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05

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THE MISSION

Established in 2023, the Northeastern University Undergraduate Law Review (NUULR) is Northeastern's distinguished undergraduate legal publication. Committed to fostering intellectual discourse and scholarly engagement, NUULR publishes insightful legal scholarship authored by undergraduate students from diverse backgrounds. Our mission is to create a dynamic space where legal ideas are explored, discussed, and shared among the Northeastern University community and the broader public. We believe in the power of well-crafted writing to spark meaningful conversations on legal, societal, and ethical issues facing our generation. Our culture is rooted in the values of objectivity, critical thinking, and interdisciplinary exploration, making NUULR a leading forum for undergraduate legal discourse, critical analysis, and academic fervor. NUULR strives to bridge the gap between academia and practicality, emphasizing the importance of thoughtful, undergraduate legal scholarship. We recognize the need for a platform where emerging scholars can contribute their unique perspectives, irrespective of thematic constraints, encouraging an open dialogue on a wide range of legal topics. We are dedicated to supporting students interested in legal careers, providing valuable resources, fostering alumni connections, and cultivating a vibrant pre-law community that celebrates diverse academic interests. As we continue to evolve, we look forward to the rich tapestry of interests and ideas that will shape the future of our organization, contributing to the development of legal thought and scholarship within Northeastern University and beyond.

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Dear Reader,

On behalf of the editorial board of the Northeastern University Undergraduate Law Review (NUULR), I am thrilled to present Issue 5. The release of this issue marks a pivotal point in the growth of our organization, as well as the close of an era, with the final members of NUULR's founding cohort graduating from Northeastern and departing the NUULR community. This semester was defined not only by our continued commitment to rigorous writing and editing, but also by a significant transformation of our website and Digital Edition – an effort aimed at advancing our vision of two distinct publications, each presented with clarity, intention, and care. As for our flagship Print Edition, presented here, Issue 5's featured writers engage with a theme that, in many ways, mirrors the work undertaken by our editorial board this semester. Each piece in this collection explores the push and pull of ***Reform vs. Reality***, examining the limitations of existing legal frameworks while proposing thoughtful and innovative paths forward.

In *"The 4B Movement in South Korea: A Critique of Law as a Tool of Substantive Equity,"* Marli Mason examines why, despite robust formal legal protections, many South Korean women have chosen to withdraw from interactions with men and join the 4B global feminist movement. Through a rigorous analysis of legal cases, she argues that societal and governmental indifference to women's struggles has directly contributed to the emergence of feminist movements such as 4B and calls for both cultural and legal shifts in South Korea.

In *"On Matters of State Courts Preserving Electoral Justice,"* Jennifer Yu contends that, despite constitutional and statutory protections, equal voting representation, particularly for minority voters, remains far from guaranteed. In light of federal judicial inaction, she argues that state courts must play a more significant role in addressing the conditions that lead to vote dilution.

In *"Sign Here: Consent, Coercion, and the Fiction of Voluntary Departure in U.S. Immigration Law,"* Sofia Flores draws on philosophical frameworks of structural injustice and immigration ethics to demonstrate that so-called "voluntary departure" is often anything but voluntary. She ultimately calls for a broader reexamination of consent within the U.S. immigration system.

In *"The Legal Permissibilities and Boundaries of Offshore Investments in Private Equity,"* Charline Apard analyzes the rise of offshore private equity funds and the challenges posed by their inherent opacity. To mitigate fraud and other illicit activity, she advocates for the strengthening and modernization of existing financial regulatory frameworks.

In *"Intent Without Impact: Structural Inequality and the Limits of Equal Protection,"* Shriya Kashyap traces the evolution of Fourteenth Amendment jurisprudence, arguing that its focus has shifted from addressing systemic inequality to scrutinizing the intent of decision-makers. She proposes both doctrinal and legislative reforms, such as expanding disparate impact frameworks, to realign Equal Protection with its original purpose.

