, 88th Gen. Assemb., Reg. Sess. (Tex. 2023) (codified at Tex. Bus. & Com. Code §§ 509.001–.152) (the Securing Children Online Through Parental Empowerment Act, imposing requirements on covered digital service providers—including disclosures and restrictions aimed at protecting minors from harmful online content); S.B. 152, 65th Gen. Assemb., Reg. Sess. (Utah 2023) (codified at Utah Code §§ 13-63-101 to -501) (regulating social media companies by requiring age verification and parental consent for minors' accounts and authorizing state enforcement for certain harms to minors). See also Andrew Atterbury, *DeSantis: Trump's AI Order "Can't Preempt" States from Taking Action*, POLITICO (Dec. 8, 2025, at 04:17 ET), <https://www.politico.com/news/2025/12/08/desantis-trump-ai-order-states-action-00681301> [https://perma.cc/Z9C3-3HME] (reporting Florida Governor DeSantis's comments that an executive order cannot preempt state AI regulation and that only Congress can do so, and that Florida is pursuing its own AI consumer protections despite federal policy).

259. Justin Hendrix & Cristiano Lima-Strong, *US House Passes 10-Year Moratorium on State AI Laws*, TECH POL'Y PRESS (May 22, 2025), <https://www.techpolicy.press/us-house-passes-10year-moratorium-on-state-ai-laws/> [https://perma.cc/SUGC-2PDC]; Cecilia Kang, *Defeat of a 10-Year Ban on State A.I. Laws Is a Blow to Tech Industry*, N.Y. TIMES (July 1, 2025), <https://www.nytimes.com/2025/07/01/us/politics/state-ai-laws.html> [https://perma.cc/ZNY7-3AHK].

260. A.B. 331, 2023–24 Leg., Reg. Sess. (Cal. 2023) (requiring impact assessments for "automated decision tools" and prohibiting algorithmic discrimination in certain areas); COLO. REV. STAT. ANN. §§ 6-1-1701 to -1707 (West 2024) (same).

261. See Press Release, Lawyers' Comm. for C.R. Under L., Leading Civil Rights Organizations Respond to Executive Order Seeking to Bar States from Addressing Harms Caused by Artificial Intelligence (Dec. 12, 2025), <https://www.lawyerscommittee.org/leading-civil-rights-organizations-respond-to-executive-order-seeking-to-bar-states-from-addressing-harms-caused-by-artificial-intelligence/> [https://perma.cc/BW8S-KG3D] (observing that Executive Order 14,365 punishes states for protecting residents from discriminatory AI and including statements in opposition to the Order from eight civil-rights organizations); Press Release, Nat'l Fair Hous. All., NFHA Denounces Harmful White House Order Attacking State Protections from AI Harms (Dec. 15, 2025), <https://nationalfairhousing.org/nfha-denounces-harmful-white-house-order-attacking-state-protections-from-ai-harms/> [https://perma.cc/9EET-YXCU] (asserting that Executive Order 14,365 would "restrain states from using fair housing laws to protect residents," leaving them "without protections against biased or harmful AI systems").

use, procurement, and oversight of AI.²⁶² As this subpart shows, the Administration directed OMB to remove equity-centered requirements from government-wide AI use and acquisition policy. It also prompted agencies to withdraw guidance, dismantle enforcement infrastructure, and reorient institutional missions in ways that weaken oversight of algorithmic discrimination. Finally, the Administration disabled disparate-impact analysis—a core legal tool for detecting bias in opaque, data-driven systems. Together, these actions translated high-level executive rhetoric into administrative practice, embedding ethnonationalism into the machinery of federal governance.

1. OMB's Removal of Equity from Government AI Policy

This section explains how the Office of Management and Budget systematically removed equity from federal AI governance through three memoranda in the first year of the second Trump Administration. First, OMB dismantled affirmative safeguards against algorithmic discrimination by rescinding detailed guidance that federal agencies using AI should assess disparate impacts, proxy discrimination, and demographic disparities. It then extended this retreat into federal procurement, removing prior guidance that agencies demand transparency, subgroup performance testing, and bias mitigation from AI vendors. Finally, OMB moved beyond omission to enforcement, requiring federal AI vendors to adhere to newly defined “Unbiased AI Principles” that recast AI fine-tuned to reduce racial bias as “ideological.” Taken together, these memoranda reorient federal policy away from pluralism and civil rights accountability in the design, acquisition, and deployment of artificial intelligence.

Pursuant to the January 2025 AI Order, OMB issued Memorandum M-25-21 (the “2025 Use Memo”), which rescinded and replaced Biden-era guidance (the “2024 Use Memo”) with new guidance for federal agency use of AI.²⁶³ While the 2025 Use Memo adopts a more technocratic tone than the January 2025 AI Order, its effect is to repeal core anti-bias and equity safeguards without substituting functionally equivalent protections.²⁶⁴

Both the 2024 and 2025 Use Memoranda require agencies to identify and manage risks associated with “High-Impact AI” systems (called “Rights-Impacting AI” in the 2024 Use Memo).²⁶⁵ But the similarities

262. See e.g., January 2025 AI Order, *supra* note 2, at § 2 (instructing the Director of OMB to revise OMB AI guidance to conform to Section 2 of the Order, which establishes that “[i]t is the policy of the United States to sustain and enhance America’s global AI dominance in order to promote human flourishing, economic competitiveness, and national security.”). Under the AI in Government Act of 2020, the OMB is required to issue guidance to federal agencies on the use of artificial intelligence. See AI in Government Act of 2020, 40 U.S.C. § 11301 (2025) [hereinafter AI in Government Act of 2020].

263. VOUGHT, 2025 USE MEMO, *supra* note 16 (rescinding and replacing 2024 USE MEMO, *supra* note 16).

264. See *id.* at 4 (“This memorandum provides guidance to agencies on how to innovate and promote the responsible adoption, use, and continued development of AI, while ensuring appropriate safeguards are in place to protect privacy, civil rights, and civil liberties, and to mitigate any unlawful discrimination . . .”).

265. Both Memoranda also presume that an AI use is “high-impact,” or “rights-impacting,” if it provides language translation when responses are legally binding or for interactions that directly inform agency decisions or actions. *Id.* at 21–22; 2024 USE MEMO, *supra* note 16, at 32–33. Neither Memo specifically addresses language equity or the rights of limited English proficient individuals. See Spencer Overton,

largely end there. While both Memoranda reference impacts on “civil rights, civil liberties, or privacy,”²⁶⁶ the 2025 Use Memo omits the 2024 Memo’s detailed articulation of those interests, which expressly included “freedom of speech, voting, human autonomy, and protections from discrimination, excessive punishment, and unlawful surveillance.”²⁶⁷ Likewise, although both memoranda reference access to education, housing, insurance, credit, and employment,²⁶⁸ the 2025 Use Memo deletes the explicit commitment to protecting “[e]qual opportunities, including equitable access . . . and other programs where civil rights and equal opportunity protections apply.”²⁶⁹

The repeal is most pronounced in the treatment of algorithmic bias. While both memoranda require baseline practices, such as pre-deployment testing,²⁷⁰ impact assessments, risk-mitigation plans,²⁷¹ human oversight,²⁷² and public input mechanisms²⁷³ for high-impact systems, the 2025 Use Memo eliminates affirmative obligations that agencies “[i]dentify and assess AI’s impact on equity and fairness, and mitigate algorithmic discrimination when it is present.”²⁷⁴ The 2025 Use Memo rescinds requirements that agencies analyze proxy discrimination, assess disparate impacts across demographic groups, and mitigate disparities that perpetuate unlawful discrimination or reduce equity.²⁷⁵ The 2025 Use Memo also removes requirements to consult “affected communities, including underserved communities,”²⁷⁶ to offer individuals a practicable opt-out in favor of human review,²⁷⁷ and to consider multilingual notice for those adversely affected by AI decisions.²⁷⁸

As a companion to the 2025 Use Memo, OMB issued Memorandum M-25-22 (the “2025 Acquisition Memo”), which rescinded and replaced the Biden-era OMB Memorandum M-24-18 (the “2024 Acquisition Memo”) governing federal procurement of AI systems.²⁷⁹ While both

Analyzing the Benefits of Artificial Intelligence to Racially Inclusive Democracy, 2026 UTAH. L. REV. 1, 23–26 (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5196382 [<https://perma.cc/CV3J-WVCC>] (discussing the promises and shortcomings of AI translation tools).

266. VOUGHT, 2025 USE MEMO, *supra* note 16, at 19 (defining “High-Impact AI”); YOUNG, 2024 USE MEMO, *supra* note 16, at 29 (defining “Rights-Impacting AI”).

267. YOUNG, 2024 USE MEMO, *supra* note 16, at 29.

268. VOUGHT, 2025 USE MEMO, *supra* note 16, at 19; YOUNG, 2024 USE MEMO, *supra* note 16, at 29.

269. YOUNG, 2024 USE MEMO, *supra* note 16, at 29.

270. VOUGHT, 2025 USE MEMO, *supra* note 16, at 15–16; YOUNG, 2024 USE MEMO, *supra* note 16, at 17.

271. VOUGHT, 2025 USE MEMO, *supra* note 16, at 15–16; YOUNG, 2024 USE MEMO, *supra* note 16, at 17–18.

272. VOUGHT, 2025 USE MEMO, *supra* note 16, at 17; YOUNG, 2024 USE MEMO, *supra* note 16, at 19–20, 23–24.

273. VOUGHT, 2025 USE MEMO, *supra* note 16, at 17; YOUNG, 2024 USE MEMO, *supra* note 16, at 22.

274. YOUNG, 2024 USE MEMO, *supra* note 16, at 21.

275. *Id.*

276. *Id.* at 22.

277. *Id.* at 24. See generally Aziz Z. Huq, *A Right to a Human Decision*, 106 VA. L. REV. 611, 615–18 (2020) (discussing State decisions to opt out of AI-enabled decisions in favor of human review).

278. YOUNG, 2024 USE MEMO, *supra* note 16, at 21, 23.

279. VOUGHT, 2025 ACQUISITION MEMO, *supra* note 16, at 1 (repealing and replacing 2024 ACQUISITION MEMO, *supra* note 16). Like the 2025 Use Memo, the 2025 Acquisition Memo largely tracks statutory requirements about OMB guidance and thus uses more measured language with regard to civil rights, risks, and safeguards than Executive Order 14,179.

Acquisition documents purport to provide a risk-management framework in AI procurement, the 2025 Acquisition Memo's practical effect is to repeal core anti-discrimination contractual and disclosure safeguards.

At a high level, both Acquisition Memoranda instruct agencies to protect privacy,²⁸⁰ determine whether vendors should disclose AI use in contracts,²⁸¹ ensure compliance with minimum risk management practices for high-impact use cases,²⁸² and monitor and mitigate "risks to privacy, civil liberties, and civil rights."²⁸³ But the 2025 Acquisition Memo removes detailed provisions that ensure that agencies address privacy, biometric (e.g., facial recognition), and civil rights risks in the procurement of AI.²⁸⁴ The 2025 Acquisition Memo also rescinds explicit recognition that AI systems can discriminate and that agencies should "require vendors to identify potential AI biases and mitigation strategies to address biases."²⁸⁵ The 2025 Acquisition Memo omits requirements that agencies consider mandating that vendors disclose "[p]erformance metrics, including real-world performance for specific sub-groups and demographic groups to surface discriminatory outcomes."²⁸⁶ The 2025 Acquisition Memo also eliminated directives that agencies include contractual terms obligating vendors "to provide the government with the results of performance testing for algorithmic discrimination, including demographic and bias testing, demographic characteristics of groups the performance testing has been conducted on, or third-party evaluations and assessments."²⁸⁷

The 2025 Acquisition Memo also removed guidance to prevent linguistic exclusion and group-based performance degradation in generative AI.²⁸⁸ It omitted provisions encouraging agencies to require documentation showing whether generative AI systems exhibit "reduced

280. *Id.* at 5; YOUNG, 2024 ACQUISITION MEMO, *supra* note 16, at 9–10.

281. VOUGHT, 2025 ACQUISITION MEMO, *supra* note 16, at 6; YOUNG, 2024 ACQUISITION MEMO, *supra* note 16, at 9.

282. VOUGHT, 2025 ACQUISITION MEMO, *supra* note 16, at 7–9; YOUNG, 2024 ACQUISITION MEMO, *supra* note 16, at 4–5.

283. VOUGHT, 2025 ACQUISITION MEMO, *supra* note 16, at 6, 11; YOUNG, 2024 ACQUISITION MEMO, *supra* note 16, at 9–11.

284. YOUNG, 2024 ACQUISITION MEMO, *supra* note 16, at 9–11.

285. *Id.* at 11.

286. *Id.* at 15.

287. *Id.* at 16.

288. The 2024 Acquisition Memo also acknowledged the economic benefits of diversity among AI vendors, and other Biden-era supplier diversity directives applied to procurement generally (including AI). See YOUNG, 2024 ACQUISITION MEMO, *supra* note 16, at 22; Memorandum from Jason S. Miller, Deputy Dir. for Mgmt., Off. of Mgmt. & Budget, Exec. Off. of the President, to The Heads of Executive Departments and Agencies (Dec. 2, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-03.pdf> [https://perma.cc/N6HM-6EHS] (establishing plan to increase share of contracts awarded to small and disadvantaged businesses to fifteen percent by FY 2025); Memorandum from Jason S. Miller, Off. of Mgmt. & Budget, Exec. Off. of the President, to the heads of executive departments and agencies (Feb. 17, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/02/M-23-11-Creating-a-More-Diverse-and-Resilient-Federal-Marketplace.pdf> [https://perma.cc/452T-T6FR] (building on M-22-03 to help agencies track their progress in recruiting and retaining new entrants to the Federal marketplace). The second Trump Administration, however, terminated each of these provisions. Exec. Order No. 14,281 at §§ 1, 2, 4, 5.

performance for certain sub-groups or languages other than English due to non-representative inputs; undesired homogeneity in data inputs . . . resulting in degraded quality of outputs.”²⁸⁹

In December 2025, OMB issued Memorandum M-26-04, *Increasing Public Trust in Artificial Intelligence Through Unbiased AI Principles* (the “December 2025 OMB Memo”),²⁹⁰ to implement Executive Order 14,319’s prohibition on so-called “woke AI” in the federal government.²⁹¹ Whereas the earlier 2025 Use and Acquisition Memoranda removed equity-centered safeguards through omission, the December 2025 OMB Memo affirmatively restructures federal AI procurement by agencies around two “Unbiased AI Principles”: “truth-seeking” and “ideological neutrality.”

The December 2025 OMB Memo mirrors the “Preventing Woke AI” Executive Order in defining “truth-seeking” to require that LLMs prioritize “historical accuracy, scientific inquiry, and objectivity,” while “ideological neutrality” requires that LLMs “not manipulate responses in favor of ideological dogmas” and that developers not “intentionally encode partisan or ideological judgments” into model outputs unless prompted by users.²⁹² These legal directives not only fail to require that agencies assess and mitigate disparate impacts, proxy discrimination, or demographic disparities, but affirmatively reframe efforts to address bias—particularly those that account for race, language, or structural inequality—as suspect ideological interventions.

The December 2025 OMB Memo operationalizes the “Preventing Woke AI” Order through procurement and contract enforcement. Agencies must include contractual provisions requiring vendors to demonstrate compliance with the “Unbiased AI Principles” in all new LLM solicitations, and modify existing contracts “to the extent practicable,” at the latest before exercising renewal options.²⁹³ The effect is to chill model fine-tuning and bias-mitigation practices that could be characterized as “non-neutral”—even where such practices improve accuracy or reduce discriminatory outcomes. After the 2025 Use and Acquisition Memoranda removed affirmative obligations to assess and mitigate algorithmic discrimination, the December 2025 OMB Memo conditions federal market access on adherence to a politically-contingent conception of neutrality that treats safeguards against racial discrimination as distortions rather than features. In embedding these requirements into procurement policy, the December 2025 OMB Memo ensures that the

289. See YOUNG, 2024 ACQUISITION MEMO, *supra* note 16, at 21. Real harms can result due to the removal of guardrails to ensure the safety of generative AI. See Jeremy Bearer-Friend & Sarah Polcz, *Sharing the Algorithm: The Tax Solution to Generative AI*, 17 COLUM. J. TAX. L. 1, 11–12 (2025) (arguing that algorithmic bias in generative AI tools such as chatbots can create racially discriminatory and offensive content that “normalize[s] bias at scale” given the prevalence of AI generated content).

290. Memorandum from Russell T. Vought, Dir., Off. of Mgmt. & Budget, Exec. Off. of the President, to the heads of executive departments and agencies (Dec. 11, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/12/M-26-04-Increasing-Public-Trust-in-Artificial-Intelligence-Through-Unbiased-AI-Principles-1.pdf> [<https://perma.cc/R6L4-USZT>] [hereinafter Increasing Public Trust Memo].

291. Exec. Order No. 14,319.

292. Increasing Public Trust Memo, *supra* note 290.

293. *Id.* at 3.

Administration's anti-equity AI agenda is not merely aspirational but institutionalized in the day-to-day operations of federal agencies and the incentives governing the AI marketplace.

The December 2025 OMB Memo's operative standards—"truth-seeking" and "ideological neutrality"—are not administrable procurement criteria. Instead, they are indeterminate labels that can be—and in this Administration's hands likely will be—applied to penalize disfavored viewpoints. For example, the Administration has continued to assert that widely debunked claims of pervasive voter fraud are "truth,"²⁹⁴ while portraying mainstream accounts of systemic racism—including widely accepted historical narratives about slavery's centrality to American development—as "anti-American ideology" or "divisive narratives."²⁹⁵ Under the Memo's "neutrality" rubric, a vendor cannot know whether an AI model that accurately rejects election-fraud falsehoods, explains disparate impact doctrine, or describes documented patterns of historical discrimination will be deemed "truth-seeking," or instead accused of failing "ideological neutrality." Procurement standards that turn on such politically- contested determinations are not neutral. They function as filters that purge government AI of bias-mitigation guardrails while embedding a politically mandated version of "truth."

The consequences of this interpretive retreat are profound. In the absence of enforceable requirements to assess proxy discrimination or demographic disparities—and in the presence of procurement rules that penalize equity-conscious design—agencies are incentivized to acquire and deploy AI systems that reproduce historical inequities under the guise of objectivity. Algorithmic decisions affecting employment, benefits, housing, education, or healthcare are thus less likely to be scrutinized, challenged, or corrected. The AI systems that federal agencies develop, procure, and deploy will reflect the priorities embedded in these 2025 memoranda—and those priorities now reflect a decisive turn away from pluralism toward a narrower and more exclusionary vision of governance.

2. Agency Execution of the Anti-Equity Mandate

The Trump Administration's AI Executive Orders and OMB Memoranda had immediate and far-reaching consequences.

Soon after President Trump assumed office and named a new acting chair of the EEOC, the agency removed from its website May 2023 guidance for employers on identifying unlawful disparate impact in automated tools, such as video interviewing software that evaluates speech and expressions, and games or assessments that assign personality

294. See e.g., Amy B. Wang, *Justice Department Sues Georgia County as Trump Pushes Debunked 2020 Election Fraud Claims*, WASH. POST (Dec. 12, 2025), <https://www.washingtonpost.com/politics/2025/12/12/justice-department-lawsuit-fulton-county-2020-election/> [https://perma.cc/R5Z5-AQG2] (reporting DOJ's lawsuit against Georgia election officials and the Trump Administration's continued claims of pervasive 2020 voter fraud despite the repeated rejection of these by courts and election officials).

295. See Darlene Superville, *Trump Executive Order on Smithsonian Targets Funding for Programs with "Improper Ideology"*, ASSOCIATED PRESS (Mar. 27, 2025, at 21:45 ET), <https://apnews.com/article/trump-smithsonian-executive-order-improper-ideology-558ebfab722f603e94e02a1a4b06ed4d> [https://perma.cc/7KE2-8J9E] (reporting that the Trump Administration's March 2025 executive order on the Smithsonian seeks to target and eliminate programs that it believes push "divisive narratives" and "improper ideology," including race-related historical content the Administration portrays as ideologically driven). See also discussion *supra* Section I.B.

or cultural fit scores to job applicants.²⁹⁶ The EEOC removed substantive clarifications that liability can still attach when relying on third-party vendors,²⁹⁷ emphasized proactive auditing, and provided a practical roadmap for reducing discrimination in hiring.²⁹⁸

Similarly, the Department of Labor’s Office of Federal Contract Compliance removed from its website guidance for federal contractors designed to ensure that their automated systems comply with civil rights obligations.²⁹⁹ The withdrawn guidance had emphasized the need to audit algorithmic tools for adverse impact in hiring, promotion, and termination, as well as to implement meaningful human oversight.³⁰⁰

In housing, algorithmic appraisal tools—often branded as “automated valuation models”—increasingly generate initial valuations that lenders and human appraisers refine. Because many lenders rely on automated valuation models for initial estimates, the previous administration had added manual safeguards to catch biased valuations.³⁰¹ The Trump Administration’s Department of Housing and Urban Development (“HUD”) rescinded those safeguards.³⁰² HUD also ended data-reporting

296. U.S. EQUAL EMP. OPPORTUNITY COMM’N, *Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964*, at 4–5 (May 18, 2023), https://data.aclum.org/storage/2025/01/EOCC_www_eeoc_gov_laws_guidance_select-issues-assessing-adverse-impact-software-algorithms-and-artificial.pdf [<https://perma.cc/F7SF-484J>] (advising employers to validate models, test for bias, and oversee third-party vendors to avoid Title VII disparate impact liability); *Gone but Not Forgotten: Federal Laws Still Apply Despite AI Guidance Disappearance Act*, COOLEY (Feb. 21, 2025), <https://www.cooley.com/news/insight/2025/2025-02-21-gone-but-not-forgotten-federal-laws-still-apply-despite-guidance-disappearance-act> [<https://perma.cc/JF8Y-28R8>] (listing and analyzing EEOC AI documents removed after Andrea Lucas became acting chair); Patrick Thibodeau, *Trump Actions Could Undermine EEOC AI Bias Efforts*, TECHTARGET (Feb. 13, 2025), <https://www.techtartarget.com/searchrsoftware/news/366619335/Trump-actions-could-undermine-EEOC-AI-bias-efforts> [<https://perma.cc/ZAY5-XQF7>] (reporting that the Trump Administration “removed key documents, including AI guidance for employers,” from the EEOC site and warning that states may step in to regulate algorithmic discrimination).

297. U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 296, at 6.

298. *Id.* at 8.

299. See OFF. OF FED. CONT. COMPLIANCE PROGRAMS, *supra* note 211, at 1–2 (implementing Executive Order 14,110 § 7.3(a) and directing federal contractors to validate AI-based hiring tools, maintain human oversight, document and audit algorithms, and routinely test for disparate impact to protect equity and reduce bias); Michelle Capezza et al., *Artificial Intelligence Executive Order: Workplace Implications*, MINTZ INSIGHTS (Feb. 12, 2025), <https://www.mintz.com/insights-center/viewpoints/2226/2025-02-12-artificial-intelligence-executive-order-workplace> [<https://perma.cc/6LLF-UQLC>] (explaining that OFCCP’s AI-hiring guide vanished after EO 14,110 was rescinded and advising contractors to continue testing AI tools for equity and bias).

300. OFF. OF FED. CONT. COMPLIANCE PROGRAMS, *supra* note 211, at 2; Kathleen D. Parker, Erinn L. Rigney, Ninamarie C. Moore & Isabella F. Sparhawk, *The Changing Landscape of AI: Federal Guidance for Employers Reverses Course with New Administration*, K&L GATES HUB (Jan. 31, 2025), <https://www.klgates.com/The-Changing-Landscape-of-AI-Federal-Guidance-for-Employers-Reverses-Course-with-New-Administration-1-31-2025> [<https://perma.cc/84Q3-75N4>] (reporting that President Trump’s revocation of Executive Order 14,110 prompted DOL/OFCCP to withdraw its AI-hiring guidance, stripping explicit safeguards against algorithmic bias and disparate-impact discrimination in federal-contractor hiring).

301. Quality Control Standards for Automated Valuation Models, 88 Fed. Reg. 40638 (June 21, 2023).

302. Letter from Jeffrey D. Little, Gen. Deputy Assistant Secretary for Hous., U.S. Dep’t of Hous. & Urb. Dev., to all FHA-Approved Mortgagees et al., (Mar. 19, 2025) (withdrawing ML 2021-27 and ML 2024-07 and abandoning FHA’s standardized bias-review framework); see also Jonathan Delozier, *HUD Rescinds Appraisal Review Policies: Standardized Federal ROV Policy had Viewed as a Tool to Combat Appraisal Bias*, HOUSINGWIRE (Mar. 20, 2025, at 17:24 ET), <https://www.housingwire.com/articles/hud-rescinds-reconsideration-of-value-appraisal-review-policies/> [<https://perma.cc/4EP6-STDY>] (describing

requirements.³⁰³ Collectively, the changes weakened HUD's ability to detect and correct discriminatory valuations and narrowed oversight of both human and algorithmic appraisals.

At the Consumer Financial Protection Bureau, the acting director abruptly withdrew the guidance governing algorithmic credit scoring. In a single Federal Register notice, the Bureau rescinded sixty-seven policy statements, interpretive rules, advisory opinions, and circulars—including documents addressing fair-lending analytics. In announcing the rescissions, the acting director stated that any future guidance would be issued “only if it reduces compliance burdens.”³⁰⁴ Among the rescinded materials was a circular reminding creditors that the Equal Credit Opportunity Act requires “specific and accurate” reasons for adverse actions, even when based on complex algorithms.³⁰⁵ The withdrawal eliminated the Bureau's main enforcement framework for algorithmic discrimination, leaving lenders freer to rely on opaque scoring models.³⁰⁶

Likewise, the Commerce Department's National Institute of Standards and Technology rewrote its March 2025 cooperative research-and-development agreement with members of the AI Safety Institute Consortium. The revision removed all references to “responsible AI,” “AI safety,” “AI fairness,” and “socio-technical methodologies,”³⁰⁷ and no longer encouraged benchmarking across race, gender, age, and income.³⁰⁸ The revised version also dropped provisions on content authentication and synthetic media labeling.³⁰⁹ The Administration warned of budget

compliance implications of ML 2025-08 and confirming that the rollback “removes a layer of oversight aimed at combating appraisal bias,” signaling to lenders that fair-housing scrutiny of algorithmic valuations is no longer expected).

303. Letter from Jeffrey D. Little, Gen. Deputy Assistant Secretary for Hous., U.S. Dep't of Hous. & Urb. Dev., to all FHA-Approved Mortgagees et al. (June 27, 2025) (striking appraisal-reporting fields, reducing data available to detect potential valuation bias); see Dan Bradley, *HUD Announces Changes to FHA Appraisal Requirements*, MCKISSOCK LEARNING (June 30, 2025), <https://www.mckissock.com/blog/appraisal/hud-announces-changes-to-fha-appraisal-requirements/> [<https://perma.cc/3TXF-9R9C>] (summarizing ML 2025-18's deletions).

304. Interpretive Rules, Policy Statements, and Advisory Opinions; Withdrawal, 90 Fed. Reg. 20084, 20085–87 (May 12, 2025) (listing each rescinded item).

305. Consumer Financial Protection Circular 2022-03: Adverse Action Notification Requirements in Connection with Credit Decisions Based on Complex Algorithms, 87 Fed. Reg. 35864, 35865 (June 14, 2022).

306. Alice S. Hrdy et al., *CFPB Revokes Guidance in Sweeping Rollback of Agency Policies and Priorities*, MORGAN LEWIS & BOCKIUS LLP (June 4, 2025), <https://www.morganlewis.com/pubs/2025/06/cfpb-revokes-guidance-in-sweeping-rollback-of-agency-policies-and-priorities> [<https://perma.cc/T4MZ-T6F2>]; Douglas Gillison, *US Consumer Watchdog to Scrap Scores of Financial Oversight Policies Issued Since 2011*, REUTERS (May 9, 2025, at 16:44 ET), <https://www.reuters.com/sustainability/boards-policy-regulation/us-consumer-watchdog-scrap-scores-financial-oversight-policies-issued-since-2011-2025-05-09/> [<https://perma.cc/EF6L-X7FE>].

307. Mariam Baksh, *Civil Society Groups Remain in NIST's AI Consortium Despite New Agreement, Stressing Safety Needs*, INSIDE AI POL'Y (Apr. 4, 2025), <https://insideaipolicy.com/share/17923> [<https://perma.cc/J3Y5-BC6X>] (discussing the removal of terms related to AI safety); Knight, *supra* note 17 (reporting White House pressure to purge fairness language).

308. Anthony Kimery, *As Trump's AI Deregulation, Job Cuts Sink In, Industry Gets Spooked*, BIOMETRIC UPDATE (Mar. 17, 2025, at 19:24 ET), <https://www.biometricupdate.com/202503/as-trumps-ai-deregulation-job-cuts-sink-in-industry-gets-spooked> [<https://perma.cc/NB6K-YXJD>].

309. See Knight, *supra* note 17.

cuts that could eliminate nearly 500 NIST staff, including many at the Artificial Intelligence Safety Institute,³¹⁰ which it soon rebranded the “Center for AI Standards and Innovation.”³¹¹

To be sure, the Trump Administration’s equity rollback was not total. Some anti-bias materials remain accessible, though they are often relegated to archival or repository pages.³¹² In some cases, agencies acknowledge bias in ways consistent with statutory civil rights obligations.³¹³ Still, the broader policy shift is clear. By chilling open discussion of discriminatory AI impacts and dismantling the enforcement infrastructure, the Administration advanced an ethnonationalist agenda under the banner of U.S. AI global dominance.

3. Disabling Disparate Impact to Undermine AI Accountability

Through revisions to guidance documents, the Trump Administration pursued a broader campaign to dismantle foundational civil rights tools. Central to that effort was the elimination of disparate impact analysis—the primary legal mechanism for identifying and remedying discriminatory outcomes absent proof of intent. This approach manifested both in the Administration’s broader civil rights rollbacks and its AI-specific directives.³¹⁴

310. Anthony Ha, *U.S. AI Safety Institute Could Face Big Cuts*, TECHCRUNCH (Feb. 22, 2025, at 13:22 PST), <https://techcrunch.com/2025/02/22/us-ai-safety-institute-could-face-big-cuts/> [<https://perma.cc/EVM2-TBYJ>] (noting NIST “could fire as many as 500 staffers,” many of them at the AI Safety Institute).

311. See Madison Alder, *Trump Administration Rebrands AI Safety Institute*, FEDSCOOP (June 4, 2025), <https://fedscoop.com/trump-administration-rebrands-ai-safety-institute-aisi-caisi/> [<https://perma.cc/D3A2-9XAH>] (observing that the “new name signals a shift away from the term ‘safety’ and toward a desire for rapid development of the technology”).

312. See, e.g., U.S. DEP’T OF JUST., *Artificial Intelligence and Civil Rights* (Feb. 3, 2025), <https://www.justice.gov/archives/crt/ai> [<https://perma.cc/E25M-V8HX>] (archived content disclaimer noting that “[t]his is archived content from the U.S. Department of Justice website. The information here may be outdated”); Education with Artificial Intelligence, *supra* note 210 (guidance hosted on ERIC, a Department of Education archival site).

313. See Request for Nominations for Members to Serve on National Institute of Standards and Technology and National Technical Information Service Federal Advisory Committees, 90 Fed. Reg. 16501, 16506 (Apr. 18, 2025) (citing National Artificial Intelligence Initiative Act provision requiring the advisory subcommittee to assess “[b]ias, including whether the use of facial recognition by government authorities . . . is taking into account ethical considerations and addressing whether such use should be subject to additional oversight, controls, and limitations”).

314. Exec. Order No. 14,281 (directing all federal agencies to repeal, revise, or avoid the use of disparate impact liability to the maximum extent permitted by law); Exec. Order No. 14,148 (repealing Executive Order 14,110, which, in § 10.1(b)(iv), directed the OMB to issue guidance specifying minimum risk-management practices for agency uses of AI); VOUGHT, 2025 USE MEMO, *supra* note 16 (rescinding and replacing 2024 USE MEMO, *supra* note 16), which required mitigating “significant disparities . . . across demographic groups” in AI outputs). But see Chiraag Bains, *When Machines Discriminate: The Critical Role of Disparate Impact in AI Accountability*, CTR. FOR C.R. & TECH. (2026), https://civilrights.org/wp-content/uploads/2026/01/SHOT-When-Machines-Discriminate_The-Critical-Role-of-Disparate-Impact-in-AI-Accountability.pdf [<https://perma.cc/XR32-4WA3>], at 39–42 (asserting that the Trump Administration’s attack on disparate impact rests on at least three legal errors: 1) misstating the doctrine as imposing liability for “any” outcome disparities, despite “significant” disparity and burden-shifting requirements; 2) conflating disparate impact with quotas or racial balancing, even though the doctrine does not require parity and Title VII bans quotas; and 3) claiming disparate impact is unconstitutional contrary to doctrine establishing the constitutionality of measures that are race-neutral in form but designed to create equal opportunity for people of color).

The elimination of disparate impact is especially dangerous in the AI context, where intent is rarely visible and harm often arises from statistical patterns of exclusion.³¹⁵ AI systems, often opaque and data-driven, make it difficult to assess whether race factored into decision-making. Even when race is excluded as a variable, AI systems frequently rely on proxies—education, geography, social networks—that replicate racial disparities. Because AI systems rarely involve consciously biased motives, outcome-focused frameworks like disparate impact are essential to ensure accountability in public-sector use.³¹⁶

Enforcement screening illustrates the problem. Customs and Border Protection’s Automated Targeting System assigns risk assessments using travel and related data at massive scale,³¹⁷ and TSA’s Secure Flight program prescreens passengers to determine who is flagged for additional security.³¹⁸ The IRS likewise uses AI-assisted analytics to identify returns or refundable-credit claims more likely to warrant audit.³¹⁹ Although these tools are race-neutral on their face, they can still generate unequal burdens through proxies tied to geography, language, occupation, or national origin. In systems like these, disparities are often detectable only in the aggregate.

Disparate-impact analysis provides the primary mechanism for identifying and evaluating such aggregated harms. It enables agencies to detect such disparities, assess whether they are justified by legitimate objectives, and to intervene when they are not.³²⁰ Without outcome-focused review, agencies risk deploying untested systems that appear

315. Chirag Bains, *The Legal Doctrine That Will Be Key to Preventing AI Discrimination*, BROOKINGS (Sep. 13, 2024), <https://www.brookings.edu/articles/the-legal-doctrine-that-will-be-key-to-preventing-ai-discrimination/> [https://perma.cc/4WFB-2ZZK] (observing that “[d]isparate impact liability is all the more crucial because today’s transformer-based AI models are still black boxes. The developers . . . don’t understand exactly how the models produce sophisticated and creative answers. The complexity and opacity of the systems’ inner workings mean that we won’t know whether or how they are considering protected characteristics.”).

316. See *id.* (asserting that intent-based antidiscrimination frameworks are ill-suited to algorithmic harms because they typically arise from data, design, and deployment choices rather than conscious animus, that disparate impact doctrine is therefore the most effective legal tool for detecting and addressing AI bias, and proposing “a new disparate impact law that covers any use of AI that impacts people’s rights and opportunities”); Barocas & Selbst, *supra* note 28, at 701 (“Where there is no discriminatory intent, disparate impact doctrine should be better suited to finding liability for discrimination in data mining.”).

317. Rachel Levinson-Walman & José Guillermo Gutiérrez, *DHS Must Overhaul Its Flawed Automated Systems*, BRENNAN CTR. FOR JUST. (Oct. 24, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/dhs-must-overhaul-its-flawed-automated-systems> [https://perma.cc/C332-R2PF] (noting that CBP’s Automated Targeting System is an “algorithmically powered analytical database” that creates risk profiles used to trigger additional government scrutiny).

318. See AI & Homeland Security, *supra* note 8; TSA Secure Flight Program, *supra* note 8.

319. See Loricchio, *supra* note 9 (reviewing IRS use of AI and analytics and reporting on study finding that IRS algorithms resulted in Black taxpayers who claimed the Earned Income Tax Credit were three to five times more likely to be audited than non-Black taxpayers). Racial bias in IRS enforcement is not confined to audit selection, and the adoption of AI could compound the bias already baked into many other IRS enforcement procedures, including summonses, civil penalties, appeals, collection due process, and criminal tax referrals to the Department of Justice. See Jeremy Bearer-Friend, *Colorblind Tax Enforcement*, 97 NYU L. REV. 1, 27–47 (2022) (documenting how facially race-neutral IRS enforcement mechanisms produce racially disparate outcomes, despite the IRS claim to the contrary, and identifying seven tax enforcement settings especially vulnerable to this bias).

320. See Bains, *supra* note 314 (explaining that algorithmic systems routinely generate discriminatory outcomes without explicit consideration of race, that proxy variables and data patterns make intent nearly impossible to prove, and that disparate impact analysis is often the only viable mechanism for identifying and remedying unjustified algorithmic disparities).

neutral while embedding discriminatory effects—replicating old stereotypes under the guise of technical efficiency. Outcome-sensitive analytical tools—whether in environmental justice, lending, or AI—are often criticized as ideological precisely not because they impose bias, but because they make structural disparities visible.³²¹

Indeed, eliminating disparate impact shields algorithmic bias from scrutiny and enables its persistence.³²² Scholars have warned that doing so can reinforce the notion that historically marginalized groups merit worse outcomes.³²³ The Trump Administration’s rejection of disparate impact reflects a broader effort to redefine racial equity as unconstitutional, dismantle civil rights enforcement, and embed those priorities in the algorithmic infrastructure of governance.

The Trump Administration moved to disable disparate impact analysis across multiple enforcement regimes, further insulating algorithmic decision making from accountability. The DOJ, for example, rescinded core Title VI regulatory provisions that had prohibited federally funded recipients from engaging in practices with unjustified disparate effects, limiting enforcement to intentional discrimination.³²⁴ The EEOC stopped investigating disparate impact claims and closed pending cases.³²⁵ The National Credit Union Administration removed disparate impact analysis from its fair-lending supervision and examination materials.³²⁶

III. Containing Ethnonationalism in Government AI

By accelerating the government’s adoption of AI without safeguards against democratic harms, the Trump Administration advances its ethnonationalist agenda. Its policies increase the likelihood that federal agencies will procure AI that is racially biased, culturally flattening, and behaviorally manipulative in domains ranging from employment and benefits eligibility to housing, education, healthcare, and law enforcement. Containing these harms requires a durable statutory framework that embeds democratic values into the design, acquisition, and use of government AI.³²⁷

321. See generally Dave Owen & Gaby Salazar Kitner, *Mapping Environmental Justice*, MINN. L. REV. (forthcoming 2026) (explaining the reactions of courts and government agencies to environmental-justice mapping).

322. Julia Rhodes Davis et al., *supra* note 162, at 3 (“Current tech regulatory efforts remain race-blind, which allows the tech sector to continue to perpetuate racial equity harms.”).

323. Barocas & Selbst, *supra* note 28, at 674.

324. Rescinding Portions of Department of Justice Title VI Regulations to Conform More Closely with the Statutory Text and to Implement Executive Order 14,281, 90 Fed. Reg. 57141 (Dec. 10, 2025), <https://www.federalregister.gov/documents/2025/12/10/2025-22448/rescinding-portions-of-department-of-justice-title-vi-regulations-to-conform-more-closely-with-the> [<https://perma.cc/24KT-PFYX>].

325. See *id.*

326. Letter from Kyle Hauptman, Chairman, Nat’l Credit Union Admin., to Federally Insured Unions, (Sep. 4, 2025), <https://ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/removal-disparate-impact> [<https://perma.cc/666S-9HBT>].

327. Building on the work of Ryan Calo and Danielle Citron, this Article argues that restoring legitimacy in government AI requires not only structural reform, but explicit statutory commitments to fairness, pluralism, authenticity, and autonomy. See Calo & Citron, *supra* note 139, at 807, 835–45 (calling for structural reforms to restore democratic legitimacy in the administrative “automated state”).

Existing frameworks are ill-equipped to confront this shift. The AI in Government Act of 2020 directs the OMB to issue guidance encouraging agency innovation while protecting civil rights,³²⁸ but imposes no binding requirements. It mandates no fairness audits, prohibits no discriminatory outcomes, and creates no enforceable rights.

The Biden Administration's 2023 AI Executive Order and 2024 Use and Acquisition Memoranda introduced the strongest federal safeguards to date, yet they remain incomplete. The Biden directives did not bind independent agencies³²⁹—continuing the norm of respecting independent agency autonomy.³³⁰ They instructed the Commerce Department to develop watermarking standards,³³¹ but imposed no uniform requirements that agencies label synthetic media or avoid disseminating disinformation. They directed OMB to issue guidance on curbing inference of sensitive traits,³³² but stopped short of prohibiting covert psychological manipulation.³³³ And while the Biden directives encouraged monitoring for reduced AI performance in non-English languages,³³⁴ they imposed no obligation to advance language access or pluralism.

These limitations were compounded by delay. Though the 2020 Act required OMB to act within 270 days, the Biden directives did not appear until March and September 2024—nearly three years later.³³⁵ In the interim, most agencies failed to adopt meaningful safeguards. And because the Biden directives were not statutory, the Trump Administration swiftly repealed them.

Recent legislative proposals—including the PREPARED for AI Act, the AI LEAD Act, and the Federal A.I. Governance and Transparency Act—would establish stronger protections than the 2020 Act or the Trump Administration's 2025 actions.³³⁶ But they largely focus on transparency and procedural oversight, while remaining silent on the ideological and structural stakes of AI governance.

This Part proposes the *Equitable AI in Government Act* (the “Equitable AI Act”)—a statutory framework grounded in four democratic principles: fairness, pluralism, authenticity, and autonomy. Each addresses a core harm: bias, homogenization, deception, and manipulation.

328. See AI in Government Act of 2020, *supra* note 262.

329. See 2023 AI Order, *supra* note 1, at § 10.2.

330. See Mauni Jalali, *Founders as Administrators: Historical Precedents for the Modern Regulatory State*, by Mauni Jalali, YALE J. ON REG. NOTICE & COMMENT (Apr. 24, 2025) (noting that presidents throughout history, regardless of their political views, “respected [independent agencies commissioners’] statutory removal protections”).

331. See 2023 AI Order, *supra* note 1, at §§ 4.5(a)–(b).

332. See *id.* § 9(a).

333. See *id.* § 9.

334. 2024 ACQUISITION MEMO, *supra* note 16, n.42.

335. See AI in Government Act of 2020, *supra* note 262; 2024 USE MEMO, *supra* note 16, at 29.

336. Promoting Responsible Evaluation and Procurement to Advance Readiness for Enterprise-wide Deployment for Artificial Intelligence (PREPARED for AI) Act, S. 4495, 118th Cong. (2024) [hereinafter PREPARED for AI Act] (establishing a comprehensive governance framework for AI procurement in federal agencies to minimize harms from high-risk AI); AI Leadership in Equitable Accountability and Development (AI LEAD) Act, H.R. 8756, 118th Cong. (2024) (requiring federal agencies to inventory AI use cases, classify risk levels, and ensure transparency, privacy, and nondiscrimination); Federal A.I. Governance and Transparency Act of 2024, H.R. 7532, 118th Cong. (2024) (proposing a comprehensive framework for federal agency oversight, procurement, and governance of AI; mandating transparency, safeguards for privacy and civil rights, risk assessments, and independent evaluations).

A. Strengthening Democracy Through the Equitable AI Act

The Equitable AI Act provides a structural response to the deeper threats posed by AI systems developed or deployed in service of ethnonationalist governance. It seeks to embed the core values of a racially inclusive democracy into all AI systems used by federal agencies or by government contractors or subcontractors operating on their behalf (collectively “covered entities”).³³⁷ It imposes binding obligations, includes enhanced enforcement mechanisms, and codifies a strengthened disparate impact standard—exceeding the scope of any current legal framework.³³⁸

1. Baseline AI Obligations to Advance Democratic Values

The Act establishes baseline protections for particular AI applications used by covered entities, regardless of risk classification, to ensure fidelity to democratic values.

Fairness is foundational; technologies used by or on behalf of the government must be nondiscriminatory. For example, the Act prohibits covered entities from using facial recognition technologies in the United States unless the system has been empirically validated to be nondiscriminatory in both treatment and effect. Additional anti-discrimination requirements are detailed in Section III.A.2.

Pluralism is equally essential. AI systems that optimize for dominant linguistic, epistemic, or cultural norms can marginalize minority groups even without overt bias. To counter this, covered entities must routinely audit their systems for representational bias and performance disparities across demographic groups, recognizing that persistent failures to serve certain populations constitute harm. The Act requires adoption of assistive technologies—translation tools, transcription devices, and chatbots—to ensure meaningful access across languages and dialects.³³⁹

Authenticity in public communication is vital to democratic legitimacy. The Act prohibits government deception and requires all official communications—synthetic or traditional—to bear a verifiable seal of authenticity, and that all generative content include visible disclosures and embedded metadata indicating artificial origin. These safeguards serve as the digital equivalent of a federal badge, enabling verification and deterring impersonation. While no disclosure regime is infallible, they empower journalists, watchdogs, and the public to distinguish genuine communications from forgeries. They also draw a categorical boundary: The federal government will not engage in intentional deception, regardless of the medium or tool.

337. The Equitable AI Act’s requirements would likely be inserted into the Federal Acquisition Regulation’s part on the acquisition of information technology. *See* Acquisition of Information Technology, 48 C.F.R. pt. 39 (2024).

338. *See* Bains, *supra* note 314 (explaining that current disparate impact law is inadequate to address algorithmic discrimination, and proposing a federal statute that would prohibit discrimination—including disparate impact—in the deployment of AI that informs decisions that impacts people’s rights and opportunities in a broad range of contexts and includes a private right of action).

339. This language is similar to provisions in Executive Order No. 13,166 which requires federal agencies to take action to accommodate the needs of LEP persons. This order was revoked by the Trump Administration. Exec. Order No. 14,244, *Designating English as the Official Language of the United States*, 65 Fed. Reg. 50121 (Mar. 1, 2025).

Autonomy requires protection from covert behavioral manipulation.³⁴⁰ The Act prohibits covered entities from using AI systems for psychological profiling, microtargeting, or behavioral manipulation without prior independent review, public disclosure, and consent.³⁴¹ Systems that adaptively influence user behavior must disclose their purpose, operational context, and foreseeable risks. The statute also bans the use of AI to suppress protest or conduct surveillance motivated by political, racial, or cultural bias.

2. Enhanced Oversight for High-Risk AI Use Cases

The Equitable AI in Government Act imposes heightened obligations for a defined set of high-risk AI applications to ensure that the most consequential uses of AI undergo rigorous scrutiny. By distinguishing high-risk systems from low-impact tools, the Act focuses oversight where democratic values are most at risk—while avoiding overregulation of benign uses like scheduling or spell-checking. This tiered framework sharpens regulatory precision, conserves resources, and protects space for innovation.

The Act defines a “high-risk artificial intelligence use case” as any development, deployment, or procurement of AI by a covered entity that plausibly risks material harm in critical domains—including employment, education, housing, utilities, healthcare, credit, insurance, financial services, criminal justice, law enforcement, surveillance, immigration enforcement, child welfare, legal services, voting, public accommodations, government benefits (including fraud prevention), and comparable services with similar effects on individual rights or life outcomes.³⁴²

Covered entities must conduct a preliminary evaluation of each AI use to determine whether harm is plausible.³⁴³ If it is not plausible, they must document their intended use of the AI, evaluation methodology, and reasoning for the finding, and submit this to the DOJ’s AI Civil Rights Enforcement Office and the Government Accountability Office.³⁴⁴

If harm is plausible, an independent auditor must conduct a full system evaluation before deployment.³⁴⁵ The audit must assess design, training data, bias testing, stakeholder consultation, disparate impact risks,

340. A critical component of preventing covert manipulation is data protection, an expansive topic which is beyond of the scope of this Article. For important models of data protection, see American Privacy Rights Act of 2024, H.R. 8818, 118th Cong. (2024); Maryland Online Data Privacy Act of 2024, H.D. 567, 2024 Reg. Sess. (Md. 2024); California Consumer Privacy Act of 2018, CAL. CIV. CODE §§ 1798.100–1798.199.100 (West 2024).

341. Cf. 2025 O.J. (L 1689) 1, art. 5, (prohibiting AI systems that deploy subliminal techniques or exploit vulnerabilities to materially distort behavior in ways that cause harm).

342. Cf. AI Civil Right Act of 2024, *infra* note 349, at § 2(3) (listing examples of “consequential action”).

343. Cf. *id.* § 102 (a)(1)(A) (requiring preliminary evaluations of plausible harm from an AI use).

344. Cf. *id.* § 102 (a)(1)(B)(i).

345. A similar two-step process is described in the AI Civil Right Act of 2024. *Id.* § 102 (a)(2) (detailing the process for a pre-deployment evaluation of an algorithm). Unlike the Equitable AI Act, the AI Civil Rights Act covers private entities, is ambiguous as to whether it applies to federal agencies and does not explicitly address language assistance and other homogenization issues, deepfakes, and behavioral manipulation. The AI Civil Rights Act is an instructive framework because it has been endorsed by over 80 civil rights groups. See Press Release, Senator Edward J. Markey, Senator Markey Celebrates 54 New Endorsements of His Comprehensive AI Civil Rights Legislation, (Nov. 21, 2024). The National

behavioral manipulation, and mitigation strategies.³⁴⁶ The auditor's report must also evaluate whether AI is suitable for the task, compare it to non-automated alternatives, and recommend safeguards. Covered entities must act on those recommendations.

Before broad implementation, the system must undergo operational testing under real-world conditions,³⁴⁷ including edge cases and high-stakes scenarios. Testing results, limitations, and risk strategies must be documented in a risk management plan.³⁴⁸ Once deployed, high-risk systems must undergo annual impact audits, with public summaries required to ensure accountability.³⁴⁹

The Act also guarantees procedural protections for those affected by high-risk AI. Covered entities must ensure a right to human review, continuous human oversight, and accessible complaint channels. All such complaints must be reviewed and resolved by a human decision-maker within a reasonable time.³⁵⁰

3. Enforcement Infrastructure

To institutionalize these commitments, the Act requires that each agency designate a Chief AI Equity Officer and fund staff with expertise in civil rights and algorithmic accountability. It establishes an AI Civil Rights Enforcement Office within the DOJ, staffed by career officials responsible for monitoring compliance and conducting AI impact assessments. Compliance waivers are permitted for no more than one year—with written justification and OMB approval based on a documented finding that compliance would compromise public safety, civil rights, or national security.³⁵¹ To guard against underenforcement or political capture, the Act authorizes a private cause of action and allows state attorneys general to sue the federal government for violations.

Transparency is essential. Agencies must inventory all AI use cases, submit them to the Government Accountability Office, and publish plain-language summaries describing each system's function, risk classification,

Environmental Policy Act of 1969 also details a similar process. *See* 42 U.S.C. §§ 4332(C), 4336 (requiring federal agencies to first assess whether a proposed action is likely to significantly affect the environment and, if so, to prepare a detailed environmental impact statement).

346. *Cf.* AI Civil Right Act of 2024, *infra* note 349, at § 102 (a)(2) (detailing the process of a full pre-deployment evaluation); CHIEF INFO. OFFICER, *Cybersecurity Maturity Model Certification*, U.S. DEP'T OF WAR, <https://dodcio.defense.gov/cmmc/About/> [<https://perma.cc/WS8G-RF7P>]. (describing a program to assess defense contractor cybersecurity compliance). *See generally* Pauline T. Kim, *Auditing Algorithms for Discrimination*, 166 U. PA. L. REV. ONLINE 189 (2017) (stressing the importance of fairness audits and transparency in countering algorithmic discrimination).

347. This pre-deployment testing would be analogous to “first article” testing. *See* 48 C.F.R. § 9.3 (2024) (requiring certain contractors to submit a sample product for testing and approval before full-scale production).

348. PREPARED for AI Act, *supra* note 336, at § 7(d) (requiring “testing the artificial intelligence in an operational, real-world setting with privacy, security, civil rights, and civil liberty safeguards to . . . determine . . . the likelihood and impact of adverse outcomes occurring during use”).

349. *Cf.* Artificial Intelligence Civil Rights Act of 2024, S. 5152, 118th Cong. § 102(a)(2) (2024) [hereinafter AI Civil Right Act of 2024] (detailing the process of a full pre-deployment evaluation).

350. *See* LAWYERS COMM. FOR C.R. UNDER L., *Online Civil Rights Act: Model AI Bill*, 15–16, (Dec. 2023) (providing a means of opting out of use of “covered algorithm with regard to a consequential action” and providing a human review alternative); AI Civil Right Act of 2024, *supra* note 349 (mandating notice and a process to appeal to a human reviewer when an algorithm has made a “consequential action”).

351. PREPARED for AI Act, *supra* note 336, at § 7(i)(1).

and any inequitable outcomes.³⁵² The statute includes whistleblower protections for current and former employees who expose noncompliant AI practices.³⁵³

B. The Implications of the Equitable AI Act

If enacted, the Equitable AI in Government Act would represent a foundational shift in how artificial intelligence is designed, deployed, and governed across the federal landscape. By statutorily embedding enforceable democratic safeguards into agency operations and contractor obligations, the Act ensures that public-sector AI advances—rather than undermines—fairness, pluralism, authenticity, and autonomy. Technologies that once reproduced racial, linguistic, and cultural hierarchies would instead help reduce past disparities and prevent new ones from emerging.

One of the Act’s most significant effects would be the professionalization of AI governance within the federal government.³⁵⁴ Requiring agencies to appoint Chief AI Equity Officers and staff with relevant expertise would build long-term institutional capacity to evaluate and manage algorithmic harms. Over time, this public-interest capacity would help shape the norms, expectations, and legal frameworks governing commercial AI—catalyzing more effective regulation across both public and private sectors.

The Act’s digital authenticity provisions would also help stabilize democratic discourse. By mandating provenance and disclosure for synthetic content, it would reduce impersonation, counter deepfakes, and clarify official communications. These safeguards, once normalized in the public sector, would likely influence the private marketplace through reputational pressure or new regulation.

The Act also promotes a more pluralistic AI ecosystem. Translation tools, chatbots, and recommendation systems would be reoriented to support diverse dialects and cultural frameworks—enhancing mutual understanding and coalitional politics, and harnessing innovation to advance democratic inclusion.

Globally, the Act would strengthen U.S. credibility and competitiveness. At a moment when other nations are wary of U.S. tech dominance,³⁵⁵ AI governance that advances fairness, pluralism,

352. Cf. 2024 USE MEMO, *supra* note 16, at 5 (requiring agencies to annually inventory all AI use cases and to report risks of inequitable outcomes and mitigation plans in safety and rights-impacting AI systems).

353. See Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 108–29 (2019) (proposing whistleblower protections to protect civil rights in the AI context).

354. U.S. GOV’T ACCOUNTABILITY OFF., GAO-25-107653, ARTIFICIAL INTELLIGENCE: GENERATIVE AI USE AND MANAGEMENT AT FEDERAL AGENCIES (2025) (reporting that many agencies reported “challenges in attracting and developing individuals with expertise in generative AI”); Jessica Tillipman & Steven L. Schooner, FEATURE COMMENT: *Institutional Amnesia and the Neglect of the Federal Acquisition Workforce*, 67 GOV’T CONTRACTOR ¶ 182, 3–4 (2025) (observing that the “severe shortage of [federal government] staff with AI expertise” exacerbates risks to national security and critical infrastructure).

355. See Mathieu Pollet, *EU Views Break from US as ‘Unrealistic’ Amid Global Tech Race*, POLITICO (Apr. 30, 2025, at 04:01 CET), <https://www.politico.eu/article/eu-us-big-tech-companies-trade-international-digital-strategy-europe-competitiveness/> [<https://perma.cc/HDZ3-Y6XB>] (noting call by member of European Parliament for the EU to “end its debilitating dependence on American tech groups”).

transparency, and autonomy offers a compelling alternative. Allies, multilateral institutions, and private actors would be more likely to engage with American AI tools seen as respectful of pluralism. Domestically, stronger public trust—especially among marginalized communities—would expand adoption in key sectors like education, workforce development, and healthcare. Rights-preserving AI would support both inclusion and economic growth.