Over the past two years, I have had the immense privilege of serving as a Staff Writer and, subsequently, in multiple editorial roles within NUULR. To have served as Editor in Chief, however, is an opportunity for which I will always be deeply grateful. I want to thank our incredibly dedicated editorial staff, marketing and outreach team, faculty advisor, and, of course, our writers for continuously devoting your time and energy to this organization. NUULR is as great as it is because of each of you. As I prepare to graduate, I could not have greater confidence in NUULR's future leadership, and I firmly believe the organization's story is far from over. With that, we are proud to present **Issue 5: *Reform vs. Reality***. Here's to a bright – and reformed – future, for NUULR and beyond.

Sincerely,

Alex Vihlen

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Editor in Chief

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The 4B Movement in South Korea: A Critique of Law as a Tool of Substantive Equality

By: Marli Mason

Abstract

The 4B movement is a globally recognized feminist movement revered for its radical resistance against and disengagement with societal norms. Given South Korea's strong democratic values and the extensive embedding of protections against gender discrimination in the constitutional framework of the Republic, the question emerges: Why, in a country with strong stances against gender discrimination, are women choosing to withdraw entirely from interaction with men in society? This paper examines a series of legal cases that highlight the shortcomings of the law in the realization of substantive equality in terms of women's rights. Through the chronological mapping of cases, a timeline emerges, demonstrating how assumed legal victories reveal a greater issue at hand due to the isolation the cases are given; the government is not willing to acknowledge the patterned violence, oppression, and silencing South Korean women face. This is where the 4B movement comes into play. This paper will focus in particular on the frailties most apparent — the government's approach to addressing gender-based violence and crimes related to the sexual-exploitation of women — and how these inform and motivate feminist movements such as 4B.

Given the sensitive and potentially triggering content this paper discusses, it is appropriate to provide a content warning for the following: gender-based violence and femicide, graphic violence, sexual exploitation and coercion, child sexual abuse and exploitation, non-consensual pornography, and digital sex crimes.

I. Introduction and Background

The law is fundamentally entwined in the very fabric of societies. It serves as the "primary mechanism" to control the development and management of societies and the potential conflicts they encounter.[1] In understanding the operational role of the law in shaping societies, a fault crucial to observe is how the letter of the law does not directly translate to an actual reformation of the practices and beliefs of society. This deficiency is especially evident when it concerns the equal treatment of, or the delivery of justice to, historically oppressed groups. A notable example is South Korea, a country that is seemingly committed to making progress, yet falters as a society in infusing the essence of its law into the social consciousness. While there are strong constitutional frameworks aimed at ensuring gender discrimination does not occur within the bounds of the law, the government continuously struggles to address the issue of crimes against women relating to sexual violence. The persistent lack of thoughtful reflection by the government and people of South Korea in response to the ceaseless sexually exploitative crimes against women is a cause for tension to manifest between South Korean women and the

[1] Daniel Martin Katz et al., *Complex Societies and the Growth of the Law*, 10 Sci Rep 18737 (2020).

society to which they belong. The 4B movement in South Korea serves as a site of crucial social pressure that is a manifestation of the disconnect between legal reform and substantive equality. Legal frameworks alone cannot achieve substantive equality; they require significant cultural transformation for the effects of the law to resonate throughout society.

Ia. Constitutional Frameworks

The Constitution of South Korea is, on paper, robust in its commitment to explicitly proclaiming equality and condemning gender discrimination. Article 11, Section 1 states, "All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social, of sex…"[2] Sections of the Constitution precisely aimed toward women include: Article 36, Section 1 which reads, "Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal," Article 36 Section 2, "The State shall endeavor to protect mothers," and Article 32, Section 4, "Special protection shall be accorded to working women and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions."[3] These provisions acknowledge some of the specific social conditions women often find themselves in and seek to preemptively ensure that protections are in place. Expressed protections for women are an admirable first step for a republic, as they provide them with a legally fortified foundation to assert their rights and hold the government and other actors accountable when such rights are violated.