C. Grappling with Challenges to the Equitable AI Act

No meaningful reform escapes opposition, and the Equitable AI Act is no exception. By grounding AI policy in the values of a racially inclusive democracy, the Act enters one of the most contested terrains of modern governance: the intersection of emerging technology, civil rights, and public power. As such, it will likely face criticism from across the ideological spectrum. This subpart anticipates and responds to key critiques.

1. *The Limits of Regulating Public AI Alone*

Some advocates may argue that the Act is too narrow because it governs only AI systems developed, acquired, or used by federal agencies and contractors. From this perspective, the most serious threats to racial inclusion—including algorithmic bias, cultural erasure, synthetic deception, and behavioral profiling—are concentrated in private-sector systems beyond the Act’s reach.³⁵⁶ Critics may further note that federal spending on AI accounts for less than four percent of total U.S. private-sector investment in AI,³⁵⁷ and that the Trump Administration’s emphasis on using off-the-shelf commercial tools limits the government’s leverage in dictating contract terms and shaping private-sector norms.³⁵⁸ In this view, regulating public AI is necessary but insufficient.

Still, government AI regulation remains an essential starting point.³⁵⁹ The federal government has a unique obligation to serve a diverse public, not a narrow faction.³⁶⁰ When it adopts democratic safeguards, it legitimizes its own systems and helps establish ethical baselines that shape state, local, and private sector norms. In the absence of comprehensive federal legislation, public procurement remains “one of the few levers governments have to push for public values.”³⁶¹

356. See, e.g., Rashida Richardson, *Racial Segregation and the Data-Driven Society: How Our Failure to Reckon with Root Causes Perpetuates Separate and Unequal Realities*, 36 BERKELEY TECH. L.J. 1051, 1088–89 (2021) (arguing that “the data-driven technology sector . . . needs a transformative justice framework,” including “policy interventions” to cure algorithmic bias).

357. *AI R&D Investments FY 2019-FY 2025*, NETWORKING & INFO. TECH. R&D PROGRAM (2025) (reporting a FY25 budget request for AI spending of \$3.316 billion); *2025 AI Index Report*, STANFORD INST. FOR HUM.-CENTERED A.I. (2025) (reporting that U.S. private-sector investment in AI reached \$109.1 billion in 2024).

358. Jessica Tillipman, *Buying Blind: Corruption Risk and the Erosion of Oversight in Federal AI Procurement*, 55 PUB. CONT. LAW J. (forthcoming Winter 2026).

359. See generally Nari Johnson, Elise Silva & Hoda Heidari, *Want Accountable AI in Government? Start with Procurement*, TECH. POL’Y PRESS (July 15, 2024) (arguing that governments can promote equitable AI by embedding requirements into procurement processes); *AI Procurement in a Box: AI Government Procurement Guidelines*, WORLD ECON. F. (2020) (providing a model framework for public procurement of AI).

360. THE FEDERALIST NO. 10 (James Madison) (warning against the concentration of power by factions).

361. Johnson et al., *supra* note 359.

2. Political Obstruction by Ethnonationalists

Some may argue that the Equitable AI Act is politically infeasible—that ethnonationalist politicians will prevent passage by Congress. But the Act’s impact does not hinge on immediate federal enactment. Its modular design enables state legislatures, governors, attorneys general, civil rights agencies, and local officials to adopt its provisions through statutes, executive orders, procurement policies, and agency guidance. Jurisdictions such as California,³⁶² Colorado,³⁶³ and New York City³⁶⁴—as well as international bodies like the European Union³⁶⁵—have already adopted AI regulations grounded in principles of fairness, transparency, and human rights. This decentralized pathway allows meaningful protections to emerge even without federal action.

Subnational and transnational uptake can also catalyze broader change. Adoption by a subset of jurisdictions can shape markets, establish best practices, and reset expectations for responsible deployment. Early adopters can create a *de facto* regulatory floor that pressures companies to align across jurisdictions. This mirrors past precedent: State-led civil rights and environmental reforms helped lay the groundwork for later federal legislation.³⁶⁶ Even during obstructive political cycles, local and global momentum can help build institutional capacity and civil society networks ready to act when a federal opportunity returns.

3. Innovation, Competitiveness, and the False Choice Between Regulation and Growth

Critics may argue that the Equitable AI Act’s requirements—fairness audits, transparency mandates, and bans on behavioral manipulation—will slow innovation, increase compliance costs, and deter investment.³⁶⁷ Some will go further, invoking a global arms race: In a competition with authoritarian regimes such as China, they argue, safeguards on U.S. firms risk conceding technological leadership to

362. See Christine Mastromonaco et al., *California’s AI Laws Are Here—Is Your Business Ready?*, PILLSBURY (Feb. 7, 2025), <https://www.pillsburylaw.com/en/news-and-insights/california-ai-laws.html> [https://perma.cc/29ZW-MSLL] (describing eighteen AI bills signed into law in California that contain various mandates).

363. COLO. REV. STAT. ANN. §§ 6-1-1701 to -1707 (West 2024); Cobun Zweifel-Keegan & Andrew Folks, *The Colorado AI Act: What You Need to Know*, INT’L ASS’N OF PRIV. PROFS. (May 21, 2024), <https://iapp.org/news/a/the-colorado-ai-act-what-you-need-to-know> [https://perma.cc/24ZV-8354] (“The Colorado AI Act focuses on . . . discrimination caused by AI in the context of a consequential decision.”).

364. N.Y.C. ADMIN. CODE §§ 20-870 to -874 (2021); N.Y.C. Dep’t of Consumer & Worker Prot., *Notice of Adoption of Final Rule* (Apr. 6, 2023) (prohibiting use of automated employment decision tools unless certain bias audit requirements are met).

365. See Francesca Palmiotti, *The AI Act Roller Coaster: The Evolution of Fundamental Rights Protection in the Legislative Process and the Future of the Regulation*, 16 EUR. J. RISK REG. 770, 778 (2025) (describing the ways the EU AI Act protects fundamental rights, including its “provisions on quality of training data and bias prevention”).

366. See, e.g., Daniel A. Mazmanian, John L. Jurewitz & Hal T. Nelson, *State Leadership in U.S. Climate Change and Energy Policy: The California Experience*, 29 J. ENV’T & DEV. 51, 69 (2020) (describing California’s role as a leader in the shaping of federal environmental policy); *The Journey to Marriage Equality in the United States*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/our-work/stories/the-journey-to-marriage-equality-in-the-united-states> [https://perma.cc/VS7L-B4M4] (last visited Jan. 28, 2026) (tracing the history of same-sex marriage legalization, from state to nationwide).

367. See January 2025 AI Order, *supra* note 2 (“This order revokes certain existing AI policies and directives that act as barriers to American AI innovation . . .”).

adversaries that prioritize speed over democratic values.³⁶⁸ This view treats regulation and innovation as a zero-sum tradeoff and law as a drag on progress.

But this logic is both empirically unproven and conceptually flawed. Democracy and law are not inherent obstacles to innovation—they are its foundation. Embedding fairness, pluralism, authenticity, and autonomy into AI systems fosters trust, reduces litigation and reputational risk, and increases adoption by aligning with public norms. As AI spreads into education, employment, healthcare, and democratic participation, success will be judged not only by technical performance but by legitimacy in the eyes of diverse publics. Deregulation in the name of “global AI dominance” may temporarily accelerate deployment, but it undermines long-term competitiveness by risking backlash from civil society, foreign regulators, and communities who view such systems as threats to autonomy, civic inclusion, and economic opportunity.

The Equitable AI Act offers a strategic alternative to this race-to-the-bottom logic. It counters rising global skepticism toward U.S. tech by codifying principles that make American AI more acceptable to democratic allies. The European Union’s AI Act already ties market access to human rights compliance,³⁶⁹ and other jurisdictions are advancing digital sovereignty frameworks to resist U.S.-based homogenization.³⁷⁰ In this context, the Act strengthens U.S. competitiveness by positioning American AI as principled and trustworthy. Long-term leadership will turn on whether AI systems are adopted and trusted across democratic societies—conditions that depend on respect for rights, public legitimacy, and accountable governance.

4. Speech, Association, and Equal Protection Challenges

The Equitable AI Act is also likely to face constitutional challenges from political opponents who frame its safeguards as violations of the First Amendment and the Equal Protection Clause. These arguments, however, lack merit.

Critics may argue that provisions like independent audits, public dashboards, and watermarking of synthetic content chills speech, burdens association, or compels cultural conformity. But the Supreme Court has long upheld disclosure requirements that serve substantial governmental

368. See, e.g., Alexandra Alper & Jody Godoy, *AI Execs Say US Must Increase Exports, Improve Infrastructure to Beat China*, REUTERS (May 8, 2025, at 12:46 ET), <https://www.reuters.com/world/us/us-ai-execs-give-congress-policy-wishlist-beating-china-2025-05-08/> [<https://perma.cc/YM2M-WUDN>] (reporting on Senate hearing discussing the risks of AI restrictions on development).

369. Article 5 of the Act prohibits the marketing and use of AI that manipulates or deceives users, or that exploits the vulnerabilities of marginalized groups. 2024 O.J. (L 1689) art. 5(1).

370. See Benjamin Cedric Larsen, *The Geopolitics of AI and the Rise of Digital Sovereignty*, BROOKINGS (Dec. 8, 2022), <https://www.brookings.edu/articles/the-geopolitics-of-ai-and-the-rise-of-digital-sovereignty/> [<https://perma.cc/3RLF-AHXC>] (describing efforts in the EU and China to achieve digital sovereignty).

interests, such as preventing deception or supporting democratic integrity.³⁷¹ Transparency mandates—like fairness audits and content labeling—fall well within that jurisprudence.

Similarly, conditions on government contracting, such as requiring bias audits or support for dialect diversity, do not compel ideological conformity or suppress association. They are neutral terms governing government funds. The U.S. Supreme Court has repeatedly held that government may choose to fund one activity over another, and that contractors cannot challenge such choices as compelled speech.³⁷² The Equitable AI Act fits squarely within this line of precedent: it regulates how public funds and systems are used, not what individuals must affirm or believe.

To be sure, conditions that extend beyond a program’s scope and seek to enforce ideological conformity may raise First Amendment concerns.³⁷³ This may explain why the January 2025 AI Executive Order attempts to reframe fairness safeguards as “ideological bias.”³⁷⁴ But the Equitable AI Act does not regulate private speech. It governs conduct—specifically the design and deployment of AI in high-stakes settings such as employment, housing, and public benefits. Just as public accommodations laws prohibit racial exclusion even if it is rooted in expressive beliefs—and have been upheld in cases like *Roberts v. United States Jaycees*,³⁷⁵—the Act imposes civil rights obligations on government-serving technologies without dictating ideology. Such AI safeguards are not censorship; they are civil rights protections.

Critics may also claim that race-conscious audits or fairness metrics violate Equal Protection, especially after *Students for Fair Admissions v. Harvard*.³⁷⁶ But the Act does not allocate benefits or burdens based on race. Policies do not trigger strict scrutiny simply because they detect discrimination and adopt alternatives that are less discriminatory toward underrepresented groups.³⁷⁷ If the Court ultimately interprets Equal Protection so narrowly that government cannot even study or consider the racial impact of its actions, institutional reforms—including court

371. See, e.g., *Meese v. Keene*, 481 U.S. 465, 479–80 (1987) (upholding statute’s requirement that “political propaganda” be labeled as such, because the law supported the public’s right to know the source of materials); *Doe v. Reed*, 561 U.S. 186, 196–98 (2010) (holding that states’ choice to disclose referendum petition signatures is permissible because it significantly furthers the State’s interest in preserving electoral integrity); *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651–52 (1985) (upholding requirement that lawyers disclose contingency-fee arrangements in advertising).

372. *Rust v. Sullivan*, 500 U.S. 173, 194–95 (1991) (upholding Title X regulations barring federally funded family planning clinics from abortion counseling or referrals); *United States v. Am. Libr. Ass’n*, 539 U.S. 194, 210–14 (2003) (upholding under the First Amendment a statute’s requirement that public libraries receiving federal grants install internet filters).

373. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l*, 570 U.S. 205, 214–16 (2013).

374. January 2025 AI Order, *supra* note 2, at § 1 (asserting that the United States “must develop AI systems that are free from ideological bias” as a rationale for revoking AI safeguards).

375. 468 U.S. 609 (1984).

376. 600 U.S. at 181.

377. *Coal. for TJ*, 68 F.4th, at 874, 885–86.

reform—may be necessary to better align the judiciary with the needs of a racially diverse democracy.³⁷⁸ Until then, the Act remains firmly within existing constitutional precedent.

5. Polarization, Cultural Anxiety, and Backlash

Some who are agnostic to questions of access, culture, and history may argue that embedding racial, linguistic, and cultural pluralism into AI law politicizes technology, fosters polarization, and privileges certain groups over a presumed neutral norm. They may contend that considering discriminatory impact risks reinforcing group distinctions and eroding civic unity.

But pluralism is not the enemy of national unity—it is its foundation. The Equitable AI Act ensures that government AI systems serve *all* Americans, not just those who resemble historical majorities. Ignoring race and ethnicity in AI design does not create neutrality—it entrenches the values, language, and data of those already most represented. The Act strengthens democratic legitimacy by ensuring that all communities have a stake in how AI systems are built and governed. In a racially inclusive democracy, inclusion is not ideological—it is a condition of equal citizenship.

Critics may also argue that codifying equity and pluralism into AI law risks inflaming tensions or fueling ethnonationalist backlash.³⁷⁹ But fear of backlash is no reason to retreat. Legislative inertia in anticipation of reaction has historically deepened exclusion. The Equitable AI Act is necessary because it affirms equal dignity, treatment, and voice at a time when AI threatens to harden inequality. Rather than capitulate to cultural retrenchment, the Act offers a forward-looking framework rooted in democratic values. It does not provoke division—it responds to it by insisting that government AI reflect the pluralism that already defines the nation.

Conclusion

Artificial intelligence will not remain neutral in the face of political, demographic, and cultural shifts—it will either reinforce existing power structures or help build a more inclusive democracy. The Trump Administration’s AI policies reveal how the technology can be harnessed to advance ethnonationalist aims: entrenching racial hierarchy, erasing cultural pluralism, and legitimizing exclusion under the guise of neutrality and innovation. Yet this future is not inevitable.

378. See, e.g., PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U. S., FINAL REPORT OF THE PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES (2021) (providing a comprehensive analysis of arguments for and against Supreme Court reforms). See generally *Confusion and Clarity in the Case for Supreme Court Reform*, 137 HARV. L. REV. 1634 (2024) (“[T]oday’s Court is hampering efforts to promote racial equality. Proponents of reform should be clear that this is why they object—and defenders of the Court’s status should be made to answer these objections directly.”).

379. See Carol Anderson, *Donald Trump Is the Result of White Rage, Not Economic Anxiety*, TIME (Nov. 16, 2016, at 12:22 ET), <https://time.com/4573307/donald-trump-white-rage/> [<https://perma.cc/6H37-PZU9>] (exploring the rise of Donald Trump as backlash against advancements in racial equity); Terry Smith, *White Backlash in a Brown Country*, 50 VAL. U. L. REV. 89, 92, 98 (2015) (describing the “adverse reaction of whites to the progress of members of a non-dominant group” as “a recurring and transformative feature of American politics”).

The Equitable AI in Government Act offers a clear alternative. By embedding fairness, pluralism, transparency, and authenticity into the architecture of AI governance, the Act challenges the notion that we must choose between technological progress and a racially inclusive society. The United States must lead in both. The task ahead is to develop legal structures that ensure AI better reflects the diversity, dignity, and democratic aspirations of all people.

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Citizenship Revoked, Humanity Denied: The Existential Cost of Statelessness

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TABLE OF CONTENTS

PART I. INTRODUCTION.	267
i. Historical Analysis of Statelessness.	270
ii. Why Examine Statelessness?.	273
PART II. DEFINITION OF STATELESSNESS.	274
A. Constituent Elements of the 1954 Convention's Definition of Statelessness.	275
i. "A Person".	275
ii. "Not Considered as a National by . . . Law".	276
iii. Under the Laws of any State.	277
PART III. THE CAUSES OF STATELESSNESS.	278
A. Discrimination: Race, Ethnicity, Religion, Language, or Gender.	278
B. Conflict of Nationality Laws.	279
C. State Secession.	280
D. Revocation of Nationality or Denial of Birthright Citizenship.	281
E. Renunciation of Nationality.	282
PART IV. DISCUSSIONS ON BIRTHRIGHT CITIZENSHIP OF CHILDREN BORN TO UNDOCUMENTED IMMIGRANTS IN THE U.S. CONSTITUTION.	284
A. Interpretation of the Fourteenth Amendment and Termination of Birthright Citizenship in the U.S..	287
B. Legal and Practical Consequences of Abolishing Birthright Citizenship in the U.S..	288
i. Risk of Statelessness.	288
ii. Enforcement Challenges.	288
iii. Impact on Immigrant Families.	289
iv. Potential Litigation.	289

C. Arguments For Ending Birthright Citizenship for Children of Undocumented Immigrants.	289
<i>i. Control of Immigration Policy & Preserving the Value of Citizenship.</i>	290
D. Arguments Against Ending Birthright Citizenship for Children of Undocumented Immigrants.	290
<i>i. Constitutional Protection and Legal Precedent.</i>	290
<i>ii. Impact on Civil Rights and Social Integration.</i>	290
<i>iii. Potential for Statelessness and Legal Confusion.</i>	291
PART V. THE RESPONSE OF THE INTERNATIONAL COMMUNITY TO STATELESSNESS.	291
A. Global Effects and Consequences of Statelessness.	292
<i>i. Denial of Nationality and the Privilege to Enjoy Basic Human Rights.</i>	293
<i>ii. The Indignity of Belonging Nowhere.</i>	294
<i>iii. Forced Displacement.</i>	295
<i>iv. Restrictions on Transferrable Nationality to Children & Gender-Discrimination.</i>	296
<i>v. The Adoption of Stateless Children.</i>	300
<i>vi. Ethnic Cleansing.</i>	301
B. How International Law Prevents Statelessness.	302
C. The Role of International Law in Unknown and Undetermined Nationality.	304
PART VI. COMPARING STATELESS PERSONS AND REFUGEES.	304
A. Different Statutes.	307
B. Crossing International Borders.	307
C. Determination Procedures for Stateless Persons and Refugees.	308
D. Different Applicable Laws.	308
CONCLUSION.	309

Citizenship Revoked, Humanity Denied: The Existential Cost of Statelessness

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This Article explains that among the many causes of statelessness, one reason is the arbitrary revocation of citizenship. This is not just a legal action; it is a deep act of exclusion that can strip individuals of their identity, rights, and social standing. The concept of statelessness, which describes the absence of recognized nationality or citizenship, is both a legal anomaly and a humanitarian crisis. “Nationality or citizenship” is essential for a dignified life and forms the foundation of all other rights that stateless people lack. This work, using legal analysis, case studies, and human rights frameworks, demonstrates how governments have weaponized nationality laws to target marginalized groups, children of undocumented immigrants, dissenters, and displaced communities. These laws are used to induce or prolong statelessness, highlighting that statelessness is a human-made issue. This work also further explains that the consequences of statelessness extend beyond legal exclusion, impacting access to healthcare, education, employment, and political participation. Instead, statelessness strips its victims of their place in humanity. There are existential ramifications of statelessness—the psychological impact of being rendered invisible, deprived of rights, and lacking a sense of belonging.

By situating the issue within the broader discussions on sovereignty, this work explains that belonging to a political community is a form of pragmatic dignity, reinforcing the idea that human beings possess identifiable existential values. How then should states protect their stateless persons? This work suggests some solutions, proposing that granting citizenship to those born on their territory (jus soli), even if their parents are stateless, is essential. Many countries lack such

[‡] Assistant Professor, Gonzaga University Law School, Spokane, Washington. I am grateful to God for this scholarly work to advocate for feasible legal protection framework for Stateless Persons. Burdened by their lack of a legal status (nationality) of a state and the vulnerabilities and obstacles from eventually obtaining a nationality has made Stateless persons one of the most vulnerable and neglected migrant groups globally. I also express gratitude to Brandi Estrada and Jeff Omari for their invaluable support and encouragement. Any mistakes or viewpoints presented in this Article are solely those of the author.

protections, and those that do, like the United States, are considering ending them, which can lead to statelessness—especially among children of migrants, refugees, or ethnic minorities. Countries can remove barriers to registration, such as discriminatory laws or burdensome documentation requirements. Stateless individuals might be eligible to apply for citizenship after a short period of residence or if they are born in the country. Reforms in nationality laws to ensure equal access for everyone, regardless of gender, ethnicity, or status, are necessary. Implementing simplified naturalization procedures or statelessness determination processes, along with providing formal legal recognition and protection, can significantly help reduce statelessness. The final section of this work explores the legal, substantive, and procedural differences between stateless individuals and refugees. It also illustrates how a stateless person can transition to refugee status, or vice versa, due to deficiencies in nationality laws and policies.

Part I. Introduction

The legal and arbitrary erasure of nationality is a form of violence against victims of statelessness.¹ Statelessness is not just a lack of citizenship—it is legal invisibility because people are excluded from protections such as due process and human rights.² Citizenship or nationality is the “right to have rights.”³ Without it, individuals are stripped of legal personhood.⁴

Statelessness may be referred to as “*hostis humanis generis*,” which translates to the “enemy of humankind.”⁵ Justice Earl Warren’s opinion in a plurality decision of the Supreme Court once said that, to strip someone of their nationality and leave them stateless “is a form of punishment

1. See Kurić and Others v. Slovenia, Application No. 26828/06, ¶¶ 32–33 (Mar. 12, 2014), <https://hudoc.echr.coe.int/?i=001-141899> [<https://perma.cc/W8UD-YK8M>] (holding that the “erasure” of over 18,000 persons from Slovenia’s civil register following the breakup of Yugoslavia—after they failed to apply for citizenship in time—amounted to a deprivation rendering many stateless and violated the rights to private life and non-discrimination). See generally Corman Kenny, *Legislated Out of Existence: Mass Arbitrary Deprivation of Nationality Resulting in Statelessness as an International Crime*, 20 INT’L CRIM. L. REV. 1026 (2020) (arguing that arbitrary deprivation of nationality, especially when en masse and group-targeted, causes marginalization, dehumanization, oppression—in effect, constituting violence against those affected. The work suggests that such policies might even amount to international crimes under certain circumstances.).

2. Stateless persons are essentially “invisible” in the eyes of the law and political community. See WILLIAM E. CONKLIN, *STATELESSNESS: THE ENIGMA OF THE INTERNATIONAL COMMUNITY* 1 (Rachel Turner et al. eds., 2014) (arguing that stateless persons exist in a legal void).

3. See BRAD K. BLITZ & MAUREEN LYNCH, *STATELESSNESS AND CITIZENSHIP: A COMPARATIVE STUDY ON THE BENEFITS OF NATIONALITY* 4–5, 32 (2009) (discussing how stateless persons are denied recognition by any state and often lack access to documentation and legal status).

4. See *STATELESSNESS, GOVERNANCE, AND THE PROBLEM OF CITIZENSHIP* 1 (Tendayi Bloom & Lindsey N. Kingston eds., 2021) (describing statelessness as the condition of being excluded from the law and from rights conferred by legal identity).

5. The term *hostis humani generis*, originating from Latin, means “enemy of all mankind.” In discussions related to law and history, it refers to individuals or groups whose actions are considered so morally repugnant that any state has both the authority and the duty to prosecute or intervene, regardless of where the crime occurred or the nationalities of those involved. See OXFORD REFERENCE, <https://www.oxfordreference.com/display/10.1093/acref/9780197583104.001.0001/acref-9780197583104-e-875#:~:text=‘Enemy of humankind.’ A,being ...> [<https://perma.cc/EF2S-M7NK>] (last visited Nov. 20, 2025) (emphasis added).

more primitive than torture, for it destroys . . . the political existence that was centuries in the development. . . . [H]e is stateless In short, [this person] has lost the right to have rights.”⁶

This Introduction elaborates on the dynamics surrounding the loss of birthright citizenship and how this loss can result in prolonged statelessness for those affected. Statelessness represents a multifaceted global issue that affects millions, yet it frequently goes unnoticed in mainstream discourse.⁷ In terms of definitions, stateless persons are individuals who are not recognized as citizens by any nation, resulting in a lack of legal identity essential for accessing rights, protections, and civic participation.⁸ This analysis aims to examine the causes, consequences, and challenges of statelessness, highlighting how legal systems, historical injustices, discrimination, and political marginalization contribute to its ongoing nature. Beyond its legal implications, statelessness constitutes a significant humanitarian crisis, stripping individuals of their dignity, opportunities, and sense of community. By examining statelessness through legal, social, and human rights perspectives, this paper underscores the pressing need for global awareness, policy reform, and inclusive solutions that affirm every individual’s right to nationality.

Furthermore, this Introduction also addresses various triggers of statelessness, particularly the erosion of birthright citizenship. It explores the present constitutional effects of the Fourteenth Amendment of the United States (“U.S.”) Constitution regarding the deprivation of American birthright status.⁹ Birthright citizenship—an automatic entitlement to nationality for those born within a nation’s borders—has been a fundamental component of inclusive nationhood and the safeguarding of human rights. It is not just a legal designation but also a firm assertion of belonging, identity, and equal participation in the community. Nevertheless, recent political changes, nationalist discourse, and restrictive legal reforms have jeopardized this essential principle. The loss or denial of birthright citizenship can result in individuals becoming stateless, stripping them of the legal acknowledgment essential for accessing fundamental rights and services. More significantly, it can disconnect individuals from their community and humanity, leading to feelings of profound alienation and exclusion. This Article examines the

6. *Trop v. Dulles*, 356 U.S. 86, 101–02 (1958) (plurality opinion) (holding that, while Congress has the power over naturalization and military discipline, it cannot impose citizenship as a form of punishment without breaching constitutional boundaries). The Court made a clear distinction between voluntarily abandoning citizenship and punishment-driven deprivation. *Id.* Removing someone’s citizenship due to desertion was deemed a cruel and unusual punishment, which violates the Eighth Amendment, even if authorized by Congress. *Id.* Such punishment exceeds reasonable limits in a civilized society and undermines individual dignity. *Id.* The Court reaffirmed that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” *Id.* at 100. “The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 101.

7. See generally Maria Jose Recalde-Vela, *Access to Redress for Stateless Persons Under International Law: Challenges and Opportunities*, 24(2) *TILBURG L. REV.* 182 (2019) (examining the legal challenges faced by stateless individuals in their quest for redress, particularly when a lack of documentation hinders their efforts to obtain nationality and reparations, as reflected in rulings from the Inter-American Court of Human Rights).

8. See *id.*

9. See *infra* Part V (examining the 1961 Convention’s rules regarding reducing statelessness, emphasizing the circumstances under which states can revoke an individual’s nationality without making them stateless, and the legal protections that exist to avert such situations).

impact of weakening birthright citizenship on the global crisis of statelessness. It analyzes the profound psychological, legal, and societal consequences of denying individuals the fundamental right to belong.

It seems difficult and complicated to envision not being recognized as a citizen of the country in which one was born and has always lived.¹⁰ Stateless individuals experience life as invisible, overlooked by the systems that establish identity, rights, and protections. For millions worldwide, being stateless means lacking citizenship, official recognition, and a nation to call home.¹¹

Some people can freely move between countries because they have the necessary documents, such as visas or passports. However, others require documentation to prove their nationality and are therefore unable to migrate freely.¹² These people are stateless, meaning they do not legally belong to any country.¹³ They require legal documentation on paper because a significant portion of what shapes a modern human is linked to nationality and citizenship.¹⁴ When someone is deprived of these, a chasm forms between them and the broader human community.¹⁵ Merely being alive does not demonstrate one's existence; legal recognition in the form of documentation assigned by a sovereign state to an individual is essential for establishing nationality. The current global situation bears a resemblance to the inter-war period when nationalism was on the rise.¹⁶ Nationalism seems to have become the most prevalent source of political conflict and violence today. It is politically correct that each nation should

10. Residency and nationality are fundamentally different concepts. An individual can reside in a country for years without being officially recognized as a citizen. These individuals are categorized under the U.N. Refugee Agency's (UNHCR) statelessness mandate, which fits the international definition of statelessness. Many countries actively compile data that includes individuals with undetermined nationality to accurately assess the total number of stateless persons residing legally within their borders. See G.A. Res. 428 (V), ¶¶ 6(A)–(B) (Dec. 14, 1950); Convention Relating to the Status of Refugees art. 1(A)(2), *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

11. See Press Release, Council of the European Union, Council Adopts Conclusions on Statelessness, U.N. Press Release 893/15 (Apr. 12, 2015), <https://www.consilium.europa.eu/en/press/press-releases/2015/12/04/council-adopts-conclusions-on-statelessness/pdf/> [<https://perma.cc/4E8S-86RQ>].

12. Not everyone living in the 195 countries around the world possesses travel passports or documents. This situation arises not only from bureaucratic government systems but also from the inability to legally obtain a passport due to a lack of nationality which ties these individuals to the countries where they reside. A passport is essential for international travel, and those without one face significant restrictions on their ability to leave their so-called home country. Many people worldwide still lack travel passports, especially in regions marked by high poverty, political instability, or limited access to government services. Individuals who manage to travel abroad eventually need passports and often struggle to access education, employment, and healthcare opportunities abroad.

13. See CONKLIN, *supra* note 2, at 3; see also Anna Rascouët-Paz, *Citizens of Nowhere: Statelessness and the Quest to Belong*, EUR. NETWORK ON STATELESSNESS (Nov. 21, 2024), <https://www.statelessness.eu/updates/blog/citizens-nowhere-statelessness-and-quest-belong> [<https://perma.cc/J8YK-DUB7>].

14. See Ekaterina, *To Be Stateless Is to Stand at the Edge of the Void*, UNITED STATELESS, <https://www.unitedstateless.org/problem> [<https://perma.cc/B57C-W2HP>] (last visited Nov. 13, 2025) (explaining that being stateless is like living at the edge of a void because a stateless person lacks membership in any country and will be seen and treated as a foreigner by every country in the world).

15. *Id.* (explaining that stateless people frequently lack identity documents like birth certificates or passports—most importantly, they have no way of getting documents without documents of legal identification, so life is like living at the edge of a void).

16. See generally MICHAEL HECHTER, *CONTAINING NATIONALISM* 1–13 (Oxford Univ. Press, 2000) (arguing that the idea of nationalism stems from the premise and movement that holds that the nation should be congruent with the state).

govern its affairs¹⁷ free from external interference. However, originality or homogeneity of nationhood does not only occur when nations avoid external relationships or create hostility towards people of different nationhood or those who do not belong to any. Nationhood does not extinguish the dignity of foreigners who belong to a new political system. Rather than considering how external contacts might pollute or corrupt a nation's purity, it should weigh the numerous benefits of diversity as positive impacts that foreigners could bring to the country.

Further, instead of being hostile to migrants, whether as refugees, internally displaced peoples ("IDPs"), stateless persons, or immigrants seeking to join new political communities, a nation could choose its purging system to determine which foreigners might be admitted or accorded nationality or not.¹⁸ The critical value is for states to develop reasonable nationality laws and administrative principles that do not exacerbate the pain or hardship of statelessness or the risk of becoming stateless. A nation can uphold its values and identity while providing a welcoming community for those seeking a sense of belonging. This can be achieved through social connections rooted in shared culture, ethnicity, geographic location, language, politics, and normative beliefs, all within a diverse historical context.¹⁹ While preserving its core values and identity, a nation can embrace individuals who align with its principles, including migrants, refugees, displaced persons, or stateless individuals, regardless of whether they have formal nationality or not.²⁰

i. Historical Analysis of Statelessness

Historically, the post-imperial period and World War I witnessed considerable agitation among people fighting for recognition and an identity as legitimate nationals within a political system that did not acknowledge them.²¹ Arguably, this identity crisis and the anxiety to "belong" have created numerous *apatrides*²² people, with protracted effects of large-scale displacement. For example, having experienced

17. See *U.N. Charter art. 2, ¶ 7*. This is the notion called Self-Determination—the legal right of people to decide their own destiny in the international order. The principle that each nation has the sovereign right to govern its internal affairs without external interference is enshrined in Article 2(7) of the U.N. Charter.

18. See *Statelessness Around the World*, COUNCIL ON FOREIGN RELS. (Jan. 10, 2023), <https://education.cfr.org/learn/reading/statelessness-around-world> [<https://perma.cc/J5LW-2A98>]. The global community is complicated because of anxiety and uncertainty. It is thoroughly interconnected yet intricately partitioned. Pivotal, one could argue that the centrality to this global anxiety is identity and belonging. People want to identify with and belong to a political system, territory, and culture. Statistically, about 8 billion people live in nearly 200 countries, but not every person has a nationality in one of those countries. In fact, between 4 and 10 million people worldwide lack citizenship in any country, resulting in a precarious legal and administrative limbo of statelessness.

19. See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 2006) (describing the fundamental transformation of historical movements and the impact on social ideology and social movements).

20. See Rogers Brubaker, *Ethnicity, Race, and Nationalism*, 35 ANN. REV. SOCIO. 21, 22 (2009) (stating that "[t]he literature on ethnicity, race, and nations and nationalism was long fragmented and compartmentalized").

21. See generally SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* 94 (2004) (articulating the decolonization struggles of against the British, French, Portuguese, and Dutch empires after World War I).

22. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 278 (1st ed. 1951) (explaining that *apatrides* is a term borrowed from French that means "stateless or without a country"). It means persons lacking state affiliation.

protracted statelessness, Hannah Arendt once described stateless persons as follows: “[o]nce they had left their homeland they remained homeless, once they had left their state, they became stateless; once they had been deprived of their human rights they were rightless, the scum of the earth.”²³

Arendt examines the origins of mass statelessness and its implications for the international order and security following World War I and II.²⁴ According to Arendt, World War I unsettled the basic concepts that defined the political reality of a group of persons defined by geographical exclusions.²⁵ During that time, certain territories were reconceptualized through demographic adjustments, resulting in forced displacements.²⁶ An important step was to update the world map to reflect new territories or accommodate displaced persons who no longer have connections to existing political territories and sovereignty.²⁷ Thus, mass members of people defined by their exclusion from any political community entered international politics and became the object of debate about the foundations of political order.²⁸ Therefore, organizing humanity into discrete sovereignties with complete control over membership meant that anyone without political status had no rights because such persons did not belong to any political community and consequently were rendered stateless.²⁹

Another scholar on statelessness, Mira Siegelberg, adopts Arendt’s analysis of statelessness and explains that statelessness can be traced back to the rise of mass numbers of people without a political home after the First World War, as well as to the later nineteenth century.³⁰ According to Siegelberg, European imperialism, capitalism, and pan-nationalism movements at that time arguably undermined the Enlightenment-era ideals of citizenship and equality under the law.³¹ The United Nations, established on October 24, 1954 as the successor to the League of Nations,

23. *Id.* at 267–78; see also MIRA L. SIEGELBERG, *STATELESSNESS: A MODERN HISTORY* 241 (Harv. Univ. Press ed. 2020). According to Mira L. Siegelberg’s commentary on Arendt, the origin of statelessness before the Second World War was that stateless persons had the description of legal freaks without the protection of the law. See generally HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (2nd ed. 1973) (describing the Second World War and its impact on statelessness). Generally, the second edition of Arendt’s book places the problem of stateless people and refugees in the center of its analysis of totalitarianism by depicting the ruthless effects of the enormous migration crisis that uprooted people from their homes during the inter-war periods. It also portrays a massive failure of the nation states that referred to stateless persons as the “superfluous” people did not belong to any political community and were therefore outlawed. The notion of totalitarianism became implicated when most states sought to annihilate “the superfluous” people (stateless persons) as a result of the impotence of human rights protection.

24. See ARENDT, *supra* note 22, at 266.

25. SIEGELBERG, *supra* note 23, at 10. For further reading, see HANNAH ARENDT, *THE JEWISH WRITINGS* 264–274 (Jerome Kohn & Ron H. Feldman, eds., Schocken Books, New York 2007) (stating that “[i]n the first place, we don’t like to be called ‘refugees.’ We ourselves call each other ‘newcomers’ or immigrants.”); see also ERIC KAUFMANN, *WHITESHIFT: POPULISM, IMMIGRATION AND THE FUTURE OF WHITE MAJORITIES* (2019). The views shared about the nexuses between statelessness and World War I is that a number of nations expelled ethnic minorities in an effort to maintain “ethnic purity” among the inhabitants who survived the war. The expelled minorities were displaced and had no legal claim of nationality to where they once called home.

26. See ARENDT, *supra* note 22, at 278.

27. SIEGELBERG, *supra* note 23, at 20.

28. *Id.* at 7.

29. *Id.*

30. *Id.* at 1.

31. *Id.* at 36–38.

made efforts to broaden the concept of human rights in the context of the ongoing European refugee crisis, positing that the idea of modern homelessness reveals that access to basic human rights and existential dignity stems from membership in a particular sovereign and political community.³² Thus, a person who does not belong to such a political community has no right to leverage any existential or fundamental principles that dignify a human being.³³

Further, people migrate from one country to another for several reasons.³⁴ Some migrations are forceful, while others are not.³⁵ Some people cross territorial lines to seek protection from humanitarian crises. In contrast, others seek protection from political persecution, and some individuals are on the move in search of a “better life” to improve their quality of life.³⁶ However, there is a growing trend of hostility towards migrant groups like IDPs regardless of the reasons for their migration.³⁷ The current inter-war period, as described above, also fits the description of “the age of borders,” characterized by a significant influx of migrants from underdeveloped to developed countries. Scholars also state that “[c]urbing . . . migration pressures is difficult . . . [because] [s]ealed borders are virtually needed to keep future migration stocks at their current level.”³⁸

Following the World Wars, statelessness was not a global epidemic; therefore, the international community deemed it unnecessary to address the issue directly.³⁹ The international community did not initially view the legal consequences of statelessness as problematic, largely due to the notion that stateless persons were merely refugees, causing perennial

32. ARENDT, *supra* note 25, at 110. Hannah Arendt opines that statelessness could happen when seeking “refugeehood” protection becomes protracted. She shows the dichotomy of statelessness and refugeehood as intertwined. According to her, though “[a] refugee used to be a person driven to seek refuge because of some act committed or some political opinion held. Well, it is true we have had to seek refuge; but we committed no acts and most of us never dreamt of having any radical opinion. With us the meaning of the term ‘refugee’ has changed. Now ‘refugees’ are those of us who have been so unfortunate as to arrive in a new country without means and have to be helped by Refugee Committees.” *Id.*

33. See Rachel Marandett, *On the Road to Nowhere: The Unique Challenges Stateless People Face in Removal Proceedings and the Untenable Legal Limbo Following Final Orders of Removal*, 27 CUNY L. REV. 37, 37–40 (2024).

34. *Id.*

35. *Id.*

36. See generally UN High Commissioner for Refugees (UNHCR), *The #IBelong Campaign: A Decade of Action to End Statelessness, 2014-2024*, UNHCR: UN REFUGEE AGENCY (2024), https://www.refworld.org/reference/statement/unhcr/2024/en/148777?_gl=1*7swypl*_rup_ga*MTQwNjYxOTExMS4xNzY5ODAxNTUw*_rup_ga_EVDQTJ4LMY_*czE3Njk5NjU0MzlkZyYkZkAkdDE3Njk5NjU0MzlkZyYwJGwwJGgw [https://perma.cc/P7R8-M65K] (explaining the diverse reasons for migration in the 21st century and how the need for a global alliance might foster a workable solution to statelessness and generalized global migration).

37. See Olawale Ogunmodimu, *Internally Displaced Persons: Ordeals and Analyses of the Possible Regimes of Legal Protection Frameworks*, 54 ST. MARY'S L.J. 407, 432 (2023) ("IDPs are also stigmatized and viewed with suspicion and hostility by host communities. They are especially vulnerable to violence, human trafficking, and recruitment as terrorists, including child recruitment, forced conscription, and sexual assault by members of their new community.").

38. See Thu Hien Dao, Frédéric, Mathilde Maurel & Pierre Schaus, Global migration in the twentieth and twenty-first centuries: the unstoppable force of demography, KIEL INST. (Jan. 13, 2021), https://pmc.ncbi.nlm.nih.gov/articles/PMC7806256/pdf/10290_2020_Article_402.pdf [<https://perma.cc/UN9W-PS66>] (studying migration in the twentieth and twenty-first centuries).

39. ARENDT, *supra* note 22, at 278.

problems to the international order and hindering resettlement after the World Wars.⁴⁰ Thus, the international community did not fully appreciate the nuances of statelessness as a potential catalyst for a global crisis.⁴¹

To orient the international community and other stakeholders, a few people responded through the narrow lens of viewing stateless persons as a mere extension of refugees.⁴² However, one response noted that a stateless person differs from a refugee in terms of their definitions and circumstances.⁴³ For instance, Patrick M. Malin, a former U.S. congressman, argued that stateless persons should be defined as persons legally deprived of their citizenship and non-repatriable refugees.⁴⁴ This proposed definition does not disconnect stateless and displaced persons but says that while the two migrating groups are different, statelessness is an umbrella that comprises persons without a formal connection to any state and those refugees who do not wish to return home or those who have been forced to return to places contrary to their wish, in contravention of the principle of non-refoulement under international law.⁴⁵

ii. Why Examine Statelessness?

Identifying stateless persons and examining the subject helps to understand the relationship between states, their nationals, and residents.⁴⁶ It evaluates how states meet their obligations under international law and its peremptory norms to identify stateless people in their territory so that they can access the minimum fundamental human rights that dignity requires.⁴⁷ Furthermore, because statelessness is a global problem, examining the subject strengthens the efforts of states to assess the size and situation of the stateless population living within their territory.⁴⁸ This exercise increases understanding of the interrelatedness of human

40. *Id.* at 276–79.

41. *See generally* Patrick M. Malin, *The Refugee: A Problem for International Organization*, 1 INT'L ORG. 443, 443 (1947) (explaining that internationally displaced individuals face vexing political questions).

42. *Id.*

43. *Id.* at 444–45.

44. *Id.* at 446.

45. *Id.* at 444–45.

46. *See Background Note on Gender Equality, Nationality Laws and Statelessness 2019*, UNHCR: UN REFUGEE AGENCY (Mar. 8, 2019), <https://www.refworld.org/reference/themreport/unhcr/2019/en/122444> [<https://perma.cc/EE32-49VH>] (explaining the connection between a stateless individual and the country they are in can manifest in two main ways: first, being stateless in their country of origin, which means the place where they used to live; or second, after leaving their homeland, they become stateless in the country where they seek nationality, particularly for those pursuing international protection far from their habitual residence).

47. The central argument of this Article posits that statelessness is a construct of human design, and the existing institutions in nations facing this issue can address it. Political will and resources are essential to eliminate statelessness. For instance, states should track their stateless individuals, as this enables them to provide essential human rights and access to vital services such as education, healthcare, and employment, which stateless persons frequently lack due to the absence of proper identification. This often results in a cycle of marginalization and heightened vulnerability; thus, acknowledging stateless individuals is critical for safeguarding them against exploitation and ensuring their fundamental rights are protected.

48. *Protect Human Rights: Ending Statelessness*, UNHCR: UN REFUGEE AGENCY, [https://www.unhcr.org/what-we-do/protect-human-rights/ending-statelessness#:~:text=Unable to prove their citizenship,exclusion%2C deprivation and marginalization](https://www.unhcr.org/what-we-do/protect-human-rights/ending-statelessness#:~:text=Unable%20to%20prove%20their%20citizenship,exclusion%20C%20deprivation%20and%20marginalization) . [<https://perma.cc/9F68-DXD7>] (last visited Nov. 16, 2025).

rights, the notions of sovereignty, and territorial integrity.⁴⁹ Furthermore, studying statelessness also helps create a national and global cohesive database that will enable stateless persons to find avenues for regularization as nationals.⁵⁰ This will significantly reduce the risk of arbitrary detention by state forces, as stateless individuals often lack official identification documents.⁵¹

Moreover, studying statelessness also helps to preserve cultures and family lineages.⁵² To be stateless is not a death sentence. The Author of this piece believes that a country with effective recording and documentation strategies could preserve the history of stateless persons and facilitate reunification with their ancestral identities, territories, and cultures. Furthermore, the identification of stateless persons can reveal the causes of statelessness and identify new trends, as it is illogical for states to address a problem they do not understand.⁵³

Part II. Definition of Statelessness

Under Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons (“1954 Convention”), a stateless person means “a person who is not considered as a national by any State under the operation of its law.”⁵⁴ This definition is part of customary international law, also known as *jus cogens*.⁵⁵ The meaning or implication is that the definition of a

49. Instead of discarding statelessness as the offshoot of mass displacement after the inter-war period, I argue that studying statelessness plays a vital role in teaching the root causes and history of population displacement. For example, statelessness helps to understand how cosmopolitan migrating theories were developed when the international community created the avenue for an interstate global system but did not pay enough attention to how numerous people became forcefully displaced.

50. See Cate Blanchett & Filippo Grandi, *Without a Nationality, You Live in Fear of Abuse, Arrest, Detention and Even Expulsion from the Country You Call Home*, LE MONDE (Oct. 16, 2024, at 09:43 CT), https://www.lemonde.fr/en/opinion/article/2024/10/16/cate-blanchett-and-filippo-grandi-without-a-nationality-you-live-in-fear-of-abuse-arrest-detention-and-even-expulsion-from-the-country-you-call-home_6729533_23.html [https://perma.cc/TU6E-CR4K].

51. See Megan Janetsky & Sonia Pérez D., *Stripped of Citizenship, These Nicaraguans Live in Limbo Scattered Across the World*, ASSOCIATED PRESS (Nov. 29, 2024, at 01:07 ET), <https://apnews.com/article/b391e05eacd7dc3cf3968f5fb23987f1> [https://perma.cc/S6D6-WKVR] (highlighting the challenges faced by Nicaraguan dissidents who have lost their citizenship and been forced to escape, battling issues such as lack of legal recognition and restricted access to vital services).

52. Minority groups’ lesser-known cultures risk extinction in the face of statelessness, making minority and indigenous populations particularly at risk. The global stateless population includes diverse ethnicities, religions, languages, and socioeconomic statuses. Without formal citizenship in any nation, they often find themselves excluded from governmental systems, lacking voting rights or access to essential services like healthcare and education. In severe situations, this statelessness can expose them to violence and large-scale displacement. Examples of minority groups are minorities that encompass smaller ethnic, national, religious, linguistic, or cultural groups that face disadvantages and seek to preserve and nurture their identity. See *Denial and Denigration: How Racism Feeds Statelessness*, MINORITY RTS. GRP.: MINORITY STORIES (Sep. 15, 2017), <https://minorityrights.org/denial-and-denigration-how-racism-feeds-statelessness-2/> [https://perma.cc/LP94-936T] (explaining further thoughts on this notion of disappearing cultures due to statelessness in Minority Group Rights).

53. See Malin, *supra* note 41; see also Ngala Killian Chintom, *Lack of Birth Certificates Puts Cameroon’s Indigenous People on the Brink of Statelessness*, ASSOCIATED PRESS (Sep. 22, 2024, at 12:10 ET), <https://apnews.com/article/e66ac688d68f1c57cabcf2c0ec788d8> [https://perma.cc/YDF6-GU62] (exploring the risk of statelessness confronting indigenous communities in Cameroon, particularly the Baka and Bagyieli, as a result of their missing birth certificates. This lack of documentation hinders their access to vital services like education, healthcare, and employment).

54. Convention Relating to the Status of Stateless Persons art. 1 ¶¶ 1–2, *opened for signature* Sep. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960). Interestingly, the 1954 Convention prohibits any form of reservations to Article 1(1) and makes the description of a stateless person binding on all States Parties to the treaty.

55. *Id.* at ¶ 1.

stateless person by the Convention must be interpreted in line with the ordinary sense of the text of the Convention, must be read in context, and must bear in mind the treaty's object and purpose as provided by Article 31(1) of the 1969 Vienna Convention on the Law of Treaties ("Vienna Convention").⁵⁶ This provision of the Vienna Convention establishes how treaties must be interpreted in a manner that does not defeat their objects and purposes, especially when they are human rights treaties.⁵⁷ Here, the 1954 Convention's object and purpose are to ensure that stateless persons can access and can enjoy their fundamental and existential human rights guaranteed in Article 15 of the Universal Declaration of Human Rights ("UDHR").⁵⁸ Importantly, the 1954 Convention adopts a declaratory rather than constitutive definition of statelessness: a person is stateless whenever they meet the elements in Article 1(1) of the Convention.⁵⁹ The recognition of statehood and its role in the protection of stateless persons is discussed in the next subhead.

A. Constituent Elements of the 1954 Convention's Definition of Statelessness

Elements are the components of a term that must be present to fully or affirmatively prove a legal claim as a whole.⁶⁰ Here, to understand the focus and description of the 1954 Convention, the following elements of a stateless person are as follows:

i. "A Person"

Personhood in law could apply to a legal person (entity) and a natural person.⁶¹ A legal person is treated as a natural person capable of engaging in all usual legal business that a natural person can participate in.⁶² Like a corporate entity, a legal person always has a place of incorporation or places of usual business, evidenced by a certificate of incorporation

56. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). Article 31(1) of the 1969 Convention mandates that states ensure the fulfillment of a treaty's object and purpose, such as the Convention on Statelessness. Typically, a treaty's "object and purpose" denotes the fundamental reasons and aims that led to its formation, clarifying the desired outcomes and the motivations behind the agreement among the involved parties. This concept serves as a guiding principle for interpreting the treaty's provisions in case of disputes; it embodies the "raison d'être" of the treaty within international law.

57. *Id.* at art. 18. Under international law, the 1969 Vienna Convention, which governs how treaties are made, allows states to make reservations or conditions to treaties before domestication or adoption, depending on how those treaties will be applicable locally. Generally, reservations are allowed unless a treaty does not allow them, and where they are permitted, the reservations are supposed not to contradict the "object and purpose of a treaty." See *id.* at art. 19, (explaining the Vienna Convention on the Law of Treaties 1969). It is common knowledge that states may make overwhelming reservations about human rights treaties because they seek to regulate states' domestic actions. They are primarily written to prevent states from taking actions that may violate the rights of their citizens or nationals. Human rights treaties may be intrusive and disruptive to state sovereignty; such may not happen to a regular treaty that does not regulate states' behaviors.

58. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 10, 1948) (illustrating, for example, that Article 15 of the Universal Declaration of Human Rights ("UDHR") states that "[e]veryone has the right to a nationality" and that "[n]o one can be arbitrarily deprived of their nationality").

59. Convention Relating to the Status of Stateless Persons, *supra* note 54, at art. 1 ¶ 1.

60. *Elements (of a Case)*, CORN. L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/elements_\(of_a_case\)](https://www.law.cornell.edu/wex/elements_(of_a_case)) [<https://perma.cc/5WE7-NMEW>] (last visited Nov. 26, 2025).

61. *Person*, BLACK'S LAW DICTIONARY 1257 (11th ed. 2019).

62. *Id.*

or registration.⁶³ Here, the implied reading of the Convention's scope is that statelessness affects "natural" human beings, not artificial or legal persons. Conventionally, international law and human rights laws seek to protect natural human beings, such as stateless persons, who lack a nationality.⁶⁴ Further, the rights and status protected by the 1954 Convention pertain to natural human beings, not legal persons.⁶⁵ Therefore, only a natural person can become stateless.⁶⁶

ii. *"Not Considered as a National by . . . Law"*

The second element of the 1954 Convention's definition is that, as a natural person living in a state's territory, the state does not consider him or her as a national according to its nationality laws. This element contradicts the provisions of the UDHR, which states that "everyone has the right to a nationality" and that "no one shall be arbitrarily deprived of his nationality."⁶⁷ "Law," in this context, is a hydra-headed concept that comprises legislation, soft laws (policies), judicial decisions (precedents), and applicable customs that have the binding force of law.⁶⁸ The overarching principle is that states' laws must not be repugnant to human rights and international norms (*jus cogens*) on the rights of stateless persons.⁶⁹ The law could become a mechanism for statelessness in a few instances. For example, states might design their nationality laws and administrative policies to exclude residents who do not meet their nationality requirements.⁷⁰ States might also develop discriminatory laws that prevent parents from transferring nationality to their children due

63. Convention Relating to the Status of Stateless Persons, *supra* note 54, at art. 1 ¶ 1.

64. See generally David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 HUM. RTS. Q. 245 (2006), https://scholarship.law.umn.edu/faculty_articles/412 [<https://perma.cc/EN2D-BZ76>] (examining international law such as Article 15 of the Universal Declaration of Human Rights which articulates the rights of stateless individuals).

65. Convention Relating to the Status of Stateless Persons, *supra* note 54, at art. 1 ¶ 1.

66. There is no evidence supporting the extension of the 1954 Convention on statelessness to legal or artificial entities. The Convention specifically addresses natural persons rather than corporations, which are linked to their main places of business or incorporation.

67. Contrary to this treaty, a group of vulnerable migrating persons is called "stateless persons." They are without a country; they do not share any nationality status and practically belong nowhere. In stasis or movement, nationality ties can be broken and give rise to statelessness. Statistically, over ten million people do not have a place they call their "country." See G.A. Res. 217 (III) A, *supra* note 58; see also *Who We Protect: Stateless People*, UNHCR: UN REFUGEE AGENCY, <https://www.unhcr.org/ibelong/statelessness-around-the-world/> [<https://perma.cc/XCW6-XNUW>] (last visited June 6, 2024).

68. The exclusion of individuals leading to statelessness typically occurs based on how states define their nationality laws, whether through legislation, administrative policies, or customs. These are human-made legal tools that states may employ to produce geographical exclusions that ultimately lead to statelessness.

69. See generally Roslyn Moloney, *Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent*, 5 MELB. J. INT'L. L. 155 (2004) (explaining that Article 19(c) of the Vienna Convention on the Law of Treaties mandates that any reservations to treaties must align with their object and purpose). This is intended to prevent questionable and excessive reservations by states concerning human rights treaties. Additionally, the text discusses options for addressing incompatible reservations and highlights the advantages of a severability regime for protecting human rights. *Id.*

70. Certain individuals might become stateless if nationality laws are not thoughtfully constructed. Moreover, the laws in some countries may deliberately exclude individuals from obtaining citizenship, thereby discriminating against minority groups based on race or religion or hindering mothers from transferring their nationality to their offspring.

to gender restrictions.⁷¹ In other instances, there could be a conflict of laws on nationality, for example, when determining the nationality of foundlings or adopted children.⁷²

Further, not being considered as a national of a state also means that a state could use its laws to exclude or determine the processes of acquisition, renunciation, loss or deprivation of nationality even when the processes do not interfere with the provisions of international law, which may eventually lead to statelessness.⁷³ For example, a state's national law and policy might trigger a loss of nationality status by operation of law, a mandate known as *ex lege*.⁷⁴ Where the operation of law does not trigger the loss or acquisition of nationality, it may occur through factual or objective evidence, such as a document recording system.⁷⁵ For example, a state might require a citizenship certificate or other documents as conclusive evidence of nationality. In this instance, a person may become stateless if there are no conclusive documents to substantiate a claim of nationality or membership in the state.

iii. Under the Laws of any State

The third component of the Convention's definition of a stateless person is being excluded from nationality by the nationality "laws and policies" of a "state."⁷⁶ Here, the status of statehood is instructive in understanding who a stateless person is. Only a state actor in line with international law may recognize a person as stateless.⁷⁷ Statehood must comply with the components outlined in the 1933 *Montevideo Convention on Rights and Duties of States*.⁷⁸ The Convention provides that a "state" must possess a permanent population, a defined territory, a government, and the capacity to conduct international relations.⁷⁹ A non-state actor may not denationalize or nationalize a stateless person because the entity lacks both international and domestic sovereignty and recognition.⁸⁰

71. See *Background Note on Gender Equality, Nationality Laws and Statelessness 2014*, UNHCR: REFUGEE AGENCY (2014), <https://www.unhcr.org/media/background-note-gender-equality-nationality-laws-and-statelessness-2014> [https://perma.cc/J2VX-X3BH].

72. See Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 1–2, Apr. 12, 1930, 179 L.N.T.S. 89 (deliberating on resolving the problem of statelessness, the members of that deliberation reasoned that humanity's efforts should be directed in this domain to the abolition of all cases of statelessness and double nationality). "It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality." *Id.*

73. *Id.*

74. See Memorandum by the Secretary General, Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons, U.N. Memorandum E/AC.32/2 (Jan. 3, 1950) (proposing that the status of refugees and stateless individuals should be established through international conventions rather than relying solely on states' nationality laws, which can be used arbitrarily to oppress marginalized groups and deny them the benefits of nationality based on discrimination).

75. The UNHCR aims to eliminate statelessness by 2024. While this target has not yet been achieved, it remains feasible if governments and international organizations can gather accurate data to support stateless individuals and tackle the root causes of statelessness. Consequently, improved statistics are essential for enhancing the lives of those without citizenship and ultimately eradicating statelessness.

76. See *Who We Protect: Stateless People*, *supra* note 67.

77. See Convention Relating to the Status of Stateless Persons, *supra* note 54, at art. 1.

78. See Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, T.S. No. 881, 165 L.N.T.S. 19 (entered into force Dec. 23, 1936).

79. *Id.*

80. *Id.*

Part III. The Causes of Statelessness

A person can be born stateless or lose their nationality later in life and consequently become stateless.⁸¹ Several reasons may trigger statelessness. People usually acquire a nationality automatically at birth through either their parents or the country where they were born.⁸² This Part outlines some common causes of statelessness, including conflicting nationality laws, administrative loopholes in accessing nationality, arbitrary deprivation of nationality, forced migration, population displacement, renunciation of nationality, gender-based discrimination, and inadequate safeguards in nationality laws.

A. Discrimination: Race, Ethnicity, Religion, Language, or Gender

Generally, a significant cause of statelessness is discrimination based on race, ethnicity, religion, language, or gender.⁸³ States can also deprive citizens of their nationality through changes in law using discriminatory criteria that leave whole populations stateless.⁸⁴ The majority of the world's known stateless populations belong to minority groups.⁸⁵ For example, gender discrimination in nationality laws is a significant cause of childhood statelessness.⁸⁶ As discussed, *infra* Part IV.A.iv, in this guise, some countries still have laws that do not allow women to pass on their nationality on equal terms with men.⁸⁷ Nations have laws that establish the grounds for acquiring or losing nationality; some of these grounds are influenced by gender-based discrimination.⁸⁸

81. See *Statelessness*, HIAS, <https://hias.org/statelessness/> [<https://perma.cc/R6EL-N9JN>] (last visited Feb. 3, 2026). For instance, an individual may become stateless or lose their nationality later in life due to several reasons, including changes in national borders, discriminatory nationality laws, administrative errors, or government actions that revoke citizenship, even if they were once regarded as a citizen of a specific country. See *id.* This scenario can arise when a new country emerges, when an individual relocates to a different territory, or if they cannot provide proof of their nationality due to lost documentation.

82. *Id.*

83. See generally *Citizenship and Statelessness: (in)equality and (non)discrimination*, INST. ON STATELESSNESS & INCLUSION (2018) (explaining discrimination against stateless persons and the right to equality).

84. *Id.* at 13.

85. See Press Release, *UNHCR Report Exposes the Discrimination Pervading the Life of Stateless Minorities Worldwide*, UNHCR: UN REFUGEE AGENCY (Nov. 3, 2017), <https://www.unhcr.org/news/press-releases/unhcr-report-exposes-discrimination-pervading-life-stateless-minorities> [<https://perma.cc/59ZY-2ZDV>].

86. See *Countries That Deny Women Equal Nationality Rights*, GLOB. CAMPAIGN FOR EQUAL NAT'L RTS., <https://www.equalnationalityrights.org/countries-that-deny-women-equal-nationality-rights/> [<https://perma.cc/423B-945E>] (last visited Nov. 7, 2025) (highlighting that gender discrimination in nationality laws can hinder children's ability to inherit their parents' nationality or result in women losing their nationality due to their gender or marital status).

87. See *id.*

88. See *id.*

B. Conflict of Nationality Laws

Another cause of statelessness is a conflict of nationality laws.⁸⁹ Here, people may move from their birth nations to another country where they face conflicting nationality laws.⁹⁰ This conflict may make it impractical for them to acquire another nationality in their current country if they have already lost their birthplace's nationality due to long-term settlement.⁹¹ Therefore, conflicting laws may give rise to the risk of statelessness.⁹² For example, a child born in a foreign country can risk becoming stateless if that country does not permit nationality based on birth alone (that is, it grants nationality based on descent from a national) and if the country of origin does not allow a parent to pass on nationality to children born abroad.⁹³ Such a situation can leave entire generations stateless. Worthy of note is the nationality of the foundlings. Foundlings are children, usually babies, who have been abandoned by their parents and then discovered and cared for by others.⁹⁴ It is important to note that not all children abandoned at churches and monasteries fit the legal description of foundlings.⁹⁵ A child could be abandoned but had been registered as a citizen of a state before being abandoned.⁹⁶ Foundlings under international law are abandoned children with no traceable blood relatives or nationality.⁹⁷ Article 2 of the 1961 Convention on the Reduction of Statelessness stipulates that: “[a] foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.”⁹⁸

89. See, e.g., U.N. High Comm'r for Refugees, *Report of the United Nations High Commissioner for Refugees*, ¶¶ 23, 62, 66, U.N. Doc. A/79/12 (Nov. 4, 2024); Carol A. Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 INT'L J. REFUGEE L. 156, 157–58 (1998) (explaining the notion of deprivation of nationality and the impacts of statelessness where there are no alternative laws to prevent a person from being stateless); see also SANDRA MANTU, *CONTINGENT CITIZENSHIP: THE LAW AND PRACTICE OF CITIZENSHIP DEPRIVATION IN INTERNATIONAL, EUROPEAN AND NATIONAL PERSPECTIVES 1* (Brill Nijhoff ed., 2015); see U.N. High Comm'r for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, UNHCR: UN REFUGEE AGENCY (June 30, 2014), <https://www.refworld.org/policy/legalguidance/unhcr/2014/en/122573> [<https://perma.cc/WK7A-Q985>].

90. See David A. Martin, *Dual Nationality: TR's "Self-Evident Absurdity"*, UVA LAW. (Oct. 27, 2004), https://www.law.virginia.edu/static/uvalawyer/html/alumni/uvalawyer/sp05/martin_lecture.htm [<https://perma.cc/RU3Q-7V4F>] (explaining that humanity's efforts should be directed toward the abolition of all cases of statelessness and double nationality where practicable, especially in instances where there might be a conflict between two nationality laws).

91. See JORUNN BRANDVOLL ET AL., *NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW* 257 (Alice Edwards & Laura van Waas, eds., Cambridge Univ. Press 2014).

92. See EDWIN O. ABUYA ET AL., *STATELESSNESS, GOVERNANCE, AND THE PROBLEM OF CITIZENSHIP* 83, 146, 201, 227, 312 (Tendayi Bloom, Katherine Tonkiss, & Phillip Cole eds., Manchester Univ. Press 2021).

93. See HIAS, *supra* note 81.

94. See Mai Kaneko-Iwase, *Are Parents of Foundlings Really "Unknown"? Avoiding Statelessness Under International Nationality Law*, EUR. NETWORK ON STATELESSNESS: BLOG (Dec. 10, 2021), <https://www.statelessness.eu/updates/blog/are-parents-foundlings-really-unknown-avoiding-statelessness-under-international> [<https://perma.cc/75H3-XHW5>].

95. *Id.*

96. *Id.*

97. See GERARD-RENÉ DE GROOT, *NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW* 144, 167–68 (Alice Edwards & Laura van Waas eds., 2014).

98. See Convention on the Reduction of Statelessness art. 2, *opened for signature* Aug. 30, 1961, 1989 U.N.T.S. 175 (entered into force Dec. 13, 1975).

Further, “foundling” refers to a “person of unknown parents who is a child” when found in a territory.⁹⁹ Some cogent issues arise from understanding foundling persons, such as determining the “required age of the child” when found.¹⁰⁰ There are instances when contracting state parties do not identify abandoned children that may be identified as foundlings because of age limitations. For example, when the police discover an abandoned child, they could say the child is “too old” to be called a “foundling” and that the term “foundling” only applies to newborn babies. On the other hand, some state agents could say that an abandoned child is old enough to be responsible for their status and identify or trace who their parents are and where they were born.¹⁰¹ These possibilities could render a foundling perpetually stateless. Also, there are instances where individuals cannot prove their nationality because, upon reaching adulthood, they realize that their birthplace and parentage were not documented or registered at the time of their birth, thus rendering them stateless.¹⁰² Here, recognizing these persons as stateless is within Article 2 of the 1961 Convention, which obliges states to resolve their statelessness by identifying them as state nationals and adjudicating them as stateless.¹⁰³ The import of the Convention is that contracting states should confer the nationality of the state where a child is found or where the child has grown into adulthood as their nationality to avoid protracted statelessness.

C. State Secession

Another cause of statelessness is “state secession” or political divorce. Secession occurs when a component state breaks away from its parent state to form a new state, or when a new state supersedes another.¹⁰⁴ When a part of a state secedes, it typically results in the emergence of new states and changes in territorial boundaries.¹⁰⁵ In many cases, specific groups can be left without nationality, and even where new countries allow nationality for all, ethnic, racial, and religious minorities frequently have trouble proving their link to the country.¹⁰⁶ Therefore, creating new countries, transferring territory between existing countries, or altering borders can result in the exclusion of groups of people who may struggle to establish their connections to a particular country.¹⁰⁷

99. See DE GROOT, *supra* note 97.

100. *Id.*

101. *Id.*

102. See *Protect Human Rights: Ending Statelessness*, *supra* note 48.

103. See Convention on the Reduction of Statelessness, *supra* note 98, at art. 2.

104. See Olawale Olumodimu, *The Politics and Consequences of State Secession*, 55 ST. MARY’S L.J. 771, 777 (2024).

105. See Mike Sanderson, *Key Threats of Statelessness in the Post-Secession Sudanese and South Sudanese Nationality Regimes*, 19 TILBURG L. REV. 236, 236–37, 247 (2014).

106. See BRANDVOLL ET AL., *supra* note 91, at 226, 234.

107. See ARMAN SARVARIAN, *THE LAW OF STATE SUCCESSION: PRINCIPLES AND PRACTICE* 265, 268, 289–90 (Oxford Univ. Press 2025); see also G.A. Res. 55/153, at art. 22 (Jan. 30, 2001).

For example, Europe has more than 600,000 stateless people due to the dissolution of former countries.¹⁰⁸ Ian Brownlie says, “[t]he population follows the change of sovereignty in matters of nationality.”¹⁰⁹ The challenge with state secession that leads to the deprivation of nationality is that, though international law mandates that states avoid statelessness or deprivation of nationality, it does not impose any duty on a seceding state or a state successor to grant nationality to members of a former parent state.¹¹⁰ Therefore, the acquisition and loss of nationality are matters for states to regulate under their municipal law according to their interests and expectations.¹¹¹ A nation must be able to determine under its legal system who its nationals are.¹¹² In countries where nationality is only acquired by descent from a national, statelessness will be passed on to the next generation. Statelessness can also be caused by loss or deprivation of nationality.¹¹³ Here, denationalization, which can occur when citizens lose their nationality due to prolonged residence outside their country, triggers statelessness. In some countries, citizens can lose their nationality simply by residing outside their country for an extended period. Individuals may be at risk of statelessness if they cannot prove their links to a state. In some instances, the lack of birth registrations or nationality documentation to prove a person’s place of birth and parentage triggers statelessness. It is apt to note that being undocumented is not the same as being stateless. However, a lack of birth registration can put people at risk of statelessness, just as a birth certificate provides proof of a person’s place of birth and parentage, which is critical information needed to establish their nationality.

D. Revocation of Nationality or Denial of Birthright Citizenship

Another cause of statelessness is the state practice of revoking nationality as a form of punishment for committing a crime—a state can also determine who is eligible for its legal membership. As seen in the case of Hamdi, *infra* Part II.E, a state may revoke nationality on specific grounds if the process is not arbitrary. However, states have been enjoined from revoking or stripping nationality as a pretext to achieve particular political or public policy objectives, because such persons could be at

108. See Abigail Edwards, Ángeles Zúñiga & Erol Yayboke, *The State of Statelessness in Ukraine*, CSIS (Mar. 1, 2023), [https://www.csis.org/analysis/state-statelessness-ukraine#:~:text=Approximately 10 million people are,to personal or political circumstances \[https://perma.cc/86SZ-VM2X\]](https://www.csis.org/analysis/state-statelessness-ukraine#:~:text=Approximately 10 million people are,to personal or political circumstances [https://perma.cc/86SZ-VM2X]).

109. Ian Brownlie, *The Relations of Nationality in Public International Law*, 9 BRIT. Y.B. INT’L L. 317, 320 (1964).

110. See D. P. O’CONNELL, STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW: INTERNAL RELATIONS 503 (C.J. Hamson & R.Y. Jennings, eds., Cambridge Univ. Press 1967). For example, “[a]lthough inhabitants of territory ceded by or seceding from the Crown lose their British nationality, it does not follow that they acquire either automatically or by submission of that of the successor State.” *Id.*

111. See Katherine Southwick, *Ethiopia-Eritrea: Statelessness and State Succession*, FORCED MIGRATION REV., <https://www.fmreview.org/southwick/> [https://perma.cc/UA35-53EP] (last visited Nov. 17, 2025).

112. See Convention on Certain Questions Relating to the Conflict of Nationality Laws, *supra* note 72.

113. See Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, opened for signature Mar. 19, 2006, C.E.T.S. No. 200 (entered into force Jan. 5, 2009).

risk of becoming stateless.¹¹⁴ This Article advocates that states should be cautious of the deliberate use of citizenship policy as a way to suppress or punish unwanted behavior or civil disobedience. For example, individuals who have deserted the military should not be penalized by losing their nationality or citizenship for their actions.¹¹⁵ Succinctly, Chief Justice Warren, in the case of *Trop v. Dulles*,¹¹⁶ explained that the:

[U]se of denationalization as a punishment . . . is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.¹¹⁷

According to Justice Warren's opinion above, states should refrain from using denationalization as a form of punishment when less severe legal alternatives can effectively address harmful behaviors detrimental to national development. For instance, the Eighth Amendment of the U.S. Constitution prohibits denationalization as punishment, as involuntary removal of citizenship is considered a form of torture.¹¹⁸ States that do not physically torture their citizens but resort to punitive denationalization still commit human rights violations similar to those found in regimes that practice physical torture.

E. Renunciation of Nationality

Statelessness may occur when nationals from countries that do not allow dual citizenship renounce their nationality and accept another country's nationality. If they lose their new nationality, they may be required to relinquish it and leave the country. Statelessness occurs if no

114. See generally *Al-Jedda v. United Kingdom*, App. No. 27021/08, ¶¶15, 38, 99, 118 (July 7, 2011), [https://hudoc.echr.coe.int/eng#{"appno":\["27021/08"\],"itemid":\["001-105612"\]}](https://hudoc.echr.coe.int/eng#{) [<https://perma.cc/7LBW-8R2D>] (holding that the UK violated the prohibition on creating statelessness by depriving Al-Jedda of his British nationality and stressing that states cannot manipulate nationality laws for policy objectives when such deprivation results in statelessness).

115. For example, in 2014, some European countries and Canada were contemplating amending their nationality laws to allow their governments to deprive "foreign terrorist fighters" ("FTFs") and (suspected) terrorists of their citizenship. While it could serve a national interest to deprive FTFs and suspected terrorists of their citizenship, states should take such steps in accordance with the due process of law. See Christophe Paulussen & Laura van Waas, *UK Measures Rendering Terror Suspects Stateless: A Punishment More Primitive Than Torture*, ICCT (June 5, 2014), <https://www.icct.nl/publication/uk-measures-rendering-terror-suspects-stateless-punishment-more-primitive-torture#:~:text=Chief Justice Warren explained that,was centuries in the development> [<https://perma.cc/33N6-QMKN>].

116. 356 U.S. at 101–02.

117. *Id.*

118. *Id.*

replacement nationality exists. If a person renounces citizenship without holding another nationality, they are left without any legal nationality, which is precisely the definition of statelessness under the 1954 Convention: “A person who is not considered as a national by any State under the operation of its law.”¹¹⁹ In *Vance v. Terrazas*, the Court established that an individual renouncing his citizenship must do so both voluntarily and with a specific intent to expatriate and that such intent must be either directly expressed or reasonably inferred from an established conduct.¹²⁰ The case of Joel Slater is a direct example of express and voluntary renunciation leading to statelessness.¹²¹ Slater officially renounced his U.S. citizenship in 1987 at the U.S. Consulate in Perth, Australia, to politically protest U.S. foreign policy, and received a Certificate of Loss of Nationality.¹²² Various international courts have also faced the question of how to determine the political status of stateless individuals.¹²³ In Austria, a Serbian national living in Austria received a letter of assurance that she would obtain Austrian nationality, *contingent* on renouncing her Serbian citizenship.¹²⁴ She renounced Serbian nationality (as required), but later lost her Austrian nationality because she did not meet other ongoing requirements (such as income).¹²⁵ Since her former citizenship had already been renounced and Austrian nationality was never officially confirmed, she became stateless. The Austrian Court declared “unconstitutional the law which requires continuous fulfillment of all the conditions for naturalization, even after Austrian nationality has been conditionally granted and the former nationality has been renounced.”¹²⁶ However, the Austrian Court did not explicitly engage with the concept of statelessness and only resolved the constitutional question.¹²⁷

*Hamdi v. Rumsfeld*¹²⁸ is an instance of forced political statelessness—the U.S. Supreme Court’s decision is instructive on the Court’s posture towards an “enemy combatant.” Hamdi, the American-born “enemy combatant” taken into custody in the aftermath of the 9/11

119. Convention Relating to the Status of Stateless Persons, *supra* note 54, at art. 1.

120. See *Vance v. Terrazas*, 444 U.S. 252, 252–53 (1980).

121. Kim Boatman, *A Man Without a Country, Literally – Ex-U.S. Citizen Has Become a Drifter Among Nations*, SEATTLE TIMES (Nov. 27, 1992), <https://archive.seattletimes.com/archive/19921127/1526849/a-man-without-a-country-literally---ex-us-citizen-has-become-a-drifter-among-nations> [https://perma.cc/T84F-F4TS]; see also Steve Chawkins, *Garry Davis Dies at 91; World Citizen No. 1 and Advocate for Peace*, L.A. TIMES (Aug. 1, 2013, at 06:00 PT) <https://www.latimes.com/local/obituaries/la-me-garry-davis-20130801-story.html> [https://perma.cc/7CGX-WTJ4].

122. Boatman, *supra* note 121.

123. See, e.g., *Austria – Constitutional Court, Case No. 5154/10*, STATELESSNESS: CASE L. DATABASE (Sep. 29, 2011), <https://caselaw.statelessness.eu/caselaw/austria-constitutional-court-case-no-g15410> [https://perma.cc/426N-3GJM].

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. See generally *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that “enemy combatants” are entitled to due process and a meaningful opportunity to contest factual findings and present evidence before a neutral decisionmaker). See Abigail d. Lauer, *The Easy Way Out: The Yaser Hamdi Release Agreement and the United States’ Treatment of the Citizen Enemy Combatant Dilemma*, 91 CORN. L. REV. 927, 928 n.3 (2006) (“Hamdi agrees to appear before a diplomatic or consular officer of the United States . . . to renounce any claim that he may have to United States nationality pursuant to Section 349(a)(5) [of the Immigration and Nationality Act, 8 U.S.C. § 1481(a)].”).

attack, was held in detention without trial for three years after the surrender of his Taliban military unit in Afghanistan.¹²⁹ The U.S. Supreme Court intervened in his case by allowing him to leave the country, provided he relinquish his citizenship pursuant to § 349(a)(5) of the Immigration and Nationality Act—a condition he agreed to with the Department of State.¹³⁰ According to this “Release Agreement,” the U.S. transferred Hamdi to Saudi Arabia on October 11, 2004, where he was raised, despite him being born in Baton Rouge, Louisiana.¹³¹ According to the Release Agreement, “Hamdi must remain in Saudi Arabia and be subject to strict travel restrictions and monitoring by the Saudi government.”¹³² Because the Kingdom of Saudi Arabia does not allow dual citizenship, except in some exceptional cases, it is not clear whether Saudi Arabia absorbed Hamdi and granted him its nationality.¹³³ What is clear is that Hamdi may no longer assert his rights as a U.S. citizen or national because the U.S. made him renounce his citizenship in return for his freedom, contrary to the Supreme Court’s decision in *Vance*.¹³⁴

As demonstrated above, revoking a person’s sole nationality can potentially lead to statelessness or the risk of becoming stateless; the revocation of nationality as punishment for crimes is akin to the extermination of humanity. For example, in 1958, the Supreme Court barred the U.S. government from punitively revoking a person’s citizenship, calling it “a form of punishment more primitive than torture.”¹³⁵ The stance of the Court amplifies the international community’s position that statelessness can be so harmful that states should consider banning the practice of revoking citizenship as a means of punishment when the victim could be at risk of statelessness. The following discussion examines the provisions of the Fourteenth Amendment concerning the principle of birthright citizenship and whether it can be revoked.

Part IV. Discussions on Birthright Citizenship of Children Born to Undocumented Immigrants in the U.S. Constitution

The Trump Administration has consistently rejects the idea of birthright citizenship and advances a position that children born to undocumented immigrants are still illegal; this anti-immigration position is expressly

129. *See Hamdi*, 542 U.S. at 510–11.

130. *See* Immigration and Nationality Act of 1952, 8 U.S.C. § 1481(a)(5).

131. *See* Lauer, *supra* note 128, at 932–33.

132. *Id.* at 928.

133. *See* Saudi Arabian Citizenship System art. 11 (1954). Hamdi’s Release Agreement also raised concern with Saudi Arabian government officials because “since the Saudi Arabian government was not a party to the Release Agreement, it cannot enforce the Agreement’s provisions.” Abigail d. Lauer, *The Easy Way Out: The Yaser Hamdi Release Agreement and the United States’ Treatment of the Citizen Enemy Combatant Dilemma*, 91 CORN. L. REV. 927, 948–49 (2006). The results of the Release Agreement revisions in the case of Hamdi was not made public by either the U.S. State Department or the Saudi government. *See id.* at 950.

134. *Vance*, 444 U.S. at 260 (holding that the U.S. government has the onus to prove intent to surrender U.S. citizenship and not just the voluntary commission of an expatriating act, and that the appropriate standard of proof for analyzing the citizen’s conduct would be by a preponderance of the evidence).

135. *Dulles*, 356 U.S. at 101 (holding that the U.S. government may not revoke the status of citizenship as a punishment for crime because the interpretation of the Eight Amendment requires some “evolving standards of decency”).

demonstrated through various executive orders.¹³⁶ Signed on January 20, 2025, Executive Order 14,160, Protecting the Meaning and Value of American Citizenship, outlines the legal justification and policy framework of the Trump Administration.¹³⁷ This recent executive order targets the termination of birthright citizenship for children born to parents illegally residing in the U.S.¹³⁸ It aims to redefine the Fourteenth Amendment and associated laws to omit children of undocumented immigrants.¹³⁹ The Order states that the “Fourteenth Amendment has never been interpreted to extend citizenship universally to everyone born within the U.S. The Fourteenth Amendment has always excluded from birthright citizenship persons who were born in the United States but not ‘subject to the jurisdiction thereof.’”¹⁴⁰ The Order goes on to describe the types of individuals who are “born in the United States and not subject to the jurisdiction thereof.”¹⁴¹ These individuals include cases in which the:

[P]erson’s mother was unlawfully present in the United States and the person’s father was not a United States citizen or lawful permanent resident at the time of said person’s birth, or (2) when that person’s mother’s presence in the United States at the time of said person’s birth was lawful but temporary, and the father was not a United States citizen or lawful permanent resident at the time of said person’s birth.¹⁴²

Arguably, this reinterpretation of the Fourteenth Amendment, as shown above, effectively eliminates birthright citizenship for individuals whose parents are not citizens. The enforcement of this Order relies on the executive’s authority over document-issuing agencies and prohibits all executive agencies and departments from issuing documents that acknowledge U.S. citizenship for individuals born in these two scenarios above.¹⁴³ The Order mandates that all departments and agencies provide public guidance on its implementation within thirty days; however, no such guidance has been published to date.¹⁴⁴ Enforcement of the Order was initially blocked by lower federal courts by preliminary injunctions filed by several states and individuals.¹⁴⁵ These challenges have been

136. See Tara Watson & Jonathon Zars, *100 Days of Immigration Under the Second Trump Administration*, BROOKINGS (Apr. 29, 2025), <https://www.brookings.edu/articles/100-days-of-immigration-under-the-second-trump-administration/> [https://perma.cc/8DD3-2YGV].

137. Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. See Haley Durudogan & Devon Ombres, *What to Know About the Supreme Court Case on Birthright Citizenship and Nationwide Injunctions*, CTR. AM. PROGRESS (May 12, 2025), <https://www.americanprogress.org/article/what-to-know-about-the-supreme-court-case-on-birthright-citizenship-and-nationwide-injunctions/> [https://perma.cc/6SFX-F7KV] (reporting that federal district court judges in Maryland, Massachusetts, and Washington issued nationwide injunctions halting the federal government from enforcing the Trump Administration’s January 20, 2025 executive order); see also *CASA, Inc. v. Trump*, 763 F. Supp. 3d 723 (D. Md. 2025); *State v. Trump*, 765 F. Supp. 3d 1142 (W.D. Wash. 2025); *Doe v. Trump*, 766 F. Supp. 3d 266 (D. Mass. 2025).

consolidated in *Trump v. CASA, Inc.*¹⁴⁶ On June 27, 2025, the Supreme Court, with a majority opinion authored by Justice Barrett, granted the Government's application to partially stay the injunctions entered by the lower courts.¹⁴⁷ The Trump Administration's brief included broad legal theories on immigration, however, not all the arguments persuaded a majority of the justices.¹⁴⁸

First, the brief references *Elk v. Wilkins*¹⁴⁹ to support its interpretation of "jurisdiction" to mean "political jurisdiction" which refers to whether a person owes allegiance to the U.S., rather than "regulatory jurisdiction" which refers to whether a person must follow U.S. law.¹⁵⁰ *Elk* consequently denied birthright citizenship to Native Americans born within Indian reservations because their primary allegiance was to their tribes.¹⁵¹ This interpretation would limit the Fourteenth Amendment to only granting birthright citizenship to children of parents who owe their loyalty to the U.S.¹⁵² Second, the brief references *United States v. Wong Kim Ark*,¹⁵³ where the Court addressed:

[W]hether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States . . . becomes at the time of his birth a citizen of the United States.¹⁵⁴

The Court ultimately decided that such children become citizens at birth with the caveat that the parents "have a permanent domicile and residence in the United States."¹⁵⁵ This ruling provides the Trump Administration with a tenuous claim and a questionable legal precedent, suggesting that birthright citizenship is only available to immigrants born to parents with permanent residence within the U.S.

146. See generally 606 U.S. 831, 837 (2025) (granting a partial stay of injunctions entered against President Trump's executive order).

147. *Id.*

148. Brief for Appellants at 1, 4, 13, 17, 19, 27, 29, *CASA, Inc. v. Trump*, No. 25-1153 (4th Cir. Mar. 2025) [hereinafter *CASA Appellants' Brief*].

149. 112 U.S. 94, 95–96 (1884); *CASA Appellants' Brief*, *supra* note 148, at 38. In *Elk v. Wilkins*, the U.S. Supreme Court considered whether someone born as a Native American in the United States could claim citizenship under the Fourteenth Amendment. John Elk, a member of the Ho-Chunk Nation, had severed his ties with his tribe and was residing among non-Native Americans in Omaha, Nebraska. After being refused voter registration, he sued the registrar, Charles Wilkins, insisting he was a U.S. citizen. The Court ruled 7-2, determining that Elk was not a citizen because he was not "subject to the jurisdiction" of the United States at the time of his birth, owing his allegiance to his tribe. This decision effectively excluded Native Americans from automatic citizenship, a situation later addressed by the Indian Citizenship Act of 1924.

150. *Elk*, 112 U.S. at 102–03.

151. *Id.* at 102–03.

152. *Id.*

153. *CASA Appellants' Brief*, *supra* note 148 at 1, 4, 13, 16, 38; see also *United States v. Wong Kim Ark*, 169 U.S. 649, 653 (1898).

154. *Wong Kim Ark*, 169 U.S. at 653.

155. *Id.* at 705.

Outside of this administration's attempts to end birthright citizenship of children born to undocumented immigrants, members of the Republican Party have also introduced legislation to end it.¹⁵⁶ The first attempt was a Senate bill titled the Birthright Citizenship Act of 2025 which attempts to define "subject to the jurisdiction" of the U.S. in the Immigration and Nationality Act ("INA") to cases where parents are: (1) a citizen or national of the United States; (2) a lawfully admitted permanent resident of the U.S.; or (3) a lawful alien actively serving the armed forces.¹⁵⁷ An identical bill was introduced in the House of Representatives.¹⁵⁸ One notable bill, titled Build the Wall and Deport Them All Act, seeks to enshrine many of Trump's Executive Orders and memoranda into law.¹⁵⁹ Despite being a year before Trump's second inauguration, the bill sought to limit the INA to only citizens, nationals, or lawful aliens with permanent residence.¹⁶⁰ The following are arguments for and against ending birthright citizenship for children of undocumented immigrants.

A. Interpretation of the Fourteenth Amendment and Termination of Birthright Citizenship in the U.S.

The debate surrounding the termination of birthright citizenship intersects constitutional law, immigration policy, and human rights.¹⁶¹ Proponents support a narrow interpretation of the Fourteenth Amendment and advocate for stricter immigration measures, while opponents emphasize explicit constitutional protections, relevant precedents, and the potential for societal harm. Given the existing legal framework and the potential for extensive repercussions, any effort to eliminate birthright citizenship would likely face substantial legal and political obstacles. The primary constitutional interpretation of the concept of birthright citizenship originates from the Fourteenth Amendment to the U.S. Constitution. Section 1 of the Amendment states: "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."¹⁶²

Here, according to the current Administration, the key phrase is "subject to the jurisdiction thereof."¹⁶³ The conventional understanding of this provision suggests that anyone born on U.S. soil (*jus soli*) is included, except for the offspring of foreign diplomats and hostile occupying forces, who are not entirely governed by U.S. laws. However, alternative perspectives exist. Some contend that "subject to the jurisdiction" does not encompass children of undocumented immigrants, arguing that they are not fully governed due to their parents' unlawful presence. This view

156. See Birthright Citizenship Act of 2023, H.R. 6612, 118th Cong. (2023) (proposing to amend Section 301 of the Immigration and Nationality Act to limit automatic citizenship to children born in the United States to U.S. citizens, lawful permanent residents, or active members of the U.S. Armed Forces).

157. *Id.*

158. Birthright Citizenship Act of 2025, H.R. 569, 119th Cong. (2025).

159. See Build the Wall and Deport Them All Act, H.R. 7594, 118th Cong. (2023-2024).

160. *Id.*

161. See Jenna Ellis, *The Debate over Birthright Citizenship: Two Sides of a Constitutional Dilemma*, AM. FAM. NEWS (Jan. 24, 2025), <https://afn.net/opinions/jenna-ellis/2025/01/24/the-debate-over-birthright-citizenship-two-sides-of-a-constitutional-dilemma/> [<https://perma.cc/KD4W-2VV2>].

162. U.S. CONST. amend. XIV, § 1.

163. See *CASA Appellants' Brief*, *supra* note 148, at 1.

is based on Supreme Court precedent established in *Wong Kim Ark*.¹⁶⁴ The Court ruled that a child born in the U.S. to parents who are foreign nationals but are legally residing is a U.S. citizen.¹⁶⁵ Furthermore, this ruling strongly supports the concept of *jus soli* birthright citizenship and is considered a cornerstone precedent.¹⁶⁶ Additionally, the Court held in *Elk v. Wilkins*¹⁶⁷ that Native Americans were not automatically citizens at birth because they owed allegiance to their tribe, not the U.S.; this case is factually distinct from other immigration and citizenship cases due to the principles of tribal sovereignty.¹⁶⁸ Furthermore, some have argued that Congress can modify or clarify citizenship laws, yet still, the Fourteenth Amendment is a constitutional provision that limits Congress's power to restrict citizenship rights granted by birthright.¹⁶⁹ The phrase "subject to the jurisdiction thereof" in the Fourteenth Amendment has been interpreted to excluded children born to foreign nationals who are unlawfully present or on temporary visas based on the framers "intent."¹⁷⁰

B. Legal and Practical Consequences of Abolishing Birthright Citizenship in the U.S.

i. Risk of Statelessness

In cases of statelessness, children born in the U.S. to undocumented parents who do not receive citizenship may risk becoming stateless if their parents' countries of origin do not provide citizenship by descent. Those who are stateless face significant legal and social challenges, including restricted access to education, healthcare, and lawful employment.¹⁷¹

ii. Enforcement Challenges

Implementing a policy to deny birthright citizenship would require a robust administrative system to verify parental status at birth, which may burden hospitals and government agencies. It risks discrimination and racial profiling, as officials may make citizenship decisions based on appearance or nationality assumptions. The Center for American Progress argues that abolishing birthright citizenship would require an intricate and expensive national birth registry, imposing a significant burden on hospitals and government entities.¹⁷²

164. See *Wong Kim Ark*, 169 U.S. at 693–94 (explaining the reasoning and the history behind citizenship). This pivotal case established that a child born in the U.S. to non-citizen parents (who are legally residents and not foreign diplomats) is considered a U.S. citizen under the Fourteenth Amendment.

165. *Id.* at 694.

166. *Id.*

167. 112 U.S. at 102–03.

168. *What Does Tribal Sovereignty Mean to American Indians and Alaska Natives?*, U.S. DEP'T INTERIOR: INDIAN AFFAIRS (Aug. 19, 2017, at 14:52 ET), <https://www.bia.gov/faqs/what-does-tribal-sovereignty-mean-american-indians-and-alaska-natives> [<https://perma.cc/33L6-786L>].

169. See Amy Swearer, *Defining Citizens: Congress, Citizenship, and the Meaning of the Fourteenth Amendment*, HERITAGE FOUND. (Feb. 17, 2011), <https://www.heritage.org/the-constitution/report/defining-citizens-congress-citizenship-and-the-meaning-the-fourteenth> [<https://perma.cc/9HCK-DU76>] (explaining that although Congress has the power to legislate on citizenship issues, the Citizenship Clause of the Fourteenth Amendment sets constitutional boundaries that restrict its capacity to change birthright citizenship).

170. See *id.*

171. See Blanchett & Grandi, *supra* note 50.

172. See Tom Jawetz & Sanam Malik, *Turning Our Backs on the 14th Amendment*, CTR. AM. PROGRESS (Nov. 9, 2015), <https://www.americanprogress.org/article/turning-our-backs-on-the-14th-amendment/> [<https://perma.cc/VM2Q-375N>].

iii. Impact on Immigrant Families

Families may face greater insecurity and separation risks if children lack citizenship. Social and economic integration efforts could be undermined, and children could be barred from public benefits and protections tied to citizenship.¹⁷³ For example, children lacking citizenship status encounter greater risks of family separation and are more vulnerable to exploitation and abuse.¹⁷⁴ Without legal recognition, these children might be barred from accessing healthcare, education, and other critical services, resulting in adverse long-term effects on their health, development, and well-being. Additionally, not having citizenship may restrict their full participation in society, constraining opportunities for social and economic progress.¹⁷⁵ Implementing a system to confirm parental status at birth would create a considerable burden for hospitals and governmental bodies. This process would necessitate extensive documentation and coordination, resulting in increased administrative expenses and potential delays in birth registration. Additionally, enforcing such a policy could lead to racial profiling and discrimination, as officials might assess citizenship based on physical appearance or assumptions linked to nationality.¹⁷⁶

iv. Potential Litigation

These policies would likely face constitutional challenges in court, potentially invoking the Fourteenth Amendment and established Supreme Court precedents. This situation could result in lengthy legal disputes and uncertainty for the families involved. Thus, supporters depend on a more limited interpretation of the Fourteenth Amendment alongside a focus on immigration control. In contrast, critics highlight existing legal precedents, constitutional rights, and the societal repercussions of denying citizenship.¹⁷⁷

C. Arguments For Ending Birthright Citizenship for Children of Undocumented Immigrants

As earlier said, the topic of birthright citizenship for children of undocumented immigrants has sparked fierce debates, especially in countries grappling with immigration policies and national identity issues. Proponents of abolishing birthright citizenship argue that the current system encourages illegal immigration, strains public resources, and undermines the rule of law.¹⁷⁸ They contend that citizenship should be tied to legal residence or parentage, rather than just birthplace, to ensure

173. *Id.*

174. *Id.*

175. See Silvia Foster-Frau, David Nakamura & Molly Hennessy-Fiske, *What Ending Birthright Citizenship Could Look Like in the U.S.*, WASH. POST (Jan. 26, 2025), <https://www.washingtonpost.com/politics/2025/01/26/trump-birthright-citizenship-undocumented-children/> [https://perma.cc/5UN2-M7DW].

176. *Id.*

177. See generally Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1, 1 n.4 (2011) (explaining the positions of proponents and critics on how strict immigration policies can impact generations).

178. Exec. Order No. 14,160.

national membership is meaningful and regulated.¹⁷⁹ This Article evaluates the main arguments of reform advocates, focusing on concerns about immigration enforcement, social integration, and the perceived fairness of granting citizenship to those born to undocumented parents. Here are some arguments in support of the notion.

i. Control of Immigration Policy & Preserving the Value of Citizenship

Supporters of immigration control argue that birthright citizenship can incentivize illegal immigration by granting automatic citizenship to children born on U.S. soil, regardless of their parents' legal status.¹⁸⁰ Ending it could reduce what they see as "birth tourism" or unauthorized entry aimed at securing citizenship for offspring.¹⁸¹ Proponents of revoking birthright citizenship of children born to undocumented immigrants argue that limiting birthright citizenship safeguards the value and importance of American citizenship against perceived automatic entitlement, which aids in preserving national sovereignty and regulating who gains citizenship.¹⁸²

D. Arguments Against Ending Birthright Citizenship for Children of Undocumented Immigrants

i. Constitutional Protection and Legal Precedent

Critics argue that the Citizenship Clause of the Fourteenth Amendment confers automatic citizenship on anyone born in the U.S., regardless of their parents' immigration status, a position strong supported by Court precedent like *Wong Kim Ark*.¹⁸³

ii. Impact on Civil Rights and Social Integration

Critics argue that the revocation of birthright citizenship may adversely affect immigrant communities, undermine confidence in the legal system, and obstruct integration efforts, potentially giving rise to further discrimination and social fragmentation.¹⁸⁴ And children will likely be the group most impacted by the lack of social integration.

179. *Id.*

180. Cf. *Debunking the Myth of Immigrants and Crime*, AM. IMMIGR. COUNCIL (Oct. 2024), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/debunking_the_myth_of_immigrants_and_crime.pdf [<https://perma.cc/55X9-BCYV>].

181. See generally Minority Staff Report, *Birth Tourism in the United States*, U.S. SENATE: COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, at ii (Dec. 20, 2022), https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/2022.12.20-Final_Birth_Tourism_Report.pdf [<https://perma.cc/E9VT-X4LZ>] (Dec. 20, 2022) ("Birth tourism refers to expecting mothers traveling to the United States to obtain U.S. citizenship for their children. These tourists often cite the superior educational and professional opportunities available in the United States as their justification for making such a trip. Obtaining U.S. citizenship for their children is a hedged bet—a rainy day fund for a better life.").

182. See Jaclyn Diaz & Juliana Kim, *DOJ Announces Plans to Prioritize Cases to Revoke Citizenship*, NPR (June 30, 2025, at 05:00 ET), <https://www.npr.org/2025/06/30/nx-s1-5445398/denaturalization-trump-immigration-enforcement> [<https://perma.cc/J7GD-2Z2D>].

183. See 169 U.S. at 693–94.

184. See *Background Note on Gender Equality, Nationality Laws and Statelessness 2018*, UNHCR: UN REFUGEE AGENCY (Mar. 8, 2018), <https://www.refworld.org/reference/themreport/unhcr/2018/en/120612> [<https://perma.cc/M88J-KZ7C>].

iii. *Potential for Statelessness and Legal Confusion*

Ending birthright citizenship may lead to a group of stateless people or uncertainties concerning citizenship status, making it difficult for children who would otherwise be regarded as citizens.¹⁸⁵ Additionally, ending birthright citizenship is directly contrary to international law and will invoke as detailed below a response from the international community to the influx of stateless people.¹⁸⁶

Part V. The Response of the International Community to Statelessness

After World War II, displaced persons, including refugees, migrants, internally displaced persons, and stateless individuals, flooded the Atlantic World, prompting states to adjust their laws to accommodate them and allow them to settle within their territories.¹⁸⁷ For example, the U.S. enacted the notorious McCarran–Walter Immigration and Nationality Act of 1952, which largely preserved the discriminatory national-origins quota system that favored Northwestern Europeans.¹⁸⁸ It primarily kept immigration limited based on ethnicity, but made allowances in the quotas for persons displaced by World War II and allowed increased immigration of European refugees.¹⁸⁹ It also ended Asian exclusion from immigrating to the U.S. and introduced a system of preferences based on skill sets and family reunification.¹⁹⁰

At the international level, the United Nations created agreements that define what it means to be stateless.¹⁹¹ These agreements provided exceptions to the general presumption that states have an inalienable right to decide who they consider their members and whether or not they recognize individuals crossing their borders as legal residents.¹⁹² Moreover, these international agreements provided the basic rules for living outside the boundaries of states and seeking entry into them.¹⁹³ Depending on whether these agreements or treaties were self-executing or not, most states responded to these international agreements by incorporating those treaties into their legal systems through the enactment of local legislation. Those treaties allowed states to adopt descent and birth as the basis for citizenship and provided guidelines for naturalization. Two of those international agreements are the Convention Relating to the Status of Stateless Persons, adopted by the United Nations

185. See Convention Relating to the Status of Stateless Persons, *supra* note 54 (allowing for descent and birth as the basis for citizenship and some guidelines for naturalization).

186. See *id.*

187. See, e.g., *The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, U.S. STATE DEPT.: OFF. HISTORIAN, <https://history.state.gov/milestones/1945-1952/immigration-act> [https://perma.cc/7Y2B-9YDF] (last visited Nov. 18, 2025).

188. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952). The Act upheld the national origins quota system established by the Immigration Act of 1924, reinforcing this controversial system of immigrant selection. Codified under Title 8 of the United States Code, the Act governs immigration to and citizenship in the United States. Amongst many improvements, it paved way for the reform of discriminatory provisions in the U.S. immigration law. For example, it created a quota system for all nations and ended racial restrictions on citizenship.

189. *Id.*

190. *Id.*

191. See CHANDRA KUKATHS, ARE REFUGEES SPECIAL? THE ETHICS OF MOVEMENT AND MEMBERSHIP 255 (Sarah Fine & Lea Ypi eds., 2016).

192. *Id.*

193. *Id.*

General Assembly in 1954, and the 1961 Convention on the Reduction of Statelessness.¹⁹⁴ The 1954 Convention, discussed *supra*, establishes a framework for the international protection of stateless persons and is the most comprehensive codification of the rights of stateless persons yet attempted at the international level.¹⁹⁵ Whether this framework should become codified as local legislation by member states of the United Nations is a valuable discussion addressed in this Article's recommendations on how to end statelessness.

Moreover, even with states ratifying the 1961 Convention on the Reduction of Statelessness and the Convention Relating to the Status of Stateless Persons, significant challenges remain in implementing these treaties to ensure they are enforceable within their jurisdictions. I argue that some states may be reluctant to implement measures that offer sustainable solutions, like providing documentation to substitute for passports for stateless individuals. States might worry that by improving the status of these people, they could inadvertently encourage a larger influx of stateless individuals into their regions, fearing they would bear this responsibility alone. I further argue that any legislation aimed at improving the status of stateless persons should encompass a comprehensive array of provisions that impact various areas of national law. Additionally, convincing parliaments to adopt reform would be difficult because some provisions introduce novel and intricate law, which when implemented, immediately grant legal residency to many stateless persons. Resistance to this idea may also arise due to the limited legislative and economic resources available to meet the needs of stateless individuals, especially since many of their urgent issues are socio-economic.

A. Global Effects and Consequences of Statelessness

Statelessness has a profoundly negative impact on the protection and integrity of stateless individuals. In *Zadvydas v. Davis*,¹⁹⁶ the U.S. Supreme Court ruled that statelessness signifies the complete annihilation of a person's standing in an organized society. It constitutes a punishment more fundamental than torture, as it eradicates the political existence that took centuries to establish.¹⁹⁷ Statelessness has severe lifelong and devastating impacts on those it affects, which result in stateless persons having no legal protection, and includes being generally denied basic rights, such as: education, healthcare, employment, housing, marriage, freedom of movement, political participation during their lifetime, and even the dignity of an official burial and a death certificate when they

194. See generally Convention Relating to the Status of Stateless Persons, *supra* note 54 (allowing for descent and birth as the basis for citizenship and some guidelines for naturalization).

195. *Id.*

196. 33 U.S. 678, 702 (2001).

197. *Id.* at 701. Additionally, the Court clarified that the plenary power doctrine does not permit the indefinite detention of immigrants facing deportation when no other country will take them in. To extend an immigrant's detention beyond six months, the government must demonstrate that removal is likely in the near future or that special circumstances exist. In this instance, the Supreme Court acknowledged the increased burden and risk of statelessness faced by resident aliens in the U.S. who are deported but cannot be accepted by any country according to their nationality laws. The consequence of not being accepted after deportation is statelessness.

die.¹⁹⁸ The Court recognizes the results of statelessness, and the reasoning of the Justices can be used as a possible legal case law framework for other international courts.

i. Denial of Nationality and the Privilege to Enjoy Basic Human Rights

Because a stateless person lacks the nationality of any country, they cannot enjoy fundamental socioeconomic and civil-political rights tied to nationality. Their exclusion from nationality profoundly marks their lives, as well as those of their families and communities, in dramatic ways. Yet, while statelessness is a serious problem, it could be addressed through intentional legislative changes in national laws and policies. Additionally, most people are citizens of a particular country, holding birth certificates, passports, identification cards, driver's licenses, and health insurance cards or documents.¹⁹⁹ Stateless persons do not exist on paper, so it may not be statistically correct to assume that a certain number of persons are stateless globally.²⁰⁰ There are countries with little or no data on how they track statelessness, as most countries do not register and count stateless persons within their territories.²⁰¹ Further, stateless persons "often are not able to go to school, see a doctor, work legally, open a bank account, buy a house, or even get married."²⁰² Statelessness is the enemy of the common good and humanity, and it respects no domestic or international boundaries or legal systems.²⁰³ Moreover, statelessness can emerge from the chaos of fleeing war; while fleeing, families may lose the papers that prove their ties to a country, and that could make registering a child's birth impossible, leaving them stateless or at risk of being stateless.²⁰⁴ In some instances, borders can shift or dissolve completely—for example, the statelessness that occurred after the fall of the Soviet Union.²⁰⁵ In nations that define nationality mainly through descent from a citizen, or *jus sanguinis*, children of stateless parents will also be stateless after major political events. This generational transfer of statelessness occurs because a stateless person is unable to grant citizenship to their offspring, resulting in the absence of a nationality for these children.²⁰⁶

198. See Blanchett & Grandi, *supra* note 50.

199. *Handbook on Protection of Stateless Persons*, *supra* note 89, at ¶¶ 3–5.

200. *Global Trends: Forced Displacement in 2022*, UNHCR: UN REFUGEE AGENCY, at 43–45 (2023), <https://www.unhcr.org/global-trends-report-2022> [<https://perma.cc/TBD5-52RP>].

201. See, e.g., LAURA VAN WAAS, NATIONALITY MATTERS: STATELESSNESS UNDER INTERNATIONAL LAW 9–10 (Sch. of Hum. Rts. Rsch. Series 2008) (stating that to register a stateless person as a person of "unknown nationality" or simply as a "non-citizen" is to further obscure the statistics and add to the invisibility of this group.) (footnotes omitted).

202. See UNHCR: U.N. REFUGEE AGENCY, *supra* note 48.

203. See *id.* at 4 (UNHCR notes that statelessness affects millions worldwide, threatening human dignity, social stability, and the international rule of law).

204. See *id.*

205. Jeffrey L. Blackman, *State Successions and Stateless: The Emerging Right to an Effective Nationality Under International Law*, 19 MICH. J. INT'L L. 1141, 1144 (1998); see also Zoya Golovneva, *Joint Steps to End Statelessness in the Commonwealth of Independent States*, EUR. NETWORK ON STATELESSNESS (Apr. 4, 2019), <https://www.statelessness.eu/updates/blog/joint-steps-end-statelessness-commonwealth-independent-states> [<https://perma.cc/3BWV-9K6T>].

206. See UNHCR: U.N. REFUGEE AGENCY, *supra* note 48.

ii. The Indignity of Belonging Nowhere

Another consequence of statelessness is that stateless individuals have no place to belong. For them, each day highlights the rights they lack and the challenging quest for acknowledgment that often seems unattainable. Being stateless involves more than simply lacking documents proving nationality; it encompasses the dignity of belonging to a nation or society and the acceptance that demonstrates everyone has a place they can call home.²⁰⁷ It is difficult to define the notion of dignity. Whether through philosophical or religious lenses, it is unlikely to provide a common universal standard for deciding what it means to dignify humans or to subject them to indignities.²⁰⁸ One practical way to find a universally acceptable meaning of human dignity could be found in searching references to human dignity in national constitutions. Scholars have identified usage patterns that suggest a consensus on specific understandings of dignity.²⁰⁹ Most national constitutions have understood human dignity in terms of bodily integrity or protection.²¹⁰ The violation of a person's physical integrity is seen as an insult or reduction of the victim's dignity. In the U.S., courts have referenced dignity in ruling against violations of bodily integrity under the Eighth Amendment, which prohibits "cruel and unusual punishment."²¹¹ Moreover, international human rights treaties strengthen the constitutional agreement to protect individuals from governmental abuses by banning any instance of "torture or cruel, inhuman or degrading treatment."²¹²

Apart from bodily protection as a form of dignity, dignity represents not only the intrinsic or "existential" worth of human beings, but also the moral duty states owe their citizens to not torture or brutalize their bodies.²¹³ Here, the notion of dignity entails a basic or the minimum core living conditions that amplify the existence of a human being. Human worth is a fundamental and inalienable quality that every person possesses simply because they are human, regardless of their background or identity. Recognizing this inherent value is essential to fostering respect and understanding among individuals, as it goes beyond personal achievements or character and underscores our shared humanity. Embracing this perspective can lead to more compassionate interactions and a more inclusive society.²¹⁴

207. See Rascouët-Paz, *supra* note 13.

208. See Adeno Addis, *Human Dignity in Comparative Constitutional Context: In Search of an Overlapping Consensus*, 2 *TULANE J. INT'L & COMP. L.* 1, 1–2 (2015).

209. *Id.*

210. See NIGERIA CONST. § 33(2) (1999); KENYA CONST. art. 28 (stating that a person is entitled "to be treated with dignity and respect and to be addressed and referred in a manner that is not demeaning"); EL SAL. CONST. art. 11 (2003); BOL. CONST. art. 73 (2009); CROAT. CONST. art. 25 (2001); UKR. CONST. art. 28 (2004). All these national constitutions use dignity as a right that impedes the government from arbitrarily violating people's bodily and human integrity.

211. See *Roper v. Simmons*, 543 U.S. 551, 560 (2005) ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.").

212. See International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171.

213. See GEORGE KATEB, *HUMAN DIGNITY* (Harv. Univ. Press 2011) (defending the idea of human dignity as an existential value or worth).

214. See Addis, *supra* note 208, at 2–5.

Connecting the two descriptions of dignity to stateless persons establishes that they deserve protection from the arbitrary violation of their bodily integrity while stateless. They also deserve living conditions that validate their existence as human beings and not as humans deemed “superfluous” *qua humans*.²¹⁵ Stateless individuals lack proof of nationality, which does not diminish their humanity. In a world where society is organized around national borders, states with significant numbers of stateless persons or residents should provide these individuals with nationality or take measures to prevent statelessness. Demonstrating a commitment to protecting these vulnerable people reflects the value placed on the dignity of stateless individuals. Stateless individuals are only free from physical torture, as their host states do not directly harm their bodies. However, they experience psychological distress as they live each day teetering on the edge of being excluded from humanity, confronting the harsh reality that they do not belong anywhere.

iii. Forced Displacement

Another effect of statelessness is the tendency to be increasingly aggravated by forced displacement. The UNHCR defines “forced displacement” as “a result of persecution, conflict, generalized violence or human rights violations.”²¹⁶ This Article highlights three key connections between statelessness and forced displacement. First, statelessness leads to forced displacement when a stateless population suffers disproportionate human rights violations, with no option but to move elsewhere for palliatives. Second, it also occurs when people risk becoming stateless due to displacement, for instance, because they cannot prove their links to their home country. Third, statelessness can increase their vulnerability to further displacement.²¹⁷ A contemporary example is the Rohingya stateless population. The Bangladesh government refers to the Rohingyas as “forcibly displaced Myanmar nationals” (“FDMNs”).²¹⁸ In 1982, Myanmar revised its citizenship law, essentially depriving the Rohingya of their nationality, although they have lived in Rakhine, a part of Burma, for generations.²¹⁹ This leaves FDMNs without freedom of movement, education, health, employment in the civil service, and land ownership. They have also been the target of serious human rights violations, prompting many to flee their homes and risk their lives in

215. See HANNA ARENDT, *VIES POLITIQUES I* (Paris: Tel/Gallimard, 1986); HANNA ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 268–69 (1965) (emphasis added).

216. See UNHCR *Global Trends: Forced Displacement in 2014*, RELIEFWEB (June 18, 2015), <https://reliefweb.int/report/world/unhcr-global-trends-forced-displacement-2014> [<https://perma.cc/AZY5-SS9Q>].

217. *Statelessness and Displacement: A Humanitarian Challenge*, NORWEGIAN REFUGEE COUNCIL & TILBURG UNIV., https://files.institutesi.org/stateless_displacement_brief.pdf [<https://perma.cc/H8MV-4HFS>] (last visited October 16, 2023).

218. See Mohammad Sajedur Rahman & Nurul Huda Sakib, *Statelessness, Forced Migration and the Security Dilemma Along Borders: An Investigation of the Foreign Policy Stance of Bangladesh on the Rohingya Influx*, 1 SN SOC. SCI. 160, 160 (2021), <https://doi.org/10.1007/s43545-021-00173-y> [<https://perma.cc/7YWQ-7JDB>].