Ic. Key Concepts

For the purposes of this paper, it is important to name two concepts of equality: formal and substantive. Formal equality is the concept that equality is attained when "a law or policy treats women and men in a neutral manner."[4] Substantive equality imposes a responsibility on the government to consider women's realities when creating and implementing laws.[5] Under this approach, the recognition of the circumstances of women as a categorically oppressed group is evident in the legislation that follows from it. It goes further to examine whether a law is actually effective in improving the lives of women in practice. The distinction between these concepts has direct consequences for how a legal system operates in response to gendered violence. A state that displays formal equality may pass anti-discrimination laws, ostensibly creating gender-neutral laws in certain respects, and consider that to be its only obligation, regardless of the systemic oppression women continue to face. Under formal equality, there is no duty from

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[2] *CONSTITUTION OF THE REPUBLIC OF KOREA*, https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=1
[3] Ibid.
[4] *University of Minnesota Human Rights Library*, https://hrlibrary.umn.edu/gencomm/escgencom16.html
[5] *Substantive Equality - United Nations Economic and Social Commission for Western Asia*, https://www.unescwa.org/sd-glossary/substantive-equality.

the government's perspective to evaluate the real-life outcomes of anti-discrimination laws in terms of their impact on addressing issues of gender discrimination because they treat the law as a one-size-fits-all model.

With an understanding of these key concepts and an identification of existing gaps, a discussion can begin regarding the stark contrast between what the law says and what it actually *does* in protecting and empowering women. South Korea is positioned in an odd in-between in which it has created gender-specific laws aimed toward elevating the status and guaranteeing rights for women, but has not done the work to assess the effectiveness of these laws. More critically, it has not reckoned with the reality that these laws have little effect on bettering the lives of women; the current foundation of its society does not genuinely embrace the premise of women straying away from patriarchal structures ingrained in society that subordinate them in the first place. In this sense, legal reform has outpaced cultural reform. What follows is an exploration of notable cases in South Korea that ignites an assessment of the effectiveness of the law in bringing about a cultural analysis and change among citizens.

II. Case Analysis

IIa. *Hojuje* System (2005): Constitutional Strides Met with Cultural Lags

Until 2005, the South Korean family registration system was that of patrilineal succession. The *hojuje* system was a bedrock of South Korean civil society, with its inception traced to the Joseon Dynasty.[6] Deeply embedded in Confucian beliefs, *hojuje* positioned male relatives as the *hoju*, or the sole figures with legal authority over family matters such as marriage, inheritance, and residence. This system was outlined in the Civil Code, with its provisions located in Articles 778, 781(1), and 826(3). Article 778, states, "A person who has succeeded to the family lineage or has set up a branch family, or has established a new family or has restored a family for any other reason, shall become the head of a family."[7] Combined with Article 781(1), which declares, "entered into his or her father's family register," and Article 826(3), "The wife shall have her name entered in her husband's family register," the framework for the *hojuje* system is evidently rooted in patriarchal principles that reverberate throughout South Korean society.[8]

In February 2005, the Constitutional Court of Korea heard a case challenging the constitutionality of the *hojuje* system.[9] The petitioners fell into two different categories of individuals with similar grievances stemming from the same issue.[10] The first included people who had married, had children with their spouse, and later divorced.[11] In this circumstance, these

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[6] Song, "The End of Korea's Hojuje System."
[7]*Constitutional Court of Korea > Decisions > Major Decisions in Brief*, https://english.ccourt.go.kr/site/eng/ex/bbs/View.do?cbIdx=1142&bcIdx=984861
[8] Ibid.
[9] Ibid.
[10]Ibid.
[11]

individuals, who both had custody of and reared their children, attempted to re-register their children under their own households instead of their ex-husbands, but the family registration office denied them.[12] The second category included married couples whose family registration was under the same household as their spouse.[13] These couples filed for a change in household head to remove their husbands as hoju, but the office denied them as well.[14]