219. Briefing, *Myanmar's 1982 Citizenship Law and Rohingya*, BURMESE ROHINGYA ORG. U.K. (Dec. 2014), <https://burmacampaign.org.uk/media/Myanmar's-1982-Citizenship-Law-and-Rohingya.pdf> [<https://perma.cc/8ZDJ-VC66>].

hope of finding a haven in nearby countries.²²⁰ In addition, in 1989, an estimated 75,000 Black Mauritians were denationalized, and a significant number were deported across the borders into Senegal and Mali, where they lived for years as stateless refugees.²²¹

iv. Restrictions on Transferrable Nationality to Children & Gender-Discrimination

Another ordeal stateless persons face is the restriction on transferring nationality to children born abroad. Being born within a state's geographical territory is crucial to a child's life because the child secures the ability to be recognized as a human being with the privileges of nationality or citizenship of that state immediately from birth. If a child does not secure nationality at birth, there is a propensity that such a child will be left stateless for a lifetime—a stateless child has no legal recognition or access to any documentation that may allow access to healthcare, registered names, education, social assistance, and other benefits mentioned under the 1989 Convention on the Rights of the Child.²²² Some countries prevent parents from passing on their nationality to their children if they are born abroad.²²³ For instance, specific nationality laws that deny women equal rights with men in conferring nationality on their children contribute to statelessness, raising concerns of gender-discrimination for the UNHCR as part of its mandate to prevent and mitigate this issue.²²⁴ Some obnoxious customary practices make women “objects” of inheritance as part of the estate of their deceased husbands.²²⁵ About twenty-seven countries do not allow mothers to confer their nationality on their children, but their fathers may do so.²²⁶

Because of this discrimination and its impact on children, the UNHCR has published an annual background note addressing gender equality in the legal aspects of nationality laws related to granting nationality to children since 2012.²²⁷ It is commendable that, unlike around sixty years ago, most states' nationality laws now grant equal rights to women in

220. See *The World's Stateless 2020: Deprivation of Nationality*, INST. ON STATELESSNESS & INCLUSION, at 14–18 (Mar. 2020), https://files.institutesi.org/WORLD's_STATELESS_2020.pdf [<https://perma.cc/N7GK-E34E>] (emphasizing that human rights abuses drive stateless persons to flee, often risking their lives in irregular migration).

221. *Statelessness and Displacement: A Humanitarian Challenge*, *supra* note 217.

222. See DE GROOT, *supra* note 97, at 144; see also Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sep. 2, 1990).

223. See generally *The Link Between Refugees and Statelessness*, NORWEGIAN REFUGEE COUNCIL & INST. ON STATELESSNESS & INCLUSION, <https://www.syrianationality.org/index.php?id=16> [<https://perma.cc/2LAY-D4QB>] (last visited Nov. 7, 2025) (explaining that under the nationality law of Liberia, a child may only inherit nationality from his or her mother if born inside the country. For a child born outside of Liberia, the only way to acquire Liberian nationality is through the father.).

224. *Background Note on Gender Equality, Nationality Laws and Statelessness 2014*, UNHCR: UN REFUGEE AGENCY, <https://www.unhcr.org/sites/default/files/legacy-pdf/4f5886306.pdf> [<https://perma.cc/4QDT-L2LG>] (last visited Feb. 3, 2026) (Countries such as “Jordan, Libya, Saudi Arabia, and the United Arab Emirates do not allow women nationals married to foreign nationals to pass their nationality to their children. However, they do permit women nationals to confer their nationality to their children in certain circumstances such as where fathers are unknown, stateless, of unknown nationality or do not establish filiation.”).

225. See Cornelia Wunsch, *Women's Property and the Law of Inheritance in the Neo-Babylonian Period*, CTR. FOR HELLENIC STUD. (May 2021) <https://classics-at.chs.harvard.edu/wp-content/uploads/2021/05/ca1.2-wunsch.pdf> [<https://perma.cc/9RMF-ELV2>].

226. See *Background Note on Gender Equality, Nationality Laws and Statelessness 2018*, *supra* note 184.

227. *Id.*

matters of nationality.²²⁸ This transformation significantly improved following the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) in 1979.²²⁹

Despite the successful implementation of CEDAW, which allows men *and* women to pass nationality to their children, as noted above, some countries that have yet to comply with the Treaty—or that are not its signatories—still discriminate against women and do not allow them to pass their nationality to their children.²³⁰ A convincing argument exists that to eliminate statelessness, a key strategy is to ensure women have equal rights to pass on their nationality to their children. This way, in cases where the father passes away before granting nationality to children born during the marriage, the mother can transfer her nationality, helping prevent her children from becoming stateless.

Furthermore, the starting point for protecting a child’s rights is not at the international level, but within the laws of the state in which the child was born. Because international law does not confer nationality at birth, the 1961 Convention on the Reduction of Statelessness mandates that states grant nationality to persons born in their territory who had no prior nationality.²³¹ The centrality of the Convention is the prevention of statelessness at birth by requiring states to grant citizenship to children born in their territory or born to their nationals abroad, who would otherwise be stateless.²³² Under this Convention, states, as a matter of law, are at liberty to give nationality to a child born in their territory or by nationalization, which requires a child born in a state’s territory to apply for the state’s nationality upon fulfilling any legal requirements.²³³

Another necessary provision of the 1961 Statelessness Convention is Article 1(3), which aims to avoid statelessness by mandating nations to apply the principle of *jus sanguinis* instead of *jus soli*.²³⁴ *Jus sanguinis* is Latin for “right of blood” and refers to countries that grant citizenship by descent, while *jus soli* is a rule of law that a child’s nationality is determined by their place of birth.²³⁵ According to Gerard-René de Groot, while the negotiation of the 1961 Statelessness Convention was ongoing, some nations practiced *jus sanguinis*, a principle that only male nationals could transmit their nationality to their children.²³⁶ Consequently, female nationals could only transmit their nationality to children born out of

228. *Id.*

229. *Id.*

230. *Id.*

231. Convention on the Reduction of Statelessness, *supra* note 98, at art. 4(1).

232. *Id.*

233. *Id.*

234. *Id.* at art. 1(3) (“Notwithstanding the provisions of paragraphs 1(b) and 2 of this article, a child born in wedlock in the territory of a Contracting State, whose mother has the nationality of that State, shall acquire at birth that nationality if it otherwise would be stateless.”).

235. *Jus sanguinis*, MERRIAM WEBSTER, [https://www.merriam-webster.com/dictionary/jus sanguinis](https://www.merriam-webster.com/dictionary/jus%20sanguinis) [<https://perma.cc/66CX-FRTJ>] (last visited Nov. 7, 2025); *Jus soli*, MERRIAM WEBSTER, [https://www.merriam-webster.com/dictionary/jus soli](https://www.merriam-webster.com/dictionary/jus%20soli) [<https://perma.cc/XAH9-FTEY>] (last visited Nov. 7, 2025).

236. Gerard-René de Groot & Olivier Vonk, *Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding Jus Sanguinis and Jus Soli*, 65 NETH. INT’L L. REV. 319, 321 (2018), <https://doi.org/10.1007/s40802-018-0118-5> [<https://perma.cc/S5LC-UVEB>].

wedlock if paternity was not established.²³⁷ Hence, the children of a mother who was a national and a father who was stateless or could not transmit his nationality would be born stateless. Consequently, the 1961 Convention provides a stopgap to this predicament in its Article 1(3), which allows the acquisition of the birth country's nationality for children born in the territory of a state of which their mother is a national or if they will otherwise become stateless.²³⁸

It is the obligation of the state where a child is born to confer the recognition of citizenship on the child. However, there are instances where a state fails to confer such recognition, and a child may seek protection through specific international law instruments. For example, as mentioned earlier in this Article, Article 15 of the UDHR guarantees citizenship or nationality as a human right, because everyone has the right to nationality, and no one shall be arbitrarily deprived of their nationality or denied the right to change their nationality.²³⁹ However, the UDHR does not explicitly proscribe statelessness.²⁴⁰ The text of the article under review only prohibits "*arbitrary statelessness*."²⁴¹ It appears to permit states to take actions that may render individuals stateless, provided they are not done arbitrarily.²⁴² Arguably, Article 15(1) is currently under review and is unclear on how children may access nationality and which state is obligated to grant such nationality at birth.²⁴³ It guarantees a nationality right to which every human being is entitled. Comparatively, Article 24(3) of the International Convention on Civil and Political Rights ("ICCPR") states that "every child has the right to acquire a nationality."²⁴⁴ It is noteworthy that the ICCPR is more specific about children's nationality.²⁴⁵ It does not specify how and where a child can obtain nationality recognition, but still imposes an obligation on states not to deprive children of their nationality and to implement the provision in a way that gives a child reasonable access or opportunity to exercise their right to acquire a nationality.²⁴⁶ Generally, the ICCPR contains negative rights that a state may not violate without legal recourse.²⁴⁷ It imposes obligations on states not to act in any manner that may deprive anyone of their civil or political rights.²⁴⁸

237. See *Interview with Gerard-René de Groot - Profesor of Comparative Law and Private International Law at Maastricht University*, EUR. NETWORK ON STATELESSNESS (Sep. 22, 2016), <https://www.statelessness.eu/updates/news/interview-gerard-rene-de-groot-profesor-comparative-law-and-private-international-law> [<https://perma.cc/2Y6B-ZKFR>] (explaining the international standards regarding the acquisition and loss of nationality and how to encourage States to implement those standards in their own nationality law).

238. Convention on the Reduction of Statelessness, *supra* note 98, at art. 1(3).

239. G.A. Res. 217 (III) A, *supra* note 58, at art. 15.

240. See *id.* at art. 1.

241. *Id.* at art. 15(2).

242. *Id.*

243. See *id.* at art. 15(1).

244. International Covenant on Civil and Political Rights, *supra* note 212, at art. 24(3).

245. See *id.*

246. See *id.*

247. See *id.* at arts. 7–9, 11–19, 21–22.

248. See *id.* arts. 2, 5(2), 6–9, 11–12, 14–19, 21–22.

A corollary to Article 24(3) of the ICCPR is Article 24(2), which obligates states to ensure that children are registered at birth.²⁴⁹ An action phrase that the Convention uses is “immediately at birth.”²⁵⁰ The implication is that children have the right to be registered immediately after birth, allowing for the early conferral of nationality and thereby avoiding the problem of statelessness, without any form of discrimination based on race, sex, or ethnicity.²⁵¹ The challenge to this provision is that states do not implement the object and purpose of the Convention as they ought to. Further, the immediacy of a child’s registration at birth means that the child shall have the right to a name and the right to acquire a nationality.²⁵² The Convention prohibits any situation that may render a child stateless at birth by obliging states to implement this provision by their national law and obligations under other international instruments in situations where a child would be stateless.²⁵³

The challenge is whether a state automatically allows a treaty’s domestication or is subject to other internal legislative requirements for a treaty to become part of its laws. For example, the U.S. has signed the Convention on the Rights of the Child, however, it has yet to ratify it as binding or practical for protecting the child.²⁵⁴ This is because not all treaties are self-executing in the U.S. and Congress would be required to make laws on whether a treaty could be identified as either self-executing or non-self-executing by looking at various indicators.²⁵⁵ A possible reason for the delay of implementing the Convention of the Rights of the Child is that the federal government and states already have adequate laws protecting children in the U.S.²⁵⁶

Further, there is no absolute obligation for a state to confer its citizenship on a child born in its territory. However, the ICCPR requires states to adopt some appropriate measures internally and in alignment with other sovereign states to ensure that every child has a nationality at birth.²⁵⁷ The Convention does not make citizenship at birth an automatic right to be recognized by a state.²⁵⁸ Still, a child must have some meaningful access to nationality without any form of discrimination. The Convention further stresses that national laws should admit no discrimination in the acquisition of nationality between legitimate children and children born out of wedlock or to stateless parents or based

249. *See id.* at arts. 24(2)–(3).

250. *Id.* at art. 24(2).

251. *See* Human Rights Committee, General Comment No. 17: Art. 24 (Rights of the Child), ¶ 4 (Apr. 7, 1989) (mentioning Arts. 2 and 26 of the ICCPR).

252. International Covenant on Civil and Political Rights, *supra* note 212, at art. 24(2).

253. *Id.* at arts. 2(2), 24, 26.

254. Geraldine Van Bueren, *The International Law on the Rights of the Child: From Guidance to Governance*, 12 HUM. RTS. L. REV. 1, 15–16 (2012).

255. *See* U.S. CONST. art. II, § 2, cl. 2, https://constitution.congress.gov/browse/essay/artII-S2-C2-1-4/ALDE_00012955/ [<https://perma.cc/9B76-8ZNP>]. Some indicators of intent can be made through analyzing the treaty’s indeterminate language. *Id.* Further, one can also analyzed whether the treaty deals with a matter within the exclusive lawmaking power of Congress, meaning that Congress must create implementing legislation. *Id.*

256. *See* FAMILIES RISING, *Key Child Welfare Laws*, <https://wearefamiliesrising.org/key-us-child-welfare-laws/> [<https://perma.cc/YAF5-CTQB>] (lasted visited Feb. 23, 2026).

257. *See id.* at art. 24.

258. *See id.*

on the nationality status of one or both parents.²⁵⁹ Therefore, neither the ICCPR nor the CRC mandates that states confer citizenship by *jus soli* or *jus sanguinis*, that is, nationality on a child born in the territory of a state nor is it automatic that nationality is acquired at birth.²⁶⁰ States do have the obligation under these Conventions to provide the necessary measures to prevent statelessness to ensure that children have access to a nationality.²⁶¹ While the measures to be taken by states are not transparent or specific, one could argue that the measures from the two Conventions aimed at preventing a child from being deprived of nationality apply to both the child's country of birth and the parent's country of nationality. A child should have access to citizenship not just by their place of birth, but by extension to residence and parentage.

Worthy of mention is the significance of a regional instrument that ensures the guarantee of nationality to children in Africa. The African Charter on the Rights and Welfare of the Child provides for a child's right to nationality.²⁶² It provides that every child has the right to acquire a nationality. It further says:

States Parties to the present Charter shall undertake to ensure that their constitutional legislation recognize[s] the principles according to which a child shall acquire the nationality of the state in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other state in accordance with its laws.²⁶³

The African Charter mandates that states constitutionally recognize the principle of giving nationality in cases where children may be at risk of statelessness.²⁶⁴

v. The Adoption of Stateless Children

A pivotal issue here is addressing the nationality of adopted children. Adoption is when a person assumes the parenting of another, usually a child, from that person's biological or legal parent or parents.²⁶⁵ Legal adoptions permanently transfer all rights and responsibilities, along with filiation, from the biological parents to the adoptive parents.²⁶⁶ An international law governing adoption authority is the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry

259. *Id.*

260. International Covenant on Civil and Political Rights, *supra* note 212, at art. 24 (Article 24 recognizes the child's right to a name and nationality but does not impose *jus soli* nationality requirements).

261. *Id.*

262. See African Charter on the Rights and Welfare of the Child arts. 2, 11(6), Nov. 29, 1999, OAU Doc. CAB/LEG/24.9/49 (noting that a "child" means every human being below the age of 18 years). It stipulates that States Parties to the present Charter shall take all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability. *Id.*

263. *Id.* at art. 6(4).

264. See *id.* at art. 6.

265. See HERMA H. KAY ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 412 (6th ed. 2021) (The treatise states that adoption occurs when a person or persons legally assume parental rights and duties for a child previously under the care of their biological or legal parents.).

266. See *id.*

Adoption (“Hague Convention”), adopted on May 29, 1993.²⁶⁷ One of the Convention’s expectations is that post-adoption, an adopted child’s nationality should mirror that of an unadopted or biological child.²⁶⁸ There must be no difference between an adopted child and a biological child because the former has become a member of the adopter’s family, having the same rights and obligations that flow from the adopter’s nationality. Like most international law agreements, a major challenge of the Adoption Convention is that it is non-self-executing. Implementation has been challenging because states must harmonize Convention requirements with their already existing laws and policies that govern adoption in their jurisdictions.²⁶⁹ The importance of the Hague Convention lies in its recognition that an adopted child may lose their nationality as a result of the adoption process.²⁷⁰ To prevent being rendered stateless, the Convention renders the child’s adoption contingent on the possession of another nationality.²⁷¹ Therefore, whether an adoption order is issued in the adopting parents’ state or abroad, a child must not be left stateless due to differences in states’ laws on the recognition of adoption.

vi. *Ethnic Cleansing*

Stateless persons face the possibility of “ethnic cleansing.”²⁷² International law does not define the term “ethnic cleansing.” Still, the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the Security Council, and the United Nations General Assembly have all used the term in their resolutions and judgments.²⁷³ Comparatively, the Statute of the International Criminal Court, which was adopted in July 1998 and entered into force on July 1, 2002, does not define the term “ethnic cleansing,” but provides precise definitions of crimes against humanity and war crimes, which encompass the acts that constitute ethnic cleansing.²⁷⁴ These definitions include the main elements that constitute the practice of ethnic cleansing, such as widespread and systematic killings, disappearances, population transfers, rape, persecution, and other

267. See Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 33 I.L.M. 1299 (establishing international rules governing adoption authorities, cooperation between states, and safeguards for children involved in intercountry adoption).

268. *Id.*

269. Frederic L. Kirgis, *International Agreements and U.S. Law*, AM. SOC’Y INT’L L. (May 27, 1997), <https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law> [https://perma.cc/37PT-VECD]; see also Ryan Hanlon, *Reflection: Ten Years After the U.S. Joins the Hague Convention*, NCF A: NAT’L COUNCIL FOR ADOPTION, No. 118 (Apr. 1, 2018), <https://adoptioncouncil.org/publications/2018/04/adoption-advocate-no-118> [https://perma.cc/JXV8-5W64].

270. Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption arts. 16, May 29, 1993, 33 I.L.M. 1299.

271. *Id.*

272. See, e.g., *Ethnic Cleansing*, INT’L COMM. RED CROSS: HOW DOES LAW PROTECT IN WAR?, <https://casebook.icrc.org/a-to-z/glossary/ethnic-cleansing> [https://perma.cc/KTD7-U76W] (last visited Nov. 7, 2025).

273. See *Ethnic Cleansing*, MEDECINS SANS FRONTIERES: PRACTICAL GUIDE TO HUMANITARIAN L., <https://guide-humanitarian-law.org/content/article/3/ethnic-cleansing/> [https://perma.cc/6YF7-9EZ9] (last visited Nov. 7, 2025); see also U.N. Secretary General, Letter dated Feb. 10, 1993, from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/25274 [hereinafter U.N. Sec. Gen. Letter Feb. 10].

274. See Rome Statute of the International Criminal Court, adopted July 17, 1998, United Nations, <https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court> [https://perma.cc/K49V-3P2Y].

similarly inhumane acts.²⁷⁵ The term means rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area.²⁷⁶ Moreover, ethnic cleansing “is a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.”²⁷⁷ Ethnic cleansing against stateless persons aims to artificially create geographic zones for them, especially by using violent methods to remove them from where they know as “home” into places they are not familiar with.²⁷⁸ Stateless persons are more vulnerable when identified in clustered groups as a population lacking a nationality or identity, this can result in marginalized grouped becoming isolated, unaccounted for, and vulnerable to political violence.²⁷⁹

B. How International Law Prevents Statelessness

The legal frameworks of protection offered by international law to stateless persons are the provisions of the 1954 Convention, discussed above, and the 1951 Convention on the Reduction of Statelessness.²⁸⁰ The 1954 Convention defines a *de jure* stateless person as someone who is not considered a national by any state under the operation of its law.²⁸¹ The International Law Commission has adopted that definition as part of customary international law.²⁸² About eighty states ratified the Convention between 2014 and 2015.²⁸³ It is inferable that *de facto* statelessness may exist when someone who once had a nationality lost it or it has become ineffective, or when a person outside their country of nationality is unable to enjoy that country’s protection. There is no definition of *de facto* statelessness under international law or the UNHCR statistical report.²⁸⁴ The term “*de facto* stateless persons” has become recognized due to irregular or forced migration paradigms and in cases

275. See MEDECINS SANS FRONTIERES: PRACTICAL GUIDE TO HUMANITARIAN L., *supra* note 273; see also U.N. Sec. Gen. Letter Feb. 10, *supra* note 272 (A United Nations commission of experts mandated to look into violations of international humanitarian law committed in the territory of the former Yugoslavia defined ethnic cleansing in its interim report S/25274 as rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area. It says it also means a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas).

276. See Kimani Njogu & Gregory Stanton, *Preventing Ethnic Genocide: Policy Guidance Note*, U.N. OFF. ON GENOCIDE PREVENTION & RESP. TO PROTECT, at 17 (2024), https://www.un.org/sites/un2.un.org/files/preventing_ethnic_genocide_nov2024.pdf [https://perma.cc/RUV5-DJCR].

277. *Ethnic Cleansing*, *supra* note 273.

278. See, e.g., Mowsume Bhattacharjee, *Statelessness of an Ethnic Minority: The Case of Rohingya*, 6 FRONTIERS POL. SCI. 1144493 (2024).

279. See *id.* at 7.

280. See Convention Relating to the Status of Stateless Persons, *supra* note 54; Convention Relating to the Status of Refugees, *supra* note 10.

281. Convention Relating to the Status of Stateless Persons, *supra* note 54, at art. 1 (Article 1 provides the authoritative legal definition of a *de jure* stateless person.).

282. *Id.* at art. 1(1); UNHCR: U.N. Refugee Agency, Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality Under Articles 5–9 of the 1961 Convention on the Reduction of Statelessness ¶ 8, U.N. Doc. HCR/GS/20/05 (May 2020).

283. As of January 2014, a report by UNHCR indicated there were eighty States Parties. See *Protecting the Rights of Stateless Persons: The 1954 Convention Relating to the Status of Stateless Persons*, UNHCR: U.N. REFUGEE AGENCY, at 1 (Jan. 2014), <https://www.acnur.org/us/sites/en-us/files/legacy-pdf/519e20989.pdf> [https://perma.cc/N2ZA-WF8S].

284. *Handbook on Protection of Stateless Persons*, *supra* note 89, at ¶¶ 2.2, 11.

where a country has refused its nationals reentry on several grounds that do not involve criminal imputations.²⁸⁵ The committee that drafted the 1961 Convention on the Status of Stateless Persons referred to the term “*de facto* stateless persons.”²⁸⁶ Resolution No. 1 of that Convention recommended that “persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality.”²⁸⁷ It is arguable that because international law does not recognize the notion of *de facto* statelessness, it could lead to a narrow interpretation of the concept of statelessness that may cause ambiguity in the description of who falls into the *de jure* stateless persons under Article 1(1) of the 1954 Refugee Convention. For example, Article 15 of the UDHR says “[e]veryone has the right to a nationality” and “[n]o one shall be arbitrarily deprived of his [or her] nationality.”²⁸⁸ The Declaration does not condemn the notion of deprivation of nationality; what it condemns or prohibits is “the arbitrary deprivation of nationality.”²⁸⁹ Here, “arbitrary” means acts that are based on random choice or personal whims rather than on any reason or system, so an arbitrary deprivation occurs when a state takes actions based on such whims that violate human rights and leave certain individuals without a remedy at law.²⁹⁰ Moreover, the UDHR also places an obligation on states to ensure that their actions do not render people stateless or create a risk of statelessness.²⁹¹ Other international and regional instruments obligate states to prevent statelessness and discourage the arbitrary loss of nationality.²⁹² For example, the American Convention on Human Rights and the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms prohibit the arbitrary deprivation of nationality.²⁹³ By contrast, the African Charter on Human and Peoples’ Rights and the European Convention on Human Rights do not include the exception of “arbitrariness” in their provisions, but only mention and guarantee the right to nationality as an absolute right.²⁹⁴ In fact, the United Nations Human Rights Committee has used “arbitrary interference with human rights” to mean when states make laws that are incompatible with the provisions, object, and purpose of human

285. *Id.* ¶¶ 2.2, 11–12 (“Persons may be considered *de facto* stateless when they are unable to avail themselves of the protection of the State of nationality, for example due to refusal of reentry, loss of documents, or displacement, even when no criminal conduct is involved.”).

286. United Nations Conference on the Elimination or Reduction of Future Statelessness, *Final Act* (1961), reprinted in 33 I.L.M. 1299 (1994).

287. MAI KANEKO-IWASE, NATIONALITY OF FOUNDLINGS: AVOIDING STATELESSNESS AMONG CHILDREN OF UNKNOWN PARENTS UNDER INTERNATIONAL NATIONALITY LAW 46–47 (2021).

288. See G.A. Res. 217 (III) A, *supra* note 58, at art. 15.

289. *Id.*

290. See *Arbitrary*, OXFORD DICTIONARIES, https://www.oed.com/dictionary/arbitrary_adj?tl=true [<https://perma.cc/39B3-EHFN>] (last visited Nov. 7, 2025).

291. See G.A. Res. 217 (III) A, *supra* note 58, at art. 15.

292. See Convention on the Rights of Persons with Disabilities art. 18(1)(a), Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008) (prohibits states from depriving disabled persons of their nationality arbitrarily or because of their disability).

293. See American Convention on Human Rights art. 20(3), Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

294. See Jorunn Brandvoll, *Deprivation of Nationality: Limitations on Rendering Persons Stateless Under International Law*, in NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 194, 195 n.8 (Alice Edwards & Laura van Waas eds., 2014).

rights treaties to which they are signatories.²⁹⁵ Here, one could argue that a state's action to deprive its "people" of their nationality is arbitrary if it results in statelessness or the risk of being stateless.²⁹⁶

C. The Role of International Law in Unknown and Undetermined Nationality

International law places an obligation on states to make efforts to identify persons whose nationality may be unknown or difficult to determine.²⁹⁷ The importance of this obligation is that there are persons whose identity cannot be defined or known because they have links to multiple countries or do not possess any nationality and are at risk of being stateless.²⁹⁸ To avoid statelessness, states need to be proactive in creating helpful preliminary strategies to determine the risks of becoming stateless for persons who are likely to be described as persons with unknown nationality or whose nationalities are under investigation. The preliminary review needs to be done as soon as possible and should prevent the protraction of an unknown national status from becoming a pathway to statelessness. Under international law, the concept of being at risk of statelessness is not a well-established idea. Still, it addresses individuals with a nationality who are at risk of becoming stateless due to discriminatory restrictions and other loopholes in nationality laws.²⁹⁹ The term is also used to describe a person without proof of nationality and at risk of not being recognized as a national.³⁰⁰ Here, the possession of nationality is not established, and calling them stateless is not accurate either. This person's nationality is undetermined, and they are at risk of statelessness. Indeed, a person could have a birth certificate and still be at risk of statelessness because a birth certificate may not be sufficient to establish a nationality.

Part VI. Comparing Stateless Persons and Refugees

For many reasons, comparing the legal regimes of stateless persons and refugees is paramount. One reason is the overarching provision of Article 1(1) of the 1954 Convention, which applies to two categories of stateless persons: *migratory stateless persons*, who have already fled their country of residence to another and as a result, are also asylum seekers, and *non-migratory stateless persons*, who are stateless but have

295. See Serena Forlati, *The United Nations Convention Against Transnational Organized Crime and International Human Rights Law*, UNODC: U.N. OFF. ON DRUGS & CRIME, at 30 (Apr. 2022), https://www.unodc.org/documents/organized-crime/tools_and_publications/21-01901_UNTOC_Human_Rights_eBook.pdf [<https://perma.cc/LNR2-GZB9>].

296. *Id.* at 195, 197 n.19.

297. See United Nations High Commissioner for Refugees Executive Committee, Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons No. 106 (LVII)-2006 (Oct. 6, 2006), <https://www.unhcr.org/us/publications/conclusion-identification-prevention-and-reduction-statelessness-and-protection> [<https://perma.cc/3WJS-LB7X>].

298. See *Global Trends: Forced Displacement in 2019*, UNHCR: UN REFUGEE AGENCY (2020), <https://www.unhcr.org/flagship-reports/globaltrends/globaltrends2019/#:~:text=During 2019%2C an estimated 11.0,the borders of their countries.&text=Many displaced populations failed to,solutions for rebuilding their lives> [<https://perma.cc/9267-9G95>].

299. See KANEKO-IWASE, *supra* note 287, at 51.

300. *Id.* at 51, 57.

never crossed into another country.³⁰¹ The 1951 Refugee Convention and its 1967 Protocol also define and protect refugees.³⁰² According to this Convention, a refugee meets the definition outlined in the United Nations Convention Relating to the Status of Refugees, which is any person:

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, [he] is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual *residence as a* result of such events, is unable or, owing to such fear, is unwilling to return to it.³⁰³

The U.S. definition of a refugee varies from the one presented in the 1951 Refugee Convention. While the U.S. has not officially ratified this Convention, it is a signatory of the 1967 Protocol Relating to the Status of Refugees, which integrates the key provisions of the Convention. Through this Protocol, the U.S. has incorporated the refugee definition into its domestic legal system, particularly through the Refugee Act of 1980.³⁰⁴

301. See U.N. High Comm'r for Refugees Exec. Comm., Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection No. 103 (LVI)-2005, U.N. Doc. A/AC.96/1021 (2005), <http://www.unhcr.org/43576e292.html> [<https://perma.cc/KAB7-6VWZ>] (reaffirming that the 1951 Convention relating to the Status of Refugees together with its 1967 Protocol are the cornerstone of the international refugee protection regime; and *noting in this regard* the fundamental importance of their full application by State Parties, including that of the fundamental principle of *non-refoulement* and the principle that all human beings (stateless and refugees or other displaced migrants) shall enjoy human rights and fundamental freedoms without discrimination, including the right to seek and enjoy asylum). Further, the European Union's subsidiary protection regime evidenced in the Council Directive 2004/83/EC of 29 April 2004 provides for some continental minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. See Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third-Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12 (EC).

302. See generally U.N. Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39: Addendum: Guiding Principles on Internal Displacement, arts. 1, 3, 8, 15, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (noting that the United States has yet to sign and domesticate the Convention, but it signed its 1967 Protocol, which incorporates or replicates the Refugee Convention). The Refugee Convention places an obligation on state parties to ensure the protection of refugees or asylum seekers living within their borders. *Id.* It also obligates states to treat these persons with at least the minimum core of human dignity and that states must not send these persons back to other countries or their country of nationality (refoulement) if such a would lead to their persecution based on their race, religion, nationality, membership in a particular social group, or political opinion. *Id.*

303. See Convention Relating to the Status of Refugees, *supra* note 10, at art.1(2) (The Convention is the key legal document that forms the basis of refugee protection. Ratified by 145 State parties, it defines the term "refugee" and outlines the rights of the displaced, as well as the legal obligations of States to protect them.).

304. The United States Code states as follows:

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this

Refugees, having fled their country of nationality to seek protection in another country, procedurally apply for a status called asylum.³⁰⁵ Asylum connotes being accorded recognition as a refugee in a host country.³⁰⁶ Asylum includes receiving legal protection from the crises that made refugees leave their country of nationality, however the asylum process can take on average 1,283 days until a status determination.³⁰⁷ The protection granted to refugees in their receiving or host state can consist of civil, political, socioeconomic, religion, or a combination of these.³⁰⁸ The purpose of these protections is to ensure that asylum seekers are protected from persecution and can enjoy a minimum core of dignity that human beings deserve.³⁰⁹ Typically, the burden is on an asylum seeker, a person in the process of becoming a refugee, to persuade the officials of the receiving country of a real, imminent, and well-founded fear of persecution in their home country.³¹⁰ To determine whether there is a “well-founded fear of prosecution,” official conduct “credible” and “reasonable” fear interviews where “if [refugees] . . . express a fear of returning to their home country or request to seek asylum, they will be first screened before being removed to see if they can establish that they have a fear of persecution or torture.”³¹¹ Adding the difference between stateless and refugees to the asylum process will bring much needed nuance because although the conditions of the statuses are similar, they differ in areas such as the legal implications of their statuses, applicable laws, border crossing requirements, proof of nationality, the nature of documentation required, and the level of expulsion the two groups may face.

title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term “refugee” does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42).

305. See Convention Relating to the Status of Refugees, *supra* note 10, at art.1 (a)–(b)(1)(b); see also Protocol Relating to the Status of Refugees art. 1(2)–(3), Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) (Asylum procedures depend on various nationality laws and states’ administrative policies. Therefore, each state makes rules that regulate how asylum applications are processed and determined. For example, there some states have existing procedures and designated officials to receive and register asylum applications and others do not have such provisions. Here, the UNHCR has filled the chasm by allowing asylum seekers to apply and lodge their applications with the High Commissioner’s office. The norm is that where States national procedures of how to examine and determine the status of asylum applications, the UNHCR does not meddle with the national protocols except where a State’s process is grossly unfair and overly restrictive. The UNHCR may also intervene or advice States who are a party to the 1951 Refugee Convention.).

306. Fact Sheet, *Asylum in the United States*, AM. IMMIGR. COUNCIL (May 9, 2025), <https://www.americanimmigrationcouncil.org/fact-sheet/asylum-united-states/> [https://perma.cc/E4MU-EMFQ].

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

A. Different Statuses

Not all refugees are stateless, nor do all stateless individuals qualify as refugees. The crucial difference between the two lies in the concepts of nationality and citizenship.³¹² Refugees are individuals who have fled their country due to a well-founded fear of persecution, while stateless individuals are those not recognized as nationals by any state according to its laws. Consequently, the legal status and protection frameworks governing refugees and stateless individuals are distinct, reflecting different underlying causes and legal remedies.³¹³ Further, while a stateless person is someone who is not a citizen or national of any country, a refugee is a citizen or national of a country who had to leave their country of nationality to seek protection in another country because of a well-founded fear of political persecution or any of the displacement drivers already discussed in this work. Lacking the nationality of any of the 195 countries means that stateless persons cannot enjoy the rights that flow from being nationals, thereby leaving them in a vulnerable and marginalized position. Conversely, a refugee who can establish their nationality may be able to present identification documents to the host or receiving country as proof of nationality, which is necessary to access fundamental rights that stateless persons often lack.

B. Crossing International Borders

Another difference is that a person need not have crossed an internationally drawn line into another country to become stateless. As discussed earlier, a person can become stateless in their country of residence due to defects in nationality laws, state secession, or loss of legal identification documents. On the other hand, a person must have crossed an international border to seek protection in another country as an asylee to be classified under “refugee status.” However, an exception to the notion of refugee crossing is that, although a stateless person need not cross into another country to become stateless, when stateless persons eventually cross into another country, they may become protracted refugees because it may become difficult to prove nationality in the new receiving country. While the inability to provide proof of nationality does not render a person stateless, the lack of identification documents can prevent a person from legally establishing their nationality bond with a country, thereby leaving them at risk of statelessness. A stateless person may eventually become a refugee, as statelessness can be both a cause and an effect of prolonged displacement.³¹⁴

312. See Convention Relating to the Status of Stateless Persons, *supra* note 54, at 3, 5, arts. 1(1), 32.

313. *Id.* at arts. 1, 2(ii) (Nationality means the legal bond between a government and an individual, and allows for certain political, economic, social and other rights of the individual, as well as the responsibilities of both government and citizen. This type of member results in obligation and duties such as the right to vote and pay taxes.).

314. See UN High Commissioner for Refugees, *Statelessness as a Root Cause of Forced Displacement and Forced Displacement as a Cause of Statelessness*, in *New York Declaration for Refugees and Migrants*, UNGA Res. 71/1, para. 72 (2016) (noting that “statelessness can be a root cause of forced displacement and that forced displacement, in turn, can lead to statelessness”).

C. Determination Procedures for Stateless Persons and Refugees

The procedure for determining the status of stateless persons differs from that for refugees under the law. For example, the Refugee Status Determination (“RSD”).³¹⁵ The legal or administrative process used by states and the United Nations High Commissioner for Refugees to determine the eligibility status of individuals seeking international protection who have fled their country to another due to a well-founded fear of persecution. The RSD procedure can be used for a group, individual refugees, or asylees. However, they must meet the eligibility criteria in the 1951 Refugee Convention, the 1967 Protocol, or any applicable regional refugee instruments or national asylum legislation. The effectiveness of RSD is contingent on whether a receiving state has an operational or existing national asylum system. Here, one of the benefits of a national asylum system is that a receiving state can handle the emergency influx of asylum seekers. The international community currently advocates for a simplified *prima facie* approach to refugee recognition or temporary protection to avoid protracted waiting lines or congested holding facilities and prevent national systems from being overrun during emergency influx. When states lack an existing national asylum system, an alternative status approach can be implemented to expedite the recognition process for eligible asylees. Generally, states can, upon verification and registration, grant a legal status such as non-refugee status (e.g., temporary protection) or refugee status.

On the other hand, a statelessness determination procedure is used to identify stateless persons and provide them with appropriate protection. The determination procedure for stateless persons is solely an obligation imposed on states by the 1954 Refugee Convention; that is, states have a responsibility to determine how to identify and protect their stateless persons residing within their territory, but only a few states have fulfilled that obligation. Here, states have broad discretion in the design and operation of their statelessness determination procedures, as the 1954 Convention does not prescribe a specific procedure for states to follow when establishing their procedures for determining statelessness. In some instances, because stateless persons may also be refugees, states could consolidate the determination procedures for both groups. Further, while it is not required for refugees’ determination, decision-makers for stateless persons may consider oral or written proofs regarding an individual’s claim of statelessness. However, actual documentation of nationality may be required for persons seeking asylum.

D. Different Applicable Laws

The leading international law instruments for refugee law are the 1951 Refugee Convention and its 1967 Protocol. The 1967 Protocol extends the scope of the 1951 Convention beyond European refugees to cover

315. See *Refugee Status Determination (RSD)*, UNHCR: UN REFUGEE AGENCY: EMERGENCY HANDBOOK (Feb. 6, 2025), <https://emergency.unhcr.org/protection/legal-framework/refugee-status-determination-rsd> [<https://perma.cc/AC3B-HKXU>] (The RSD is generally the process to assess and decide whether an asylum-seeker is or is not a refugee.).

global refugees and population displacement.³¹⁶ The 1951 Convention defines who refugees are, the legal protection they are entitled to receive from state parties, and the obligations of refugees to their host states.³¹⁷ The 1951 Refugee Convention defines a “refugee” and provides a set of rights, such as the right to employment, housing, education, and non-refoulement; however, the 1954 Convention on the Status of Stateless Persons defines a “stateless person” and provides some of the same rights as well as other minimum standards of treatment under international law.³¹⁸ The 1961 Convention on the Reduction of Statelessness provides safeguards for states to introduce into their nationality laws and policies when protecting stateless persons.³¹⁹ Furthermore, the 1961 Convention on the Reduction of Statelessness helps states determine how to avoid statelessness by acquiring or retaining nationality in various circumstances. This is an area that the Refugee Convention does not cover.

Conclusion

Statelessness is more than just a legal status—it is a daily denial of dignity.³²⁰ Being stateless means being told: you do not belong, and you do not matter.³²¹ Revoking or losing birthright citizenship in the U.S. would have significant repercussions, affecting not only those directly impacted but also the overall integrity of the global human rights framework. Advocates, scholars, and experts in the realm of international law must insist—in law, policy, and principle—that every human being matters.³²² This paper formally advocates for a legal and moral framework that treats citizenship not as a privilege to be revoked but as a human right to be protected.³²³ When revocation is necessary, officials should allocate more weight to the dignity of stateless persons, and the ultimate decision must not be made arbitrarily or capriciously.

316. See Convention Relating to the Status of Refugees, *supra* note 10, at art.1(a)–(b)(1)(b); see also Protocol Relating to the Status of Refugees, *supra* note 305, at art. 1(2)–(3).

317. See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, at 14, 52–35 (Feb. 1, 2019), <https://www.unhcr.org/publications/legal/5ddfdcd47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> [<https://perma.cc/G7GX-DYT8>].

318. Convention Relating to the Status of Stateless Persons, *supra* note 54, at 3 (“For those who qualify as stateless persons, the Convention provides important minimum standards of treatment. It requires that stateless persons have the same rights as citizens with respects to freedom of religion and education for their children.”).

319. See Convention on the Reduction of Statelessness, *supra* note 98, at 3–4; see also Mirna Adjami & Julia Harrington, *The Scope and Content of Article 15 of the Universal Declaration of Human Rights*, 27 REFUGEE SURV. Q. 93, 101, 104, 107 (2008).

320. See Hélène Lambert, *Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status*, 64 INT’L & COMPAR. L. Q. 1, 7 (2015); see also Human Rights Council Res. 1998/48, U.N. Doc. E/CN.4/RES/1998/48 (Apr. 17, 1998).

321. See Luca Bücken & René de Groot, *Deprivation of Nationality Under Article 8(3) of the 1961 Convention on the Reduction of Statelessness*, 25 MAASTRICHT J. EUR. & COMPAR. L. 38, 39 (2018).

322. See Hélène Lambert, *Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness Within the Context of Article 1A(2) of the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees*, UNHCR: DIV. INT’L PROT., Oct. 1, 2014, at 1, 2, 35.

323. See Guidelines on Statelessness No. 5, *supra* note 282, at 2–3; see also David Owen, *On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights*, 65 NETH. INT’L L. REV. 299, 300–01 (2018).

Statelessness represents a significant yet frequently overlooked human rights issue today. Individuals lacking nationality often exist on the fringes of society, deprived of legal protections, education, and healthcare, as well as the rights to work, vote, and move freely. Contributing factors to statelessness—such as discriminatory laws, gaps in nationality legislation, state succession, and diminishing birthright citizenship—require coordinated and empathetic global efforts. Addressing this challenge transcends mere legal duties; it is a moral imperative. Eradicating statelessness is a collective effort, and we need not only legal reforms and international cooperation but also a profound commitment to the principle that every person deserves the right to belong. Only through this dedication can we begin dismantling the concealed barriers that prevent millions from enjoying dignity, opportunities, and recognition as part of the human family. Such a loss may result in *de jure* or *de facto* statelessness, depriving individuals of their legal identity, access to essential services, and a sense of belonging. Harsh immigration policies promote exclusion, intensify social marginalization, and challenge the fundamental notion that citizenship is a birthright rather than a privilege that can shift with political changes. Ultimately, the denial of birthright citizenship poses a challenge to the moral and legal responsibilities of states under international law, undermining universal principles of dignity, equality, and inclusion. To uphold our shared humanity, nations must protect birthright citizenship and oppose policies that unjustly separate individuals from the only home they have ever known.

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The Invisible Among Us: Defending the Right to Self-Shelter Using the State-Created Danger Doctrine

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TABLE OF CONTENTS

INTRODUCTION	312
PART I: HOMELESSNESS IN AMERICA & CRIMINALIZATION THROUGH ANTI-CAMPING ORDINANCES	313
PART II: A LOOK AT THE GRANTS PASS DECISION & THE EROSION OF CONSTITUTIONAL PROTECTIONS	315
A. The Supreme Court’s Decision in Grants Pass	315
B. Critique of the Grants Pass Decision	317
PART III: DIGNITY & THE RIGHT TO SELF-SHELTER	319
PART IV: THE STATE-CREATED DANGER DOCTRINE	322
A. Background	322
B. The Circuit Split	324
C. A New Test: The State-Created Danger Test	327
1. <i>Elements of the Proposed State-Created Danger Test</i>	327
2. <i>Benefits and Limitations of the State-Created Danger Test</i>	329
PART V: PRESIDENT TRUMP’S CRACKDOWN: EXECUTIVE ORDER 14,321 AND ENCAMPMENT SWEEPS IN THE DISTRICT OF COLUMBIA ..	329
A. President Trump’s Executive Order	329
B. <i>D.C. v. Trump: Crackdown in Washington, D.C.</i>	331
C. Application of State-Created Danger Test	332
CONCLUSION	333

The Invisible Among Us: Defending the Right to Self-Shelter Using the State-Created Danger Doctrine

AKYLA TOMLINSON[‡]

Unhoused people exist in our society in plain sight, yet occupy a liminal space that is both legally and socially ambiguous. Their rights, personhood, and social status are simultaneously presumed and denied: hypervisible when sleeping on park benches or pushing shopping carts filled with their belongings, yet invisible in policymaking, budget allocation for resources, and structural interventions. They are recognized as rights-bearing citizens entitled to constitutional liberty, but treated as public nuisances when criminalized for engaging in conduct essential to their survival, such as sleeping outdoors. This paradox leaves unhoused people in a legal and social superposition. Once the government acts, by enforcing anti-camping ordinances that disproportionately affect them, it collapses this uncertainty into harm, creating affirmative danger that the state cannot disclaim. The Constitution guarantees liberty against arbitrary government interference. That liberty, shaped by the constitutional value of dignity, should encompass the right to choose how one shelters when no adequate alternative exists. The State-Created Danger Doctrine provides a doctrinal framework for enforcing this protection, ensuring that the government cannot exacerbate the dangers of homelessness while avoiding accountability for its role.

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Introduction

To be homeless in America is a crime. The Supreme Court's 2024 decision in *City of Grants Pass v. Johnson* marked a turning point in the legal treatment of homelessness, holding that local ordinances penalizing people for sleeping outdoors do not violate the Eighth Amendment of the U.S. Constitution.¹ This decision grants governments broad discretion to criminalize the conduct of unhoused people, effectively sanctioning policies that punish survival rather than addressing the root causes of homelessness. For decades, advocates have sought to challenge these ordinances by calling for a positive "right to shelter."² However, only two states and the District of Columbia have embraced this positive conception of the right to shelter.³ For example, Massachusetts enshrined a right to shelter in its state constitution, and New York City recognizes it under its Bill of Rights.⁴ However, these rights remain politically vulnerable and can be rescinded depending on shifting legislative priorities.

While federal courts have historically been reluctant to recognize new positive rights,⁵ the Ninth Circuit, in *Martin v. City of Boise*, held that the Eighth Amendment prohibits criminalizing urban camping when no adequate alternative shelter exists.⁶ While this ruling was ostensibly hailed as a victory for advocates of the unhoused, cities and states contend that the Ninth Circuit's intervention prevented local governments from addressing the humanitarian crisis while balancing community concerns over public safety and use of public spaces.⁷ The Supreme Court's reversal of *Martin* in *Grants Pass* eliminated that protection, leaving the current legal landscape barren of meaningful constitutional recourse for those cast aside by circumstances beyond their control. The *Grants Pass* decision sends a stark message: the Court is willing to uphold laws that prioritize the aesthetics of our nation's parks and sidewalks, and speculative public safety concerns, over constitutional liberties. While

1. 603 U.S. 520, 563 (2024).

2. Ben A. McJunkin, *The Negative Right to Shelter*, 111 CALIF. L. REV. 127, 147–48 (2023) (citing *Lindsey v. Normet*, 405 U.S. 56, 73 (1972) (arguing for the "need for decent shelter" and the "right to retain peaceful possession of one's home"); Kristin D. Adams, *Do We Need a Right to Housing*, 9 NEV. L.J. 275, 283 (2009) ("[S]ome advocates for homeless people have resorted to the weaker position of arguing for negative rights, or *liberties*, such as the right to sleep outside without being forced to leave. . . . Although such an argument is not nearly as appealing to housing advocates . . . it may nevertheless provide the foundation for a powerful argument that homeless persons actually have fewer liberties than housed persons do[.]" (alteration in original)).

3. McJunkin, *supra* note 2, at 148 (stating that New York, Massachusetts and the District of Columbia have "managed to adopt new laws straightforwardly guaranteeing temporary emergency shelter.").

4. Press Release, Mass. Governor's Off., Governor Healey Proposes Significant Changes to Right to Shelter Law (Jan. 15, 2025), <https://www.mass.gov/news/governor-healey-proposes-significant-changes-to-right-to-shelter-law> [https://perma.cc/LB2C-SCMK]; Michael Bobelian, *The Contentious History Behind New York City's Right to Shelter*, STATE CT. REP. (Mar. 18, 2024), <https://statecourtreport.org/our-work/analysis-opinion/contentious-history-behind-new-york-citys-right-shelter> [https://perma.cc/E9MS-BYC6].

5. Alex Keiper, *Taking a Broad View to Recognize a Narrow Right: How a Holistic Analysis of Literacy's Role in American Society Demonstrates That it is a Fundamental Right*, 70 AM. U. L. REV. 157, 165 (2021).

6. 902 F.3d 1031 (9th Cir. 2018), *amended by*, 920 F.3d 584 (9th Cir. 2019), *abrogated by*, *Grants Pass*, 603 U.S. at 520.

7. Brief for Idaho, et al. as Amici Curiae Supporting Petitioner, at 11, *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024) (No. 23-175) ("State and local governments in the Ninth Circuit have attempted a variety of solutions to address the problems that public encampments inflict on their communities. But thanks to *Martin*, these efforts are often met with litigation and shut down by federal courts.").

some concerns over public health and safety are legitimate, by framing homelessness as a matter of choice and shelter adequacy as a policy issue, the Court's decision reflects a detached reality, one in which the consequences of criminalizing homelessness are ignored in favor of punitive measures that only perpetuate the crisis. If the Eighth Amendment is closed off as a vehicle for protection, a new doctrinal strategy is needed.

To fill the constitutional gap left by *Grants Pass*, this Note proposes recognizing a constitutional right to self-shelter as a liberty interest informed by dignity and enforced through the State-Created Danger Doctrine ("SCDD") under the Due Process Clause. The SCDD is a narrow exception to the rule that the government bears no duty to protect individuals from harm inflicted by private parties.⁸ Nevertheless, the SCDD "allows for the possibility of holding the government responsible for creating or increasing a danger to an individual."⁹ This language ultimately creates a pathway for unhoused people to hold the government accountable for enforcing anti-camping ordinances that take away their ability to choose how to shelter and displace them in environments that are often dangerous.

Part I of this Note looks at the state of homelessness in America. Part II examines the *Grants Pass* decision and reflects on its shortcomings in narrowing Eighth Amendment protections. Part III explores how dignity-based conceptions of constitutional liberty can inform the recognition of a right to self-shelter. Part IV explores the doctrinal foundations of the SCDD and addresses the circuit split by advancing a framework for its resolution. Finally, this Note demonstrates how this framework can be applied by analyzing President Trump's Executive Order No. 14,321: Ending Crime and Disorder on America's Streets, signed on July 24, 2025, and considers how courts should evaluate this order under a refined state-created danger analysis.

Part I: Homelessness in America & Criminalization through Anti-Camping Ordinances

According to the Housing and Urban Development's ("HUD") 2024 Annual Homeless Assessment Report to Congress ("AHAR"), the number of people experiencing homelessness on a single night in January 2024 was the highest ever recorded, with a total of 771,480 people in the United States experiencing homelessness, and of that amount, 274,224 were unsheltered.¹⁰ At the end of 2024, HUD reported a 6.9% nationwide increase in the number of people experiencing homelessness who were unsheltered in the 2023–2024 calendar year.¹¹ While it is true that the

8. See Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 *TOURO L. REV.* 1, 2 (2007).

9. Christopher M. Eisenhauer, *Police Action and the State-Created Danger Doctrine: A Proposed Uniform Test*, 120 *PENN. ST. DICK. L. REV.* 893, 894 (2016).

10. U.S. Dep't of Hous. and Urb. Dev., ANN. HOMELESSNESS ASSESSMENT REP. TO CONG. v. 2, 6 (2024), <https://www.huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part-1.pdf> [<https://perma.cc/2SFJ-LND7>] [hereinafter *Homelessness Rep.*]. The AHAR defines "unsheltered homelessness" as "people whose primary nighttime location is a public or private place not designated for, or ordinarily used as, a regular sleeping accommodation for people (for example a car, public park, abandoned building, bus or train station, airport, or camping ground)." *Id.* at x.

11. *Id.* at 86.

total number of shelter beds nationwide has increased, many states still lack sufficient beds to meet the needs of those requiring shelter, forcing them to seek alternative places to live.¹² Although people experiencing unsheltered homelessness often sleep in public spaces without access to water, bathrooms, blankets, or emergency medical care, many shelters impose strict curfews and exclusionary rules based on gender, age, income, sexuality, religious practice, or prohibitions on pets and drug use, rendering them inaccessible to unhoused people who may need them most.¹³

Homelessness is a complex and dynamic issue driven by intersecting structural and cultural factors.¹⁴ The worsening national affordable housing crisis, rising inflation, stagnating wages among middle and lower-income households, and the persisting effects of systemic racism have stretched homelessness services systems to their limits.¹⁵ These pressures have been compounded by additional public health crises, natural disasters that have displaced people from their homes, the rising number of people immigrating to the United States, and the expiration of pandemic-era prevention programs, such as emergency rental assistance and the expanded child tax credit.¹⁶ To combat the growing homelessness crisis, state and local governments have experimented with a range of policies, from rental assistance programs and temporary shelters to outreach efforts for mental health and substance use treatment, to eradicate homelessness in their own jurisdiction.¹⁷

At the same time, however, many local governments and municipalities have turned to anti-camping ordinances as the focus of their response.¹⁸ These ordinances criminalize sleeping or erecting encampments or other structures on publicly owned property, with penalties that range from fines to incarceration.¹⁹ At the heart of the dispute between advocates for the unhoused and state and local governments are the community interests in public health, safety, and welfare.²⁰ Proponents of ordinances, as echoed in the *Grants Pass* opinion, argue that encampments spread disease, lack sanitation and access to running water, and pose safety risks to residents and surrounding communities.²¹ Opponents counter that shelters are often inaccessible for several reasons and that punishing encampment residents or those who sleep outside strips them of any meaningful choice.²² The impact of this punitive measure can lead to collateral consequences, such

12. *Id.* at 8–13, 71–73.

13. See Brief of 57 Soc. Scientists with Published Rsch. on Homelessness as Amici Curiae in Support of Respondents at 22, *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024) (No. 23-175).

14. See Meredith Mast, *Gimme Shelter: The Right to Adequate Housing and Grants Pass v. Johnson*, 6 U. CINN. IMMIGR. & HUM. C.R. L. REV. 1, 7 (2025).

15. See *Homelessness Rep.*, *supra* note 10, at v.

16. See *id.*

17. See Mast, *supra* note 14, at 7.

18. See *id.* at 7–8.

19. See *id.* at 8.

20. See *id.* (“[P]roponents of . . . ordinances urge that they are necessary to promote public health and safety.”).

21. See *id.*; Brief for California Governor Gavin Newsom as Amici Curiae in Support of Neither Party at 11–12, *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024) (No. 23-175).

22. See Mast, *supra* note 14, at 10–11 (“[A]nti-camping ordinances cycle individuals through a revolving door and ultimately make it harder for individuals to exit homelessness.”).

as loss of care or disqualification from HUD-funded public housing and voucher programs, due to “unpaid fines or [outstanding] warrants.”²³ These competing arguments frame the political debate. Yet underlying this debate is the core problem this Note seeks to address, which is that anti-camping ordinances deny unhoused people the most basic exercise of liberty—the ability to self-shelter, the only option available to them when no adequate alternative exists. By criminalizing conduct essential to their survival, the government strips unhoused people of their dignity, forcing them into shelters or subjecting them to punitive measures, denying them the freedom to choose how to shelter. The next section will turn to *Grants Pass* to analyze how the Court’s decision narrowed constitutional protections for unhoused people and why the SCDD is needed.

Part II: A Look at the *Grants Pass* Decision & the Erosion of Constitutional Protections

A. The Supreme Court’s Decision in *Grants Pass*

In June 2024, the Supreme Court decided *City of Grants Pass v. Johnson*, a case brought by two homeless individuals (“Plaintiffs”) in Grants Pass, Oregon, challenging the constitutionality of the city’s public-camping laws.²⁴ The ordinances at issue prohibited: (1) sleeping on public sidewalks, streets, or alleyways; (2) camping on public property; and (3) camping and overnight parking in the city’s parks.²⁵ Violations of these ordinances triggered escalating penalties.²⁶ An initial violation triggers a possible fine, followed by exclusion orders barring repeat offenders from city parks for 30 days, and violations of those orders can constitute criminal trespass punishable by a maximum of 30 days in prison and a \$1,250 fine.²⁷ Plaintiffs argued that these ordinances violated the Eighth Amendment’s Cruel and Unusual Punishment Clause and sought class-wide relief for all involuntary homeless people living in Grants Pass.²⁸

In a 6–3 decision authored by Justice Gorsuch, the Supreme Court held that the Grants Pass ordinances do not violate the Eighth Amendment’s Cruel and Unusual Punishment Clause.²⁹ Justice Gorsuch began the opinion by framing the case against the backdrop of the homelessness crisis in the western United States, and by stressing concerns from state and local governments that *Martin* injunctions “paralyze their ability to

23. *Id.*

24. *Grants Pass*, 603 U.S. at 538. This case arises out of an injunction issued in *Martin*. *Martin* injunctions stem from the Ninth Circuit’s decision in *Martin* where the court reasoned that punishing a person for sleeping outdoors when no shelter was available effectively criminalized the status of homelessness itself, reaffirming the Supreme Court’s decision in *Robinson v. California* which struck down a law criminalizing the status of narcotics addiction. *Id.* at 533–34, 544 (citing *Robinson v. California*, 370 U.S. 660 (1962)). This Note uses the term “homeless people” when referencing case law, statutory language, and other legal authorities. On the other hand, the term “unhoused people” is used in my discussion and analysis.