In a 6-3 decision, the Court found the three articles encompassing the framework of the *hojuje* “nonconforming to the Constitution.”[15] The majority opinion rooted its reasoning in the tension between the Constitution's expressed intent to be intolerant of a system of marriage that is a product of patriarchy and feudalism, and the existence of a family registry system that reflects the oppressive systems the Constitution sought to expel.[16] Among the values the Constitution declared, the court found that sexual equality and individual dignity — as Article 36(1) references, which fully states, “Maarriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal”— sit firmly above other considerations in the Constitution when it concerns marriage or the family registration system.[17] The court recognized that while other sections within the Constitution such as the preamble which states, “We the people of Korea, proud of a resplendent history and traditions dating from time immemorial…” and Article 9 which follows, “The State shall strive to sustain and develop the cultural heritage and to enhance national culture” were still vital to the essence of the founding document.[18] Notions of tradition and cultural heritage are a manifestation of the context in which the Constitution’s framers wrote it and should not be the guiding beacon to which all laws must conform. Instead, the Court believed that these concepts should be reflective of their present interpretation and consider their place in the aforementioned succession of value.[19] As such, the *hojuje* system, which derives its structure from the past in pursuit of maintaining tradition, is incongruent with the ideals of sexual equality and individual dignity.[20]

Furthermore, the Court found the provisions that formed the *hojuje* system were created with the true intention of placing the perpetuation of male lineage at the crux. This was not an instance where household heads were designated, and the family register just happened to follow, but a deliberate sequence of statutes enacted to maintain existing family structures. It found the system to be unjustifiably discriminatory and anchored in stereotypes. The system bred consequences that were not considerate of 1) the welfare of people within a family, and 2) the ever-evolving nature of family structures in the contemporary social context, such as single

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Constitutional Court of Korea > Decisions > Major Decisions in Brief, https://english.ccourt.go.kr/site/eng/ex/bbs/View.do?cbIdx=1142&bcIdx=984861

[12] Ibid.

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid.

mothers, remarried individuals, and the transition to women as the head of a household in the economic sense.[21] The Court ordered the repeal of the articles of the Civil Code declared unconstitutional, with the amended provisions to take effect on January 1, 2008.[22]

In recognizing the underlying sexist issues with the provision and the unfavorable circumstances the system created for women, the Court exercised a substantively equal approach in analyzing the case and the Constitution. Its critique of the dissenting argument favoring the preservation of traditional family structure and rejection of the discriminatory nature of the provisions demonstrated a cognisance of the larger systemic implications of the *hojuje* system and sought to correct it through codification.

IIb. Gangnam Station Murder (2016): Institutional Denial of Gendered Violence

On May 17, 2016, a 23-year-old woman was stabbed to death in a public bathroom located near Gangnam Subway Station in Seoul, South Korea.[23] The defendant, a 34-year-old man named Kim Seong-min, testified that he did not know the victim and killed her because women constantly ignored him.[24] CCTV footage revealed that he waited 40 minutes for a woman to enter the bathroom, ignoring six men who did so before her.[25] The police investigation determined the murder to be a “random killing” attributed to the defendant’s mental health issues, despite the testimony of the defendant himself, who admitted to the belittlement and lack of attention he received from women in general as the motive for his crime.[26] In a press briefing, police stated, “There is a need to distinguish between hate crimes and crimes driven by mental illness. The latest case falls in the latter category.”[27] To support their claims, police released information about Kim’s mental health struggles. Since 2008, he had been hospitalized six times due to his schizophrenia.[28] His most recent hospitalization was in January of 2016, but he had since gone unmedicated–a fact the police viewed as cause for his violence.[29]

On October 14, 2016, the Seoul Central District Court sentenced Kim to 30 years in prison, mandatory medical treatment for 20 years while in prison, and ordered the wearing of an ankle monitor.[30] Its reasoning for not handing down life imprisonment as the prosecution sought was the importance of taking into account the defendant’s schizophrenia and “persecution

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[21] *Constitutional Court of Korea > Decisions > Major Decisions in Brief*, https://english.ccourt.go.kr/site/eng/ex/bbs/View.do?cbIdx=1142&bcIdx=984861.
[22] Ibid.
[23] Ock Hyun-ju, *Gangnam Murder Was Not a Hate Crime: Police*, The Korea Herald (May 22, 2016), https://www.koreaherald.com/article/964959.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ock Hyun-ju, *Man Gets 30 Years in Jail for Gangnam Murder*, The Korea Herald (Oct. 14, 2016), https://www.koreaherald.com/article/1115889.
[30] Ibid.

complex," as described by Kim's doctor.[31] It explained that although the crime seemed to be premeditated to an extent, the fact that Kim did not try to cover up his crime called his mental condition into question.[32] The court denied any role that misogyny might have played in the murder, stating, "It seems that Kim's crime against women resulted from his fears toward men in general and women's more socially marginalized status rather than his hatred toward women."[33]

On January 12, 2017, the Seoul High Court upheld a lower court's decision to sentence the defendant to 30 years, rejecting the defense's appeal and argument that Kim was without decision-making capacity due to his mental instability.[34] It acknowledged his mental illness and the delusions that it induced.[35] Still, it found that "considering all the circumstances, including circumstances of the crime, the content, the means and methods, and the circumstances after the crime, as well as the results of psychiatric evaluation, it cannot be said that he was mentally unstable."[36] The Supreme Court upheld this ruling in its April 13, 2017, decision.[37]

IIc. The Nth Room (2020): Exposing Systemic Failure in Reform

A user by the nickname of "GodGod", later identified as Moon Hyung-wook, created eight chat rooms on the platform Telegram through which he sold pornography.[38] This material was obtained through the coercion of at least 103 victims, 26 of whom were minors.[39] Those involved in the distribution of the material obtained it through gathering the victim's private information and using it as blackmail to get them to film themselves performing sexually explicit acts.[40] Another perpetrator, Cho Ju-bin, operated another chat room that replaced Nth Room, which was given the name the "Doctor's Room."[41] This chatroom was particularly gruesome in that victims were forced to fulfill violent and degrading "missions," which included "carving the words 박사 (doctor) or 노예 (slave) into their skin," placing objects inside sexual organs, and providing photographs of themselves defecating and drinking from toilet bowls.[42]

Moon was apprehended in May 2020 and indicted on 12 counts, which included the "production and distribution of pornography and sexual assault" under the Child Protection

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[31]Ock Hyun-ju, *Man Gets 30 Years in Jail for Gangnam Murder*, The Korea Herald (Oct. 14, 2016), https://www.koreaherald.com/article/1115889.
[32] Ibid.
[33] Ibid.
[34]*강남 "묻지마" 살인범 2심도 징역 30년..."범행 중대성 고려"(종합)* | 연합뉴스, https://www.yna.co.kr/view/AKR20170112085851004
[35] Ibid.
[36] Ibid.
[37]*Top Court Confirms 30-Year Jail Term for "Gangnam Murder" Suspect - The Korea Times*, (Apr. 13, 2017), https://www.koreatimes.co.kr/southkorea/law-crime/20170413/top-court-confirms-30-year-jail-term-for-gangnam-murder-suspect .
[38] *[DEBRIEFING] 'Nth Room': A Digital Prison of Sexual Slavery*, (Mar. 29, 2020), https://koreajoongangdaily.joins.com/2020/03/29/features/DEBRIEFING-Nth-room-A-digital-prison-of-sexual-slavery/3075441.html.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.

Act.[43] Prosecutors sought a life sentence for his crimes, but the Daegu District Court adjusted his final sentencing to 34 years.[44] Both the Daegu High Court and the Supreme Court of Korea upheld the decision.