25. *Id.* at 537 (quoting GRANTS PASS, OR. MUN. CODE § 5.61.020(A) (2023), § 5.61.030 (2023) (alteration in original), §§ 6.46.090(A)–(B) (2023) (alteration in original)). The ordinance has since been amended. See GRANTS PASS, OR. MUN. CODE § 5.61.010 (2025) & § 6.46.040 (2025).

26. See *id.*

27. *Id.* (quoting GRANTS PASS, OR. MUN. CODE §§ 1.36.010(I)–(J), § 6.46.350, ORE. REV. STAT. §§ 164.245, 161.615(3), 161.635(1)(c)).

28. See *id.* at 538.

29. *Id.* at 542–43.

act,” given the risk of lawsuits.³⁰ Doctrinally, the Court confined its analysis to its prior precedent in *Robinson v. California* and *Powell v. Texas*, rejecting the Ninth Circuit’s expansion of *Robinson* in the *Martin* case.³¹ The majority in *Grants Pass* rejected *Martin*’s conclusion that ordinances prohibiting public sleeping in the absence of adequate shelter effectively criminalized the status of homelessness.³² For the majority, *Robinson* already sat uneasily with the Amendment’s text, original meaning, and precedent, and could not be stretched further.³³ Instead, the Court turned to *Powell* and adopted Justice Marshall’s plurality view that *Robinson* “does nothing to curtail a State’s authority to secure a conviction when ‘the accused has committed some act . . . society has an interest in preventing,’” even if that act is involuntary or closely tied to a condition or status.³⁴ Just as public intoxication could be punished in *Powell* despite its link to alcoholism, the Court concluded, so too could public camping be punished despite its connection to homelessness.³⁵

Justice Gorsuch also relied on Justice Marshall’s caution in *Powell* that expanding the Eighth Amendment to excuse conduct based on involuntariness would lack a limiting principle and improperly entangle courts in defining standards of criminal responsibility.³⁶ That warning, in the majority’s view, materialized in *Martin*, where the Ninth Circuit created an unworkable test for involuntariness.³⁷ The majority stressed that involuntariness is too “dynamic” to be judicially administered because it would require courts to determine in real time whether an individual was compelled to sleep outside.³⁸ Likewise, the Court rejected the Ninth Circuit’s focus on shelter adequacy as a constitutional matter, framing it instead as a policy judgment beyond judicial competence.³⁹ The Court reasoned that determining whether shelters are safe, accessible, or a sufficient alternative would improperly grant judges authority to oversee homelessness policy, a legislative function.⁴⁰

The dissenters in *Grants Pass* argued that *Robinson* controlled, and the ordinances at issue effectively criminalize the status of being homeless, not merely certain conduct.⁴¹ Additionally, the dissent emphasized that sleep is a biological necessity, and for homeless people with no access to adequate shelter, sleeping outside is unavoidable.⁴² Punishing homeless persons for participating in a biological necessity, the dissent reasoned, is indistinguishable from punishing them for their status—precisely what *Robinson* prohibits.⁴³ The dissent also contended that the majority

30. *Id.* at 555 (citing Brief for Int’l Mun. Law. Assoc., et al. as Amici Curiae in Support of Petitioner at 4).

31. *Id.* at 548–50.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 546.

36. *Id.* at 551.

37. *Id.*

38. *Id.* at 553.

39. *Id.* at 556.

40. *Id.* at 558–61.

41. *Id.* at 575 (Sotomayor, J., dissenting).

42. *Id.* at 563.

43. *Id.* at 563–64.

mischaracterized *Powell*, noting that the case did not turn, as the majority suggested, on whether the conduct was “involuntary”—the correct characterization of *Powell* was whether the conduct was inseparable from the underlying status.⁴⁴ The dissent concluded that the Court has an obligation to safeguard constitutional rights for all, including the most vulnerable, a duty it failed to fulfill by permitting the punishment of people living without shelter.⁴⁵

The Court’s majority decision accomplished two things that concern the rights of unhoused people. First, the Court narrowed Eighth Amendment protections by foreclosing challenges to anti-camping ordinances under the Cruel and Unusual Punishments Clause; second, the Court engaged in *judicial retreat*, reframing the issue as a separation of powers problem and insisting that regulating homelessness is a matter for the legislature to address, not for the courts to resolve.⁴⁶ Both decisions by the Court effectively insulate punitive measures from constitutional review and leave unhoused people without a clearly enforceable constitutional remedy.

B. Critique of the *Grants Pass* Decision

The result of *Grants Pass* created a constitutional vacuum for people experiencing homelessness. By narrowing Eighth Amendment protections without recognizing any corresponding right to self-shelter, the Supreme Court’s decision leaves unhoused people vulnerable to the enforcement of anti-camping ordinances.⁴⁷ The Court’s reliance on the fractured *Powell* plurality rested its reasoning on a precedent that never squarely addressed the issue presented in *Grants Pass*. Although *Powell* never resolved whether involuntary conduct could be punished under the Eighth Amendment, the majority in *Grants Pass* nonetheless conflated survival conduct with choice, reasoning that unhoused people could be punished if they declined to use whatever shelter options the city offered, regardless of how limited or unsuitable those options might be.⁴⁸ While it is true that many unhoused people reject shelter offers due to safety concerns, risk of family separation, curfews, sobriety requirements, or religious conditions, this reasoning effectively erases the involuntariness of homelessness, allowing courts to overlook the dangers of inadequate shelter, and renders punitive ordinances indistinguishable from punishing the status of homelessness.⁴⁹

The majority further justified the Grants Pass ordinances as neutral laws of general applicability, regulating conduct such as camping on public property for everyone.⁵⁰ However, this neutrality obscures their disproportionate effect because only unhoused people lacking private

44. *Id.* at 585.

45. *Id.* at 592.

46. *Id.* at 560 (emphasis added).

47. Erik W. Stanley, *City of Grants Pass v. Johnson: The Limits of the Eighth Amendment’s Cruel and Unusual Punishments Clause*, 19 LIBERTY U. L. REV. 484, 513 (2024) (“One may object to the outcome of the case as unjust and as callous to the homeless and the poor who have no place to sleep and now will be punished for simply having a blanket and trying to do something humanly inherent and necessary.”).

48. *Grants Pass*, 603 U.S. at 584–85.

49. *Id.*

50. *Id.* at 546–47.

space are realistically burdened, turning the ordinances into direct bans on survival. The tension between the Court's doctrinal minimalism and institutional restraint highlights the need for a new doctrinal framework. By refusing to extend the Eighth Amendment, the Court left unhoused people without any constitutional basis to challenge laws that create or increase their exposure to danger. This case should have recognized a dignitary right to self-shelter, but instead, it dismissed involuntariness and shelter adequacy as policy questions beyond judicial reach.

Moreover, the Court missteps again, but this time in its failure to meaningfully engage with pre-enforcement constitutional challenges, particularly those rooted in the Due Process Clause, that it gestures to but does not fully develop.⁵¹ The majority's focus on post-enforcement remedies overlooks the fact that for unhoused people, the constitutional injury arises from the enforcement itself—when their belongings are destroyed, when they are cited, or when they are incarcerated—not afterward.⁵² Remedies available only after the fact are also often illusory, given the barriers to accessing representation and the difficulty of reversing harms already suffered.⁵³ This makes pre-enforcement protections, rooted in substantive due process, all the more critical. Yet, the majority offers only a cursory treatment of how a due process challenge to anti-camping ordinances might succeed. Both the majority and dissent acknowledge that *Robinson's* admonition—that “[e]ven one day in prison would be . . . cruel and unusual”—may more appropriately fall under the Fifth or Fourteenth Amendment's Due Process guarantees.⁵⁴ Still, the Court stops short of affirming that involuntarily unhoused people have a constitutional right to avoid criminal penalties for sleeping or camping in public when no shelter is available. The failure to engage with the doctrinal and practical implications of due process protections leaves open important questions and contributes to uncertainty for lower court litigants. For a Court that purports to safeguard the dignity and constitutional rights of all people, its unwillingness to entertain the viability of pre-enforcement due process claims—particularly in light of the lack of historical grounding for the *Robinson* ordinance and similar laws like those in *Grants Pass*—is a striking omission. It is in this pre-enforcement gap that the SCDD may offer a more promising path forward. Unlike the majority, which defers entirely to local governments, the SCDD *requires* judicial oversight when government action creates or heightens danger. In this sense, *Grants Pass* does not foreclose judicial intervention but opens the door for a potential new remedy for unhoused litigants.

In the next section, I argue for the right to self-shelter and demonstrate how anti-camping ordinances function similarly to the anti-sodomy law at issue in *Lawrence v. Texas*. The ordinances and laws in *Grants Pass* and *Lawrence* were not designed to prevent tangible harm but intended

51. *Id.* at 551–52; see also *Eighth Amendment—Cruel and Unusual Punishment Clause—City of Grants Pass v. Johnson*, 138 HARV. L. REV. 375, 380 (2024) [hereinafter *Eighth Amendment*].

52. *Eighth Amendment*, *supra* note 51, at 380–81.

53. *Id.* at 381 (“[T]o even vindicate these post-enforcement rights, unhoused individuals need to secure legal representation, which itself poses logistical obstacles.”).

54. *Grants Pass*, 603 U.S. at 544–45, 573–74.

to stigmatize and subordinate a vulnerable group by punishing moral disapproval with the use of punitive sanctions. And, just as *Lawrence* rejected moral condemnation as an insufficient basis for criminalizing intimate conduct, courts should also reject ordinances that punish unhoused people for exercising the most basic liberty, the choice to self-shelter, which in itself is also a moral condemnation.

Part III: Dignity & the Right to Self-Shelter

The right to self-shelter may be recognized as a constitutional liberty interest under the Fifth and Fourteenth Amendments, which prohibit the deprivation of liberty without due process of law.⁵⁵ This liberty interest can be informed by the constitutional value of dignity, which safeguards an individual's ability to make necessary choices for survival and self-preservation.⁵⁶ While the Constitution does not explicitly reference "dignity," the principle has become deeply ingrained in U.S. constitutional jurisprudence,⁵⁷ particularly through Justice Anthony Kennedy's opinions.⁵⁸

Justice Kennedy's jurisprudence illustrates how dignity operates as a constitutional value rather than an independent constitutional right—according to Justice Kennedy, dignity was often invoked as a shield against cruelty inflicted on either the physical body, social self, or psychological self.⁵⁹ At his Senate confirmation hearing, Justice Kennedy emphasized that constitutional interpretation must begin with the text.⁶⁰ Because "dignity" is not expressly mentioned in the Constitution, its application must be grounded in specific constitutional provisions.⁶¹ For example, in *Planned Parenthood of Southwestern Pennsylvania v. Casey*, Justice Kennedy "expressly linked dignity to autonomy" under the Fourteenth Amendment, writing that matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."⁶² At the heart of this liberty, Kennedy

55. U.S. CONST. amends. V, XIV.

56. See Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 184, 187 (2011).

57. *Id.* at 235 ("[C]onstitutional courts have sometimes invoked respect for dignity as a justification for requiring the state to provide such goods.").

58. Adeno Addis, *Justice Kennedy on Dignity*, 60 HOU. L. REV. 519, 529 (2023) (articulating that "Justice Kennedy . . . invoked dignity more often and more substantively than almost any other Justice who served on the Court (at least in the modern era).").

59. *Id.* at 539. At times, Justice Kennedy invoked dignity to protect the physical integrity of the person and emphasize disapproval of State action. See *id.* For example, in cases involving torture or the imposition of capital punishment on minors or individuals with mental disabilities, dignity play a crucial role "to protect a person against cruelty." *Id.* Justice Kennedy also emphasized the "psychological and social dimension of personhood," such as in cases denying equal rights to gay people or racial minorities, where the State's action inflicted humiliation and entrenched stigma, subjecting individuals to indignity. *Id.*

60. See *id.* at 546.

61. See *id.* (stating that within the words of the Constitution, "of course, dignity is not one of those words. So, we must start from a term found in the Constitution as a point of departure to harness the value of dignity.").

62. *Id.* at 574 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion)).

explained, is the “right to define one’s own concept of existence.”⁶³ This approach, often referred to as “constitutive autonomy,” safeguards those personal decisions that are integral to identity and personhood.⁶⁴

Lawrence v. Texas provides a particularly useful illustration of Justice Kennedy’s use of dignity to inform the constitutional right to liberty under the Due Process Clause. To provide background, in Houston, Texas, police officers responded to an anonymous call reporting a weapons disturbance.⁶⁵ When the officers entered John Lawrence’s apartment, they discovered Lawrence and Tyron Garner engaged in consensual sexual conduct.⁶⁶ Both men were arrested and charged under Texas’s anti-sodomy law, which criminalized same-sex intimacy, and were fined.⁶⁷ The Court considered whether two adults were free to engage in private, consensual sexual conduct without government intervention.⁶⁸ Striking down a Texas statute that criminalized same-sex intimacy, the Court held that the Due Process Clause protects such choices as part of the liberty to which all persons are entitled.⁶⁹ Writing for the majority, Justice Kennedy explained that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”⁷⁰ In doing so, he grounded constitutional liberty in the value of dignity, recognizing that laws criminalizing intimate choices demean individuals by targeting conduct inseparable from their identity and operate to subordinate disfavored groups.⁷¹

As Professor Ben McJunkin explains, while the Court in *Lawrence* was vague about whether the conduct at issue constituted a fundamental right, Justice Kennedy’s prolonged exploration of the “‘transcendent’ dimensions of due process” leaves little doubt that the Court was articulating the contours of one.⁷² The Court took a novel approach, defining the right not by its deep roots in the nation’s history and traditions, as is typical under originalist interpretations, but instead grounding its opinion through respecting an individual’s “self-definition” and self-governance, ultimately centering on intimate personal

63. *Id.*

64. *Id.* Addis emphasizes that there exists a conception of autonomy known as “constitutive autonomy,” which holds that dignity requires individuals be allowed to make choices in relation to activities central to defining who they are. *Id.* In this sense, autonomy is not about every decision a person might make, but about those fundamental choices that shape identity and self-definition. Constitutive autonomy thus functions as an expression of dignity, ensuring that individuals retain the ability to exercise agency in matters essential to their personhood.

65. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

66. *Id.* at 563.

67. *Id.*

68. *Id.* at 562.

69. *Id.* at 564.

70. *Id.* at 562.

71. Addis, *supra* note 58, at 595. Justice Kennedy most often used dignity as a bridge between liberty and equal protection. *See id.* He used the phrase “equal dignity” to describe the protection of the social person, including the person’s capacity to love, to cultivate relationships, and to define identity through those commitments and relationships. *Id.* Applied to a right to self-shelter, one could argue that, just as the Court in *Lawrence* refused to let criminal law demean the existence of Lesbian, Gay, Bisexual, Transgender, Queer, and other identifying (“LGBTQ+”) persons, courts should refuse to let anti-camping ordinances demean homeless people by denying them autonomy in deciding how to shelter. The exploration of this “equal dignity” dimension, however, falls beyond the scope of this Note and I hope to explore this connection in another article or comment.

72. McJunkin, *supra* note 2, at 178.

choices—although *Lawrence* concerned sexual intimacy, Justice Kennedy’s reasoning extended beyond privacy.⁷³ He further explained that dignity protects a person’s right to make choices central to one’s personhood, even when those choices are stigmatized or unpopular.⁷⁴ Criminalizing sodomy, he explained, demeaned the existence of LGBTQ+ people by branding their most intimate choices as crimes.⁷⁵

Seen through a dignified lens, *Lawrence* supports recognizing the right to self-shelter as a liberty interest rooted in dignity. Just as the Constitution protects a person’s intimate decision of whether and with whom to engage in sexual relationships, it should also protect the intimate decision of where and how to shelter oneself during periods of homelessness when no adequate alternative exists. Choosing where and how to shelter is a personal decision, thus reflecting a core liberty interest tied to dignity because it implicates survival, personal choice,⁷⁶ and the preservation of community.⁷⁷ When unhoused people set up encampments⁷⁸ or sleep outdoors in the absence of adequate shelter, they are exercising autonomy over how to survive and endure conditions beyond their control. Anti-camping ordinances that prohibit encampments or sleeping outdoors strip individuals of this autonomy, forcing them into shelters that may be unsafe, inaccessible, or discriminatory, which otherwise subjects them to punitive sanctions. These ordinances undermine the very form of dignity-based liberty Justice Kennedy articulated in *Lawrence*—the right of individuals to define for themselves the most intimate and constitutive choices of existence.

A likely objection to grounding a right to self-shelter in *Lawrence* is that *Lawrence* itself confined liberty to private spaces, while self-sheltering necessarily takes place in public. McJunkin addresses this distinction by emphasizing that the answer lies in the comparison between the right to make sexual decisions and the right to self-shelter by distinguishing *Lawrence*’s private-space limitation.⁷⁹ In the case of public sex, the state may invoke a weighty interest in prohibiting indecent exposure or lewd acts before nonconsenting observers—interests long recognized as grounded in moral and social norms and viewed as dangerous, disruptive, and infectious.⁸⁰ By contrast, no similar potential

73. *Id.* (“Justice Kennedy trade a line between prior rights identified as fundamental and the conduct at issue to connect shared themes, including the importance of self-definition.”).

74. *See id.* at 177, 183.

75. *See id.* at 182.

76. *Id.* at 185 (“Control over one’s own body is fundamentally at stake in the decision of where and how to find shelter.”).

77. *Id.* at 185–86 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984)) (“[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.”).

78. For purposes of this Note, I do not address whether encampments might be recognized as legally significant spaces under the Property Clause, an issue I hope to explore in a future Note. Here, encampments, though informal, when destroyed, eliminates homeless people’s chosen means of survival and infringes on the principles of human dignity articulated by Justice Kennedy in *Lawrence*.

79. McJunkin, *supra* note 2, at 189 (articulating that *Lawrence* did not involve “public conduct.”).

80. *Id.* at 189–90 (“[F]ew would argue that *Lawrence*’s logic compels a right to engage in public sex, despite the decision’s soaring rhetoric about the intimacy and dignity of personal sexual choices.”).

for third-party harm arises from public camping.⁸¹ Simply existing in public spaces, even when visibly homeless, does not generate harm in the same way public sex might—at most, “exposing poverty to nonconsenting viewers . . . generates strong feelings of disgust and discomfort” among observers.⁸² But as McJunkin notes, such reactions are “insufficient grounds for criminal intervention[.]”⁸³ Moreover, arguments that homeless encampments unfairly convert public property into private space are also unconvincing. McJunkin expounds that “public spaces *exist to be occupied*, and homeless people are no less part of the ‘public’ entitled to use them like anyone else.”⁸⁴ The true objection is not occupation itself, but the manner of use, as homelessness makes public spaces appear undesirable to others.⁸⁵ In *Grants Pass*, while Justice Gorsuch cited public safety risks associated with sleeping outdoors, those risks are no greater than the countless ordinary dangers of everyday public life.

It is clear, after examining the Court’s long-established precedent in *Lawrence*, that the majority in *Grants Pass* failed to engage with its conception that liberty, informed by dignity, protects intimate and identity-defining choices from state-imposed harm. In *Lawrence*, the criminalization of same-sex intimacy effectively punished the status of being homosexual. The conduct at issue, engaging in sexual intimacy with a same-sex partner, was inseparable from the defendants’ identity as homosexual men. By criminalizing that conduct, Texas did not merely prohibit certain conduct; it rendered the very status of being homosexual legally suspect. The Court recognized this as an infringement on liberty because it denied individuals the ability to make intimate choices constitutive of their personhood and dignity. Similarly, ordinances that criminalize sleeping outdoors or erecting an encampment do not punish only “conduct,” but effectively punishes the status of being unhoused. The act of self-sheltering is a byproduct of homelessness, an unavoidable consequence of the condition when no adequate alternative shelter exists. In both contexts, the state transforms identity-defining choices into crimes; thus, infringing upon the liberty protected by the Due Process Clause.

Part IV: The State-Created Danger Doctrine

A. Background

The SCDD emerged from the Supreme Court’s 1989 decision in *DeShaney v. Winnebago County Department of Social Services*.⁸⁶ In that case, Joshua DeShaney (“Joshua”), a four-year-old boy, was repeatedly abused by his father while living in Winnebago County, Wisconsin, from 1982 to 1984.⁸⁷ Winnebago County Department of Social Services (“DSS”) received multiple reports of suspected abuse.⁸⁸ On at least one

81. *Id.* at 190.

82. *Id.*

83. *Id.*

84. *Id.* at 190–91 (emphasis added).

85. *See id.* at 191.

86. *See generally* *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989) (discussing when the affirmative actions of the State trigger the protections of the Due Process Clause).

87. *Id.* at 191–93.

88. *Id.* at 192–93.

occasion, Joshua was removed from his father's custody, but later returned after DSS concluded that there was insufficient evidence of abuse.⁸⁹ Afterwards, despite repeated reports to DSS of ongoing incidents of child abuse and a DSS caseworker reporting her suspicion, Joshua remained in his father's custody.⁹⁰ In 1984, Joshua was beaten so brutally that he suffered severe permanent brain damage and "is expected to spend the rest of his life confined to an institution for the profoundly retarded."⁹¹ Joshua's mother sued Winnebago County and its DSS officials, arguing that their failure to intervene to protect him against a risk of violence of which they knew or should have known deprived Joshua of his liberty without due process of law under the Fourteenth Amendment.⁹²

The central question before the Court was whether the government's failure to protect an individual against private violence could amount to a constitutional violation.⁹³ Chief Justice Rehnquist, writing for the majority, answered: "No."⁹⁴ The Court emphasized that because "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," the Clause is "phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."⁹⁵ In other words, the Constitution generally protects individuals from affirmative state interference, not from state inaction. The Court's precedent supports that the Due Process Clauses "generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."⁹⁶ Although the Court denied the existence of any general government duty, Chief Justice Rehnquist identified circumstances where the government would have a duty to provide protection. He states, "[i]n the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means."⁹⁷ Put differently, the Court acknowledged that the Due Process Clause may be implicated when the state itself plays a part in creating a danger or renders an individual more vulnerable to it.⁹⁸ This acknowledgment became the basis of the SCDD. In the decades since *DeShaney*, nearly every federal circuit court has recognized some version

89. *Id.* at 192.

90. *Id.* at 192–93.

91. *Id.* at 193.

92. *Id.*

93. *Id.* at 191.

94. *Id.*

95. *Id.* at 195.

96. *Id.* at 196.

97. *Id.* at 200.

98. Chemerinsky, *supra* note 8, at 3.

of this doctrine, but it remains unsettled by the Supreme Court, leading to a circuit split and significant inconsistencies in how lower courts apply it.⁹⁹

B. The Circuit Split

The Supreme Court has not established a specific test for the State-Created Danger Doctrine. While the Court has established general culpability thresholds for constitutional torts under the Due Process Clause—holding that negligence is insufficient, but that deliberate indifference and recklessness may be sufficient, and that in emergency situations, liability requires conduct that “shocks the conscience”—it has left lower courts to develop their own frameworks.¹⁰⁰ The circuits that recognize the doctrine vary in how narrowly or broadly it is applied.¹⁰¹

The Second Circuit has recognized liability when state actors take affirmative actions that create or increase a risk of danger to victims.¹⁰² While it does not define “affirmative actions,” it has extended this reasoning beyond overt acts to include implicit conduct and sustained inaction that amounts to affirmative conduct, even if there is no approval or encouragement.¹⁰³ The Second Circuit rejected *DeShaney*’s “special relationship” condition, which broadens the circumstances under which plaintiffs can bring their claims.¹⁰⁴ The Third Circuit adopted a more structured test with four elements to prove liability. First, the harm caused

99. Hannah Behar, *The State-Created Danger Doctrine*, EMORY L. SCH. SUP. CT. ADVOC. PROGRAM BLOG (Nov. 26, 2023), <https://www.sundaysplits.com/blog/hannah-behar-the-state-created-danger-doctrine> [<https://perma.cc/KS35-J9N9>].

100. Chemerinsky, *supra* note 8, at 11–12 (citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986) and *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

101. Eisenhauer, *supra* note 9, at 898. The First Circuit has declined to recognize the State-Created Danger Doctrine, holding that affirmative action by the state even when undertaken with deliberate indifference that played a causal role in the harm should not rise to the level of a constitutional violation but be deemed tortious in nature only. *Id.* The First Circuit dismissed the “deliberate indifference” standard as insufficient but hinted at adopting a “shocks the conscience” standard for creation-of-danger cases in the future. *Id.*; see also Behar, *supra* note 99 (stating that the D.C. Circuit has acknowledged the doctrine but declined to adopt it until 2001 due to inconsistencies across the circuits). In *Butera v. District of Columbia*, the court noted confusion in existing jurisprudence and withheld formal recognition, resulting in a lack of a clear standard. *Id.* (citing *Butera v. D.C.*, 235 F.3d 637, 651 (D.C. Cir. 2001)). The Fifth Circuit has not formally recognized the doctrine but has articulated potential elements it would consider if the Supreme Court were to provide guidance. *Id.* In *Doe v. Hillsboro Indep. Sch. Dist.*, it suggested that liability exists when “[a] state actor is held accountable for foreseeable injuries when it creates or permits a dangerous situation The first element is whether the environment was dangerous. The second is whether the state actors knew the environment was dangerous. The final element is whether the state actors created an opportunity that would not otherwise have existed for the injury to transpire.” *Id.* (citing *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198 (5th Cir. 1994) (Goldberg, J., dissenting); *Scanlan v. Texas A&M U.*, 343 F.3d 533 (5th Cir. 2003)).

102. Behar, *supra* note 99 (citing *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993)) (finding the complaint adequately alleged that police officers “conspired with the ‘skinheads’ to permit the latter to beat up flag burners with relative impunity, assuring the ‘skinheads’ that unless they got totally out of control they should not be impeded or arrested.”), *overruled on other grounds* by *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163 (1993).

103. Eisenhauer, *supra* note 9, at 899 n.56 (citing *Okin v. Vill. of Cornwall-On-Hudson Police Dep’t*, 577 F.3d 415, 434–35 (2d Cir. 2009) (holding that “affirmative police conduct runs along the spectrum of explicit and implicit actions” and “the state-created danger theory . . . prohibit[s] . . . affirmatively contributing to the vulnerability of a known victim by engaging in conduct, whether explicit or implicit, that encourages intentional violence against the victim . . . ”)).

104. *Id.* at 899–900; see also Behar, *supra* note 99 (citing *DeShaney*, 489 U.S. at 198–99) (stating that the Special Relationship Exception, is often applied when a state incarcerates, institutionalizes, or restrains a person involuntarily). This Note will not explore the Special Relationship Exception, focusing instead on the State-Created Danger Doctrine.

was foreseeable and fairly direct.¹⁰⁵ Second, the government conduct shocks the conscience.¹⁰⁶ Third, a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general.¹⁰⁷ Finally, the state actor affirmatively used their authority in a way that created danger or rendered the plaintiff more vulnerable than if no action had been taken.¹⁰⁸ This circuit also struggles to define "affirmative conduct" like the Second Circuit.¹⁰⁹ However, it does recognize liability in "hyperpressurized environments" where liability attaches only when a plaintiff shows that the harm was intentionally caused.¹¹⁰ The Fourth Circuit has also been highly restrictive. In *Pinder v. Johnson*, it held that recognizing a right to affirmative protection would raise public policy concerns because it may expose the government to limitless liability.¹¹¹ Looking at *Callahan v. North Carolina Department of Public Safety*, it emphasized that only affirmative government conduct that directly creates or increases danger qualifies, while omissions or failures to act categorically do not.¹¹²

The Sixth Circuit focused on the issue of vulnerability to danger through deliberate indifference and has relied on the Supreme Court's definition to establish liability.¹¹³ However, there is a lack of consistency in how state-created danger claims are decided.¹¹⁴ In *Cartwright v. City of Marine City*, the court adopted a "special danger" element, requiring that the state's conduct must place the plaintiff at risk, as opposed to the public at large.¹¹⁵ In *Jones v. Reynolds*, the court outlined two other elements.¹¹⁶ First, an affirmative act by the state that either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party.¹¹⁷ Second, knowledge or constructive knowledge on the part of the state that its actions specifically endangered the plaintiff.¹¹⁸ The Seventh Circuit recognizes the doctrine but also has strict requirements. Its test requires that affirmative state acts create or increase danger, the state's conduct must be the proximate cause of the plaintiff's injury, and the state's failure to protect the individual must shock the conscience.¹¹⁹ This circuit often rejects claims where plaintiffs are deemed to have assumed the risk.¹²⁰ The Eighth Circuit developed a five-factor test, excluding the affirmative

105. Eisenhauer, *supra* note 9, at 900 (citing *Kneipp v. Tedder*, 95 F.3d 1199, 1208–11 (3d Cir. 1996)).

106. *Id.*

107. *Id.*

108. *Kneipp*, 95 F.3d at 1207 (stating that police officers separated a highly intoxicated couple as they were walking home at night, and the wife was later found with hypothermia and permanent brain damage).

109. Eisenhauer, *supra* note 9, at 901.

110. *Id.*

111. See *Pinder v. Johnson*, 54 F.3d 1169, 1178 (4th Cir. 1995); see also *Callahan v. N.C. Dep't of Pub. Safety*, 18 F.4th 142, 148 (4th Cir. 2021).

112. *Callahan*, 18 F.4th at 148.

113. Eisenhauer, *supra* note 9, at 903.

114. *Id.*

115. *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003).

116. Eisenhauer, *supra* note 9, at 903.

117. *Id.*

118. *Id.* (citing *Jones v. Reynolds*, 438 F.3d 685, 693–94 (6th Cir. 2006)).

119. Eisenhauer, *supra* note 9, at 904 (citing *Reed v. Gardner*, 986 F.2d 1122, 1126–27 (7th Cir. 1993)).

120. See Behar, *supra* note 99.

act element, and requiring that plaintiffs are members of a limited and definable group, the government's conduct put the person at significant risk of serious, immediate, and proximate harm, the risk was obvious or known, the government acted recklessly in conscious disregard of the risk, and the conduct shocks the conscience, when viewed in total.¹²¹ To prove the last element, the government action must be so egregious and so outrageous that it shocks the contemporary conscience.¹²²

The Ninth Circuit has long embraced the doctrine, even prior to *DeShaney*, most notably in *Wood v. Ostrander*.¹²³ Its test requires that the state affirmatively created or enhanced danger, acted with deliberate indifference, and caused foreseeable harm to the plaintiff.¹²⁴ The Tenth Circuit requires that there be an actual intent to harm or expose the victim to risk without regard to the consequences to prove liability.¹²⁵ It applies a six-part test that requires that the state actors created or increased the danger, the plaintiff belongs to a limited, definable group, the conduct put the plaintiff at substantial risk of serious, immediate, and proximate harm, the risk was obvious or known, the government acted recklessly in conscious disregard of that risk, and when viewed in total, the conduct shocks the conscience.¹²⁶ The Tenth Circuit has not established a standard for conscience-shocking conduct, resulting in uncertainties regarding how the test should be applied.¹²⁷ The Eleventh Circuit uses both subjective and objective standards.¹²⁸ Subjectively, plaintiffs must show that the government had subjective knowledge of a serious risk and disregarded it with deliberate indifference.¹²⁹ Objectively, the test asks whether a reasonable official would recognize that their conduct constitutes a constitutional violation.¹³⁰

Looking across the circuits, it is clear that no two courts apply the SCDD in the same way. For example, the Second and Ninth Circuits apply it broadly, allowing liability for a wide range of government conduct, whereas the Third, Fourth, and Seventh Circuits impose strict limitations, requiring a more direct or narrowly defined misuse of state authority. Although there are recurring elements in some circuits, such as the requirement of an affirmative act, the foreseeability of harm, or the need for a definable plaintiff, the circuits define these terms differently. These definitional divergences create uncertainty about what the doctrine actually requires and make it more difficult for courts and even litigants to determine when liability will attach. The SCDD has been applied in

121. Eisenhauer, *supra* note 9, at 905.

122. *Id.* at 906 (citing *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005)).

123. Chmerinsky, *supra* note 8, at 25; Julia Steiner, *Beware of the Dangers of the State-Created Danger Doctrine: A Look at the Ninth Circuit's Approach*, 79 U. MIA. L. REV. 573, 583 (2025).

124. Behar, *supra* note 99 (citing *Lawrence v. United States*, 340 F.3d 952, 957 (9th Cir. 2003)).

125. *Id.* (citing *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995)).

126. *Id.*

127. Eisenhauer, *supra* note 9, at 907.

128. *Id.* at 908.

129. *Id.*

130. *Id.*

cases ranging from law enforcement officers abandoning individuals in dangerous situations¹³¹ to law enforcement officers releasing an abusive partner, which foreseeably led to the abuser killing the victim.¹³²

This SCDD could similarly be extended to laws that criminalize homelessness, as they actively place unhoused people in greater danger than they would have otherwise faced. For instance, incarcerating unhoused people for sleeping in public spaces exposes them to violence, exploitation, and unsafe conditions while detained.¹³³ Encampment sweeps forcibly displace unhoused people from established communities, often leaving them without shelter or belongings, making them vulnerable to assault, theft, or fatal exposure to extreme weather.¹³⁴ Additionally, restrictive shelter policies, such as prohibiting pets, barring individuals with substance use disorders, or imposing strict time limits on shelter stays, can result in individuals being left with no viable alternatives, forcing them to self-shelter, risking criminalization.¹³⁵

C. A New Test: The State-Created Danger Test

1. Elements of the Proposed State-Created Danger Test

To resolve the circuit split and ensure the consistent application of the SCDD, the Supreme Court should adopt a uniform standard: the *State-Created Danger Test*.¹³⁶ Under this test, plaintiffs may bring a claim by showing that the government conduct: (1) materially increased the danger; (2) was undertaken with deliberate indifference or reckless disregard; and (3) had a clear nexus between the government's action and the infringement of a constitutional right.¹³⁷ This test avoids the Supreme Court's "shocks the conscience" standard, which is notoriously difficult to satisfy—it also eliminates the "affirmative act" requirement, which has created confusion across the circuits.¹³⁸ Finally, it removes the requirement that the plaintiff belong to a definable group, ensuring the doctrine protects all victims rather than discrete classes. Ultimately, this test strikes a proper balance between the countervailing interests at stake. On one hand, "[s]tate actors, especially those such as police who regularly

131. *Wood v. Ostrander*, F.2d 583, 586 (9th Cir. 1989) (finding that an officer left a woman stranded on the side of the road at 2:30 a.m. in a high crime area where she was subsequently raped).

132. *Pinder v. Johnson*, 54 F.3d 1169, 1172 (4th Cir. 1995) (Police assured the plaintiff that her former boyfriend was in custody, but he was released that night and proceeded to set her home on fire, killing her three children.).

133. Madeline Bailey et al., *No Access to Justice: Breaking the Cycle of Homelessness and Jail*, VERA INST. OF JUST. 1, 9 (Aug. 2020), <https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/08/homelessness-brief-web.pdf> [<https://perma.cc/D3LQ-HAFL>].

134. *Impact of Encampment Sweeps on People Experiencing Homelessness*, NAT'L HEALTH CARE FOR THE HOMELESSNESS COUNCIL 1, 2–5 (Dec. 2022), <https://nhchc.org/wp-content/uploads/2022/12/NHCHC-encampment-sweeps-issue-brief-12-22.pdf> [<https://perma.cc/MJ9Q-J378>].

135. *Why Some Homeless People Avoid Homeless Shelters*, BRIGHTEN THE CORNER 1, 4–5 (Feb. 12, 2023), <https://brightenthecorner.org/2023/02/12/why-some-people-avoid-homeless-shelters/> [<https://perma.cc/FU5U-MH6G>].

136. *Eisenhauer*, *supra* note 9, at 918 (“[A] uniform test should delicately balance the interests of protecting the public from abuse with allowing the police and other state actors a necessary margin of latitude to perform certain essential public functions without losing considerable proficiency.”).

137. *Id.* This is different than *Eisenhauer*'s proposed multipart test, which includes: (1) state conduct that materially increased the danger to the victim, (2) the state knew or reasonably should have known that the act increased the danger to the victim, and (3) the state conduct shocks the conscience of a reasonable person.

138. *Chemerinsky*, *supra* note 8, at 13.

operate in tense and dangerous circumstances, rightfully must be allowed to do their jobs without hesitating to calculate the likelihood of litigation.”¹³⁹ On the other, the doctrine must be sufficient to empower citizens to “hold the powerful state responsible for flagrant and glaring abuses, . . . [which] could become worse and more prevalent if left completely unchecked.”¹⁴⁰

In this proposed test, the first element requires that the government’s conduct materially created or increased the danger to the victim. This element allows courts to make a qualitative judgment about the degree to which the defendant’s conduct heightened the likelihood that harm would occur.¹⁴¹ Importantly, this element recognizes the full spectrum of how government operates, where danger can result not only from overt affirmative acts but also from inaction in circumstances where the state has exercised control. This approach aligns with the Second Circuit’s recognition that both action and omission may qualify as “affirmative” when the state exercises control.¹⁴² By focusing on substance rather than semantics, this element avoids the definitional disputes over “affirmative acts” that have affected the outcome of some circuit cases.

The second element clarifies the appropriate threshold of culpability. Negligence is too low to justify constitutional liability, while the “shocks the conscience” standard is too high that it insulates even egregious misconduct.¹⁴³ A deliberate indifference or reckless disregard standard resolves this imbalance. Liability would attach only when officials knew or should have known of the risk and consciously disregarded it. This may be established through prior warnings, a pattern of recurring harm, or well-documented consequences. This requirement provides a clear standard and is necessary to avoid penalizing negligible conduct while ensuring accountability for government actors who create danger to the victim.

The third element requires a nexus between the government’s conduct and the infringement of a constitutional right. This element prevents the doctrine from devolving into a generalized tort remedy,¹⁴⁴ instead it ensures that liability arises only when government conduct directly burdens constitutionally protected interests such as liberty or property. By narrowing the inquiry to constitutional rights, courts can distinguish between ordinary negligence claims and constitutional violations. This element also balances public policy concerns. Some state actors, specifically law enforcement officers, frequently operate in dangerous and unpredictable situations where decisions must be made without hesitation. The point is not to expose them to liability for every imperfect decision they make. Nevertheless, when state actors act in a manner that is counter to the constitutional safeguards afforded to all persons, they should be held accountable.

139. Eisenhauer, *supra* note 9, at 915.

140. *Id.*

141. Elizabeth G. Poole, *An Unattainable Standard: Analyzing the Fourth Circuit’s Approach to the State-Created Danger Doctrine*, 101 N.C. L. REV. 871, 884 (2023).

142. See discussion *infra* Part IV.B, at 20–21.

143. *Id.* at 20, 23.

144. *Id.*

2. Benefits and Limitations of the State-Created Danger Test

The State-Created Danger Test offers a well-defined, consistent, and constitutionally supported standard for applying the SCDD. This proposed test resolves the long-standing circuit split that has left the doctrine underdeveloped and inconsistently applied. Its focus is to ensure access to justice, especially for members of vulnerable groups. The test combines certain elements common to different circuits, including deliberate indifference or reckless disregard. This test also clarifies when deliberate indifference is sufficient and does not require the “shocks the conscience” standard, making it easier to hold government actors accountable for their conduct. Moreover, the test incorporates a nexus threshold to avoid opening the floodgates to multiple suits that could overwhelm the courts, ensuring that only government conduct that infringes on a constitutional right is actionable.¹⁴⁵

Nevertheless, some may view this test as expanding constitutional liability too broadly, to the point where it transforms the Due Process Clause into a general guarantee of protection that would allow anyone to challenge government action unfavorable to them, without considering that a particular law or policy was enacted for a legitimate government purpose. However, the test’s negative-rights structure provides a clear boundary, as it does not impose a general duty to aid but prohibits the government from worsening an individual’s condition. A further critique may be that the first element of the test introduces judicial subjectivity by requiring courts to evaluate the disproportionate impact of laws on a certain group of people. For example, determining whether anti-camping ordinances “target” unhoused individuals may appear speculative. Finally, there may be concern that this test could deter legitimate government decision-making and enforcement due to fear of facing litigation, particularly in cases involving laws aimed at addressing homelessness. However, the State-Created Danger Test does not prohibit law enforcement from enforcing laws or protecting public safety; it merely requires that when doing so, the government must not place people in danger.

Part V: President Trump’s Crackdown: Executive Order 14,321 and Encampment Sweeps in the District of Columbia

A. President Trump’s Executive Order

In July 2025, a year after the *Grants Pass* decision, President Trump signed Executive Order 14,321 (“EO”): Ending Crime and Disorder on America’s Streets.¹⁴⁶ The order propelled a federal push to clear homeless encampments nationwide, which President Trump linked to rising crime, thus turning away from the longstanding federal homelessness policy to eradicate it by providing access to resources.¹⁴⁷ The order aims to accomplish at least six goals. First, the EO encourages the expansion

145. Chemerinsky, *supra* note 8, at 19.

146. *Ending Crime and Disorder on America’s Streets*, THE WHITE HOUSE (July 24, 2025), <https://www.whitehouse.gov/presidential-actions/2025/07/ending-crime-and-disorder-on-americas-streets/> [https://perma.cc/8Y6K-QC99].

147. *Id.*

of involuntary civil commitment, allowing the Department of Justice (“DOJ”) to seek the reversal of judicial precedents and consent decrees that limit civil commitment, and to support states in adopting more flexible commitment and treatment laws.¹⁴⁸ The problem with this provision is that mental health professionals have used it only for a short period of time, typically in rare instances, for selected patients with mental illness who pose a threat to themselves or others.¹⁴⁹ Persons incarcerated in mental hospitals are deprived of liberty because those living in institutionalized settings are deprived of friends, family, and community, as institutionalized patients must live in unnatural surroundings under the control of strangers.¹⁵⁰ Yet, the EO fails to address whether investments will be made to community-based resources, such as outpatient treatment, supportive housing, and mental health services that support the future health trajectory of the person.¹⁵¹

Second, the EO eliminates unconditional federal support for Housing First. Under the evidence-based Housing First model, access to housing is prioritized without preconditions, such as sobriety or compliance with mental health or substance use treatment, while supportive services are offered on a voluntary basis to promote housing stability and improved quality of life.¹⁵² The EO departs from this approach by directing HUD and Health and Human Services (“HHS”) to condition housing assistance on active participation in treatment for substance use disorders or severe mental illness, as the administration believes Housing First deprioritizes accountability and fails to promote treatment, recovery, and self-sufficiency.¹⁵³ Conditioning federal support of housing assistance in this way is a threat to a person’s dignity because the EO converts treatment from a voluntary service into a prerequisite for access to housing, thereby undermining individual agency and denying unhoused individuals a meaningful choice.¹⁵⁴ Third, the EO prioritizes federal support for jurisdictions enforcing public safety laws that ban urban camping, loitering, squatting, and open-air drug use by awarding discretionary grants to local law enforcement for compliance.¹⁵⁵ Fourth, the EO targets harm reduction efforts by authorizing DOJ to initiate enforcement action against federally funded organizations that operate safe consumption sites where drug paraphernalia is distributed or on-site drug use is permitted.¹⁵⁶

148. Francis Torres, *President Trump’s Executive Order on Homelessness: A Shift in Federal Policy* (Aug. 18, 2025), <https://bipartisanpolicy.org/blog/president-trumps-executive-order-on-homelessness-a-shift-in-federal-policy/> [https://perma.cc/PX4K-EUFW].

149. Karen Feldscher, *Trump Executive Order on Homelessness ‘A Punitive Approach,’ says expert*, HARV. SCH. PUB. HEALTH (Aug. 20, 2025), <https://hsph.harvard.edu/news/trump-executive-order-on-homelessness-a-punitive-approach-says-expert/> [https://perma.cc/XCL9-HCEA].

150. Addis, *supra* note 58, at 566 (citing *Olmstead v. L.C.*, 527 U.S. 581, 609 (1999) (Kennedy, J., concurring)).

151. Feldscher, *supra* note 149.

152. Marcy Thompson, *Understanding Trump’s Executive Order on Homelessness: Attacks on Housing First*, NAT’L ALL. TO END HOMELESSNESS: BLOG (Aug. 5, 2025), https://endhomelessness.org/understanding-trumps-executive-order-on-homelessness-attacks-on-housing-first/?utm_ [https://perma.cc/9Y5W-PDXE].

153. Torres, *supra* note 148.

154. See discussion *infra* Part III.

155. Torres, *supra* note 148.

156. *Id.*

Lastly, the EO mandates interagency data sharing with law enforcement authorities, thus increasing surveillance of unhoused individuals and further compromising their autonomy and civil liberties.¹⁵⁷ In effect, this EO aims to criminalize homelessness under the guise of public safety. Not only does this directive encourage punitive measures to address homelessness, but it also awards this treatment by providing funds to jurisdictions that follow its directive. Since the issuance of this EO, President Trump's directive to dismantle homeless encampments in Washington, D.C.—further explored below—has displaced numerous unhoused individuals. These enforcement actions, especially when carried out with knowledge of an inadequate shelter system, constitute affirmative state action that foreseeably increases the risk of harm. Thus, this EO falls within the State-Created Doctrine's reach, where constitutional scrutiny under the Due Process Clause is not only appropriate but imperative.

B. D.C. v. Trump: Crackdown in Washington, D.C.

In August 2025, President Trump declared a public safety emergency in Washington, D.C., and asserted direct federal control over the city's law enforcement using Section 70 of the Home Rule Act.¹⁵⁸ Trump announced that he was "taking over" the Metropolitan Police Department ("MPD") and deploying National Guard Troops to assist in patrolling the streets.¹⁵⁹ Trump justified this takeover by asserting that D.C. is "one of the most dangerous cities in the world" and claimed that homeless encampments made the city unsafe.¹⁶⁰ On August 11, the White House declared a 30-day federal emergency in D.C., during which law enforcement was authorized to dismantle encampments.¹⁶¹ The U.S. Park Police spearheaded sweeps on federal land, such as national park areas and the National Mall, while MPD cleared encampments on city property.¹⁶² Although few arrests or confrontations occurred during the sweeps, the White House warned that it would fine or arrest individuals who refused to move.¹⁶³ Federal officials directed people to nearby shelters.¹⁶⁴ However, clearing these encampments displaced even more unhoused D.C. residents; people did not suddenly have shelter. Amber Harding, Executive Director of the Washington Legal Clinic for the Homeless, said, "[w]e do not have

157. *Id.*

158. Complaint for Declaratory and Injunctive Relief at 3, *District of Columbia v. Trump*, No. 1:25-cv-02678 (D.D.C. Sep. 15, 2025).

159. Joseph Nunn & Spencer Reynolds, *One Week of Trump's DC Takeover Attempt*, BRENNAN CTR. FOR JUST. (Aug. 19, 2025), <https://www.brennancenter.org/our-work/analysis-opinion/one-week-trumps-dc-takeover-attempt> [https://perma.cc/XC3Q-DRAS].

160. David Smith & George Chidi, *Trump seizes control of Washington DC police and deploys national guard*, THE GUARDIAN (Aug. 11, 2025, at 18:11 ET), <https://www.theguardian.com/us-news/2025/aug/11/trump-washington-dc-crime> [https://perma.cc/5ZKA-G4ED].

161. Josh Boak & David Klepper, *Trump says he's placing Washington police under federal control and activating the National Guard*, AP NEWS (Aug. 11, 2025, at 18:05 ET), <https://apnews.com/article/trump-washington-crime-national-guard-homelessness-655bc22834223c7dc93115bbcb2b215c> [https://perma.cc/P4SM-G3NJ].

162. Kriston Capps, *In Trump's DC Crackdown, the National Park Service Leads Homeless Sweeps*, BLOOMBERG (Aug. 22, 2025, at 13:16 ET), <https://www.bloomberg.com/news/articles/2025-08-22/dc-crime-crackdown-deputizes-national-park-service-in-homeless-sweeps> [https://perma.cc/A582-T5G3].

163. *Id.*

164. *Id.*

enough shelter beds for everyone on the street.”¹⁶⁵ To stay out of sight, many displaced Washingtonians are riding city buses or the Metro trains at night, or finding secluded corners to sleep.¹⁶⁶ With existing shelters at or near capacity, D.C.’s Department of Human Services made over 100 beds available in light of the crackdown, and Mayor Bowser’s administration also invoked the city’s cold weather shelter protocol, which allows overflow arrangements so that no one is turned away even if shelters are full.¹⁶⁷ However, even with the additional shelter beds available, unhoused people are not guaranteed to use them. People are often kept out of shelters due to issues with their pets, partners, possessions, or substance-use issues.¹⁶⁸ D.C.’s shelter system clearly demonstrates that merely providing a bed is insufficient; the inadequacies of the shelter system show the necessity of recognizing a right to self-shelter as a fundamental right.

C. Application of State-Created Danger Test

With regard to the first element, in the context of anti-camping ordinances that deny unhoused people the right to self-shelter, the government action of penalizing them for sleeping outdoors, through fines or incarceration, materially increases their risk of danger. Fines imposed on people already financially insecure exacerbate poverty, while incarceration often places them in unsafe or overcrowded jail conditions.¹⁶⁹ Furthermore, encampment sweeps create or exacerbate the harm to unhoused people by displacing people from relatively stable communities where they have informal support networks. The mental toll of being forcibly displaced, often without notice, can cause or worsen mental health issues like anxiety and depression, especially when individuals are separated from familiar surroundings and social networks.¹⁷⁰ Taken together, these actions create or increase danger by stripping unhoused people of the limited options they have for survival, infringing on their constitutional right to liberty.

In the context of homelessness, deliberate indifference can be demonstrated when government officials enforce punitive anti-camping ordinances while knowing they will disproportionately harm unhoused people, who are especially dependent on sleeping outdoors. For example, city officials who conduct encampment sweeps during extreme weather

165. Meg Kinnard, *DC’s homeless pack up as sweeps are expected. What we know about Trump’s plan to clear encampments*, AP NEWS (Aug. 14, 2025, at 17:52 ET), <https://apnews.com/article/trump-homeless-washington-relocation-encampments-federal-takeover-305cb8108031ef67b31712a42852c3d5> [https://perma.cc/QM7Y-27Z3].

166. Kyle Swenson, Paul Kiefer, & Marissa J. Lang, *D.C.’s homeless begin to see the effects of Trump’s crackdown*, WASH. POST (Aug. 13, 2025), <https://www.washingtonpost.com/dc-md-va/2025/08/13/dc-homeless-camps-trump-federal-takeover/> [https://perma.cc/597C-VR5M].

167. Sachini Adikari, *This summer, D.C.’s city-run homeless shelters were nearly full on the hottest days*, ST. SENSE MEDIA (Sep. 12, 2025), <https://streetsensemedia.org/article/this-summer-d-c-s-city-run-homeless-shelters-were-nearly-full-on-the-hottest-days/> [https://perma.cc/8VXS-LL7V].

168. See discussion *infra* Part II.A.

169. Madeline Bailey et al., *No Access to Justice: Breaking the Cycle of Homelessness and Jail*, VERA INST. OF JUST., at 11 (Aug. 2020), <https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/08/homelessness-brief-web.pdf> [https://perma.cc/F27U-RH3C]; Eric S. Tars, *Criminalization of Homelessness*, NAT’L L. CTR. FOR HOMELESSNESS & POVERTY (2020), https://nlihc.org/sites/default/files/AG-2020/6-08_Criminalization-of-Homelessness.pdf [https://perma.cc/S3WX-WX55].

170. See Bailey et al., *supra* note 169, at 11.

act with deliberate indifference to public health warnings and knowingly expose unhoused people to health risks.¹⁷¹ Likewise, when shelters enforce restrictive policies, officials know these rules exclude large segments of the unhoused population, forcing them outdoors and increasing their exposure to encounters with law enforcement. When this happens, unhoused people are at risk of incarceration or fines.¹⁷² Repeatedly arresting unhoused people with known mental health conditions without providing access to mental health resources demonstrates the same disregard for the severe and cumulative harm incarceration can cause.¹⁷³ At the federal level, policies such as President Trump's EO, which incentivizes punitive encampment sweeps and the removal of unhoused people from public sidewalks while disregarding their constitutional liberty, exemplify deliberate indifference because they expose individuals to foreseeable harms that government actors knew or should have known.

The nexus element can be satisfied in the context of anti-camping ordinances and similar policies that are facially neutral but enforced almost exclusively against unhoused people, effectively singling them out because they have limited sleeping options. This enforcement burdens the liberty interest in self-sheltering because it strips unhoused people of the autonomy to decide where and how to survive when no adequate alternative exists.¹⁷⁴ Thus, this element ensures that the doctrine remains tethered to substantive constitutional protections rather than becoming a generalized tort remedy.

In short, the proposed three-element test yields a result distinct from *Grants Pass* because it recognizes the infringement of liberty that occurs when survival conduct is criminalized. At the same time, the test demonstrates the necessity of a uniform standard by showing how it could give judicial review of federal policies such as the Trump Administration's Executive Order, ensuring the government is held accountable when its actions put people in dangerous situations.

Conclusion

By acknowledging the right to self-shelter and to be free from state-created danger, this Note seeks to illuminate a path forward in the wake of an unprecedented presidential administration. The Supreme Court's refusal in *Grants Pass* to extend Eighth Amendment protections for unhoused people demonstrates the Court's inflexible jurisprudential standards. Beyond leaving unhoused people without constitutional recourse against laws that disproportionately affect them, the decision threatens their survival. Nevertheless, this vacuum creates an opportunity

171. *Impact of Encampment Sweeps on People Experiencing Homelessness*, NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, at 4–5 (Dec. 2022), <https://nhchc.org/wp-content/uploads/2022/12/NHCHC-encampment-sweeps-issue-brief-12-22.pdf> [<https://perma.cc/NG6D-58QY>].

172. *Id.* at 5.

173. See e.g., Lindsey Zirkle, *Sexual Violence Against Women Experiencing Homelessness*, GEO L.J. ON POVERTY L. & POL'Y BLOG (Sep. 15, 2022), <https://www.law.georgetown.edu/poverty-journal/blog/sexual-violence-against-women-experiencing-homelessness/> [<https://perma.cc/S35Y-MC4V>].

174. See discussion *infra* Part II.A.

for courts to rethink liberty through the lens of dignity, recognizing that the freedom to decide how to shelter is a fundamental choice safeguarded by the Constitution.

The SCDD, once the circuit split is resolved, provides a doctrinal framework that both adheres to institutional limits and ensures that the government is held accountable when its actions create or increase the conditions of homelessness. In conclusion, the right to self-shelter is not about circumventing the law, but about ensuring that constitutional liberties are safeguarded.

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The Docket Strikes Back: Recalibrating the Supreme Court’s Shadow Docket to Prevent Voter Disenfranchisement

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TABLE OF CONTENTS

PART I: INTRODUCTION.	336
PART II: HEIGHTENED HARM AND THE EMERGENCE OF THE SHADOW DOCKET.	340
A. Heightened Harm: Recalibrating the Shadow Docket.	340
B. The Birth of Equity.	340
C. The History of Certiorari and the Court’s Power Discretion.	343
D. Ripeness and Article III of the Constitution.	344
PART III: EMERGENCY PROCEDURE AND PER CURIAM SIGNALS.	346
A. The Process of Procedural Emergency Applications & Emergency Relief.	346
B. Per Curiam Signals & Other Procedure.	349
PART IV: THE MODERN SHADOW DOCKET.	350
A. Procedure As Major Doctrine.	350
B. The Purcell Principle, Its Progenies, & Voter Suppression.	351
C. Identifying Purcell’s Per Curiam Signal & Its Consequential Legacy.	354
D. Purcell’s Relationship to Other Landmark Voting Rights Cases.	357
PART V: UNSEEN CONSEQUENCES: THE OFFICE OF THE SOLICITOR GENERAL, THE EXECUTIVE BRANCH, AND THE NEED FOR EFFECTIVE PROCEDURAL RECALIBRATION.	358
PART VI: A NEW HOPE.	360

The Docket Strikes Back: Recalibrating the Supreme Court's Shadow Docket to Prevent Voter Disenfranchisement

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The Supreme Court's emergency docket or "shadow docket" procedurally rules on many controversial cases every year, and these rulings operate mostly in the "shadows." As a result, emergency petitions are used as a procedural tool to enact major doctrine and quickly advance case dispositions like never before. Rulings on the shadow docket usually culminate without a formal opinion or through per curiams when emergency relief is sought before the Court. The flexibility of emergency petitions is especially noticeable in the emergency docket's activity as its historical evolution has gone from prudential to almost manic use in recent years under the Roberts Court. Because of the opaqueness of these rulings, the shadow docket can be subject to abuse. In addition, the weight of opinions without reasoning and clear per curiam signals confuse lower courts and lead to inconsistent rulings. Purcell v. Gonzalez is a direct result of the Court's quick "shadow" rulings which have led to voter disenfranchisement and the now major Purcell principle. To remedy these issues, this Note argues for a workable and transparent reframing of "irreparable harm" by recalibrating the legal standard into two tiers: (1) "heightened harm" and (2) "irreparable harm."