Cho was charged with producing and distributing sexually exploitative material, blackmail, coercion, and organizing a criminal organization in violation of the Child Protection Act, the Privacy Act, and the Sexual Abuse Act.[45] The Seoul District Court sentenced him to 40 years, and a year later, added 5 years to his sentence for "concealing criminal proceeds."[46]

In response to the public outrage concerning both cases and the greater discourse surrounding digital sex crimes, the National Assembly revised the Act on Special Cases Concerning the Punishment of Sexual Crimes.[47] Article 14 which reads, "A person who takes photos of another person's body, which may cause any sexual stimulus or shame against the latter's will, by using a camera or similar mechanism, or who distributes, sells, leases, provides, or openly exhibits or screens the photos so taken, shall be punished by imprisonment for not more than five years or by a fine not exceeding ten million won" was expanded to new provisions:

> "(2) Even though taking photos under paragraph (1) was not against the will of the person photographed at the time of taking such photos, a person who distributes, sells, leases, provides, or openly exhibits or screens any photos of the former's body so taken, against the former's will, thereafter, shall be punished by imprisonment for not more than three years or by a fine not exceeding five million won

and

> (3) A person who circulates any photos taken under paragraph (1), for profit-making, by means of an information and communications network referred to in Article 2 (1) 1 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (hereinafter referred to as "information and communications network"), shall be punished by imprisonment for not more than seven years or by a fine not exceeding thirty million won."[48]

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[43] *Prosecutors Request Life Sentence for Prime Suspect behind Nth Room Case*, https://english.hani.co.kr/arti/english_edition/e_national/965602.html

[44] Ibid.

[45] Justin McCurry, *Outrage in South Korea over Telegram Sexual Abuse Ring Blackmailing Women and Girls*, The Guardian, Mar. 25, 2020, https://www.theguardian.com/world/2020/mar/25/outrage-in-south-korea-over-telegram-sexual-abuse-ring-blackmailing-women-and-girls.

[46] *"Nth Room" Cho Ju-Bin Sentenced to Additional 5 Years*, (Feb. 4, 2021), https://koreajoongangdaily.joins.com/2021/02/04/national/socialAffairs/Nth-room-Cho-Jubin-sexual-abuse/20210204192800595.html.

[47] *ACT ON SPECIAL CASES CONCERNING THE PUNISHMENT OF SEXUAL CRIMES*, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=40947&lang=ENG

[48] Ibid.

These additions were aimed at combating the serious issue that digital sex crimes created in South Korea, especially.

IIb. Legal Shortcomings

While each case was momentous in moving the needle in the conversation surrounding gender equality and justice, they are not without their shortcomings. The key issue at the crux of each case's outcome is the lack of cultural change resulting from the case's implications. The insufficient cultural transformation stalls any substantive progress from taking effect, rendering the laws unproductive to an extent.

The abolition of the *hojuje* system in 2005 and the system that replaced it, while a breakthrough in expanding the rights of women with respect to their familial registration, did not take effect until 2008 with the *Act on Registration of Family Relations*. The limitations of legal reform in the arena of family law lie in the attitudes surrounding family structure and the positionality of women within that structure in South Korean culture. The case demonstrates that although the law and the amending of it can remove barriers faced by women, it cannot mandate respect or change attitudes surrounding them. The patriarchy is deeply embedded in everyday life, regardless of what legal victories work to dismantle it.

Despite the Gangnam Station murder being a clear case of the pattern of gender-based violence, there was a vehement and systemic denial of this fact. On every level, the murder was delegitimized as a femicide; the police and prosecution classified it as a motiveless crime, ignoring the defendants' own testimony, citing the sole reason for the murder being the victim's gender. Both the argument that this was a hate crime and an instance of femicide were never seriously considered. Law enforcement, the Court, and the media all attributed the crime to the defendant's mental illness. While it could be true that it played a big role in the execution of the crime, it does not dismiss the fact that the defendant explicitly targeted women on the basis of their being women. The deliberate negligence in recognizing patterns of gender based violence against women and treating this as an isolated incident when, in fact, one in three women in South Korea has "experienced physical or sexual violence at least once" in their lifetime is a failure to address the structural problems that South Korea faces.[49] Without a cultural recognition of gendered violence and the serious dangers that women face, the punishment of one crime makes little impact on the overall change in the system.

The Nth Room cases reveal a larger cycle that occurs in addressing issues of sexual exploitation and gender inequality. Before the Nth Room, the issue of "molka" began in 2013. "Molka" is the use of hidden cameras in seemingly private spaces such as women's bathrooms, hotel rooms, and locker rooms from which footage is taken, sold, and used for illicit purposes in Telegram groups. From 2013 to 2018, there were over 30,000 molka cases reported to the police.

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[49] *1 in 3 Women in Korea Experienced Violence at Least Once in Their Lifetime: Survey - The Korea Times*, https://www.koreatimes.co.kr/southkorea/society/20250424/1-in-3-women-in-korea-experienced-violence-at-least-once-in-their-lifetime-according-to-survey

From 2012 to 2017, 16,000 people were arrested for molka.[50] As a legal response to the issue, Article 14 of the Act on Special Cases Concerning the Punishment of Sexual Crimes was amended in 2014 to include specific language on digital sex crimes. 2019 saw a new iteration of sexual exploitation with the infamous Burning Sun Scandal. The Burning Sun Scandal is a case in which high-profile public figures in South Korea, including one of the most famous K-pop stars by the name Seungri, were charged with crimes that took place in or near the Burning Sun nightclub in Seoul. Among those crimes was the distribution of footage of women being either raped or "engaging in sexual acts" with other K-pop idols. This explosive sequence of offenses brought accusations of corruption and bribery within Seoul's police force. Seungri, who was the face of the Burning Sun case, was sentenced to three years in prison for arranging prostitution services, embezzlement, and violation of overseas gambling laws.[51]

Although there were 124 arrests and 18 imprisonments of those involved with operating the chat rooms, there were an estimated 60,000 users who accessed the chat rooms and purchased the sexually exploitative content. The cycle is as follows: a massive scandal takes over the country, public outrage ensues, and some legal reform or retribution is imposed. In response to the reforms made, for example, the amending of laws to facilitate a stricter form of punishment, new methods emerge to continue sexual exploitation until the crime gains traction and starts to expand its scope of victims, which draws attention and becomes a scandal, thus beginning the loop once again. This persists due to the absence of a substantive, lasting influence on society that ignites a transformation in the fundamental perception of gender inequality and gender-based crimes. The Nth Room and Molka cases highlight the continued normalization of sexual crimes in South Korean society, given the sheer volume of perpetrators. These crimes are treated as atypical when in reality they are a product of the systemic issues that women face. What can be done when this recurring cycle continues to afflict society and women in particular? The 4B Movement suggests throwing a wrench in the wheel, a complete disengagement from the means of production of such a cycle.

III. Discussion

IIIa. What is the 4B Movement?

As a philosophical concept, the 4B movement is a radical disengagement with "expected gendered activities."[52] The four tenets of the movement are "no marriage (bihon), no childbirth

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[50]*From "Molkas" to Deepfake Scandals: South Korea's Ongoing Battle Against Digital Sex Crimes | Czech Centre for Human Rights and Democracy*, (Oct. 4, 2024), https://www.humanrightscentre.org/blog/molkas-deepfake-scandals-south-koreas-ongoing-battle-against-digital-sex-crimes.

[51]*K-Pop Star Seungri Sentenced To 3 Years In Prostitution Case : NPR*, https://www.npr.org/2021/08/12/1027037205/k-pop-star-seungri-sentenced-to-3-years-in-prostitution-case

[52]Ash Schepens, *The Rise of the 4B Movement: Reimagining Futures Through Radical Resistance*, 9 MacEwan University Student eJournal (2025), https://journals.macewan.ca/muse/article/view/2902.