I will make the following arguments: First, the shadow docket is a powerful tool where unfavorable rulings are increasingly challenged and argued under the guise of an emergency, so what this Note calls a "heightened harm" standard must be implemented because irreparable harm is no longer adequate. Second, the Court risks running afoul of Article III of the Constitution when the Court

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precludes civil rights challenges to election laws which are sufficiently “ripe” by articulating unworkable and arbitrary standards. Third, the Purcell Principle is wrongly enshrined as major doctrine and its subsequent progenies of election law cases continue to negatively impact marginalized groups. Fourth, this Note identifies Purcell’s per curiam signal for greater consistency in the lower courts. Finally, this Note argues that heightened harm should also be equally applied to emergency petitions from the Office of the Solicitor General of the United States to protect underrepresented groups against executive administrations with a hostile posture towards civil rights. Heightened harm will have its own standard of procedural scrutiny, safeguards, and corresponding factors to “balance the equities.” Reframing irreparable harm to a “heightened” standard will lead towards greater procedural transparency and protections to underrepresented litigants challenging the deprivation of their voting rights.

Part I: Introduction

Justice Elena Kagan has sounded the alarm on emergency petitions and the issues of the “shadow docket” by expressing that emergency petitions alleging “irreparable harm”¹ can be “improvidently granted[.]”²

Democracy and the principles of civil rights demand that the functions of government remain transparent and open to the criticisms of the American people through voting. The Supreme Court of the United States is a battleground for voting rights due to being “the highest court in the land . . . [and] the court of last resort for those looking for justice.”³ To dispense justice, the Court exercises its legal powers and mechanisms to exercise judicial review over the laws, rules, and regulations of the United States.⁴ However, under the Roberts Court, the Court has become increasingly comfortable circumventing judicial review and intervening in major issues through the shadow docket by procedurally issuing major doctrine—such as the disruptive *Purcell* principle created in *Purcell v. Gonzalez*.⁵ The *Purcell* principle is a presumption used against voters to preclude challenges to election law perceived by the Court to be “too

1. *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (articulating the standard for “irreparable harm”).

2. *Moyle v. United States*, 603 U.S. 324, 327 (2024) (Kagan, J., concurring) (per curiam) (emphasis added) (“I concur in the Court’s decision today to vacate its stay and dismiss the writ of certiorari before judgment as improvidently granted. . . . And with this Court’s stay dissolved, the District Court’s preliminary injunction will again take effect.”).

3. *About the Supreme Court*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about#:~:text=First%2C as the highest court,limits of its own power> [<https://perma.cc/R86P-48RH>] (last visited Nov. 3, 2025).

4. *Id.*

5. See generally *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (per curiam) (“Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules.”); David Gans, *The Roberts Court, The Shadow Docket, and the Unraveling of Voting Rights Remedies*, AM. CONST. SOC’Y, p. 1 (Oct. 2020), <https://www.acslaw.org/wp-content/uploads/2020/10/Purcell-Voting-Rights-IB-Final-Version.pdf> [<https://perma.cc/EJD8-H9CM>].

close” to election day.⁶ The shadow docket undermines judicial transparency and public trust because rulings are usually unsigned and without sufficient reasoning for lower courts to identify signals.⁷ Judicial transparency is essential because all judicial decisions—including those on the shadow docket—have broad legal and societal implications, especially decisions that impact marginalized and underrepresented groups.⁸ Governmental and non-governmental parties continuously apply for emergency relief by alleging irreparable harm will result without the Court intervening with an emergency order to cease or permit certain identified conduct.⁹ The irreparable harm standard spans from emergency petitions relating to the recent COVID-19 pandemic cases to major voting rights decisions like the *Purcell* principle.¹⁰ Because emergency petitions affect a broad spectrum of cases, the Court constantly grapples with consistency, especially when voting rights are in dispute.¹¹ The Court must also contend with institutional pressure from presidential administrations that increasingly lean on emergency applications to advance political goals through the Office of the Solicitor General.¹² Emergency relief should only be granted in “extraordinary cases,” but

6. Gans, *supra* note 5, at 12, 18 (“[T]he Court’s approach suggests that—irrespective of the merits—courts should not enter injunctive relief close to Election Day.”); see also STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* 204 (2023) (“The two most common classes of election-related litigation—challenges to voting rules and redistricting before Election Day; and challenges to the result afterward—both tend to unfold under highly compressed timetables with a fixed expiration date, whether the election itself or the deadline for certifying the election’s results.”).

7. See Katie Buehler, *Justices Squabble Over Emergency Review Of Smog Plan*, LAW 360 PULSE (Feb. 21, 2024) <https://www.law360.com/pulse/articles/1796477/justices-squabble-over-emergency-review-of-epa-smog-plan> [https://perma.cc/H2SP-DNRK]; Katie Buehler, *New Bill Calls For High Court To Explain Emergency Rulings*, LAW 360 PULSE (May 22, 2024) <https://www.law360.com/articles/1840206/new-bill-calls-for-high-court-to-explain-emergency-rulings> [https://perma.cc/WD6Y-E87Q] (proposing a coalition that Democratic lawmakers introduced that would require the Court to provide vote tallies and explanations for decisions in most cases on its elusive emergency docket; this bill has a goal of expanding transparency relating to the court’s docket).

8. Gans, *supra* note 5, at 1.

9. See *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980); *Conkright*, 556 U.S. at 1402; *Indiana State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960–61 (2009) (per curiam) (emphasizing that “[a] stay is not a matter of right, even if irreparable injury might otherwise result.”) (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)); *Sampson v. Murray*, 415 U.S. 61, 90 (1974). According to *Sampson*:

Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Id.; *Cuomo v. U.S. Nuclear Regul. Comm’n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam) (The four factors that appellate courts consider are whether (1) whether the claim in district court is likely to succeed on the merits, (2) irreparable harm, (3) whether others will be harmed without a stay, and (4) the public interest granting the stay). It is important to note that the second factor “irreparable harm,” is given considerable weight in determining an emergency stay. *Id.*

10. See e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020) (per curiam) (stating that “applicants have clearly established their entitlement to relief pending appellate review. . . . [And b]ecause of the needs to issue an order promptly, we provide only a *brief summary* of the reasons why immediate relief is essential.”) (emphasis added); see also, e.g., *Purcell*, 549 U.S. at 1.

11. Zina Makar, *Per Curiam Signals in the Supreme Court’s Shadow Docket*, 98 WASH. L. REV. 427, 458 (2023); Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 695–98 (2020).

12. Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019) (explaining the increased use of the shadow docket by the Trump Administration).

the Court continues to intervene and provide arbitrary standards, so irreparable harm should harden and metastasize into a “heightened” standard.¹³ “Heightened harm” will simultaneously protect disenfranchised voters, shed light on the *Purcell* principle, and ultimately cabin political pressure exerted by the executive branch over the Solicitor General to petition the Court on every hot-button political issue.¹⁴

What this Note terms “heightened harm” is a procedural presumption rooted in equity, which mandates major doctrine cannot be created through emergency applications and applies the procedural presumption that a challenged voting law is inequitable. The resulting rulings, whether in the form of per curiam opinions or summary reversals, will have no precedential weight and are precluded from application to subsequent election law cases.¹⁵ Under heightened harm, the state must show that there would be a (1) “severe burden” or (2) “inequity” to the state that would result from not upholding the voter law in controversy. Heightened harm would also apply the presumption that the challenged voting law is *inequitable* until the state can satisfy its burden. Through heightened harm, the Court would be required to balance factors such as impact to underrepresented demographics, voter confusion, and the harm in maintaining the original status quo of the previous voting scheme until the Court can formally review on the merits.

This Note critiques the *Purcell* principle and seeks to protect voting rights by arguing that the Court’s shadow docket should be recalibrated by introducing a new standard of heightened harm to protect citizens from widespread voter disenfranchisement.¹⁶ Part II proposes the heightened

13. *Conkright*, 556 U.S. at 1402; see also *Rostker*, 448 U.S. at 1308.

14. See, e.g., Amy Howe, *Trump Administration Withdraws Request to the Supreme Court for it to Hear Dispute over Foreign-Aid Payment*, SCOTUSBLOG (Aug. 26, 2025, at 21:30 ET), <https://www.scotusblog.com/2025/08/trump-administration-returns-to-supreme-court-in-dispute-over-foreign-aid-payment/> [https://perma.cc/LB3B-42NR].

15. Alexander V. Hirsch, Jonathan P. Kastellec & Anthony R. Taboni, *Reviewing Fast or Slow: A Theory of Summary Reversal in the Judicial Hierarchy*, *Am. J. of Pol. Sci.* (forthcoming 2025) (manuscript at 3), https://jkastellec.scholar.princeton.edu/sites/g/files/toruqf3871/files/documents/hkt_summary_reversal_AJPS.pdf [https://perma.cc/P7NC-BDJA]. According to the Professors Hirsch, Kastellec, and Taboni:

The emergence of a lopsided 6-3 conservative court following President Trump’s three appointments in his first term (Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett), however, has placed a critical spotlight on the expedited procedure of *summary reversals*, whereby the Court grants cert and reverses the lower court without written briefs on the merits or full arguments. Summary reversals are a critical element of the Court’s broader “shadow docket,” which describes all the decisions the Court makes other than though the merits docket.

Id. (alteration in original) (internal citations omitted). Moreover, Professor Vladeck states:

These “summary” rulings are supposed to be for cases in which the lower court clearly and egregiously erred, and so there’s no need for the Court to conduct plenary review or hear oral argument before publishing an opinion explaining the error and reserving. . . . And to reflect their summary nature, these rulings, even when they speak for a majority, are always unsigned—denominated as per curiam, or “for the Court.”

VLADECK, *supra* note 6, at 87.

16. *Voting Laws Roundup: 2024 in Review*, BRENNAN CTR. FOR JUST. (Jan. 15, 2025), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2024-review> [https://perma.cc/UBV8-SQZ7]. Restrictive voting laws lead to voter disenfranchisement; according to the Brennan Center for Justice, “[l]egislation is categorized as restrictive if it contains one or more provisions

harm standard and articulates the birth of equity along with the Court's modern and historical relationship with the Constitution and procedural relief.¹⁷ Part III articulates the procedural process of emergency applications and how litigants can request emergency relief when alleging irreparable harm.¹⁸

Part IV begins by discussing the procedural creation of the modern *Purcell* principle and how it became enshrined as major doctrine.¹⁹ Part IV further explains how the progenies of *Purcell* have further rooted its claws in the foundation of democracy by becoming an effective tool in disproportionately affecting marginalized groups across the country.²⁰ Additionally, Part IV identifies the *Purcell* principle's per curiam signal to give guidance to lower courts and show the doctrine's consequential legacy as it pertains to future challenges to voter laws.²¹ Moreover, Part IV will discuss the proposed solution to combat the issue of voter suppression by reframing the test of irreparable harm into two separate tiers: (1) heightened harm and (2) irreparable harm.²²

Finally, Part V analyzes the consequences that result when the executive branch exerts pressure on the Solicitor General to pursue emergency applications which advance political goals.²³ Part V ultimately highlights *why* there is a need for additional "heightened" safeguards, and how theories, such as the unitary executive theory, can allow presidents to pursue political interests through the Office of the Solicitor General and give exclusive legitimacy to the political interests of the executive branch.²⁴ Part VI concludes by reaffirming that longstanding justiciable and equitable principles cannot allow the *Purcell* principle to stand between litigant-voters and relief.²⁵ The goal of this Note is to pull back the veil of the shadow docket and suggest an equitable standard of heightened harm that will bring transparency to issues that affect voting

that would make it harder for eligible Americans to register, stay on the voter rolls, or vote compared to existing state law.” *Id.* at n.1. Moreover:

[A] significant trend [throughout the United States] was [and continues to be] the introduction of bills that would require people registering to vote to provide documentary proof of citizenship while often allowing for only a small number of documents to satisfy the requirement. These efforts seem to be motivated by conspiracy theories about significant numbers of noncitizens voting in our elections. It is already a federal crime for noncitizens to register and vote in federal elections. Further, voting by noncitizens is an extraordinarily rare occurrence and usually a mistake.

Id. Voter suppression manifests in various forms such as lack of access to polling locations, methods of voting, and voter identification laws. See Derek Hill, Madison Coleman & Erica Bassett, *Disenfranchisement and Suppression of Black Voters in the United States*, BALLARD BRIEF (Summer 2021), <https://ballardbrief.byu.edu/issue-briefs/disenfranchisement-and-suppression-of-black-voters-in-the-united-states> [https://perma.cc/V2XY-P2NH].

17. *Infra* Part II.

18. *Infra* Part III.

19. *Infra* Part IV.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Infra* Part V.

24. *Id.*

25. *Infra* Part VI.

rights, and by default, our democracy. The battle for civil rights is not only fought in the light on the battlefield in public view, but also in the shadows, away from the sight of mass media and public discourse.

Part II: Heightened Harm and the Emergence of the Shadow Docket

A. Heightened Harm: Recalibrating the Shadow Docket

Heightened harm applies the procedural presumption that a challenged voting law is inequitable. The state's burden to combat the "heightened" presumption requires proving the voting law is equitable and balancing the public's interest in voting through various factors. Under heightened harm, the state must show either a (1) "severe burden" or (2) "inequity" to the state resulting from not upholding the voter law in controversy. The Supreme Court would also be required to "balance the equities" through factors such as, *inter alia*, impact to marginalized demographics and voter confusion at the ballot-box. In addition, when the standard of heightened harm is applied, it holds little precedential value and creates a consistent per curiam signal reasoned on an exacting factual basis. Heightened harm will also give the lower courts a consistent message and help alleviate "unintended consequence[s] as a result of the per curiam outcome being misconstrued[.]"²⁶ To remedy this confusion, heightened harm will also have the presumption that major doctrine cannot be issued through the emergency application process. Under the heightened harm standard, *Purcell* would be severely limited in its scope and application due to the prohibition on major doctrine made through the emergency docket as it pertains to voting rights. Heightened harm will also create a more "exacting standard" on a case-by-case basis; this new standard would be an effective remedy to combat voter suppression by changing the legal landscape through equitable mechanisms. A historical background of equitable relief is essential to understand how the Court fashions its procedural power of emergency injunctive remedies.

B. The Birth of Equity

Courts exercise concurrent jurisdiction in both law and equity in modern American jurisprudence.²⁷ When a petitioner seeks an equitable remedy, the court orders a party to do or refrain from a particular action; a party seeking an equitable remedy must formally request equitable relief from the court.²⁸ An injunction is a form of equitable relief and "is a court order, enforceable by sanctions for contempt of court, directing a defendant to do or refrain from doing some particular thing."²⁹ Whereas a monetary remedy, or a remedy at law, seeks to restore an injured party

26. Makar, *supra* note 11, at 466–67 ("'Disruptive signals' can best be described as signals that may lead to an unintended consequence as a result of the per curiam outcome being misconstrued by lower courts. . . . [D]isruptive signals are most apparent when lower courts are trying to piece together or make sense of signals arising from various cases that may not necessarily fit together.").

27. Russel Fowler, *A History of Chancery & Its Equity: From Medieval England to Today*, CAP. AREA BAR ASS'N (May 2012), <https://caba.ms/articles/features/history-chancery-equity> [<https://perma.cc/CN8G-JNRU>].

28. *Id.*

29. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 275 (4th ed. Aspen Publishers 2010) ("The injunction is a preventive remedy, because it seeks to prevent harm rather than let it happen[.] . . . The injunction against future violations of law is the simplest use of the injunction.").

to the position they would have been in if the wrong never occurred.³⁰ Courts of law and equity both have origins in old English feudal law and the courts of law and equity previously operated as two separate institutions.³¹ When subjects of the king sought remedies for wrongs which could not be remedied at law, they would petition the king, who would then convene with the King's Council or *Curia Regis*, and refer the petitions to the Lord Chancellor.³² Courts of equity were first developed to formally address wrongs that could not be remedied by monetary damages at common law—this resulted in the creation of the Court of Chancery, which derived its name from the Lord Chancellor.³³ The Lord Chancellor was also known as the “Keeper of the King's Consciousness,” and early practitioners who were devoted to practicing in the court of equity were called “solicitors in equity.”³⁴ Moreover, the Lord Chancellor acted as both judge and jury in administering equity “in personam” which translates to “against the person,” and gives the court personal jurisdiction over the person or entity.³⁵ Because the Lord Chancellor acted as both judge and jury when presiding over suits in equity, there is no right to a jury trial when a party seeks an equitable remedy.³⁶ One of the most “extraordinary” remedies constructed and administered by the Lord Chancellor was the decree of injunction.³⁷ There is also an overlapping relationship between law and equity because the Chancellor could also equitably enjoin judgments won in courts of common law.³⁸

States such as Tennessee, Delaware, and Mississippi have separate chancery courts which exclusively exercise equitable jurisdiction and primarily administer equitable relief.³⁹ In most state and federal courts, the administration of law and equity are unified in one court, meaning

30. See generally *United States v. Hatahley*, 257 F.2d 920 (10th Cir. 1958) (clarifying a remedy at law).

31. *Chancery*, CORN. L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/chancery> [https://perma.cc/7JYN-DECS] (last visited Nov. 6, 2025).

32. Fowler, *supra* note 27.

33. CORN. L. SCH. LEGAL INFO. INST., *supra* note 31.

34. Fowler, *supra* note 27. According to Fowler:

In the early Middle Ages, Chancery, as the great secretariat and writ shop of government, operated in a corner of the hall where the king presided separated by a screen called a cancella. It is from this source that the chancellor received his name. . . . By the year 1280, in the reign of Edward I, the Lord Chancellor clearly had his own court and established jurisdiction.

Id.

35. *In Personam*, CORN. L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/in_personam [https://perma.cc/9W2Z-7HQQ] (last visited Nov. 6, 2025).

36. Fowler, *supra* note 27.

37. *Id.* According to Cornell Law School's Legal Information Institute:

An injunction is a court order that directs a person to do something or to stop doing something. It is an equitable remedy issued in situations where monetary compensation would be inadequate, typically to prevent irreparable harm. Courts have discretion to grant or deny this remedy, and must consider the facts and balance the relative harms to the parties involved.

Injunction, CORN. L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/injunction> [https://perma.cc/VUJ8-NM9V] (last visited Nov. 6, 2025).

38. Fowler, *supra* note 27; *Enjoin*, CORN. L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/enjoin> [https://perma.cc/9EWE-VPUR] (last visited Nov. 6, 2025) (*Enjoin* is the verb form of *injunction*, which “means to prohibit a person from doing something through a court order.”).

39. Fowler, *supra* note 27.

that both a remedy at law or equity may be sought in a singular venue.⁴⁰ Under 28 U.S.C. § 1651, the Supreme Court and lower federal courts have the statutory power to fashion a series of appropriate remedies through writs.⁴¹ Section 1651 states that:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.⁴²

Although Section 1651 gives federal courts wide latitude to issue all necessary remedies, modern case law has set legal parameters around injunctive relief for federal courts.⁴³ The Court has remained flexible in using its discretion to issue a myriad of different writs, whether substantive or procedural, by leaning into the statutory language that “[t]he Supreme Court . . . may issue all writs necessary or appropriate[.]”⁴⁴

Justiciable cases and controversies between adverse parties give rise to judicial remedies that may be applied on a case-by-case basis.⁴⁵ The law of remedies has various mechanisms that allow courts to fashion requested relief.⁴⁶ However, the form of remedy that parties request will vary and include: compensatory, preventive (coercive and declaratory), restitution, punitive, and ancillary remedies.⁴⁷ Coercive remedies, such as injunctions, are subject to the Court’s power of certiorari because the Court’s discretion has wide procedural latitude whether to stay or reverse lower court orders on appeal, “even if denials of certiorari are not precedential Sometimes, the [justices] send implicit messages both to lower courts and to policymakers about the justice’s lack of appetite for particular issues, or their unwillingness to set aside lower-court judgments even on questions they never considered.”⁴⁸ The Court has procedurally ruled through the shadow docket by giving a plethora of emergency remedies to parties whose matters have not formally undergone traditional review on the merits.⁴⁹

40. *Id.*

41. 28 U.S.C. § 1651.

42. *Id.* Rule Nisi is “[a] rule which will become imperative and final []unless cause be shown against it. This rule commands the party to show cause why he should not be compelled to do the act required, or why the object of the rule should not be enforced.” *Rule Nisi*, BLACK’S LAW DICTIONARY (4th ed. 1968).

43. *Conkright*, 556 U.S. at 1401.

44. 28 U.S.C. § 1651(a).

45. Cases & Controversies not only requires that disputes be of the type specified in, but requires that cases are, in fact, actual “cases” and “controversies.” U.S. CONST. art. III, § 2, cl. 1.

46. LAYCOCK, *supra* note 29, at 1–3 (explaining that courts can adapt relief based on the circumstances).

47. *Id.*

48. VLADECK, *supra* note 6, at 64 (“In general, although denials of certiorari therefore cannot be cited as proof of the Supreme Court’s views on any particular issue, they regularly produce significant substantive effects by changing the status quo on the ground.”).

49. Gan, *supra* note 4, at 1–2.

C. The History of Certiorari and the Court's Power Discretion

The Supreme Court exercises complete discretion over its docket and selects cases and controversies through the judicial mechanism of certiorari.⁵⁰ Former President and Chief Justice William Howard Taft “understood that the Court’s true power comes not from the substance of its rulings, but from its institutional autonomy and independence, both formally and functionally. And he fought for decades to maximize both”⁵¹ To expand the Court’s powers, Then-Chief Justice Taft pushed a series of reforms known as the “Judges’ Bill” which is officially codified as the Judiciary Act.⁵² On February 13, 1925, President Calvin Coolidge signed the Judiciary Act into law and the Court immediately began transforming its docket.⁵³ The Court exercised its new discretion by narrowing the scope of cases to specific questions in *Olmstead v. United States*, and while that practice is commonplace today, it was a sharp departure from English common law.⁵⁴ For example, in the English common law, when a writ of certiorari was issued to a lower court from a superior court, the lower court brought the entire case—*Olmstead* established the judicial practice to grant particular questions rather than cases.⁵⁵

Expanding the Court’s discretion over cases also led to judicial side-stepping on major issues.⁵⁶ In 1954, the ground-breaking case *Brown v. Board of Education* struck down racially segregated private schools for violating the Fourteenth Amendment’s Equal Protection Clause.⁵⁷ A few years later, in 1956, *Naim v. Naim* came before the Court on appeal claiming that Virginia’s anti-miscegenation laws were unconstitutional based on the reasoning and precedent set in *Brown*, however:

[I]n a cryptic, unsigned order, the Court ducked, refusing to decide the appeal because of claimed defects in the record. . . . The real reason for ducking, as became clear later, was that Justice Felix Frankfurter didn’t think the Court had the political wherewithal to take up anti-miscegenation laws so soon after *Brown*.⁵⁸

Because of judicial side-stepping, simultaneously accompanied with a cryptic and unsigned order, interracial couples would not have the ability to marry until the Court struck down Virginia’s anti-miscegenation statute in *Loving v. Virginia* in 1967.⁵⁹ By cryptically denying review

50. VLADECK, *supra* note 6, at 29.

51. *Id.* at 28–29 (“Taft’s view of how certiorari would work in the United States was far less modest than what this practice encompassed. Certiorari, as he understood it, was about the appeals courts’ discretion in deciding what to decide. And discretion is what he desperately wanted the Supreme Court to have, especially over its own docket.”).

52. *Id.* at 29.

53. *Id.* at 42.

54. *Id.* at 47.

55. *Id.* at 47–48.

56. *Id.* at 50–51.

57. *Id.* at 50; *see also* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495–96 (1954) (holding that racially segregated schools violated the Equal Protection Clause of the Fourteenth Amendment).

58. VLADECK, *supra* note 6, at 50–51.

59. 388 U.S. 1, 11 (1967) (holding that Virginia’s miscegenation statutes violated the Equal Protection Clause).

of *Naim*, the Court used certiorari to fashion procedural technicalities that produced substantive results.⁶⁰ *Naim* was sufficiently ripe for review in 1956, *eleven years before Loving*, so by denying review, the Court effectively precluded relief to litigants and established a practice of ducking adequately ripe issues.⁶¹ The Court's discretion allows it to side-step certain issues by maximizing the writ certiorari, however, the Court's discretion must be exercised in accordance with Article III and long-established principles of justiciability to maintain constitutional consistency and legitimacy.⁶²

D. Ripeness and Article III of the Constitution

Article III of the Constitution states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."⁶³ In 1803, *Marbury v. Madison* subsequently gave breath to the Court's doctrine of judicial review, which allows appellate review of cases and controversies between adverse parties.⁶⁴ In addition, the dispute must be a justiciable "case or controversy" under Article III.⁶⁵ The question of whether a matter is constitutionally justiciable when an emergency application is made to the Court is crucial. If cases containing major constitutional rights are procedurally ruled upon while simultaneously neglecting justiciable principles, Article III is being unconstitutionally circumvented, and therefore, it follows that a major constitutional issue has been relegated to the shadows.⁶⁶

Purcell highlights the justiciable principle of ripeness as it relates to voting rights and whether challenges are sufficiently ripe for appellate review and emergency intervention by the Court.⁶⁷ If courts are able to preclude challengers from the courthouse when issues are sufficiently

60. VLADECK, *supra* note 6, at 59. According to Professor Vladeck, "[t]he justices today have the power to control their docket and thereby choose their (and the Court's) destiny, in ways that the public doesn't understand and the Court seldom confronts—and, if anything, regularly avoids even acknowledging." *Id.* at 60. In addition, "the certiorari process does not just set the Supreme Court's agenda; it sets the nation's." *Id.* at 65.

61. Compare *Naim v. Naim*, 350 U.S. 985, 985 (1956) (denying the petition to recall mandate involving an interracial-marriage ban) with *Brown*, 347 U.S. at 495–96 (requesting supplemental briefing on the appropriate remedy after determining that segregation in schools violated the Equal Protection Clause).

62. U.S. CONST. art. III.

63. *Id.*

64. 5 U.S. 137, 178 (1803) ("So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.").

65. Under Article III of the United States Constitution, a case must be justiciable to be adjudicated by an Article III Court. U.S. CONST. art. III. See, e.g., *Hayburn's Case*, 2 U.S. 409, 411–14 (1792) (suggesting that Article III courts may not issue advisory opinions); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1991) (establishing that Article III standing requires a plaintiff to show a concrete, particularized, and imminent injury that is particularized to the defendant's actions).

66. Gans, *supra* note 5, at 1 n.1.

67. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) ("Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'"); see also *Abbott Lab's v. Gardner*, 387 U.S. 136, 148–49 (1967) (determining pre-enforcement action was ripe by weighing "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.").

ripe, then a blatant disregard for firmly established justiciable principles is present.⁶⁸ In *Purcell*, the Court articulates that the challengers' claims were essentially *too ripe* since, in the Court's opinion, the legal challenge came *too close* to election time.⁶⁹ Moreover, if challenges to voter laws are precluded without a clear bright-line rule due to the phenomenon of over-ripeness, then subsequently applying the arbitrary standard set in *Purcell* would fundamentally circumvent clearly established justiciability principles relating to ripeness.⁷⁰ There must be a *heightened* remedy that is consistent with the constitutional principles of justiciability to protect against arbitrary standards imposed on voting law challenges.

Federal courts are not the only venues affected by emergency procedural rulings; lower state courts are often affected by procedural interventions of state supreme courts.⁷¹ Adam Sopko's article, *State Supreme Court 'Shadow Dockets': More Power with Less Transparency*, highlights that the same procedural guise which has manifested around the Supreme Court has now inserted itself within state courts' legal systems as well.⁷² This suggests that the scope of the Court's procedural power

68. *Nat'l Park Hosp. Ass'n*, 538 U.S. at 807–08.

69. VLADECK, *supra* note 6, at 206 (“[O]n its own terms, *Purcell* never explained when it’s ‘too close’ to an election for courts to intervene.”). A major controversy that highlights the early use of using the judiciary to intervene in state elections is the “Box 13” incident between former President Lyndon B. Johnson and Coke Stevenson in 1948 that lead to *Johnson v. Stevenson*. *Id.* at 197–201. “Stevenson was an old-school conservative Texas Democrat—a segregationist and unapologetic racist widely known as ‘Mr. Texas.’” *Id.* at 197. Six days after the Democratic run-off, 202 additional votes were found from Precinct 13 of Jim Wells County in South Texas, in the town of Alice. *Id.* at 198. Out of 202 votes, 200 were cast for Johnson; the names of all 202 voters appeared in alphabetical order and in the same pen and handwriting. *Id.* “The votes from ‘Box 13’ put Johnson ahead by 87 votes out of nearly 1 million cast—a lead of 0.008 percent.” *Id.* Stevenson challenged the election and alleged claims of electoral fraud. *Id.* Stevenson challenged the election by “persuad[ing] Dallas federal judge T. Whitfield Davidson to issue an injunction freezing the certification of Johnson’s victory until the claims of electoral fraud were investigated.” *Id.* at 199. Special masters were subsequently appointed by Judge Davidson to investigate the allegation of electoral fraud. *Id.* at 200. On appeal to the Fifth Circuit, Justice Hugo Black (in his capacity as circuit justice for the Fifth Circuit), after hearing four hours of argument, stayed the lower courts order and an appeal to the Supreme Court followed. *Id.* at 200–01. Justice Black’s formalized order “issu[ed] a stay pending further order of the Court, without any explanation as to why.” *Id.* at 200. Because the order lacked explanation, Judge Davidson, the district judge, likely interpreted the order “overbroadly [and] fr[oze] the ongoing investigations into Box 13 and other voting irregularities—which were stopped in their tracks, never to resume.” *Id.* at 200–01. Stevenson asked the full Court to lift Justice Black’s stay and Johnson asked the Court to either affirm Justice Black’s order or to stay Judge Davidson’s injunction itself; the Court ruled 8-0 and denied all motions which cleared the way for Johnson to win the Democratic primary. *Id.* at 201.

70. *Trial Court*, CORN. L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/trial_court#:~:text=Trial courts are any courts,the evidence of the case](https://www.law.cornell.edu/wex/trial_court#:~:text=Trial%20courts%20are%20any%20courts,the%20evidence%20of%20the%20case) [https://perma.cc/9RLU-ZWDQ] (last visited Nov. 6, 2025).

71. Adam Sopko, *State Supreme Court 'Shadow Dockets': More Power with Less Transparency*, STATE CT. REP. (May 10, 2024), <https://statecourtreport.org/our-work/analysis-opinion/state-supreme-court-shadow-dockets-more-power-less-transparency> [https://perma.cc/6A3N-99J8].

72. *Id.* According to Adam Sopko:

To date, debate around shadow dockets has focused almost entirely on the U.S. Supreme Court. But state courts have shadow dockets as well. State courts are the engines of the American legal system and are increasingly serving as the primary forums to address society’s most consequential questions of law and policy, from abortion to climate change. Despite the stakes, the way state supreme courts use their shadow dockets has gone largely unnoticed.

Id.; see also Sopko, Adam, *Invisible Adjudication in State Supreme Courts*, 102 N.C. L. REV. 1449, 1455 (2024) (explaining that “unlike the U.S. Supreme Court’s shadow docket, the public typically cannot

affects the jurisprudence of both the federal and state courts in how relief is bestowed upon parties.⁷³ Although each state court has their own substantive and procedural nuisances, the Supreme Court provides constitutional guidance to all courts in the land, and the acceptance of arbitrary procedural rulings by the highest court (which results in major doctrine), leads other state courts to conclude that the lack of transparency is acceptable jurisprudence.⁷⁴ If state courts look to the Supreme Court for guidance, it logically follows that when the Court disregards firmly rooted justiciability doctrines and precludes ripe challenges to election laws, state courts will likely follow suit.⁷⁵ Such disregard for constitutional principles will have grave effects on the emergency disposition of civil rights cases at the state level—effects already present in federal courts.⁷⁶ Tailoring a heightened procedural safeguard to protect voting rights, will help remedy and preserve civil rights claims that are sufficiently ripe for review. The current framework under the *Purcell* principle is unworkable and has led to greater voter disenfranchisement and a string of cases that further chip away firmly rooted justiciability principles.⁷⁷

This Note's proposed heightened harm standard is not without its critics. Those who challenge it may argue that because the voting law at issue was enacted through direct democratic participation, it should be enforced as the expressed will of the people. Critics may further contend that a heightened harm standard obstructs democratic outcomes. But that objection inverts the principle: heightened harm does not suppress the will of the people—it preserves it.

Part III: Emergency Procedure and Per Curiam Signals

A. The Process of Procedural Emergency Applications & Emergency Relief

Before the Supreme Court reviews a case on its merits, the case must move through the legal system: beginning as a complaint filed at the district court level, proceeding through the circuit courts on appeal, and culminating in a petition for certiorari to the Court.⁷⁸ Under 28 U.S.C. § 1254, the Court primarily grants parties' petitions of certiorari in a civil or criminal case that has gone through the appropriate appellate

tell who is invoking the state supreme court's shadow docket, what they are seeking, or how the court is responding. State supreme court shadow dockets are not just in the shadows; they are effectively invisible.”).

73. See Sopko, *supra* note 71.

74. See Amy Howe, *Emergency Appeals: Stay Requests*, SCOTUSBLOG (2020), <https://www.scotusblog.com/election-law-explainers/emergency-appeals-stay-requests/> [https://perma.cc/ZK6R-TE5B].

75. Sopko, *supra* note 71.

76. See *id.*

77. See Ruoyun Gao, *Why the Purcell Principle Should be Abolished*, 71 DUKE L.J. 1139, 1141–42 nn.12–13.

78. See, e.g., INFORMATION SHEET: FILING A PETITION FOR A WRIT OF CERTIORARI, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, https://www.ca9.uscourts.gov/wp-content/uploads/RulesProceduresAndForms/FilingResources/Petition_for_Writ_of_Certiorari_-_Information_Sheet.pdf [https://perma.cc/D3DF-XHEX] (“There is no automatic right of appeal to the Supreme Court of the United States from judgments of the Federal Circuit. Instead, a party must file a petition for a writ of certiorari which the Supreme Court will grant only when there are compelling reasons.”); see also SUP. CT. R. 10.

process.⁷⁹ The Court may *grant* certiorari and hear oral argument on the merits of a case, or the Court may *deny* certiorari and refuse to hear oral argument on the merits of a case.⁸⁰ Additionally, the Court can procedurally rule on emergency applications by granting or denying stays or by issuing an order of injunction.⁸¹ For example, emergency injunctive relief is unlikely to be granted if the present harm is too “remote and speculative” and lacking irreparable harm.⁸² A stay and an injunction are different procedural mechanisms that specifically request different forms of relief.⁸³ Understanding the differences between the merits and procedural process can give skilled advocates an edge when requesting various forms of relief for clients.⁸⁴

There are also circumstances when the Court may procedurally issue stay orders or emergency relief before a case has gone through the formal appellate process.⁸⁵ For example, the Court may grant a petition for certiorari before judgment when an issue is pending in a lower appellate court “only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.”⁸⁶ To apply for an emergency petition and request a stay, an injunction, or another form of relief from the Court, the filing party must show irreparable harm will likely result if the requested relief is not granted.⁸⁷ The test for irreparable harm is also continuously articulated in both Supreme Court cases, such as *Conkright v. Frommert*, and appellate court cases, such as *Cuomo v. U.S. Nuclear Regulatory Comm’n*.⁸⁸ The Court’s current standard of irreparable harm is articulated in *Conkright*:

79. 28 U.S.C. § 1254.

80. UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, INFORMATION SHEET: FILING A PETITION FOR A WRIT OF CERTIORARI, *supra* note 78; *see also* SUP. CT. R. 10.

81. FED. R. APP. P. 8.

82. *Almurbati v. Bush*, 366 F. Supp. 2d 72, 78 (D.D.C. 2005) (“To obtain injunctive relief, the petitioners must show that the threatened injury is not merely ‘remote and speculative.’”).

83. Zara Watkins, *Stay v. Injunction: Do you Know the Difference?*, ON POINT EXPERTISE (Mar. 15, 2023), <https://www.onpointexpertise.com/interestpoints/what-is-the-difference-between-a-stay-and-an-injunction> [https://perma.cc/DN88-CQ9Q]. According to the article:

An injunction is a court order or judgment that prohibits . . . a person or entity from doing something[.] . . . A stay is a court order that pauses the process of an action that is already pending[.] Stays are usually granted pursuant to a statute or rule . . . [however a party may] convince[] a court to order a stay in other circumstances.

Id.

84. “A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.” American Bar Association, MODEL RULES OF PRO. CONDUCT: PREAMBLE & SCOPE (A.B.A. 1983), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ [https://perma.cc/RPR9-AG5D]. It seems that one of the main differences between cases are what the parties are ultimately seeking, or the remedy. Zealous advocates should understand not only the monetary remedies at law but the equitable and procedural remedies as well. *See id.*

85. 28 U.S.C. § 2101.

86. SUP. CT. R. 11.

87. *See Cuomo*, 772 F.2d at 974; *Indiana State Police Pension Tr.*, 556 U.S. at 960–61.

88. *See Cuomo*, 772 F.2d at 974; *see also Conkright*, 556 U.S. at 1401–02.

[T]he applicant must demonstrate (1) “a ‘reasonable probability’ that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction”; (2) “a fair prospect that a majority of the Court will conclude that the decision below was erroneous”; and (3) a likelihood that “irreparable harm [will] result from the denial of a stay. . . . [And] in a close case it may be appropriate to ‘balance the equities’—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.”⁸⁹

Since parties, including the government, are continuously seeking emergency injunctive relief through claiming irreparable harm, it can be difficult for courts to ascertain consistent signals from a myriad of orders that involve a variety of distinct legal issues.⁹⁰ This dysfunction is further reflected in the *Purcell* Court’s failure to fulfill the standard articulated in *Conkright*, having materially departed from truly “balanc[ing] the equities . . . to explore the relative harms . . . as well as the interests of the public at large.”⁹¹

A heightened standard is required because the Court failed to correctly apply the current irreparable harm standard in *Purcell*—a correct application would have likely yielded a different outcome for voting rights. The *Purcell* Court stayed the Ninth Circuit’s two-judge panel ruling without formally and correctly applying the standard of irreparable harm and truly “balancing the equities.”⁹² The emergency applicants before the Court sought to uphold Arizona’s voting law, Proposition 200, and stay the lower court’s ruling that enjoined it.⁹³ By vacating the Ninth Circuit’s stay, the Court failed to “balance the equities” because it did not adequately contemplate “exploring the relative harms to applicant and respondent, as well as the interests of the public at large.”⁹⁴ In *Purcell*, the litigants challenging Proposition 200 were not only the respondents to the emergency application, but were themselves members of the “public at large.”⁹⁵ As local members of the public directly affected by Proposition 200, they articulated their interests through legal mechanisms because their right to vote faced abridgment—the courts being the only available venue for protecting this right.⁹⁶ The public has an inherent interest in voting rights and the election laws that seek to add or restrict access to the polls.⁹⁷ The *Purcell* Court effectively precluded voters from challenging

89. *Conkright*, 556 U.S. at 1402; see also *Rostker*, 448 U.S. at 1308 (reiterating the standard of irreparable harm).

90. Vladeck, *supra* note 12, at 125 (explaining the increased use of the shadow docket by the Trump Administration).

91. *Conkright*, 556 U.S. at 1402.

92. Gans, *supra* note 5, at 9–10.

93. *Id.* at 10 (“In *Purcell*, the Justices criticized the Ninth Circuit’s failure to explain its reasoning.”).

94. *Id.* at 11; SUPREME COURT OF THE UNITED STATES, PUBLIC INFORMATION OFFICE, A REPORTER’S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/publicinfo/reportersguide.pdf> [<https://perma.cc/65RJ-JE9H>].

95. See *Purcell*, 549 U.S. at 2–3.

96. VLADICK, *supra* note 6, at 204 (“In May 2006, a group of Arizona voters, Native American tribes, and community organizations sued[.]”).

97. See, e.g., Hill et al., *supra* note 16.

election laws “too close” to an election, and this challenge preclusion directly results in “irreparable harm,” not only to voters solely affected by Proposition 200, but the public as large.⁹⁸

B. Per Curiam Signals & Other Procedure

Professor William Baude explains how the Court, operating through its emergency docket, issues orders outside the merits process, including stays, injunctions, and summary reversals of lower court decisions, that have become procedurally routine.⁹⁹ While the Court’s cases on the merits garnish the most publicity among the media and public, the little known orders list, which is issued before the Court formally goes into session at 10 AM, has received substantially less publicity.¹⁰⁰ Per curiam opinions are “issued in the name of the Court rather than specific judges[.]” and routinely appear in short and summarized forms—often without explanation—such vague per curiam summaries foster confusion in lower courts and provide little guidance on what factors lower courts should consider in deciding future disputes.¹⁰¹ Per curiam signals act as guidelines for lower court decisions because the Court issues the decision in the name of the court rather than having the traditional majority or dissenting opinion.¹⁰² However, there are times when per curiams are not unanimous and have substantial controversy attached, which may result in individual justices writing concurring and dissenting opinions.¹⁰³ Per curiams should be closely associated with signals so lower courts can interpret and apply the law consistently.¹⁰⁴ Even when per curiam signals are clearly delineated, there is further nuance associated with properly administering these signals to future cases and controversies.¹⁰⁵

98. Gans, *supra* note 5, at 9.

99. William Baude, *Foreword: The Supreme Courts Shadow Docket*, 9 N.Y.U. J. L.&L. 1, 3–4 (University of Chicago Public Law & Legal Theory Working Paper No. 508, 2015). Professor Baude provides a contextual roadmap to weave the theory that major doctrine coming from the “shadow docket” will result in the procedural erosion of civil rights without going through the formal merits process.

100. *Id.* at 6 (“The most frequent orders are those granting or denying certiorari.”).

101. *Id.* at 9; see also *Per Curiam*, CORN. L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/per_curiam [<https://perma.cc/LV6D-WHM6>] (last visited Nov. 6, 2025).

102. CORN. L. SCH. LEGAL INFO. INST., *supra* note 101.

103. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000).

104. Laura Krugman Ray, *The Road to Bush v. Gore: The History of the Supreme Court’s Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517, 519 (2000). Krugman deciphers the underlying meaning of per curiam signals and states that “[t]he subtext of a per curiam was clear: this case is so easily resolvable, so lacking in complexity or disagreement among the Justices, that it requires only a brief, forthright opinion that any member of the Court could draft and that no member of the Court need sign.” *Id.* at 519–20.

105. Professor Makar recognizes six categories of per curium signals under the doctrine of qualified immunity, which includes: (1) factbound, (2) transsubstantive, (3) heuristic, (4) disruptive, (5) siren, and (6) prophetic signals. Makar, *supra* note 11, at 458; *id.* at 459 (“[F]actbound signals as those in which the lower court limits its application to comparing or contrasting the factual guidance provided by the Court.”); *id.* at 462 (“‘Transsubstantive signals’ can occur when a lower court applies one of the Court’s summary reversals across a different, but tangentially related, legal context.”); *id.* at 464 n.203 (“Heuristic signals” are “somewhat similar in concept to lower courts relying on dicta, but rather that this particular type of signal is more forceful because it reinforces principles of the law that may not necessarily have been intended to carry forward to future applications.”); *id.* at 466–67 (“‘Disruptive signals’ can best be described as signals that may lead to an unintended consequence as a result of the per curiam outcome being misconstrued by lower courts. . . . [D]isruptive signals are most apparent when lower courts are trying to piece together or makes sense of signals arising from various cases that may not necessarily fit together.”); *id.* at 470 (“‘Siren signals’ can arise if the author of the per curiam opinion happens to be the author of a dissent on a merits case and begins to slowly law the groundwork for an alternate reading of case law that lower courts rely on but that may not necessarily be supported by the majority in

Part IV: The Modern Shadow Docket

A. Procedure As Major Doctrine

The shadow docket can make precedent, whether intentionally or inadvertently, through using the Court's emergency docket.¹⁰⁶ Thus, the Court must exercise caution when issuing summary orders to avoid creating new legal doctrine that lacks the full briefing and oral argument of the merits process.¹⁰⁷ If the merits processes of full briefing and oral argument are continuously circumvented through the emergency docket, then new major legal doctrines will regularly be summarily created, leading to the procedural usurpation of traditional legal doctrine.¹⁰⁸ Procedural decisions can significantly affect different areas of the law and change the availability of various remedies—blockbuster shadow docket rulings that changed the legal landscape include: the COVID-19 cases, death penalty cases, and civil rights challenges to voter suppression laws.¹⁰⁹

When faced with the issue of voting rights, the Court's emergency docket has been, and continues to be, an exceedingly effective tool in curbing election challenges.¹¹⁰ In 2006, *Purcell v. Gonzalez*¹¹¹ was one of the first major voting cases that procedurally found its way before the Roberts Court. In response to the election law challenge, the Court created the *Purcell* principle, which precluded challenges to election law determined to be “too close” and confusing to voters.¹¹² The *Purcell* principle has subsequently spawned a line of cases that have effectively closed the court doors to voters looking to mount constitutional challenges

reasoning, if on the merits docket.”); *id.* at 474 (“Prophetic signals” are “[c]oncurrences and dissents in per curiam opinions are uncommon, but are perhaps the most unambiguous in messaging given that they do not present the same issue that unsigned per curiam opinions present with regard to authorship. . . . [T]he discord can be less distracting and more illuminating, particularly for lower courts or litigants[.]”). Professor Makar’s identified per curiam signals can be applied more broadly than just qualified immunity because a broader application allows lower courts to interpret various cases and maintain consistency in jurisprudence. See Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591, 597 (2016); Chen, *supra* note 11, at 695–98.

106. Gans, *supra* note 5, at 8.

107. *Id.* at 2.

108. *Id.* at 4.

109. See, e.g., Wendy Parment, *From the Shadows: The Public Health Implications of the Supreme Court’s COVID Free Exercise Cases*, 49 J.L. MED. & ETHICS 564, 564 (2021) (“Early in the pandemic, most courts, including the Supreme Court, rejected challenges to public health emergency orders even when they applied to worship. Then on November 25, 2020, in *Roman Catholic Diocese v. Cuomo*, the Court changed course, offering a strikingly different approach that casts a far more skeptical eye on state health orders that touch upon religious practices, especially in-person worship.”) (footnotes omitted); Jenny-Brooke Condon, *The Capital Shadow Docket and the Death of Judicial Restraint*, 23 NEV. L.J. 809, 810 (2023) (“While decisions addressing death penalty cases on the Court’s emergency orders docket is nothing new, the Court’s willingness to issue momentous, dispositive rulings in death cases through the shadow docket has emerged as an important feature of the Court’s constitutional regulation of the death penalty.”) (footnotes omitted); Elizabeth Williams, *COVID-19 Related Litigation: Challenges to Election and Voting Practices During Covid-19 Pandemic*, 54 A.L.R. Fed. 3d Art. 3 § 2 (2020) (During COVID, “parties scrambled for emergency injunctive relief, arguing that their right[] to vote and to petition the government for the redress of grievances would be abridged if they were required to risk their lives and health by voting or gathering signatures in person, on the one hand, or forego voting or petitioning, on the other.”).

110. Gans, *supra* note 5, at 9.

111. See *Purcell*, 549 U.S. at 2.

112. *Id.* at 4–6.

on election laws when there are upcoming elections.¹¹³ Without heightened procedural protections and a bright-line rule, the preclusion of facial challenges to the constitutionality of election law will stifle voting rights and ultimately lead to widespread voter suppression.

B. The *Purcell* Principle, Its Progenies, & Voter Suppression

The *Purcell* principle, even when constitutional and statutory violations are present, precludes voters from challenging election laws when election day is imminent.¹¹⁴ David Gans, writing for the American Constitution Society in his article, *The Roberts Court, The Shadow Docket, and Unraveling of Voting Rights Remedies*, states that the “*Purcell* principle . . . establish[ed] a hard-and-fast rule that lower courts should not enjoin voting changes close to Election Day, even when doing so is necessary to vindicate the right to vote and prevent constitutional violations.”¹¹⁵ In addition, Gans recognizes that *Purcell* fundamentally departs from the very reason that equitable principles exist—to prevent inequity—and these equitable principles should hold strong.¹¹⁶ Moreover, Gans dissects the perils and differences of making law through the shadow docket and the merits process by stating:

The Supreme Court’s regular decision-making process is slow and methodical. The Court carefully selects a case for full review, receives full briefing both from the parties and amici, and hears oral argument, peppering the attorneys with questions that force them to consider their case from every possible angle. And at the end of this process, the Court explains its reasoning in an opinion. The Supreme Court’s decision-making process on stay orders could not be more different. The Justices’ consideration and decision-making is rushed, briefing takes place on a very expedited schedule, which often precludes briefing by friends-of-the-court, and there is no opportunity for oral argument. These shadow docket orders are often accompanied by cursory opinions or no reasoning at all.¹¹⁷

Purcell was the first step in a new line of cases that used the *Purcell* principle as a launch-pad to close the courthouse doors on voters’ ability to seek equitable relief for voter suppression laws.¹¹⁸ Had the Court proclaimed the *Purcell* principle by undergoing the merits process of full briefing and oral arguments, *Purcell*’s disposition would likely be more

113. Howe, *supra* note 74. Subsequent cases which were filed as emergency applications continuously applied *Purcell*’s arbitrary principle and resulted in the preclusion of challenges to election law across the United States due to the challenge’s timing. See, e.g., Republican Nat’l Comm. v. Democratic Nat’l Comm., 589 U.S. 423 (2020) (per curiam) (granting stay); Merrill v. People First of Alabama, 141 S. Ct. 190 (2020); Raysor v. DeSantis, 140 S. Ct. 2600 (2020); Little v. Reclaim Idaho, 140 S. Ct. 2616 (2020); Clarno v. People Not Politicians Oregon, 141 S. Ct. 206 (2020); Texas Democratic Party v. Abbott, 140 S. Ct. 2015 (2020).

114. Gans, *supra* note 5, at 12.

115. *Id.*

116. *Id.*

117. *Id.* at 15.

118. *Id.* at 2.

mechanistically sound and rooted in clearly articulated legal principles; but instead, the *Purcell* principle was announced from the “shadows.”¹¹⁹ As a result, the *Purcell* principle lacks the legal legitimacy and weight of reasoning that results from the traditional merits docket.¹²⁰ *Purcell* should be reconsidered and rigorously reviewed on the merits, and furthermore, the *Purcell* principle should be overruled through the merits process, or in the alternative, traditional review will force the Court to narrow and anchor its reasoning in firmly rooted legal principles.¹²¹

In *Purcell*’s per curiam opinion, the Court vacated an “interlocutory injunction entered by a two-judge motions panel of the Court of Appeals for the Ninth Circuit.”¹²² To understand how *Purcell* came before the Court, its complex and important procedural history must be explained.¹²³ In 2004, the voters in Arizona approved Proposition 200, which was a “measure sought to combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day.”¹²⁴ According to *Purcell*, Proposition 200 does not necessarily turn away all persons without identification because voters may cast a “provisional vote” and return within five business days, with proper identification, for the ballot to be officially counted.¹²⁵ Under Section 5 of the Voting Rights Act of 1965 (“VRA”), Arizona submitted its new voting standards to the Department of Justice (“DOJ”) and the Attorney General of the United States for preclearance; the Attorney General precleared Proposition 200 on May 6, 2006.¹²⁶ In May 2006, plaintiffs consisting of members of the community and various Native American tribes subsequently filed suit in the United States District Court for the District of Arizona challenging Proposition 200 under the VRA.¹²⁷ On September 11, 2006, the district court denied plaintiffs’ request for a preliminary injunction and “did not at that time issue findings of fact or conclusions of law,” withholding those findings until October 12; an appeal to the Ninth Circuit followed.¹²⁸ However, the Clerk of the Court of Appeals set the briefing date for November 21, well after the election date of November 7.¹²⁹

119. *Id.* at 8.

120. *See id.* at 1.

121. *Id.* at 14.

122. *Purcell*, 549 U.S. at 2. Justice Kennedy referred the application for stay to the Court and the filings of the State and County officials were construed as petitions for certiorari. *Id.* In a civil action, an interlocutory order under 28 U.S.C. § 1292(a)–(b) gives federal district courts and appellate courts jurisdiction along with the power to certify “an order not otherwise appealable under this section” when “such order involves a controlling question of law as to where there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]” § 1292(b). The court of appeals may review the order at its own discretion, and in addition, “[t]hat application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or judge thereof shall so order.” *Id.*

123. *Purcell*, 549 U.S. at 2.

124. *Id.* Voters without identification were able to cast a provisional ballot, but in order for the cast ballot to be officially counted, “the voter is allowed five business days to return to a designated site and present proper identification.” *Id.*

125. *Id.*

126. *Id.* at 2–3.

127. *Id.*

128. *Id.* at 3.

129. *Id.* The district court weighed the balance of harm to the plaintiffs and the public interest when it denied the initial injunction sought. *Id.* at 4.

The later briefing date prompted plaintiffs to request an injunction pending appeal because the briefing date would be *after* the election.¹³⁰ The emergency request was assigned to and reviewed by a two-judge panel in the Ninth Circuit.¹³¹ On October 5, the two-judge panel issued a four-sentence order enjoining Arizona from enforcing Proposition 200 pending disposition; the court subsequently denied a motion for reconsideration four days later.¹³² The State of Arizona subsequently appealed the injunction entered by the two-judge panel to the Supreme Court.¹³³ The Supreme Court reviewed the emergency application and reversed the Ninth Circuit's two-judge panel.¹³⁴ The Court's reasoning in *Purcell* acknowledged that the State has a "compelling interest" in preserving the integrity and process of elections.¹³⁵ Though "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms[.]" the Court arbitrarily and ironically established its own bright-line rule: there will be no constitutional voting challenges to election laws ahead of an upcoming election, regardless of its constitutionality.¹³⁶

The *Purcell* Court concluded that "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules."¹³⁷ The Court's conclusion has a direct line to its earlier reasoning that "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."¹³⁸ The Court's conclusion that voter confusion will result if Proposition 200 was enjoined is inapposite because there was already a previously used voting scheme in place that voters were accustomed to.¹³⁹ The *Purcell* Court should have affirmed the Ninth Circuit's order enjoining Proposition 200 and kept the status quo of the previous voting scheme, however, the Court "treated the [S]tate's emergency application as a petition for a writ of certiorari, granted it, and summarily vacated the Ninth Circuit's injunction."¹⁴⁰ Moreover, the Court should have treated the State's emergency application as a petition for certiorari and put it on the calendar *for the next term* to fully flesh out the merits and declare a bright-line rule that is more definitive than

130. *Id.* at 3.

131. *Id.* at 2–3. It must also be noted that though there was full briefing, no oral argument occurred, and "the panel issued a four-sentence order enjoining Arizona from enforcing Proposition 200's provisions pending disposition, after full briefing, of the appeals of the denial of a preliminary injunction." *Id.* at 3.

132. *Id.*

133. *Id.* at 2.

134. *Id.*; see also Howe, *supra* note 74 (describing the Supreme Court's process for reviewing emergency applications).

135. *Purcell*, 549 U.S. at 4.

136. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997).

137. *Purcell*, 549 U.S. at 5–6.

138. *Id.* at 4–5.

139. See VLADECK, *supra* note 6, at 205 ("At its simplest, the principle is that, to avoid confusion among voters and election administrations, courts should generally not change the rules governing elections as Election Day approaches, meaning that injunctions against even unlawful election rules are increasingly disfavored as Election Day draws near.").

140. *Id.*

“too close” to an Election Day.¹⁴¹ Further, by applying heightened harm, the Court would balance the equities relating to the risk of voter disenfranchisement and the impact that marginalized groups will face from increased voter ID regulations. Such equitable balancing would expose the *Purcell* principle as weak non-mandatory authority, given its failure to conduct any meaningful equitable analysis.

C. Identifying *Purcell*’s Per Curiam Signal & Its Consequential Legacy

The result of *Purcell* is a series of cases whose reasoning, or lack thereof, have led to the further abridgment of the right to vote and currently waters the fiery spirit of many voting rights challenges across the United States.¹⁴² Under *Purcell*’s regime, litigants opposing disenfranchisement will likely ask the appellate court for a “stay” of a lower court order if the lower court ruled against them on the grounds that the challenge was “too close” to election day.¹⁴³ Under *Purcell*, litigants will not have the opportunity to stay orders or receive relief because challenges are effectively chilled, meaning that meaningful challenges to voter disenfranchisement, even when meritorious, are prima facie barred.¹⁴⁴ Even with the specter of voter disenfranchisement looming over the Court, the *Purcell* principle has survived several trips to the Supreme Court and is continuously affirmed.¹⁴⁵ Two major voting rights cases, *Veasey v. Perry*¹⁴⁶ and *Republican National Committee v. Democratic National Committee*,¹⁴⁷ have both referenced the *Purcell* principle when dismissing challenges to local elections as election day looms.¹⁴⁸

In 2014, the Court issued a ruling in *Veasey v. Perry* and upheld the Fifth Circuit Court of Appeal’s decision disallowing the challenge of a Texas Voter ID law that was found by the lower court to be unconstitutional.¹⁴⁹ The Court did not provide reasoning for its majority opinion and denied the petitioner’s application to vacate the stay issued by the Fifth Circuit.¹⁵⁰ Justice Ginsburg dissented to this ruling and was joined by Justice Sotomayor and Justice Kagan.¹⁵¹ According to Justice Ginsburg, “[t]he fact-intensive nature of this case does not justify the court of appeals’ stay order; to the contrary, the Fifth Circuit’s refusal to home in on the facts found by the district court is precisely why

141. *Id.* at 205–06.

142. *See* cases cited *supra* note 113.

143. Gans, *supra* note 5, at 8.

144. *See* Howe, *supra* note 74 (discussing how stays “often effectively resolve the issue at the heart of the case for an upcoming election”).

145. *See id.* (discussing the factors the Court considers for granting a stay and how opinions are issued).

146. *See generally* *Veasey v. Perry*, 574 U.S. 951 (2014) (denying applications to vacate stay entered by the Fifth Circuit).

147. 589 U.S. at 423.

148. *See generally* Howe, *supra* note 74 (discussing the process of asking the Supreme Court for stay in election litigation); *Veasey*, 574 U.S. at 951; *Republican Nat’l Comm.*, 589 U.S. at 424–25 (“And all of that further underscores the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion.”). The dissenting Justices in *Republican Nat’l Comm.* argued that the Court should have deferred to the findings of the district and appellate courts instead of “interven[ing] at the eleventh hour to prevent voters who have timely requested absentee ballots from casting their votes.” *Republican Nat’l Comm.*, 589 U.S. at 427 (Ginsburg, J., dissenting).

149. *Veasey*, 574 U.S. at 951.

150. *Id.*

151. *Id.*

this Court should vacate the stay.”¹⁵² The Fifth Circuit’s refusal to give deference to lower court findings portrays a departure from *Purcell*’s mandate of deference to the fact-finding of lower courts, and the Court has given the Fifth Circuit’s departure a stamp of approval.¹⁵³ *Veasey* signals that voting jurisprudence has effectively gone rogue with little to no signs of consistency; the Court’s lack of consistency in applying its own standard will result in circuit courts splitting and dispensing their own version of various principles.¹⁵⁴ If the Court makes major doctrine procedurally, then its application should remain consistent, and the Court should subsequently enforce that standard to promote uniformity.¹⁵⁵ In *Republican National Committee v. Democratic National Committee*, the Court came to the same conclusion as *Veasey* by intervening and staying a lower court’s order to extend the deadlines for the receipt of absentee ballots and ballot requests in Wisconsin’s statewide election.¹⁵⁶

Purcell and its inconsistent progeny directly exemplify the problems of the shadow docket through the weaponization of emergency applications to procedurally manufacture new major doctrine, especially on issues affecting voting rights.¹⁵⁷ The Eleventh Circuit has also specifically highlighted the problems with the *Purcell* principle, making it essential to identify its per curiam signal to guide lower courts and help litigants navigate the ever-changing legal landscape surrounding voting rights.¹⁵⁸

Professor Zina Makar provides a workable categorial standard to identify per curiam signals under the doctrine of qualified immunity; this Note argues that these categories of identification can be applied broadly beyond qualified immunity to guide both lower courts and practitioners alike.¹⁵⁹ Categorizing per curiam signals prevents confusion for all parties involved in analyzing Court opinions—the inability to identify per curiam signals is harmful for our legal system.¹⁶⁰ For example, the Court’s order of injunction issued in *Wheaton College* was “a four-paragraph unsigned opinion that left the legal standard and its legal basis a mystery.”¹⁶¹ The reasoning for the Court’s ruling in *Wheaton College* was virtually unidentifiable.¹⁶² The lack of transparency and identification in the Court’s emergency orders undermines the institution as a whole and

152. *Id.* at 951–52.

153. *Id.* at 951; *Purcell*, 549 U.S. at 5 (“It was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court. We find no indication that it did so, and we conclude this was error.”).

154. *See Gans, supra* note 5, at 11.

155. *Id.*

156. *See Comment On: Republican National Committee v. Democratic National Committee*, 134 HARV. L. REV. 450, 451 (2020) (arguing that “the Court should stop treating *Purcell* as a bright-line rule against late judicial intervention and instead include an order’s timing as just one element in its ordinary multifactor stay analysis.”); *see also Veasey*, 574 U.S. at 951 (“I would not upset the District Court’s reasoned, record-based judgment, which the Fifth Circuit accorded slim, if any, deference.”) (Ginsburg, J., dissenting) (citation omitted)).

157. *See Gans, supra* note 5, at 11.

158. Professor Makar recognizes six different categories of per curiam signals under the doctrine of qualified immunity, which includes: (1) factbound, (2) transsubstantive, (3) heuristic, (4) disruptive, (5) siren, and (6) prophetic signals. Makar, *supra* note 11, at 458.

159. Makar, *supra* note 11, at 458.

160. *Id.*

161. Baude, *supra* note 99, at 15; Chen, *supra* note 11, at 695–98.

162. Baude, *supra* note 99, at 15.

creates a culture of confusion in the lower courts, so decisions must be categorized.¹⁶³ Identifying the per curiam signal of *Purcell* is essential to understanding whether it is a legally sound “major doctrine” under the regime of election law or just a “disruptive” anomaly that is ultimately unworkable.

The per curiam signal that *Purcell* likely falls under is the disruptive signal.¹⁶⁴ *Purcell* is likely a disruptive signal because it directly led to “unintended consequence[s] as a result of the per curiam outcome being misconstrued by lower courts.”¹⁶⁵ The *Purcell* Court clearly erred in giving its stamp of approval to the Fifth Circuit’s interpretation of *Purcell* because no deference was given to the district court’s fact-finding—the very standard that *Purcell* demanded.¹⁶⁶ The unintended consequences of *Purcell* have been disruptive to civil rights and as a result precluded voter challenges to election laws—*Purcell*’s progenies follow the same disruptive path like the tail of a hurricane.¹⁶⁷

Since heightened harm is rooted in equitable principles, its application will effectively transform *Purcell* from a “disruptive signal” to a “heuristic signal.”¹⁶⁸ Identifying *Purcell* as a “heuristic signal” is proper because “this particular type of signal is more forceful [and] reinforces principles of the law that may not necessarily [have] been intended to [be carried] forward to future applications.”¹⁶⁹ A quick-hand summary to describe the law is exactly what *Purcell* embodies, thus its limited reasoning is used as a “mental shortcut . . . [which] can often be distracting and encourage lower courts to shift the burden of a factual analysis.”¹⁷⁰ Further, “[r]eliance on such statements that have little explanation and act as conclusory statements should be limited as they result in inconsistent applications across cases and circuits.”¹⁷¹ The conclusion in *Purcell* not only has little explanation, but it is also conclusory, so if identified as a “heuristic signal,” its application should be limited in scope when applied to voting rights to prevent lower court inconsistency.¹⁷²

163. Alicia Bannon, Stephen Spaulding & Harry I. Black, *The Supreme Court “Shadow Docket,” Explained*, BRENNAN CTR. FOR JUST. (July 19, 2022), <https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket> [<https://perma.cc/YMSG-VUTK>].

164. Makar, *supra* note 11, at 466–67 (“‘Disruptive signals’ can best be described as signals that may lead to an unintended consequence as a result of the per curiam outcome being misconstrued by lower courts. . . . [D]isruptive signals are most apparent when lower courts are trying to piece together or makes sense of signals arising from various cases that may not necessarily fit together.”).

165. *Id.*

166. *Id.*

167. Gans, *supra* note 5, at 11 (“The Court has continued to apply the *Purcell* principle to leave citizens no recourse when states deny or abridge the right of citizens to vote.”).

168. Makar, *supra* note 11, at 464 n.203 (“[H]euristic signals” are “somewhat similar in concept to lower courts relying on dicta, but rather that this particular type of signal is more forceful because it reinforces principles of the law that may not necessarily had been intended to carry forward to future applications”).

169. *Id.*

170. *Id.*

171. *Id.* at 464–65.

172. See *Purcell*, 549 U.S. at 5–6.

D. *Purcell*'s Relationship to Other Landmark Voting Rights Cases

Because *Purcell* dealt a massive blow to voting rights, safeguards need to be enacted so the Court does not continue to weaken the people's political power.¹⁷³ The Roberts Court has continued to intervene in voting rights disputes and strike at the heart of democracy without a sound legal basis anchored in authority.¹⁷⁴ However, *Purcell* is not the first time the Court has intervened in voting—some of the most well-known examples of Court interventions relating to voting rights are: *Bush v. Gore*,¹⁷⁵ *Shelby County v. Holder*,¹⁷⁶ and *Abbott v. Perez*.¹⁷⁷ Although *Bush v. Gore* preceded the Roberts Court, the Roberts Court has maintained the legacy and theme of Court intervention in voting issues through *Purcell*.¹⁷⁸ *Purcell* is distinguishable from *Shelby County* and *Perez* because those cases were decided through the substantive mechanisms of the traditional merits process.¹⁷⁹ In contrast, *Purcell* and *Bush* are similar because the Court used procedure to formally intervene in voting matters.¹⁸⁰ *Purcell* was decided through the procedural mechanisms of the Court's emergency application process, and the Court ordered a procedural stay that affected the outcome of Arizona's election; the Rehnquist Court in *Bush* similarly issued a stay that controversially affected the outcome of the 2000 presidential race between George W. Bush and Al Gore.¹⁸¹ Neither *Purcell* nor *Bush* were initially decided through the merits process; both cases also left large questions on challenges to election law.¹⁸² Edward Foley's article, *Symposium: The particular perils of emergency election cases*, identifies that the procedural power of the Court can immediately affect outcomes of elections because:

The truly important decision in *Bush v. Gore* as a practical matter was not the merits ruling released on Tuesday, Dec. 12, 2000, but instead the stay decision issued the previous Saturday, Dec. 9. That stay surely ranks among the most consequential shadow-docket rulings the Supreme Court has ever issued. . . . The Dec. 9 stay is what stopped the

173. Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 HARV. LAW & POL'Y REV. 131, 132 (2019).

174. *Id.*

175. 531 U.S. 98, 103 (2000).

176. 570 U.S. 529, 536 (2013); *see also* *Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (June 25, 2023), <https://www.brennancenter.org/our-work/court-cases/shelby-county-v-holder> [<https://perma.cc/Q7PR-T9Q5>] ("On June 25, 2013, the Supreme Court ruled that the coverage formula in Section 4(b) of the Voting Rights Act—which determines which jurisdictions are covered by Section 5—is unconstitutional because it is based on an old formula. As a practical matter this means that Section 5 is inoperable until Congress enacts a new coverage formula, which the decision invited Congress to do.").

177. 585 U.S. 579, 584 (2018).

178. *See Purcell*, 549 U.S. at 5–6.

179. *See, e.g., Shelby Cnty.*, 570 U.S. at 529; *Perez*, 585 U.S. at 579; *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 5, 2018), <https://www.brennancenter.org/our-work/research-reports/effects-shelby-county-v-holder> [<https://perma.cc/P89M-ZS8T>] ("In a 5–4 decision, the Court reasoned that the coverage formula was out of date – despite Congress's determination that it was still needed.").

180. Edward Foley, *Symposium: The Particular Perils of Emergency Election Cases*, SCOTUSBLOG (Oct. 23, 2020, at 12:00 ET), <https://www.scotusblog.com/2020/10/symposium-the-particular-perils-of-emergency-election-cases/> [<https://perma.cc/M2H2-5NKP>].

181. *Id.*

182. *See Bush*, 531 U.S. at 103; *see also Purcell*, 549 U.S. at 5–6.

Florida recount and made it impossible to complete a recount by the so-called safe harbor deadline, the date by which a state must complete its procedures for counting ballots in a presidential election if the state wishes to take advantage of the congressional promise to accept as “conclusive” the result of those procedures.¹⁸³

The procedural ruling of *Bush* rendered a recount inoperative, so even though a traditional merits ruling was released three days after the procedural ruling, a substantive decision in the opposite conclusion was already too late.¹⁸⁴ Voting is inherently a sensitive and controversial topic, especially as it relates to access to the ballot box. Therefore, the current standard of irreparable harm should be reframed and *heightened* to reign in procedural mechanisms that are now commonplace within our voting schemes.¹⁸⁵

Part V: Unseen Consequences: The Office of the Solicitor General, the Executive Branch, and the Need for Effective Procedural Recalibration

Professor Vladeck, in *The Solicitor General and the Shadow Docket*, also highlights the unique relationship between the Solicitor General, the Court, and the shadow docket.¹⁸⁶ The relationship between the Solicitor General’s Office and the Supreme Court is a crucial aspect of the judiciary, so much so that the Solicitor General is also often referred to as the “Tenth Justice.”¹⁸⁷ The Office of the Solicitor General is the fourth-ranked official within DOJ and, under statute, must be “learned in the law.”¹⁸⁸ The Solicitor General is responsible for representing the interests of the United States on appeal before the Supreme Court, and, similar to the Office of the Vice President, has official duties in multiple branches of government.¹⁸⁹ This representation encompasses filing emergency appeals, arguing cases on the merits, and writing opinions as a “friend of the court,” on behalf of the government when not directly involved in a matter before the Court.¹⁹⁰ The Solicitor General, however, like any institutional actor, is open to political pressure based on the policy objectives of a particular administration.¹⁹¹ Depending on the stance of

183. Foley, *supra* note 180.

184. *Id.*

185. *Marching for the Vote*, U.S. C.R. TRAIL, <https://civilrightstrail.com/experience/marching-for-the-right-to-vote/> [<https://perma.cc/ZA26-UE83>] (last visited Nov. 3, 2025).

186. Vladeck, *supra* note 12, at 125.

187. Steve Vladeck, *The Tenth Justice*, ONE FIRST, (Nov. 28, 2022), <https://www.stevevladeck.com/p/3-the-tenth-justice> [<https://perma.cc/NG24-UA3F>].

188. 28 U.S.C. § 505; *Office of the Solicitor General*, U.S. DEP’T OF JUST., <https://www.justice.gov/doj/office-solicitor-general#:~:text=The Office of the Solicitor,of his or her duties> [<https://perma.cc/ZM6N-P3XV>].

189. U.S. DEP’T OF JUST., *supra* note 188.

190. Scott S. Harris, Supreme Court of the United States Office of the Clerk, Memorandum from the Supreme Court of the United States Office of the Clerk to Those Intended to File an *Amicus Curiae* Brief in the Supreme Court of the United States (Oct. 2019), <https://www.supremecourt.gov/casehand/AmicusGuide2019.pdf> [<https://perma.cc/5LEK-S9R6>] (“The filing of *amicus* briefs in connection with emergency applications is strongly discouraged, and the Clerk’s Office will accept such briefs only if they are presented along with a motion for leave to file the brief.”).

191. *See, e.g.*, VLADECK, *supra* note 6, at 145 (“In the Trump Cases, the Office of the Solicitor General advanced radical new theories justifying broad usage of the Supreme Court’s power to grant emergency relief, theories that the conservative justices repeatedly bought into.”).

a presidential administration, the Solicitor General may seek to litigate certain issues, which can also lead to the politicalization of the emergency docket; in other words, the stance of the Solicitor General can wax and wane simultaneously with changes in the ideas of the executive branch.¹⁹² For example, an administration can use the Court's emergency docket to aggressively pursue or defend policy goals; if a lower court ruling unfavorably enjoins a policy objective, the administration can seek to "stay" the lower court order to maintain the status quo by claiming there is an irreparable harm present to the government.¹⁹³ This means that the Solicitor General has the ability to appeal specific cases that the current administration believes are essential to its policy goals and initiatives.¹⁹⁴

Moreover, an aggressive executive branch can focus on certain issues and fast-track unfavorable opinions to the Supreme Court through emergency petitions.¹⁹⁵ Through tracing the use of the Court's emergency docket by Solicitor Generals through the Bush, Obama, and Trump administrations, Professor Vladeck's data reveals Trump's first administration as "*far* more aggressive in seeking to short-circuit the ordinary course of appellate litigation[.]"¹⁹⁶ This leads to the conclusion that an aggressive presidential administration can lean on the Solicitor General to score political points and present emergency petitions that can negatively impact civil rights.¹⁹⁷ Worse still, even without an aggressive executive, the Court continues to block civil rights groups' requests for relief through the shadow docket; suits challenging voting rights are a major, controversial issue that has and continues to dominate the emergency docket.¹⁹⁸ The politicization of the emergency docket will have an overarching impact on civil rights beyond voting, resulting in political, ideological, and theoretical differences that drive positions such as the "unitary executive theory," which is being implemented to establish uniform policy objectives of the president.¹⁹⁹ The introduction of a new

192. Vladeck, *supra* note 12, at 125, 137.

193. Gans, *supra* note 5, at 1; *see also* VLADECK, *supra* note 6, at 133 (highlighting Chief Justice Robert's 2012 opinion on states and irreparable injury).

194. Vladeck, *supra* note 12, at 126.

195. *Id.* at 125.

196. Vladeck, *supra* note 12, at 125. The increased use of the shadow docket likely also depends on the current Presidential Administration's relationship with its Solicitor General and the Supreme Court. *Id.* The Trump administration through the Solicitor General has "in less than three years . . . filed at least twenty-one applications for stays in the Supreme Court (including ten during the October 2018 Term alone)." *Id.* However, under the Obama and Bush Administrations, "the Solicitor General filed a total of eight such applications—averaging one every *other* Term." *Id.* The Office of the Solicitor General was created by the Statutory Authorization Act of 1870; this act grants the Solicitor General the power to represent the interests of the United States before the Supreme Court and oversee the government appellate caseload. U.S. DEP'T OF JUST., *supra* note 188.

197. VLADECK, *supra* note 6, at 150 (During the Trump Administration, "the solicitor general had increasingly come to view emergency applications as a means of scoring political points rather than legal ones").

198. Gans, *supra* note 5, at 1.

199. Vladeck, *supra* note 12, at 125. The politicization of the shadow docket could increase even more under the theory of the unitary executive. *See* John Harrison, *The Unitary Executive and the Scope of Executive Power*, 126 YALE L.J. F. 374, 374 (2017). This is because the unitary executive theory contains the idea that "[t]he executive is headed by a single person, not a collegial body, and that a single person is the ultimate policy maker, with all other subordinate to him." *Id.* Since the Solicitor General is below the President of the United States, the President can exert political pressure to force the Solicitor General to file emergency applications advancing disposition where there are challenges to certain policies or executive orders. *See* Vladeck, *supra* note 12, at 125. In practice, a president who is hostile towards civil

heightened standard of irreparable harm is also necessary to protect against theories like the unitary executive by providing a presumptive mechanism that “balances the equities.”²⁰⁰

Part VI: A New Hope

Recalibrating the shadow docket to include a heightened harm standard rooted in equitable principles will enhance voting rights by applying the presumption of “inequity” against the state when there are facial challenges to election law. When this new standard is applied to the *Purcell* doctrine, the *Purcell* doctrine will be severely limited because it does not satisfy the equity that heightened harm demands, nor will it survive the presumption that major doctrine, which carries broad implications over civil rights, cannot be made through procedural vehicles. Because the *Purcell* doctrine will not survive the presumption of heightened harm, it logically follows that *Purcell*’s progeny will fail under a heightened presumption for the same reasons. As a result of heightened harm, voters who challenge a state’s voting proposition will be able to effectively challenge, but not completely kill, the proposition that would have otherwise gone into effect. If the Court determines that the challenge to the voting law is “too close,” then they should enjoin the challenged law and reinstate the previously administered standard. This would prevent voter confusion due to the familiarity with the process until oral arguments can be fully heard to determine whether the challenge has merit. This solution protects litigants who have a sufficiently ripe claim by maintaining the previous voting scheme until the case is fully heard on its merits. Additionally, a heightened standard will protect voters against actors who seek to take advantage of *Purcell*’s doctrinal preclusion by deliberately implementing voting laws that may seem to be neutral on its face but actually disenfranchise minorities *en masse*.²⁰¹

rights could exert political pressure to force the Supreme Court to hear its petition under an emergency application and seek a disenfranchising procedural remedy. In addition, when there is an aggressive executive, whose administration formally adopts the idea of the “unitary executive,” the executive branch becomes more centralized and in line with the president’s policy goals. Harrison, *supra*. Justice Alito has also expounded positive jurisprudential thoughts towards the “unitary executive” theory and the ability of the president to fundamentally control all aspects of the executive branch. *Id.*

200. See *Conkright*, 556 U.S. at 1402. The relationship between the executive, Solicitor General, and theories such as the “unitary executive” theory can be further explored in another article. However, it is important to note that the Supreme Court, or at least specific justices, seem to be receptive to the theory of the unitary executive. See, e.g., Jacob Knutson, *What is the Unitary Executive Theory? How is Trump Using it to Push His Agenda*, DEMOCRACY DKT. (Feb. 20, 2025), <https://www.democracydocket.com/analysis/what-is-unitary-executive-theory-how-is-trump-using-it-to-push-his-agenda/> [https://perma.cc/D6SQ-XHV4] (The unitary executive theory “asserts that the president has unlimited power to control the actions of the four million people who make up the executive branch.”).

201. See VLADDECK, *supra* note 6, at 223 (“[I]n Georgia, Governor Kemp had deliberately waited a month to sign the new maps into law—delay that could be explained only as an effort to frustrate preselection judicial review.”). Litigants ultimately face a vexing question when looking down the barrel of voter suppression: Do I file my suit in state or federal court? In federal court, the *Purcell* principle will likely preclude the claim from being heard on the merits. In state court, litigants may find judges that are hostile to the *Purcell* principle and more receptive to issuing relief against alleged voter suppression tactics. For example, in Texas, the 2026 Democratic Primary was between State Rep. James Talarico and U.S. Rep. Jasmine Crockett; the 2026 Republic Primary was between Texas Attorney General Ken Paxton and Senator John Cornyn. See Jack Fink, *Texas GOP chair celebrates separate primary elections; Democrat chair blames Republicans for the confusion*, CBS NEWS (Mar. 8, 2026, at 08:48 CDT), <https://www.cbsnews.com/texas/news/dallas-county-separate-primary-elections-democrat-blame-republicans-voting-election-day-confusion/> [https://perma.cc/54MW-GHS4]. In Dallas County, the newly

The heightened harm standard will also produce greater consistency in lower federal courts because judges will apply a uniform procedural presumption when faced with challenges to voting rights laws. This will allow not only the suit to remain alive, but the voting law to remain alive and be temporarily enjoined pending full briefing and oral argument on the merits. In addition, lower courts will be able to consistently identify per curiam signals due to this heightened presumption. Without a heightened standard, litigants face inconsistent lower court rulings—meaning that on a similar issue, one court could rule one way while another rule the opposite. This leads to consequences felt by lower courts, who look for guidance on rulings through well-reasoned orders and opinions from higher courts—the lack of guidelines ultimately harms litigants of various marginalized and underrepresented groups. The reframing of heightened harm will lead to greater transparency in Supreme Court decisions involving voting rights and dispel the specter of unconstitutionality by anchoring emergency docket rulings in a clear constitutional framework. As the Roberts Court fights to maintain its legacy and legitimacy, heightened harm would introduce a transparent standard that does not run afoul of Article III but reaffirms the principles of justiciability—and thus justice itself.

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implementing voting scheme required that voters would have to cast their ballots in their respective precincts rather than anywhere in the county. *Id.* Despite some warnings from the county, voters were being turned away and long lines were created because of the confusion. *Id.* Dallas County Democrats filed suit in county court and “Judge Clay Lewis Jenkins extended the voting for Democrats only for another two hours on Election Day.” *Id.* Further, Dallas County Judge Staci Williams found that “the Court after reviewing the petition finds that there has been mass confusion as to where to voters[sic] were entitled to cast their ballot on election day, and voter confusion was so severe that the Dallas County Election Department website crashed” Marina Trahan Martinez, *Votes cast after judge ordered polls to stay open checked by Dallas County ballot auditors*, KERA NEWS (Mar. 10, 2026, at 04:57 CDT), <https://www.keranews.org/news/2026-03-10/votes-cast-after-judge-ordered-polls-to-stay-open-checked-by-dallas-county-ballot-auditors> [<https://perma.cc/9HWW-93S9>] (alteration in original). AG Ken Paxton filed and challenged the county court’s order by asking the Texas Supreme Court to issue a stay—the stay was granted. Fink, *supra*. The Texas Supreme Court further ordered that the nearly 2,000 ballots cast by voters after 7 pm be separated. *Id.* Even though 2,000 ballots would not have decided the election winner between the Democratic Party candidates, in this instance (however, Ken Paxton and John Cornyn will face in a run-off), the stay issued by the Texas Supreme Court is alarming when there are clear factual findings of voter confusion.

Equitable Market Value: How the Government Cannot Afford the
Loss of Black Wealth, Culture, and Joy When Calculating Just
Compensation for Eminent Domain Proceedings
ANTONIA IZUOGU

TABLE OF CONTENTS

I. INTRODUCTION.....	363
II. LEGALIZED ABUSE: EMINENT DOMAIN AND THE BLACK LAND STRUGGLE.....	365
A. Supreme Court Interpretation of "Public Use" and Just Compensation.....	365
1. <i>Berman v. Parker</i>	365
2. <i>Hawaii Housing Authority v. Midkiff</i>	367
3. <i>Kelo v. New London</i>	367
B. Pawns of War: 40 Acres and a Mule.....	369
C. The Peak and Fall of Black Land Ownership.....	370
1. <i>Homestead Acts</i>	370
2. <i>The Decline of the American Dream</i>	371
D. The Problem: Eminent Domain Abuse in Black Communities.....	372
III. THE LIMITS OF JUST COMPENSATION: TAKINGS, FAIR MARKET VALUE, AND SUBJECTIVE VALUE.....	375
A. Takings: The Requirement of Just Compensation.....	375
1. <i>Economic Development Takings Displaces Black Community for Corporate Gain</i>	375
B. Defining "Just Compensation": The Willing Seller Fiction and the Exclusion of Compensating for Intangible Value.....	379
C. A Flawed Standard: How Traditional Property Valuation Undermines Black Property Ownership.....	380
D. The Failure to Justly Compensate for Joy and Culture Attached to Property.....	381
IV. FROM FOOTNOTE TO HOLDING: HOW A DUE PROCESS CLAIM CAN COMPEL SCOTUS TO ADDRESS EMINENT DOMAIN DISPARITIES.....	382
A. Due Process Claim: The Right to Just Compensation.....	383
1. <i>Just Compensation is a Fundamental Right</i>	384
2. <i>The Infringement on "Just Compensation" through Discriminatory Valuation</i>	384
3. <i>Lack of Affordability Infringes on Justly Compensating Property Owners</i>	385
4. <i>Forcing Some People Alone to Bear the Burden of "Public Use"</i>	386
a. <i>"Withintrification" as a Less Restrictive Alternative to Shortchanging Black Property Owners</i>	386
V. "IT IS SO ORDERED": THE INCLUSION OF SUBJECTIVE VALUE IS NOT AN OPTIONAL COMPONENT IN JUST COMPENSATION CALCULATION.....	387

Equitable Market Value: How the Government Cannot Afford the Loss of Black Wealth, Culture, and Joy When Calculating Just Compensation for Eminent Domain Proceedings

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The Just Compensation Clause in the United States Constitution's Fifth Amendment mandates the bare minimum: the fair market value of the property taken for public use. Transitioning from being chattel property to owning real property, Black Americans have yet to benefit fully from constitutional and real property laws. At its peak, Black American landownership spanned sixteen million acres, but this number plummeted by over ninety percent between 1910 and 1997 due to practices including eminent domain. Just compensation is intended to be the monetary equivalent of the property, putting the owner in the same position as if their property were not taken. Fair market value does not capture the loss of Black wealth, culture, and joy, considering the significance of property ownership to Black Americans. Scholars have proposed ideas to address land loss, including restoring the property owner's dignity, compensating for mental distress, and preventing eminent domain by empowering property owners to determine development on their land. Those suggestions fail to include the Black American perspective, and the historical disrepair eminent domain has on the community. And traditional property valuation methods only further the loss of Black wealth, culture, and joy by creating a cycle of undervaluing Black-

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owned property when just compensation depends on fair market value. The Supreme Court has had an opportunity to expand the scope of just compensation beyond fair market value in cases of “discrete and insular minorities” and “manifest injustice.” This Note examines the expansion of the equation of just compensation to prevent eminent domain abuse for Black property owners, analyzes a potential due process claim for the right to just compensation to prevent eminent domain abuse, and suggests a community-conscious alternative for economic development takings.

I. Introduction

Under the Takings Clause of the Fifth Amendment of the United States Constitution, just compensation equates to the property’s fair market value.¹ The displacement of African Americans dates back to 1526 and continues to the present day in the United States. The Atlantic Slave Trade, slave auctions, the arguably involuntary Great Depression, redlining, and eminent domain all resulted in the expulsion of African Americans from their land, their home. New case precedent is necessary to acknowledge the African American experience of losing claim to American soil and the “*manifest injustice*” that eminent domain has forced on the community. Current case precedent states that compensation is a measurement of suitable uses of the property for its environment or what is reasonably expected of the land in its immediate future; however, it does not encompass “imaginary uses” or “speculative schemes” for the property.² Considering this precedent, some scholars challenge the fair market value equation by either expanding the factors to consider when measuring just compensation or presenting alternatives to just compensation, such as “dignity restoration,”³ and compensating for the property owner’s mental distress⁴ from losing their land. Other proposals include having property owners and developers communicate directly to collaboratively plan the future of the land,⁵ as well as an option to provide replacement housing⁶ for such landowners to prevent instability. These recommendations are race-neutral and lack attention to the massive disparity African Americans experience in land ownership.⁷

1. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510–11 (1979).

2. *Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 250 (1897).

3. See generally Alyssa M. Hasbrouck, *Rethinking “Just” Compensation: Dignity Restoration As A Basis for Supplementing Existing Takings Remedies with Government-Supported Community Building Initiatives*, 104 CORN. L. REV. 1047 (2019) (arguing that non-economic injuries from displacement necessitate non-economic remedies).

4. See generally Alberto B. Lopez, *Weighing and Reweighing Eminent Domain’s Political Philosophies Post-Kelo*, 41 WAKE FOREST L. REV. 242 (2006) (explaining that just compensation is not adequately achieved without an individualized assessment of subjective damages).

5. See generally Michael A. Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465 (2008) (explaining a legal grouping of landowners that could more equitably negotiate land consolidation and overcome collection action barriers).

6. See generally James Kelly, *“We Shall Not be Moved”: Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN’S L. REV. 923 (2006) (proposing legislative reforms that would grant replacement housing in the same development area for residents who are opposed to an approved collective action sale).

7. Note: Native Americans lost 98.9% of historical land base due to European settlers. Dylan Walsh, *Near Total Loss of Historical Lands Leaves Indigenous Nations in the U.S. More Vulnerable to Climate Change*, YALE SCH. OF THE ENV’T (Oct. 28, 2021), <https://environment.yale.edu/news/article/near-total->

Eminent domain abuse, especially in communities with a majority of Black property owners, has oppressed Black property ownership, evident through racist history and current practices. The premise of this Note is to raise the bar for just compensation to encompass the full extent of the Black landowner's losses in the forced sale: their generational wealth, sense of place, and joy. To achieve this option, I suggest African American property owners, undergoing eminent domain, ideally those with a rich cultural tie to their land, such as those with enslaved ancestors, sue the government under the Fifth Amendment's Due Process Clause to justly retain the wealth, joy, and culture that property bestows to Black communities, under the right to just compensation.⁸ The Supreme Court has acknowledged the impact of eminent domain on particular communities⁹—an acknowledgment that emboldens the discussion of this Note, which emphasizes that the Supreme Court should revise the fair market definition and calculation to stop the cycle of eminent domain abuse in these communities and address the systematic undervaluation of Black property. This is crucial because of the significance of property to African Americans and the need to fairly compensate this population, given their struggles to claim property, maintain ownership, and find comparable properties to continue building generational wealth. African Americans have lacked stability and the full potential to claim a stake in this country. In the wake of resiliency, Black landowners should be protected from having to leave their property without “just” compensation and discontinue the cycle of disadvantaging African Americans on their journey of liberation from blatant anti-Blackness via policies and laws that keep Black communities oppressed.

Part II surveys the history of “legalized abuse” within the Black land struggle—tracing Supreme Court interpretations of “public use” and the trajectory of Black land ownership in America—to highlight how eminent domain has and continues to be weaponized against Black communities. Part III examines the current limitations of “just compensation,” contending that the “willing seller fiction” and traditional fair market value standards fail to account for the value of generational wealth, joy, and culture attached to property. Part IV argues that a Due Process claim can serve as a procedural vehicle to compel the Supreme Court to address

loss-historical-lands-leaves-indigenous-nations-us-more-vulnerable-climate#:~:text=Among their findings was that,possess no federally recognized land [https://perma.cc/NF3Z-5VJQ]. Technically, Native Americans did not believe in individual land ownership, therefore African Americans experience the greatest land ownership disparity in America at about 98% of their farmland. The Different Views of Land, NATIVE KNOWLEDGE 360°, <https://americanindian.si.edu/nk360/manhattan/different-views-land/different-views-land.cshtml> [https://perma.cc/T8LV-JGML]. Vann R. Newkirk, II, *How Black Americans Were Robbed of Their Land*, LAND TR. ALL. RES. CTR. (2019), <https://landtrustalliance.org/resources/learn/explore/how-black-americans-were-robbed-of-their-land> [https://perma.cc/F8QA-NMZF].

8. See generally Danielle Buckingham, *A home is more than a house: Black folks reflect on what Home means to them*, RECKON (Dec. 16, 2022, at 11:00 CST), <https://www.reckon.news/black-joy/2022/12/a-home-is-more-than-a-house-black-folks-reflect-on-what-home-means-to-them.html#:~:text=Given all this%2C where can,subconsciously elude peace and tranquility> [https://perma.cc/6UY5-VKST] (discussing how the concept of home is often viewed as one of community, legacy, and love); *Four Ways Homeownership Builds Generational Wealth*, TWIN CITIES HABITAT FOR HUMAN., <https://home.tchabitat.org/building-wealth-through-homeownership> [https://perma.cc/BMY7-SDAQ] (explaining how home values appreciate over time, and provide hidden benefits such as stability through hardship and better health and educational outcomes).

9. *Kelo v. City of New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting).

eminent domain abuse in Black communities. This Note posits that discriminatory valuation—which ignores the subjective value of generational wealth, joy, and culture—infringes upon the fundamental right to just compensation. To remedy this, Part IV introduces the “equitable market value,” a reparative valuation theory that incorporates these traditionally excluded elements to truly make the property owner whole. The Note contends that the Court must consider “withintrification”—a resident-led revitalization model—as a less restrictive alternative to the total displacement of Black property owners. This Note concludes in Part V by asserting that the equitable market value is not optional, but a mandatory requirement to meet the constitutional requirement of *just* compensation.

II. Legalized Abuse: Eminent Domain and the Black Land Struggle

A. Supreme Court Interpretation of “Public Use” and Just Compensation

Eminent domain is “an exercise of the power of government or quasi-government agencies to take private property for public use.”¹⁰ Or simply put, “eminent domain is the power of the government to take away someone’s private property,” for what they deem a better use.¹¹ Eminent domain has origins traced to the Magna Carta of 1215, which limited the King’s power to take property from its owner for public use without compensation.¹² This law was intended to protect landowners and limit government power.¹³ The United States federal government has expanded its purpose of acquiring property for public use through the Constitution’s Fifth Amendment Takings Clause, which is traditionally used to “facilitate transportation, supply water, construct public buildings, and aid in defense readiness.”¹⁴ The definition of “public use” is expansive, made possible through the following key cases: *Berman v. Parker* (1954), *Hawaii Housing Authority v. Midkiff* (1984), and *Kelo v. New London* (2005). The *Berman*, *Midkiff*, and *Kelo* cases exemplify how the Supreme Court advances the marketplace value of property by expanding the meaning of public use, further jeopardizing marginalized communities, particularly Black wealth, joy, and culture. The Court’s advancement keeps the Black community subordinate to the benefit of others’ wealth accumulation via property ownership, particularly in economic development takings.

1. *Berman v. Parker*

In *Berman v. Parker*,¹⁵ the Supreme Court determined the District of Columbia Redevelopment Act of 1945 did not violate the Fifth Amendment when authorizing the use of eminent domain in pursuance

10. *Eminent Domain*, U.S. DEP’T OF HOUS. AND URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/centers/sac/eminent [https://perma.cc/VL5H-TL8F].

11. *Eminent Domain: IJ Defends Homes and Businesses from Government Land Grabs*, INST. FOR JUST., <https://ij.org/issues/private-property/eminent-domain/> [https://perma.cc/VN5Q-4DG5].

12. Mazie Leftwich, *The Spirit of Eminent Domain: A historical accounting of honest and fair negotiations*, RIGHT OF WAY (Nov./Dec. 2017), at 39, https://eweb.irwaonline.org/eweb/upload/web_novdec_17_EminentDomain.pdf [https://perma.cc/PDH5-VD5N].

13. *Id.*

14. *Early Evolution of Eminent Domain Cases*, U.S. DEP’T OF JUST., <https://www.justice.gov/enrd/condemnation/land-acquisition-section/history-federal-use-eminent-domain> [https://perma.cc/W9TW-KUKU] (last updated Jan. 30, 2024).

15. 348 U.S. 26, 36 (1954).

of a comprehensive plan to eliminate and prevent slums, substandard housing, and blighted areas for the redevelopment. Congress stated that “the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use.”¹⁶ The redevelopment plan included the establishment of new homes, schools, churches, parks, streets, and shopping centers.¹⁷ The Court said legislative branches, whether Congress or individual state legislatures, have the authority to determine whether communities should be beautiful and sanitary, and it is not the Court’s determination of what housing is desirable or not.¹⁸ The Court also stated that “[i]f those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.”¹⁹ The Act lacked a definition of slums or blighted areas.²⁰

The appellants in *Berman* owned a department store within the designated blighted area.²¹ They objected to the appropriation of the property for the project’s purpose of beautification and slum clearance, as the land was commercial property, not slum housing.²² The appellants claimed that their property would be taken and put under the management of a private agency to redevelop the property for private use.²³ They believed their land should not be taken because it did not fit the kind of land targeted, nor should it be transferred to a private entity.²⁴ The Court stated that because the redevelopment plan eliminated slums and “blighted areas that tend to produce slums, . . . [p]roperty may, of course, be taken for this redevelopment, which, standing by itself, is innocuous, and unoffending.”²⁵ The Court also stated that Supreme Court Justices cannot say that “public ownership is the sole method of promoting the public purposes of community redevelopment projects.”²⁶ The power of eminent domain is simply a means to an end, and Congress has the sole power to determine the means of executing a project once the public purpose has been established.²⁷ The Court said, “the public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude.”²⁸ In *Berman*, Congress concluded that the public end, beautification and sanitation, was best served by eminent domain, even if it meant that end requires selling the property to private developers.²⁹ Just compensation

16. *Id.* at 29.

17. *Id.* at 34–35.

18. *Id.* at 33.

19. *Id.*

20. *Id.* at 36.

21. *Id.* at 31.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 35.

26. *Id.* at 34.

27. *Id.* at 33.

28. *Id.* at 33–34.

29. *Id.* at 34–35.

was used to satisfy the rights of the property owners.³⁰ Essentially, the word “public use” was transformed to mean “public purpose” in *Berman*.³¹

2. *Hawaii Housing Authority v. Midkiff*

The Supreme Court in *Hawaii Housing Authority v. Midkiff* found that a justified, rather conceivable, public purpose validates taking property from one person “for the benefit of another private person” via eminent domain with paid compensation.³² The Court gave deference to the legislature in determining what is public use “unless the use be palpably without reasonable foundation.”³³ The Hawaii legislature created the Land Reform Act of 1967 to “reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs,” said to be a practice of a State’s police powers.³⁴ The Act authorizes the Hawaii Housing Authority (“HHA”) to condemn lots where many people want to buy but cannot purchase land at fair prices.³⁵ The HHA could “limit the number of lots any one tenant can purchase and . . . use public funds to ensure that the market dilution goals will be achieved” to correct the “market failure.”³⁶ The Act allowed for the condemnation of residential tracts and the sale of land titles from the HHA to the existing lessees after compensating the lessor to reduce the concentration of fee simple ownership in Hawaii.³⁷ Here, the private taking of property was a legitimate purpose of government because it attacked the “certain perceived [evil] of concentrated property ownership”; therefore, using condemnation power was rational.³⁸ The Supreme Court made it clear that “[it] is not essential that the entire community, nor even a considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.”³⁹

3. *Kelo v. New London*

The Supreme Court did not find an illegitimate purpose in condemning residential property to transfer it to a private party for economic revitalization for the broader public in *Kelo v. New London*.⁴⁰ The City of New London approved a development plan to “create in excess of 1,000 jobs to increase tax and other revenues, and to revitalize an economically

30. *Id.* at 36.

31. Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse*, INST. FOR JUST. (2007), https://ij.org/wp-content/uploads/2015/03/Victimizing_the_Vulnerable.pdf [<https://perma.cc/N626-6PQK>].

32. 467 U.S. 229, 241 (1984).

33. *Id.* at 241.

34. *Id.* at 241–42.

35. *Id.* at 242.

36. *Id.*

37. *Id.* at 231–32.

38. *Id.* at 245.

39. *Id.* at 244 (citing *Rindge Co. v. Cnty. of Los Angeles*, 262 U.S. 700, 707 (1923)). See generally *Rindge Co.*, 262 U.S. at 707 (explaining that a highway which primarily extends through private land and provides little benefit to local residents still serve the general public by connecting adjacent cities and providing a scenic view for future drivers).

40. NCC Staff, *On this day, the Supreme Court redefines eminent domain*, NAT’L CONST. CTR. (June 23, 2023), <https://constitutioncenter.org/blog/on-this-day-the-supreme-court-redefines-eminent-domain> [<https://perma.cc/7LMF-XSPR>].

distressed city.”⁴¹ The city wanted to transfer the land to a private nonprofit organization, New London Development Corporation, for the land to be developed as a new Pfizer facility, to increase tax revenue, and provide jobs.⁴² Susette Kelo, amongst other local property owners, refused to sell their land.⁴³ The State claimed that taking the land was a “public use” and in the “public interest.”⁴⁴ Therefore, their properties were condemned only because they were located in the development area, not because they were blighted or in poor condition, like the property targeted in *Berman*, nor did the development plan address “certain perceived evils of concentrated property ownership” as in *Midkiff*.⁴⁵

The majority opinion acknowledged that the dissenting judges called for a heightened standard of judicial review for economic development takings.⁴⁶ In Justice Clarence Thomas’s dissent, he discussed how the definition of “public use” has strayed from the natural reading, “that the government may take property only if it actually uses or gives the public a legal right to use the property.”⁴⁷ Justice Thomas, in referencing the landmark case *United States v. Carolene Product Company*, stated that the justification for intrusive review is to protect “discrete and insular minorities,”⁴⁸ which should align in principle with the Public Use Clause, meant to protect “powerless groups and individuals.”⁴⁹

41. *Kelo*, 545 U.S. at 472.

42. NCC Staff, *supra* note 40.

43. *Kelo*, 545 U.S. at 472, 475.

44. *Id.* at 476.

45. *Id.*; see also *Midkiff*, 467 U.S. at 245.

46. *Kelo*, 545 U.S. at 477.

47. *Id.* at 521.

48. Strict scrutiny is required for laws that target “discrete and insular minorities.” Caroline Fredrickson and Ilan Wurman, *United States v. Carolene Product (1938)*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/supreme-court-case-library/united-states-v-carolene-products-co> [<https://perma.cc/7YWU-6D3C>]; Justice Harlan F. Stone stated in footnote 4 of *Carolene Product* that “legislation aimed at ‘discrete and insular’ minorities without the normal protections of the political process would be one exception to the presumption of constitutionality and justify heightened standard of judicial review.” Todd K. Beharry, *The Central Park Five As “Discrete and Insular” Minorities Under the Equal Protection Clause: The Evolution of the Right to Counsel For Wrongfully Convicted Minors*, 9 TOURO J. RACE GENDER & ETHNICITY 25, 49 (2020); The Court considers a list of factors of what is a “discrete and insular community,” including prejudice against the group, history of discrimination against the group, and the immutability of the group’s defining trait such as race. Marcy Strauss, *Reevaluating Suspect Classification*, 35 SEATTLE U. L. REV. 135, 146 (2011); African Americans were “the quintessential discrete and insular minority.” Thomas C. Berg, *Race Relations and Modern Church-State Relations*, 43 B.C. L. REV. 1009, 1011 (2002); African American property owners have experiences of prejudice rooted in historical practices such as redlining and racial covenants, and current prejudices like racially biased home appraisal, predatory lending and exclusionary zoning. Emily Peiffer, *The Ghosts of Housing Discrimination Reach Beyond Redlining*, URB. INST. (Mar. 15, 2023), <https://www.urban.org/stories/ghosts-housing-discrimination-reach-beyond-redlining#:~:text=The reasons for that emphasis,race%2C ethnicity%2C and religion> [<https://perma.cc/W9LD-V83H>]; see also Alisa Chang, Christopher Intagliata & Jonaki Mehta, *Black Americans and the Racist Architecture of Homeownership*, NPR (May 8, 2021, at 11:20 ET), <https://www.npr.org/sections/codeswitch/2021/05/08/991535564/black-americans-and-the-racist-architecture-of-homeownership#:~:text=The story of housing discrimination,tax revenue%2C diminishing school funding> [<https://perma.cc/NJ95-9UJZ>]. The history of discrimination Black property owners experience is discussed in Part I of this Note. Black/African American identity is an immutable trait. The impact of eminent domain on Black communities requires the Court’s protection as a “discrete and insular community” because it results in the displacement of a group of people, the loss of their property, and the destruction of their community’s economic and social fabric.

49. *Kelo*, 545 U.S. at 521–22 (Thomas, J., dissenting).

Although the question of just compensation was not before the Court, the majority's opinion understood that just compensation would not "minimize the hardship condemnations may entail."⁵⁰ Such hardship includes emotional injuries and social distress that "can stem from difficulty in finding a new residence, sentimental attachment to the property, and questionable usefulness of the property to the community."⁵¹ Justice Thomas dissenting states that "[s]o-called 'urban renewal' programs provide some compensation for the property they take, but no compensation is possible for the subjective value of such land to the individual displaced and the indignity inflicted by those uprooting them from their homes."⁵² Such takings for public purposes disproportionately fall on poor communities and those least politically powerful.⁵³ Justice Thomas supported his point when citing *Berman v. Parker* in his acknowledgment of "Negro Removal."⁵⁴ During the time of *Berman*, "urban renewal" meant "Negro removal."⁵⁵ Over 97% of persons in Project Area B, the project of concern in Southwest Washington, D.C., were African American or Black, referred to as "Negroes" in the *Berman* opinion, were ultimately forcibly removed when the Court upheld the project.⁵⁶ Justice Thomas predicted that the decision would exacerbate such effects on African Americans.⁵⁷ Institutional racism has historically forcibly detached African Americans from their property, resulting in the loss of their wealth, culture, and joy, with one of the early displacements of Black people in America being the promise of "40 Acres and a Mule."

B. Pawns of War: 40 Acres and a Mule

On January 12, 1865, General William T. Sherman and Secretary of War Edwin M. Stanton met with twenty ministers and asked them: "What do you want for your own people?"⁵⁸ They said, land to establish themselves.⁵⁹ The order identified 400,000 acres of land in South Carolina, Georgia, and Florida.⁶⁰ The land was intended for a Blacks-only settlement, and Sherman later promised to loan mules to the settlers.⁶¹ In the fall of 1865, President Andrew Johnson overturned the order, which returned the land to the previous white landowners who supported the Confederacy; the action displaced tens of thousands of Black settlers resulting in the white landowners driving away Black property owners with guns and federal troops forcefully evicting others.⁶² About two

50. *Id.* at 489 (majority opinion).

51. STANLEY L. BRODSKY, PRINCIPLES AND PRACTICE OF TRIAL CONSULTATION 187 (2009).

52. *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting).

53. *Id.*; see also *Berman*, 348 U.S. at 30.

54. *Kelo*, 545 U.S. at 520 (Thomas, J., dissenting).

55. *Id.*

56. *Berman*, 348 U.S. at 30.

57. *Id.*

58. Henry Louis Gates, Jr., *The Truth Behind '40 Acres and a Mile'*, PBS, <https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/the-truth-behind-40-acres-and-a-mule/> [https://perma.cc/4N2R-6AJS].

59. *Id.*

60. Special Field Ords. No. 15. (Jan. 16, 1865), <https://www.loc.gov/resource/mss83434.256/?sp=2&st=image&r=0.49,0.086,0.402,0.347,0> [https://perma.cc/NC2X-2AFQ].

61. See *id.*

62. Devon McCurdy, *Forty Acres and a Mule*, BLACKPAST (Dec. 15, 2007), <https://www.blackpast.org/african-american-history/forty-acres-and-mule/> [https://perma.cc/X48V-WG32].

thousand African Americans retained their land and worked the land, as initially envisioned by the twenty ministers.⁶³ The dispossession of land from African Americans is a cycle rooted in the legacy of chattel slavery, where the denial of ownership was a core tenet of enslavement. After emancipation, this struggle to build and retain land-based establishments continued through a combination of violence, discriminatory policies, and exploitation.

C. The Peak and Fall of Black Land Ownership

Black land ownership peaked in the early twentieth century, with approximately fifteen to sixteen million acres of land accumulated between 1865 and 1919.⁶⁴ Much of that land was owned by farmers.⁶⁵ African Americans acquired land in various ways during this period. They “leveraged relationships with white landowners, squatted on unused land, and saved hard-earned ‘Sunday money’ (extra wage labor done on the weekends) for a piece of land to call their own.”⁶⁶ Also, the Homestead Acts, mainly the Southern Homestead Act of 1866, helped more recently emancipated enslaved persons acquire land.⁶⁷

1. Homestead Acts

However, the Homestead Acts of 1862 and 1866 did not catalyze Black land ownership. President Abraham Lincoln signed the first Homestead Act of 1862, which offered citizens public land to cultivate.⁶⁸ Some African Americans, as early as 1865, had success homesteading in the Great Plains under the first Homestead Act.⁶⁹ The Homestead Act offered

63. *Id.*

64. Sheila McGrory-Klyza, *Preserving African-American Land Heritage*, LAND TR. ALL. (2015), <https://landtrustalliance.org/resources/learn/explore/preserving-african-american-land-heritage#related-resources> [https://perma.cc/C9MA-62RA]. See Dania V. Francis et al., *The Contemporary Relevance of Historic Black Land Loss*, A.B.A. (Jan. 6, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/wealth-disparities-in-civil-rights/the-contemporary-relevance-of-historic-black-land-loss/ [https://perma.cc/6S2K-HNE7]. There is a discrepancy in the actual year that Black landownership peaked due to available data.

65. More than ninety percent of the Black farmer-owned land acreage was lost by 1997, equating to a cumulative value loss of \$326 million. Dania V. Francis et al., *supra* note 64. Some Black farmers faced physical violence and terror at the hands of white landowners and violent mobs wanting their land. *A Black History of Black Land Ownership in the U.S.*, WATERKEEPERS CHESAPEAKE (Mar. 25, 2021), <https://waterkeeperschesapeake.org/a-brief-history-of-black-land-ownership-in-the-u-s/> [https://perma.cc/7YM4-QJS8]. The USDA discriminated against Black farm owners by making adequate farm financing and operation capital hard to access through their aid. Edward J. Pennick, *Land Ownership and Black Economic Development*, 21 THE BLACK SCHOLAR 43, 43 (1990), <https://www.jstor.org/stable/41067672> [https://perma.cc/JDB2-3A4G].

66. *Sharecropping, Black Land Acquisition, and White Supremacy (1868–1900)*, SANFORD SCH. OF PUB. POL’Y, [https://wfpc.sanford.duke.edu/north-carolina/durham-food-history/sharecropping-black-land-acquisition-and-white-supremacy-1868-1900/#:~:text=Despite nearly a third of,5%2C000 of those were Black](https://wfpc.sanford.duke.edu/north-carolina/durham-food-history/sharecropping-black-land-acquisition-and-white-supremacy-1868-1900/#:~:text=Despite%20nearly%20a%20third%20of%20those%20were%20Black) [https://perma.cc/V4CZ-HNAP].

67. See Muhammad et al., *African Americans and federal land policy: Exploring the Homestead Acts of 1862 and 1866*, 46 APPLIED ECON. PERSP. & POL’Y 95, 96 (2023), <https://onlinelibrary.wiley.com/doi/full/10.1002/aep.13401> [https://perma.cc/6HUK-X2PC].

68. *Id.* See generally *Homestead Act (1862)*, NAT’L ARCHIVES, [https://www.archives.gov/milestone-documents/homestead-act#:~:text=The Homestead Act%2C enacted during,plot by cultivating the land](https://www.archives.gov/milestone-documents/homestead-act#:~:text=The%20Homestead%20Act%2C%20enacted%20during%20the%20Civil%20War%20and%20the%20 Reconstruction%20Era) [https://perma.cc/YRL5-CUA6] (last updated Jun. 7, 2022) (describing the 1862 Act which granted 160 acres of public land to citizens willing to live on and “improve” the land).

69. *African American Homesteaders in the Great Plains*, NAT’L PARK SERV., <https://www.nps.gov/articles/african-american-homesteaders-in-the-great-plains.htm> [https://perma.cc/2Z55-VAHA].

hope to those seeking a fresh start and to be regarded as landowners.⁷⁰ The Southern Homestead Act of 1866 encouraged land ownership for freed slaves and poor whites.⁷¹ The latter act offered forty-six million acres of public land in the American South: Alabama, Mississippi, Louisiana, Arkansas, and Florida.⁷² The 1866 Act actually hindered land ownership for the formerly enslaved because the reserved land was “mostly swampy, poorly drained, and unsuitable for settlement without large expenditures, all of which were major deterrents to homesteading.”⁷³ Less than six thousand African Americans were successfully homesteaded by 1876 out of the nearly four million freed African Americans at the time of emancipation.⁷⁴ The 1866 Act was repealed at the end of the Reconstruction Era in 1876, while the 1862 Act lasted until 1976.⁷⁵

2. The Decline of the American Dream

The American Dream is anchored in ownership, particularly property ownership. As of 2022, African Americans wholly own 1.1 million acres of land.⁷⁶ The legal system, amongst other factors like white violence, harmed Black landowners through estate planning, partition sales, the Torrens Act, and tax sales.⁷⁷ The failure to write wills, which often control land passage via heirs’ property law, led to the loss of much Black-owned land.⁷⁸ And white developers prey on families by using the Torrens Act to prompt partition sales amongst relatives.⁷⁹ Partition sales occur when one property owner wants to sell while the others refuse—by filing a

70. *Colorblind Homestead Act?*, NEB. PUB. MEDIA, <https://nebraskastudies.org/en/1850-1874/who-were-the-settlers-who-was-daniel-freeman/colorblind-homestead-act/> [https://perma.cc/P57E-HFXK]. While often romanticized as a pillar of American opportunity, the Homestead Act of 1862 functioned as a racially exclusionary mechanism for generational wealth:

Meanwhile, as Jim Crow ossified, the Federal Government was “giving away land” on the western frontier, and with it “the opportunity for upward mobility and a more secure future,” over the 1862 Homestead Act’s three-quarter-century tenure. Black people were exceedingly unlikely to be allowed to share in those benefits, which by one calculation may have advantaged approximately 46 million Americans living today.

Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 389 (2023) (Jackson, J., dissenting).

71. Muhammad et al., *supra* note 67, at 96.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* See generally *About the Homestead Act*, NAT’L PARK SERV., <https://www.nps.gov/home/learn/historyculture/abouthomesteadactlaw.htm#:~:text=The prime land across the,homesteading in Alaska until 1986> [https://perma.cc/V4FZ-7SYG] (last updated Oct. 12, 2022) (providing an overview of the Act’s timeline, including its eventual repeal).

76. Tykeisa Nesbitt, *Black Land Theft and the Racial Wealth Divide*, INEQUALITY.ORG (May 6, 2022), <https://inequality.org/research/black-land-theft-racial-wealth-divide/> [https://perma.cc/RM4X-YF5L].

77. *One Million Black Families in the South Have Lost Their Farms*, EQUAL JUST. INITIATIVE (Oct. 11, 2019), <https://eji.org/news/one-million-black-families-have-lost-their-farms/> [https://perma.cc/Z2GR-UJWD].

78. Harold A. McDougall, *Black Landowners Beware: A Proposal for Statutory Reform*, 9 N.Y.U. REV. L. & SOC. CHANGE 127, 128 (1979–1980).

79. Nesbitt, *supra* note 76. See, e.g., Lizzie Presser, *The Reels Brothers Spent Eight Years in Jail for Refusing to Leave It*, PROPUBLICA (July 15, 2019), <https://features.propublica.org/black-land-loss/heirs-property-rights-why-black-families-lose-land-south/> [https://perma.cc/SY3X-U8GU]. See generally *Silver Dollar Road* (Amazon Studios 2023) (providing an example of a Black family that lost their land to partition sales and lack of a will).

partition action; the sale is forced.⁸⁰ The Torrens Act, upheld in North Carolina and other states with their own versions, allows “an adverse possessor [to] claim ownership of a land parcel when one physically ‘possesse[s] the property under known and visible lines and boundaries adversely to all other persons for 20 years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability.’”⁸¹ The Torrens Act is meant to settle “muddled” titles, and various versions have been adopted in several states.⁸² This process does not require the adverse possession claim to go through the traditional judicial proceeding, meaning none of the other family members are informed that they lost their land.⁸³ Additionally, some owners on fixed income who could not afford high annual property taxes had their properties auctioned off through tax sales upon default.⁸⁴

D. *The Problem*: Eminent Domain Abuse in Black Communities

Urban renewal displaced African Americans at a disproportionate rate.⁸⁵ The following stories are examples of eminent domain abuse against Black property owners. Eminent domain abuse occurs “when the government or its entities seize private property for purposes other than genuine public use or fail to provide fair compensation to the property owner.”⁸⁶ Such abuses are exemplified when property is taken for private benefit—property owners are inadequately compensated, denied due process, or targeted based on their protected status, such as race (described as arbitrary or discriminatory takings).⁸⁷

A prominent historical example of a discriminatory taking is the seizure of Bruce’s Beach. In 1912, Willa Bruce and Charles A. Bruce owned a Black beach resort, Bruce’s Beach,⁸⁸ located in Manhattan Beach, Los Angeles County, California.⁸⁹ After experiencing racial violence from white landowners, their property was condemned because of “community animus and racial intolerance” under the guise of proposed park that never

80. Nesbitt, *supra* note 76.

81. Will Breland, *Acres of Distrust: Heirs Property, the Law’s Roles in Sowing Suspicion Among Americans and How Lawyers Can Help Curb Black Land Loss*, 28 GEO. J. POVERTY L. & POL’Y 377, 379 (2021).

82. *Id.* at 379 n.9.

83. *Id.* at 379–80. See generally *Underwriting Manual: Torrens Registration System*, STEWART TITLE GUAR. CO., <https://www.virtualunderwriter.com/underwriting-manuals/2005/12/UM00000004> [https://perma.cc/F339-G67D] (noting that the Torrens process permits transfer of title without notice to any unregistered interested party).

84. Nesbitt, *supra* note 76.

85. Mindy Thompson Fullove, *Eminent Domain & African Americans: What is the Price of the Commons?*, 1 PERSP. ON EMINENT DOMAIN ABUSE 1, 2 (2007); *Berman* allowed private property to be taken for private redevelopment if the land area is blighted and a public health concern. *Berman*, 348 U.S. at 35.

86. *5 Famous Cases of Eminent Domain Abuse*, PURDY & BAILEY, LLP (Jan. 20, 2020), <https://www.purdybailey.com/blog/2020/january/5-famous-cases-of-eminent-domain-abuse/> [https://perma.cc/DEE8-UVU8].

87. *Id.*

88. Bill Chappell, *The Black Family who won the return of Bruce’s Beach will sell it back to LA County*, NPR (Jan. 4, 2023, at 11:43 ET), <https://www.npr.org/2023/01/04/1146879302/bruces-beach-la-county-california> [https://perma.cc/7WWE-G8XQ].

89. *Bruce’s Beach*, CHIEF EXEC. OFFICE, <https://ceo.lacounty.gov/ardi/bruces-beach/> [https://perma.cc/JZ43-PWWP] (last visited Feb. 17, 2026).

manifested on their former property.⁹⁰ Willa and Charles Bruce died in poverty⁹¹—working as cooks in someone else’s restaurant with Willa losing her mind from the stress of it all—and their grandson Bernard Bruce spent decades fighting to restore the family’s legacy, dying of Covid-19 in January 2021, eighteen months before the County of Los Angeles returned the land to their great-grandsons, Marcus and Derrick Bruce, who subsequently sold it back to the County for nearly \$20 million.⁹² Attorney George Fatheree III stated that the descendants of the Bruces were robbed of their birthright to the land that their ancestors set up for them.⁹³ The implications of this decision are examined in Part III.D, *infra*.

In the 1960s, a Black community within Newport News, Virginia, lost most of its homes so the city could intentionally build and expand Christopher Newport University to extinguish the Black community’s desire to expand their neighborhood along the Shoe Lane area.⁹⁴ The Shoe Lane Community encompassed a church, farmland, and around

90. Ryan v. Los Angeles Cnty. Bd. of Supervisors, No. 21STCV38353, at *11 (Super. Ct. of Cal., Cnty. of L.A., Apr. 14, 2022) (order denying petition for writ of mandate), https://file.lacounty.gov/SDSInter/lac/1122973_2022-04-14OrderDenyingWrit.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= [https://perma.cc/7MJZ-93C6]. See generally *Los Angeles County Contemplates Landmark Return of Bruce’s Beach to the Rightful Heirs of Charles and Willa Bruce*, CNTY. OF L.A. SUPERVISOR, <https://hahn.lacounty.gov/los-angeles-county-completes-landmark-return-of-bruces-beach-to-the-rightful-heirs-of-charles-and-willa-bruce/> [https://perma.cc/GR43-J2SM] (providing the history of Bruce’s Beach and the state’s efforts to return the property to the family’s descendants).

91. B.C. LAW, *The Land Conference: Fireside Chat with George Fatheree III*, (YouTube, Apr. 3, 2023), <https://youtu.be/TkJI3Mftc0s?si=gz3qyhFmLjEhXQmr>.

92. *Id.*; Jesus Jiménez, *Los Angeles County Votes to Return Beach Seized in 1924 From a Black Family*, N.Y. TIMES (June 28, 2022), <https://www.nytimes.com/2022/06/28/us/bruces-beach-black-descendants.html> [https://perma.cc/NEP5-ZRCN].

93. *Id.* Bruce’s Beach was the perfect embodiment of Black wealth, joy and culture examined in Part III.D, *infra*. In the 1910s and 1920s, African Americans were moving from the rural South to the North, Midwest, and West for economic opportunity and safety from Jim Crows laws and racial oppression. Bruce’s Beach created a space for Black beachgoers amidst the racialized residential and public facilities segregation with beach access, a lodge, café and dance hall. *Building a Community: A Look at African American Institutions in Early Los Angeles*, L.A. PUB. LIBR. (Feb. 1, 2021), <https://www.lapl.org/collections-resources/blogs/lapl/building-community-look-african-american-institutions-early-los#~:text=in Los Angeles.,Civic Organizations,an overall population of 319%2C198> [https://perma.cc/TM5F-RFPQ]; Danny Hajek et al., *A Black family got their beach back — and inspired others to fight against land theft*, NPR (Oct. 10, 2021, at 07:01 ET), <https://www.npr.org/2021/10/10/1043821492/black-americans-land-history#~:text=Shepard’s ancestors%2C an African American,African American Museum hide caption> [https://perma.cc/3H98-B425]. Beyond economic security, property ownership empowered the couple to create a sanctuary that radiated joy and culture to Black beachgoers. The visible resistance and resilience embodied in the Black community’s wealth, joy, and cultural expression directly challenge the policing of Black bodies. This affirmation of Black liberation not only threatened the status quo but also provoked resentment, likely fueling the racially motivated eminent domain proceedings against the Bruces. “The white gaze will have folks believing that Black folks exist for the consumption, entertainment and enlightenment of whiteness and anything outside of that is deemed offensive.” Emily, *Black Joy Is Liberation*, CUPCAKES & CASHMERE (Mar. 8, 2022), <https://cupcakesandcashmere.com/blog/lifestyle/black-joy-is-liberation/#~:text=What about the playfulness%2C laughter,woman%2C a joyful Black woman> [https://perma.cc/RNY9-ZTDS].

94. Brandi Kellam, et al., *“Uprooted” Explores How University Expansion and Eminent Domain Led to Black Land Loss*, PROPUBLICA (Dec. 9, 2023), <https://www.propublica.org/article/uprooted-documentary-christopher-newport-university-black-neighborhoods> [https://perma.cc/6NSC-4LZ6]. See generally PROPUBLICA, *Uprooted: What a Black Community Lost When a Virginia University Grew*, (YouTube, Dec. 9, 2023), <https://youtu.be/o80ENCqNFAc?si=C2WfQheOLeH9CSu> (documenting how a long-established Black neighborhood in Newport News was prevent from expanding and displaced by the creation of Christopher Newport University).

twenty Black families.⁹⁵ Residents had jobs as teachers, dentists, a high school principal, and an engineer at the National Aeronautics and Space Administration (“NASA”).⁹⁶ The Newport News City Council disregarded homeowners’ and civil rights advocates’ protests, which. Included suggestions for more suitable and less expensive sites for the college.⁹⁷ The city council paid property owners 20% less than what an independent appraiser valued.⁹⁸ Previous Black property owners, James and Barbara Johnson, have files and photo albums; one album is titled “The Demise of a Community,” and depicts what the Shoe Lane community used to be and might have become.⁹⁹ The true measure of racial harm lies not just in what happened, but in all that was prevented. Christopher Newport University’s all-white status, until 1965,¹⁰⁰ was the physical manifestation of the absence and disregard of Black wealth, joy, and culture.

The town of Lakeland was incorporated into College Park, Maryland, despite the majority of residents’ opposition and their suspicion that it was a political move to take their land to expand the university.¹⁰¹ Most Lakeland residents voted against the merger, with 173 votes against it and 9 votes for it.¹⁰² A Department of Housing and Urban Development (“HUD”) urban renewal project, supported by the city council and the University of Maryland-College Park, demolished 104 of 150 homes, including the east side of Lakeland, which is now a man-made lake.¹⁰³

The legislature has great deference in eminent domain proceedings by delineating what constitutes public use, and these historical incidents support the prevalence of discrimination in property takings that led to the loss of Black wealth in Bruce’s Beach, Newport News, and Lakeland. Eradicating eminent domain pursued against marginalized populations would be a challenging case to make if the purpose adheres to a narrow meaning of public use. The Supreme Court cases, *Berman*, *Midkiff*, and *Kelo*, have exemplified how expansive “public use” is to qualify a property for eminent domain, originating as government-promoted projects such as clearing space to develop trainways and highways, to clearing the way for private developments. There needs to be heightened

95. Brandi Kellam & Louis Hansen, *Christopher Newport expansion erased a Black neighborhood*, VPM (Sep. 26, 2023, at 02:53 ET), <https://www.vpm.org/news/2023-09-26/christopher-newport-university-shoe-lane-displacement-newport-news> [https://perma.cc/2V7H-XNYA].

96. Kellam, et al., *supra* note 94.

97. *Id.*

98. Brandi Kellam & Louis Hansen, *Erasing the “Black Spot”: How a Virginia College Expanded by Uprooting a Black Neighborhood*, PROPUBLICA (Sep. 5, 2023), <https://www.propublica.org/article/how-virginia-college-expanded-by-uprooting-black-neighborhood> [https://perma.cc/2CGL-TLBA].

99. Kellam et al., *supra* note 94.

100. *Id.*

101. *A Chance To Cooperate*, GREENBELT COOPERATOR, June 8, 1945, at 2.

102. *Id.*

103. Teneille Gibson, Dominique Moody, and Maggie More, *‘People just want to come back home:’ The story of Lakeland, Maryland*, NBC4 WASH. (Feb. 15, 2025), <https://www.nbcwashington.com/discover-black-heritage/people-just-want-to-come-back-home-the-story-of-lakeland-maryland/3845963/> [https://perma.cc/AD8H-SMAX]; Lake Artemesia in Lakeland and other examples of erasures of Black towns drowned the Black wealth, joy and culture, and possibilities of its flourishing. See generally THE AMBER RUFFIN SHOW, *Beyond Tulsa: The Secret History of Flooding Black Towns to Make Lakes*, (YouTube, June 25, 2021), <https://youtu.be/l3D4hSQcWbk?si=x8pXvGoPwrC4SCgn> (detailing black town erasure examples nationwide).

scrutiny of what is “public use” to control the taking of property, especially when just compensation is not sufficient for the loss of Black wealth, joy, and culture.

The following argument examines the fair market equation. The majority opinion in *Kelo* already acknowledged that just compensation may not be sufficient to compensate for hardship, thereby raising the question of whether fair market value constitutes “just” compensation.¹⁰⁴ Expanding just compensation is an avenue to prevent more incidents of eminent domain abuse against Black property owners. If the compensation amount is inadequate, the taking of property would be unconstitutional, preventing a court from allowing the eminent domain proceeding to successfully take and save another property owner from hardship.

III. The Limits of Just Compensation: Takings, Fair Market Value, and Subjective Value

Just compensation is used to acknowledge and justify the involuntary dispossession of one’s property, partially or entirely, by the government for public use, which is legally referred to as a taking. The following section will discuss: (A) what a taking is and what economic development takings are; (B) how the Supreme Court interprets fair market value; (C) how fair market value is calculated; and (D) the failure to “justly” compensate African American property owners.

A. *Takings*: The Requirement of Just Compensation

The Supreme Court has “invariably found a taking” when “faced with a constitutional challenge to a permanent physical occupation of real property.”¹⁰⁵ There are two types of takings: possessory and regulatory.¹⁰⁶ Possessory takings, or physical takings, occur where the “government confiscates or occupies property.”¹⁰⁷ Possessory takings can consist of a seizure of portions of land, a seizure of land in its entirety, or creation of an easement.¹⁰⁸ An easement is “a legal right that gives its holder a non-ownership interest in land that someone else owns.”¹⁰⁹ Regulatory takings occur “when government regulation leaves no reasonable economically viable use of the property.”¹¹⁰

1. *Economic Development Takings Displaces Black Community for Corporate Gain*

Economic development takings occur “when the government condemns property through the power of eminent domain and then transfers that property to a new private owner, citing the possibility of ‘economic development’ as the sole justification,” which can include uses such as improvement to the local economy, increased employment, and increased

104. *Kelo*, 545 U.S. at 489.

105. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982).

106. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 641 (3rd ed. 2006).

107. *Id.* at 641.

108. *Id.* at 642–43.

109. Michelle Llamas, *Easement*, CONSUMERNOTICE.ORG (Mar. 20, 2023), <https://www.consumernotice.org/legal/eminent-domain/easement/> [https://perma.cc/4BEX-JUEU].

110. CHERMERINSKY, *supra* note 106, at 641.

tax revenue.¹¹¹ This subsection illustrates and discusses economic development takings against landowners, beginning with a Black community at risk of losing their land in Tennessee, currently.

Ford Motor Company is venturing to create its BlueOval City, “an automotive manufacturing ecosystem,” in Tennessee.¹¹² BlueOval City is a \$5.6 billion campus in Stanton, Haywood County, Tennessee, for battery and electric vehicle manufacturing, projected to employ six thousand people, on land previously owned by the State of Tennessee.¹¹³ The Tennessee Department of Transportation is looking to construct road connections in the surrounding counties of Haywood, Tipton, and Fayette using eminent domain because the commuter and freight traffic is anticipated to increase when the project is fully developed and operational.¹¹⁴ Eminent domain has been historically used to create the highway system we know today, as the Federal Aid Highway Act of 1956 routed highways through Black and brown neighborhoods, sometimes intentionally, displacing residents and seizing their homes.¹¹⁵ The development of BlueOval City is an example of current-day eminent domain attempts to take entire plots or portions of Black-owned land for private use.

Rosa Whitmore-Miller, a Black landowner in Stanton, Tennessee, was initially offered \$8,000 for the farmland her family purchased in 1958—Rosa and her ten siblings worked on the farm to pay off the property and rent it to a local farmer.¹¹⁶ Another family in Stanton, the Sanderlins, whose ten acres of land is in the path connecting the BlueOval City to the interstate, received a state land appraisal letter stating each acre was worth between \$3,500 and \$10,000.¹¹⁷ The family was offered the lower end of the scale at a total of \$35,000 for all ten acres, of which two of the acres host their timber business that saved them through a rough farming period.¹¹⁸ Haywood County is the only affected county that has a majority Black population,¹¹⁹ but it also has a rich history between Black people and land ownership. For example, the Haywood County Farm Project, a federal Farm Security Administration initiative, provided African American residents with small rental farms and the option to

111. Ilya Somin, *The Case Against Economic Development Takings*, 1 N.Y.U. J. L. & LIBERTY 949, 950 (2005).

112. BLUEOVAL CITY, FORD, <https://corporate.ford.com/operations/blue-oval-city.html> [<https://perma.cc/NQQ6-UW9A>] (last visited Feb. 17, 2026).

113. Aallyah Wright, *Tennessee Wants to Take Land from Black Residents So a Ford Plant Can Benefit*, CAP. B (Apr. 20, 2023), <https://capitalbnews.org/tennessee-eminant-domain/> [<https://perma.cc/LUZ5-LRUD>]; State Route 194, TDOT DEP'T OF TRANSP., <https://www.tn.gov/tdot/projects/region-4/sr-194-extension-exit-39.html> [<https://perma.cc/DJ4Y-TRNC>] (last visited Feb. 17, 2026).

114. *State Route 194*, *supra* note 113.

115. Noel King, *A Brief History Of How Racism Shaped Interstate Highways*, NPR (Apr. 7, 2021, at 05:02 ET), <https://www.npr.org/2021/04/07/984784455/a-brief-history-of-how-racism-shaped-interstate-highways> [<https://perma.cc/RVD5-WY8Y>].

116. Aallyah Wright, *supra* note 113.

117. *Id.*

118. *Id.*

119. *Haywood County Tennessee*, CENSUS REP. (2023), <https://censusreporter.org/profiles/05000US47075-haywood-county-tn/> [<https://perma.cc/4JJT-YCV3>] (last visited Feb. 18, 2026).

buy between 1939 and 1940.¹²⁰ Thirty-nine families participated in the project.¹²¹ Farmland represented more than just a material asset or income, but a “means of self-determination, self-sufficiency, and a foundation for economic and political power” to Black families.¹²² The value of land should not be limited to its physical worth.

Residents have recognized the current and future impacts of BlueOval City’s development, including rising housing costs, environmental concerns regarding water and air quality, and “predatory land grabs in historically [B]lack agricultural communities.”¹²³ Black property owners across the three counties, especially Haywood County, are set to lose not only their physical land, but also the stability and heritage their land provides as the government seeks to undermine another federal government project meant to empower Black residents. The State of Tennessee and Ford Motor Company should find a different route to create access into BlueOval City before it becomes fully operational, by improving the current transit network to accommodate the anticipated traffic growth and considering the environmental impact on the health of nearby residents and the surrounding land.

Tennessee is one of many states that have not banned economic development takings. However, the State of Michigan amended its state constitution to limit economic development takings after permitting such takings in *Poletown Neighborhood Council v. Detroit* (1981) and

120. Emma Nunn, *Haywood County*, TENN. ENCYCLOPEDIA (Oct. 8, 2017), <https://tennesseencyclopedia.net/entries/haywood-county/> [https://perma.cc/2UXX-BKX5]. See generally *Haywood Farms Project - Stanton TN*, LIVING NEW DEAL, <https://livingnewdeal.org/sites/haywood-farms-project/> [https://perma.cc/QC3J-CTQL] (last visited Feb. 18, 2026) (describing the Farm Security Administration and its relationship to the development of land for African American families).

121. *Id.*

122. *Sharecropping, Black Land Acquisition, and White Supremacy (1868–1900)*, *supra* note 66.

123. The Blue Oval Good Neighbors and Tennessee For All, amongst several partners, requested Bob Holycross, the Vice President of Environment, Sustainability and Safety of Ford Motor Company, to be a “good neighbor” and negotiate a community benefits agreement with the community that proposes the following objectives: (1) preserve the local environment and ensure proper water and air quality protections; (2) fund local education and workforce programs, and hire residents of Haywood, Tipton, Lauderdale, Shelby, and Fayette counties; (3) provide affordable housing in the directly impacted counties to prevent displacement; and (4) “safeguard our agricultural communities who are promised generational wealth but are being asked to sell their land at a price that only leave crumbs for their children and grandchildren.” Adam Friedman, *West Tennessee group makes another push for Ford to negotiate a community benefit agreement*, TENN. LOOKOUT (June 25, 2024, at 05:00 CT), <https://tennesseelookout.com/2024/06/25/west-tennessee-group-makes-another-push-for-ford-to-negotiate-a-community-benefit-agreement/> [https://perma.cc/AM9A-BQT7]; The community has been waiting for a response from Ford since April 2024, after formally inviting the company to the table. BLUE OVAL GOOD NEIGHBORS, *Ford, Come to the Table To Ensure Blue Oval’s Legacy Is Not Reinforcing Historic Racism in West Tennessee*, TENN. FOR ALL, <https://www.tn4all.org/ford-blueoval> [https://perma.cc/76AT-EA8N]; This letter is most likely a response to Ford’s “Good Neighbor Plan for West Tennessee” released in January 2024, which includes a \$9 million investment into community gathering spaces, community preservation, environmental protection, literacy programs, support for farmers and businesses, workforce development, and youth programs. The Equitable Growth Advisory Council, FORD MOTOR COMPANY (Jan 23, 2024), <https://www.fromtheroad.ford.com/us/en/articles/2025/ford-good-neighbor-plan-west-tennessee> [https://perma.cc/M85M-FSVW]; Rebekah Gorbea, a spokesperson for Tennessee For All, stated that “Ford expressed concern over the ‘legally-binding’ part of the Community Benefits Agreement.” Friedman, *supra*; Construction of BlueOval City concluded in 2025, with electric vehicle battery production planned to commence in 2027. Brett Foote, *Ford BlueOval City Construction Completed Despite EV Pickup Delay*, FORD AUTH. (Sep. 18, 2025, at 10:15 ET), <https://fordauthority.com/2025/09/ford-blueoval-city-construction-completed-despite-ev-pickup-delay/> [https://perma.cc/3MJC-KGAY].

overturing that very ruling in *County of Wayne v. Hathcock* (2004).¹²⁴ The Michigan Supreme Court ruled that the court must inspect with heightened scrutiny what is required for claims where the public interest is the predominant interest being advanced in condemnation power.¹²⁵ The Michigan constitutional requirement of “‘public use’ . . . prohibit[s] the state from transferring condemned property to private entities for a private use.”¹²⁶ The Michigan Supreme Court, in *Hathcock*, found that the condemnation in *Poletown* was unconstitutional as the condemnation benefited General Motors, a private entity, which outweighed public use.¹²⁷ The court found that the transfer of condemned property to a private entity is appropriate in one of the three following situations:

- (1) [W]here public necessity of the extreme sort requires collective action;
- (2) where the property remains subject to public oversight after transfer to a private entity; and
- (3) where the property is selected because of facts of independent public significance, rather than the interests of the private entity to which the property is eventually transferred.¹²⁸

Like many other states, Michigan’s constitution still leaves a “loophole” for blighted areas to be vulnerable to economic development takings.¹²⁹ Blight is often a trigger word for urban renewal.¹³⁰ James Baldwin said, “urban renewal means negro removal,” and Justice Thomas acknowledged this in *Kelo*.¹³¹ The Institute for Justice found that cities usually target communities of color with lower levels of income and education for condemnations, “as government officials know the residents there rarely have the political clout or the financial means to fight back.”¹³² More protection is needed for Black communities, especially those susceptible to condemnations and in the path of economic development plans often not meant to primarily benefit them. This can be done by finding that the enforcement of eminent domain against Black communities is discriminatory. In addition to a discriminatory finding, Black property owners constitute “discrete and insular minorities,” which

124. CITIZENS RSCH. COUNCIL OF MICH., ARTICLE X - PROPERTY, Special Report No. 360-13, at 3 (2010), <https://csrcmich.org/PUBLICAT/2010s/2010/rpt36013.pdf> [<https://perma.cc/6JX7-EAH8>]; see also MICH. CONST. art. X, § 2 (as amended 2006).

125. *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 634–35 (1981).

126. *Cnty. of Wayne v. Hathcock*, 471 Mich. 445, 472 (2004).

127. *Id.* at 476.

128. *Id.*

129. See generally David T. Beito & Ilya Somin, *Battle over Eminent Domain is Another Civil Rights Issue*, CATO INST. (Apr. 27, 2008), <https://www.cato.org/commentary/battle-over-eminent-domain-another-civil-rights-issue> [<https://perma.cc/2DNJ-2E2W>] (discussing ongoing state-level loopholes in eminent domain restrictions); MICH. CONST. art. X, § 2 (1964) (permitting takings for public use).

130. Justin Garrett Moore, *Why We Need a New Word for “Blight”*, MEDIUM (Oct. 8, 2015), <https://medium.com/@jgmoore/why-we-need-a-new-word-for-blight-52a65fbf1b73#pko74m5zt> [<https://perma.cc/5C2K-YM99>].

131. VINCE GRAHAM, *Urban Renewal...Means Negro Removal. ~ James Baldwin (1963)*, at 00:30–00:36 (YouTube, June 3, 2015), https://youtu.be/T8Abhj17kYU?si=VdE0KqzWY_DT4itf; *Kelo*, 545 U.S. at 522 (Thomas, J., dissenting).

132. *North Carolina Eminent Domain*, INST. FOR JUST., [https://ij.org/issues/private-property/eminent-domain/north-carolina-eminent-domain-laws/#:~:text=Communities targeted by eminent domain,financial means to fight back](https://ij.org/issues/private-property/eminent-domain/north-carolina-eminent-domain-laws/#:~:text=Communities%20targeted%20by%20eminent%20domain,financial%20means%20to%20fight%20back) [<https://perma.cc/7DDS-Z9G8>] (last visited Feb. 18, 2026).

would require the U.S. government to provide more *just* compensation that accounts for both the history of Black land loss and the value of property to Black people beyond fair market value.

B. Defining "Just Compensation: The Willing Seller Fiction and the Exclusion of Compensating for Intangible Value

The Supreme Court found just compensation to be the standard fair market value.¹³³ Fair market value is the “price which property will bring when offered by a willing seller to a willing buyer, neither obligated to buy or sell,” which is contradictory in nature, as eminent domain proceedings are literal forced sales.¹³⁴ The Supreme Court of the United States affirmed the Supreme Court of Oklahoma’s use of the willing buyer and seller hypothetical to define fair market value with consideration of “all purposes, present and prospective, for which the land was adapted and might in reason be applied.”¹³⁵ “The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken,”¹³⁶ and given the “fair market value of the property at the time of the taking.”¹³⁷ Compensation is a measurement of suitable uses of the property to its environment or what is reasonably expected of the land in its immediate future; however, it does not encompass imaginary or speculative potential plans of use.¹³⁸ Just compensation can also be alternatively measured “when market value is too difficult to find, or when its application would result in manifest injustice to owner or public.”¹³⁹

The Court in *United States v. Commodities Trading Corporation* raised the question: “What compensation is ‘just’ both to an owner whose property is taken and to the public that must pay the bill?”¹⁴⁰ The undervaluation of the Black land loss crisis hinders Black wealth growth and leads to the loss of joy and culture for displaced Black owners.¹⁴¹ This represents an injustice, and the cost of *just* compensation is too high for the public to afford.

133. *United States v. 50 Acres of Land*, 469 U.S. 24, 25–26 (1984).

134. *Elmhurst Cemetery Co. v. Comm’r.*, 300 U.S. 37, 39 (1937).

135. *Grand River Dam Auth. v. Grand-Hydro*, 335 U.S. 359, 367–68 (1948).

136. *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

137. *Id.*

138. *Chi., Burlington & Quincy*, 166 U.S. at 250.

139. *Kirby Forest Indus. v. United States*, 467 U.S. 1, 9 n.14 (1984) (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)).

140. *Commodities Trading Corp.*, 339 U.S. at 123.

141. Footnote 15 of *Kirby Forest Indus.* acknowledges that fair market value may not compensate for the special value owner’s hold to their property but that that “occasional inequity” is tolerable because it is difficult to access the value of property to each individual and for the need of a “clear, easily administrable rule governing the measure of ‘just compensation.’” *Kirby Forest Indus.*, 467 U.S. at 10 n.15. I would respond to this “tolerance” and question what is “occasional.” I would assume the Black property owners have experienced inadequate just compensation beyond what is considered “occasional” inequity, given the eminent domain abuse Black communities disproportionately face. Regarding the loss of subjective value. See generally THE CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN ABUSE BRIEFING REPORT 32 (U.S. Commission on Civil Rights 2014), https://www.usccr.gov/files/pubs/docs/FINAL_FY14_Eminent-Domain-Report.pdf [<https://perma.cc/HPW9-FGKB>] (discussing the impact of eminent domain abuse on poor and minority communities and its civil rights implications).

C. A Flawed Standard: How Traditional Property Valuation Undermines Black Property Ownership

There are four options to determine fair market value: selling price or cost, sales of comparable assets, appraised value, or price per square foot.¹⁴² An agreed price between a willing buyer and seller is based on the parties' "reasonable knowledge of the property and current market trends."¹⁴³ This method is hypothetical, as eminent domain is a forced sale, triggered specifically because the property owner is not a willing participant in the land transaction. Comparable assets are incorporated into a comparative market analysis in which the property is compared to similar properties, often recently sold.¹⁴⁴ Homes in Black neighborhoods are undervalued by 21–23% compared to their value if they were in non-Black neighborhoods.¹⁴⁵ The cycle of undervaluing homes diminishes the wealth-building power of homeownership by creating a barrier to profit in voluntary sales and underestimates the true fair market value if the valuation of the home is already low.¹⁴⁶

Land appraisal is a "professional assessment of the value of a piece of land."¹⁴⁷ A land appraiser considers several factors when determining the value of land, such as the property's location, size, shape, zoning, land use regulations, access, topography, environment, market conditions, legal and regulatory issues, and potential for development or use.¹⁴⁸ Appraisers may use a sales comparison approach (comparable asset valuation), an income approach for income-generating properties, or the land residual technique, which includes subtracting the development cost from the projected sales value.¹⁴⁹ Homes in majority Black neighborhoods are appraised 15% lower in value than neighborhoods with a 1% Black population.¹⁵⁰ To calculate the price per square foot, divide the selling price by a comparable property's square footage, then add all the square footage rates for each similar property and divide that number by the

142. Lauren Bowling, *What Is Fair Market Value (FMV) In Real Estate And How Is It Calculate*, ROCKET MORTG. (Mar. 26, 2024), <https://www.rocketmortgage.com/learn/fair-market-value> [https://perma.cc/H9VG-FF27]. *How to Calculate Fair Market Value*, YIELDSTREET (Jan. 1, 2024), <https://www.yieldstreet.com/blog/article/how-to-calculate-fair-market-value/> [https://perma.cc/3PC4-29BE].

143. *Id.*

144. *Id.*

145. Jonathan Rothwell & Andre M. Perry, *How racial bias in appraisals affects the devaluation of homes in majority-Black neighborhoods*, BROOKINGS (Dec. 5, 2022), <https://www.brookings.edu/articles/how-racial-bias-in-appraisals-affects-the-devaluation-of-homes-in-majority-black-neighborhoods/> [https://perma.cc/4N45-WNUL].

146. Jeff Ostrowski, *The Black neighborhood home appraisal gap is real. Can we close it*, BANKRATE (July 12, 2024), <https://www.bankrate.com/mortgages/homes-in-black-neighborhoods-more-likely-to-get-low-appraisals/> [https://perma.cc/EPV6-TEY5].

147. Matthew Reynolds, *A Complete Guide to Land Appraisal: Definition, Methods, Factors, and More.*, VANGUARD REALTY ADVISORS, <https://www.vracommercial.com/uncategorized/a-complete-guide-to-land-appraisal-definition-methods-factors-and-more/> [https://perma.cc/VM3T-WRKY].

148. *Id.*

149. *Id.*

150. Rothwell & Perry, *supra* note 145 ("We estimate that the median appraisal is 15% lower in majority-Black neighborhoods compared to homes in neighborhoods where less than 1% of the population is Black."); see also Courtney Lindwall, *A Once-Thriving Black-Owned Beach Is Returned to Its Rightful Owners*, NRDC (Feb. 10, 2023), <https://www.nrdc.org/stories/once-thriving-black-owned-beach-returned-its-rightful-owners#> [https://perma.cc/FAG5-PSGY]; *Anti-Racism, Diversity, and Inclusion Initiative: Bruce's Beach*, CNTY. OF L.A., <https://ceo.lacounty.gov/ardi/bruces-beach/> [https://perma.cc/JXE2-RVAH].

number of comparable properties assessed to yield the average rate per square foot for the property in question.¹⁵¹ Next, multiply that average rate by the total square footage to determine the property's fair market value.¹⁵²

Comparable market analysis is the traditional option for determining fair market value.¹⁵³ However, fair market value cannot truly be accurate because there is a strong presumption that property valuation derived from a comparable market analysis, land appraisal, and price per square foot is undervalued, given that land in Black neighborhoods is undervalued.

D. The Failure to Justly Compensate for Joy and Culture Attached to Property

Regardless of how fair market value is calculated, just compensation will always be an inaccurate analysis of actual value of Black land because it is dependent on a biased valuation. Professor Ilya Somin, a professor of law at George Mason's Antonin Scalia Law School, wrote:

Undercompensation is particularly likely in the case of “low value” properties of the kind often occupied by poor minority group members. Even when fair market value compensation is paid, owners are still not compensated for losing the “subjective value” they attach to their property over and above its market valuation. Subjective value includes such elements as community ties and business good will that are often lost when victims of eminent domain are forced to move their homes or businesses.¹⁵⁴

The closing and taking of Bruce's Beach exemplify the impact that the loss of subjective value has on the Black community. In February 1912, Willa A. and Charles Bruce bought a 33-foot by 100-foot plot of land along the Manhattan Beach coastline for \$1,225;¹⁵⁵ in 1920, they purchased an adjacent lot.¹⁵⁶ The couple, with their son, fled west to California from New Mexico and were one generation distant from slavery in hopes of the American Dream.¹⁵⁷ Amid Jim Crow, the Bruces established a Black-only beach resort on their land—open to Black beachgoers as a space to dine, swim, and socialize.¹⁵⁸ The Bruce Beach Front establishment symbolized Black wealth and prosperity, representing a disruption of the white-majority neighborhood. White neighbors

151. *How We Calculate the Fair Market Value of a Home*, L.A. CNTY. ASSESSOR'S OFF., <https://assessor.lacounty.gov/real-estate-toolkit/how-we-calculate-fmv> [https://perma.cc/LQ57-LJNT].

152. *Id.*

153. *Id.*

154. THE CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN ABUSE BRIEFING REPORT 47 (U.S. Commission on Civil Rights, 2014), https://www.usccr.gov/files/pubs/docs/FINAL_FY14_Eminent-Domain-Report.pdf [https://perma.cc/RQ8K-DWKP].

155. Lindwall, *supra* note 150; *Colored People's Resort Meets With Opposition*, L.A. TIMES, Jun. 27, 1912, at 15.

156. Lindwall, *supra* note 150.

157. *Id.*

158. Lindwall, *supra* note 150.

surrounding the resort had to witness Black joy, even under the existing segregation of beaches, and responded with harassment and Ku Klux Klan violence.¹⁵⁹

After twelve years, the threat of eminent domain would affect the co-existence of a cultivated Black space and white agitation. In 1924, the Manhattan Beach City Council voted to seize Bruce Beach and surrounding lots, including four other Black-owned properties totaling thirty lots, to build a park on the soon-acquired land.¹⁶⁰ The pressure to condemn the resort came from racist white residents and a petition from local white real estate agents and civic leaders to force the Bruces to give up their property.¹⁶¹ After a lengthy battle to stay in Manhattan Beach, Willa A. and Charles Bruce valued their property at \$70,000 and asked for an additional \$50,000 for damages because they could not buy any other property in Manhattan Beach.¹⁶² The family was given \$14,500 as “just” compensation in 1929 and left town.¹⁶³ Willa A. and Charles Bruce died in poverty, and their entire family moved out of Los Angeles County.¹⁶⁴ The Black community fought for the dream that the Bruces worked for: a haven to enjoy the ocean. In 1927, the National Association for the Advancement of Colored People organized a “swim-in,” one of several peaceful protests, in response to the exclusionary practices on the shoreline of Manhattan Beach.¹⁶⁵ Due to the protests, the city ended an illegal lease between the Board of Trustees and Oscar Bessonette, a local businessman, on the land that provided access to the beach, which was intended to help “keep out undesirable visitors,” later admitted to keep Black people off the beach.¹⁶⁶ Bruce Beach Front was more than a business; it was an inclusive venue for Black beachgoers in the time of Jim Crow, a haven to enjoy the ocean.

IV. *From Footnote to Holding*: How a Due Process Claim Can Compel SCOTUS to Address Eminent Domain Disparities

The current definition of just compensation, fair market value of property at the time of the taking, under the Fifth Amendment, is not truly a “just” remedy when taking property from African American owners. Former President Barack Obama once said, “[o]ur Constitution places the ownership of private property at the very heart of our system of

159. See CNTY. OF L.A., *supra* note 150; LINDSEY FOX ET AL., CITY OF MANHATTAN BEACH: HISTORY ADVISORY BOARD REPORT 32 (County of Los Angeles 2021); Robert L. Brigham, Land Ownership and Occupancy by Negroes in Manhattan Beach 41 (May 1956) (M.A. thesis, Fresno State College) (on file with Fresno State College).

160. Lindwall, *supra* note 150.

161. *Id.*

162. Jenna Greene, *Black family's oceanfront land seized in 1929 returned with help from pro bono lawyer*, REUTERS (July 28, 2022), <https://www.reuters.com/legal/government/black-familys-oceanfront-land-seized-1929-returned-with-help-pro-bono-lawyer-2022-07-28/> [<https://perma.cc/9RNP-WUNN>].

163. Lindwall, *supra* note 150.

164. BC LAW, *The Land Conference: Fireside Chat with George Fatheree III*, at 14:00 (YouTube, Apr. 3, 2023), <https://youtu.be/TkJ3Mftc0s?si=gz3qyhFmLjEhXQmr>.

165. *The History of Bruce's Beach*, L.A. CNTY. LIBR., <https://lacountylibrary.org/bruces-beach/> [<https://perma.cc/SRA2-GWP6>] (last visited Feb. 18, 2026) (“On July 17, 1927, the Los Angeles chapter of the NAACP organized its first peaceful protest. Chapter president Dr. Henry Claude Hudson led a ‘swim in’ and four protestors were charged with resisting an officer. At trial, Bessonette testified that the actual intent of the ‘No Trespassing’ signs was to keep ‘Colored people’ off the beach.”).

166. *Id.*

liberty.”¹⁶⁷ African American property owners have endured a centuries-long struggle to obtain and maintain property, as discussed in Part II. This Note further argues that subjective value should be required to calculate just compensation for African American property owners to make redress genuinely equitable. A due process claim that values life, liberty, and property could require the Supreme Court to respond to their predictions of eminent domain abuse, and the inadequate compensation of value given to “discrete and insular minorities” without leaving such legal conflict to simmer in dissenting opinions and footnotes.¹⁶⁸ This would compel legislatures and government actors to cautiously consider from whom they take property. African American property owners should pursue a due process claim for just compensation to reevaluate whether subjective value should be included in fair market value assessments. This argument can encourage more cautious urban and rural planning to prevent disrupting African American ownership and the explicit and implicit bias involved in the undervaluing of Black-owned land.

A. Due Process Claim: The Right to Just Compensation

Due process ensures that “[n]o person shall . . . be deprived of life, liberty, or property without due process of law” by the federal government¹⁶⁹ or individual states.¹⁷⁰ The lack of “just” compensation, when traditional methods of land valuation are racially discriminatory,¹⁷¹ and the inconsideration of Black wealth, joy, and culture cultivated through land ownership, is an undeniable deprivation of property because the Fifth Amendment requires “just compensation” for “private property . . . taken for public use.”¹⁷² The government must also justify a violation of an individual’s substantive or procedural due process rights. Procedural due process requires that “when the government takes away a person’s life, liberty or property, it must provide adequate procedures,” for example, providing notice and a hearing before terminating custody.¹⁷³ The right to just compensation is not a procedural issue. Substantive due process requires that “the government must justify an infringement by showing that its action is sufficiently related to an adequate justification.”¹⁷⁴ Therefore, the infringement of the right to just compensation is a substantive due process issue when the standard means of calculating the amount of compensation systemically harms Black landowners.

When an individual raises a due process violation claim of an enumerated right, the government will need to meet the highest judicial review standard, strict scrutiny.¹⁷⁵ Under substantive due process, strict

167. BARACK OBAMA, *THE AUDACITY OF HOPE* 149 (2006).

168. See DICK M. CARPENTER II & JOHN K. ROSS, *VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN ABUSE* (Institute for Justice, 2007).

169. U.S. CONST. amend. V.

170. U.S. CONST. amend. XIV.

171. Rothwell & Perry, *supra* note 145.

172. U.S. CONST. amend. V.

173. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 905–06 (6th ed. 2020).

174. *Id.* at 905.

175. *Id.* at 906. The lowest judicial review standard is the rational basis test, which is when the “the statute or ordinance must have a legitimate state interest, and there must be a rational connection between the statute’s/ordinance’s means and goals.” *Rational basis test*, CORN. L. SCH. LEGAL INFO. INST.,

scrutiny requires that the government show that terminating the fundamental right is necessary to achieve a compelling purpose.¹⁷⁶ Courts analyze four main issues to determine whether there is a due process violation: (a) Is there a fundamental right?; (b) Is the constitutional right infringed?; (c) Is there a sufficient justification for the government's infringement of a right?; and (d) Is the means sufficiently related to the purpose?¹⁷⁷

1. Just Compensation is a Fundamental Right

An enumerated right is a right specifically mentioned in the U.S. Constitution or is "fundamental to the operation of the nation and liberties enjoyed by the people."¹⁷⁸ The Fifth Amendment enumerates the right to just compensation as a fundamental right: "Nor shall private property be taken for public use without just compensation."¹⁷⁹ This clause makes it clear that property owners have the right to receive just compensation from the government when their land is taken for public use. The Court should agree that the right to just compensation is an enumerated right and should next analyze whether the current definition of fair market value infringes on the right to just compensation.

2. The Infringement on "Just Compensation" through Discriminatory Valuation

Case precedent has narrowed the definition of just compensation to the fair market value of property at the time of the taking. As discussed in Part III of this Note, traditional practices of calculating fair market value tend to undervalue African American-owned property. Additionally, the Supreme Court has not overturned *Chicago, Burlington & Quincy Railroad* that excludes owning land as generational wealth from being included in fair market value: "[I]t is well settled that 'mere possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded.'"¹⁸⁰ The Supreme Court has not recognized that the subjective value of property should be included in fair market value; therefore, consideration of subjective value is not required within a just compensation analysis.

Until subjective value is included in a fair market value computation, most African American owners will not be fully compensated for their forced property sale.¹⁸¹ Currently, the Court identifies fair market value

https://www.law.cornell.edu/wex/rational_basis_test [<https://perma.cc/YQD7-HRP2>]. The intermediate scrutiny test is a higher standard than the rational basis test but has a lower burden than the strict scrutiny test. Intermediate scrutiny is applied when the challenged law must "further an important government interest . . . and must do so by means that are substantially related to that interest." *Intermediate scrutiny*, CORN. L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny [<https://perma.cc/T9BW-QMXD>].

176. CHEMERINSKY, *supra* note 173 at 582.

177. CHEMERINSKY, *supra* note 173 at 906–08.

178. Donald Ritchie, *Enumerated Rights*, ANNENBERG CLASSROOM, https://www.annenbergclassroom.org/glossary_term/enumerated-rights/ [<https://perma.cc/HUH2-MGE6>].

179. U.S. CONST. amend. V.

180. *Chi., Burlington & Quincy*, 166 U.S. at 250.

181. I conceptualize the phrase "fully compensated" to mean the loss of generational wealth, joy and culture is included in the calculation of the fair market value of a property, which I deduce in the phrase "equitable market value."

as the minimum value of just compensation,¹⁸² therefore, my solution is to require the inclusion of subjective value in a fair market evaluation, equating to a new theory: equitable market value. The term “fair” in fair market value invokes an equal application of how property is valued. However, property ownership is different for African Americans compared to other racial groups. African Americans were legal chattel for approximately four centuries, and only within recent history were able to establish and retain actual land ownership in the United States.¹⁸³ This transition and the obstacles faced throughout should be considered when the government seeks to exercise a taking of Black-owned land. Taking such land without cautious calculation of what encompasses “just” compensation, would infringe on the right to just compensation in direct violation of the Fifth Amendment, especially in light of such a disadvantaging history.

The directness and substantiality of an interference are considered when a violation of a fundamental right is raised.¹⁸⁴ The strict boundaries of fair market value are a direct and substantial interference on the right of just compensation from the perspective of African American owners. Requiring a standard of fair market value is a direct legal obstacle because it prevents subjective value from being calculated in that equation, which would make the compensation “just.” Preventing such calculation is also substantial, considering the significance of property ownership for the African American community in the wake of the Black land loss crisis and the racial wealth gap valued in the trillions of dollars.¹⁸⁵ This argument now turns to whether the undercompensation of African American property owners constitutes a sufficient justification for the infringement of the right to just compensation.

3. Lack of Affordability Infringes on Justly Compensating Property Owners

The violation of the right to just compensation requires the government to carry the burden of proving that such infringing serves a compelling government interest. The compelling interest must be “important enough that it justifies the infringement on a fundamental right.”¹⁸⁶ Justice Hugo L. Black stated that in considering just compensation, the question remains: “What compensation is ‘just’ both to an owner whose property is taken and to the public that must pay the bill?”¹⁸⁷ The compelling interest in infringing on the right to just compensation lies in balancing what is affordable for the public and what is equitable for the owner. Why

182. *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 273 (2024).

183. See discussion *supra* Part II (B) and (C).

184. *Zablocki v. Redhail*, 434 U.S. 374, 387 n.12 (1978) (stating that “[t]he statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.”).

185. See discussion *supra* Part II (B) and (C). See Vanessa Williamson, *Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth*, BROOKINGS (Dec. 9, 2020), [https://www.brookings.edu/articles/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/#:~:text=Conclusion-,Summary,%2C therefore%2C is \\$10.14 trillion](https://www.brookings.edu/articles/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/#:~:text=Conclusion-,Summary,%2C%20therefore%2C%20is%20$10.14%20trillion) [https://perma.cc/8VC4-BMTG].

186. *Deep Dive: “A Compelling State Interest Achieved by The Least Restrictive Means”*, ACLU VT. (Sep. 16, 2022), <https://www.aclut.org/en/news/deep-dive-compelling-state-interest-achieved-least-restrictive-means> [https://perma.cc/2HQW-LYQS].

187. *Commodities Trading Corp.*, 339 U.S. at 123.

should the owner have to sacrifice their land for the public, especially when considering the disproportionate rate of eminent domain abuse that African American owners experience, and given the evolution of public use, which may permit land to be transferred for private use? A public budget should not be given greater importance over someone's stability, sense of home, and opportunity for generational wealth. Given the weakness of this suggested potential compelling interest, this argument moves to the next issue: considering whether the right to infringe on just compensation is sufficiently related to its purpose of making the owner "whole."

4. Forcing Some People Alone to Bear the Burden of "Public Use"

The objective of providing just compensation, in exchange for taking private property for public use, is to "bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁸⁸ However, in juxtaposition with this objective, footnote 15 of *Kirby Forst Industries v. United States* acknowledges that fair market value may not compensate for the special value landowners hold in their property.¹⁸⁹ The *Kirby* Court notes that "occasional inequity" is tolerable given the difficulty assessing the value of property to each individual, and due to the need for a "clear, easily administrable rule governing the measure of 'just compensation.'"¹⁹⁰ I would question the Court's "tolerance" measure and query on what qualifies as "occasional inequity." Given the history of eminent domain abuse, Black communities have disproportionately faced challenges and continue to do so, since traditional, current-day fair market value evaluations often undervalue African American-owned property. This disparity is not merely "occasional" inequity, and continuing such disparity is a "manifest injustice" on African American owners who were separated from their property at below equitable market value for questionable public use.

a. "Withintrification" as a Less Restrictive Alternative to Shortchanging Black Property Owners

Lastly, under strict scrutiny, the government must prove it has a compelling interest in infringing on the fundamental right and has chosen the least restrictive means to achieve that goal.¹⁹¹ If an alternative approach that is less restrictive on the fundamental right exists, the government must use that alternative.¹⁹² The Supreme Court should recognize, given eminent domain abuse, that there are less restrictive means to improve communities rather than continuing to allow the undercompensation of Black property owners by using the traditional just compensation model.

188. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

189. *Kirby Forest Indus.*, 467 U.S. at 10 n.15.

190. *Id.*

191. VICTORIA L. KILLION, *Freedom of Speech: An Overview*, at 6 (CRS Report No. R47986) (2024).

192. *Id.*

An alternative method, especially for economic development takings, is the practice of “withintrification.” Withintrification, a term coined by Professor and Pastor John Wallace, allows current residents to revitalize the area under their direction to prevent displacement.¹⁹³ Gentrification originates when the “interests lie with outside developers, often at the expense of displacing current residents.”¹⁹⁴ However, withintrification occurs when “community investments are led by the interests of current residents” to improve their community without displacing themselves.¹⁹⁵ The concept involves “identifying assets in the community, bringing them together under common objectives, and raising the value of the place from within at a pace appropriate for revitalizing the existing community, not displacing it.”¹⁹⁶ Keeping long-standing residents in their community helps ensure owners are not forced to give up their homes and can reap the benefits of “public use” or “renewal.” Most withintrification efforts require investments in the targeted communities such as creating streetscapes, parks, museums and other projects for historic and cultural preservation, affordable housing, job creation, culturally appropriate zoning overlay, community benefits agreements, property rehabilitation, and using grant funding from local government or philanthropic foundations managed by non-profit organizations.¹⁹⁷ Withintrification focuses on community-driven revitalization that strengthens existing residents and their needs, in contrast with gentrification.¹⁹⁸ Eminent domain can be a tactic to facilitate gentrification, where governments use the power to acquire property in areas targeted for redevelopment, ultimately leading to displacement and the replacement of low-income communities with more affluent populations.

V. “It Is So Ordered”: The Inclusion of Subjective Value is Not an Optional Component in Just Compensation Calculation

The Supreme Court should recognize that subjective value is required beyond the fair market value of a property at the time of taking, in a due process claim for just compensation, to include equitable market value (subjective value within the calculation of fair market value) as the minimum cost of just compensation, not an optional component. Therefore, equitable market value is the baseline for determining just compensation. There are numerous reasons why the legal meaning of just compensation, the fair market value of property at the time of taking, is not an equitable remedy for eminent domain, particularly for African

193. Ennis Davis & Bill Delaney, *Gentrification vs. Withintrification in Jacksonville*, THE JAXSON (Aug. 4, 2020), <https://www.thejaxsonmag.com/article/gentrification-vs-withintrification-in-jacksonville/> [https://perma.cc/N83T-VGB3].

194. *Community Development: Creating local opportunity through the Emerald Trail and restoration of Hogan and McCoy Creeks*, NAT’L PARK SERV., <https://www.nps.gov/articles/000/equitable-development-creating-local-opportunity-through-the-emerald-trail-and-restoration-of-hogan-and-mccoy-creeks.htm> [https://perma.cc/W3SP-6J7U].

195. *Id.*

196. Davis & Delaney, *supra* note 193.

197. *Id.* *Withintrification Planning*, CMTY. PLANNING COLLABORATIVE, <https://www.planningcollab.com/portfolio/withintrification-planning> [https://perma.cc/CF7Z-Y8SZ]. *Supporting Neighborhood Revitalization from Within*, THE CMTY. FOUND. FOR NORTHEAST FLA. (Dec. 13, 2023), <https://www.jaxcf.org/withintrification/> [https://perma.cc/M6Y9-K4PC].

198. CMTY. PLANNING COLLABORATIVE, *supra* note 197.

American property owners. First, the Black Land Crisis from 1919 to 1997 debilitated generational wealth for African Americans. Second, eminent domain abuse affects African American owners and residents at a disproportionate rate compared with owners in other racial groups. Third, the inaccuracy of appraisal methods undervalues property in predominantly Black neighborhoods. And fourth, the racial wealth gap in America between Black and White citizens continues to alienate Black people from the American Dream, which is founded on property ownership.

Eminent domain is antithetical to the American Dream. Again, moving from being chattel property to real property owners, African Americans have tried to forge a sense of belonging and stability—an intangible realization of the American Dream. Eminent domain places the American Dream for sale, often undervaluing Black-owned property, and with it, the trials and tribulations of the property owners' ancestors who struggled to survive in this country to allow their descendants to participate in the "dream." Accounting for the generational wealth lost because of the government's taking is necessary to make a property owner's sacrifice of property and the American Dream wholly compensatory. The American Dream cannot survive if the property owner is undercompensated, and therefore not made whole, because of "occasional inequity." The government either must find alternative property or support withintrification until the public can honestly afford to equitably compensate the owner, therefore not continuing to force marginalized property owners to forsake their "dream" to bear the cost of public use.

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