(bichulsan), no sex (bisekseu), and no dating (biyeonae) with men."[53] There is no sole definitive catalyst for the beginning of the movement; instead, it is more so the consequence of a culmination of dissatisfaction with the heteropatriarchal state of South Korean society. To trace a lineage, there are a few notable events that greatly aided in the formation of the movement–the first of which is the creation of *Megalia* in 2015.[54] *Megalia* is a feminist internet community that serves as a space to generate discourse surrounding misogyny in South Korea, the sharing of experiences informed by being perceived as a woman, and also to provoke Korean men. It emerged as a response to the rampant misogyny of online spaces, the root of which has been identified by scholars as "an effort to relegate women back to a subordinate status within the patriarchal system to prop up the hegemonic masculinity of young men when the status of male breadwinner is no longer secure."[55] This inclination toward relegation is due to the decline of the domination of Confucianism and the role it subjects women to in Korean society. Women's roles have transformed, beginning with their entry into the industrial work force in the 1970s, which served as a gateway for them to become more vocal in advocating for their rights and further allowed for economic mobility and independence.[56] With this newfound economic freedom, the relationship that women had toward social practices and positionality historically attributed to them–reproductive labor, domesticity, and dependence on men, among these–shifted. As a result, the backlash that women face for said shift has been detrimental to the progress of achieving equality that is truly meaningful.

Misogynistic online spaces cast blame on women for being "selfish and indifferent to the public good," their interpretation stemming from the new social and economic positions women have assumed, departing from patriarchal expectations. Korean women in these spaces are particularly criticized for their "Korean-ness."[57] They are referred to as *kimchinyeo*, or kimchi women, designating them as inferior and undesirable as compared to white or Japanese women.[58] A key observation highlighted by *Megalia* is the particular hypocrisy that exists in the "casual acceptance and toleration" of misogyny as compared to the severe criticism women receive when expressing opinions of a misandrist nature — elucidated by a user belonging to the group as the infiltration of misogyny into society, likened to the permeation of air in the atmosphere. This is exemplified by the ease with which terms such as *kimichinyeo* are adopted and popularized.

Furthermore, the Gangnam Station case served as another source in building the momentum of 4B. Following the news of the murder, women began to publicly express their

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[53]Ash Schepens, *The Rise of the 4B Movement: Reimagining Futures Through Radical Resistance*, 9 MacEwan University Student eJournal (2025), https://journals.macewan.ca/muse/article/view/2902.
[54]Euisol Jeong & Jieun Lee, *We Take the Red Pill, We Confront the DickTrix: Online Feminist Activism and the Augmentation of Gendered Realities in South Korea*, 18 Feminist Media Studies 705 (2018).
[55]Ibid.
[56]Kim Seung-kyung, *Consolidating Women's Rights in Southcriteria , rigidheir, Korea: The Role of Women's Movements in the Democratization*, 35 Korea Observer 463 (2004).
[57]Euisol Jeong & Jieun Lee, *We Take the Red Pill, We Confront the DickTrix: Online Feminist Activism and the Augmentation of Gendered Realities in South Korea*, 18 Feminist Media Studies 705 (2018).
[58]Ibid.

opinions both online and offline.[59] At the center of the conversation was the outrage women felt at the authorities' and press's refusal to recognize the murder as femicide. Activists organized a social campaign, leaving over a thousand sticky notes at Gangnam Station Exit No. 10 with messages expressing grief, anger, and a call to action.[60] This campaign ignited a larger conversation surrounding the issue of gender-based violence and the serious lack of recognition of it as a specific form of violence that is informed by larger sociocultural norms.

The last event to highlight in understanding the contemporary roots of the 4B movement is the "Escape the Corset" movement. This movement, which originated online in 2015, is conceived by young Korean women in *Megalia* and targets the unrealistic beauty standards cast upon women by society.[61] South Korea especially has a longstanding practice of creating extremely rigid definitions of attractiveness, particularly for women, and enforces such criteria to the detriment of their well-being. In rejection of conforming to such beauty standards, participants cut their hair short, committed to disposing of cosmetics, did not wear makeup, and refused to wear feminine-presenting clothing.[62]

The 4B movement, informed by and intertwined with the three examples mentioned, operates largely online. 4B examines the "sites and mechanisms of power" through the approach of focusing on the shared experiences of Korean women in their everyday struggle against patriarchy, highlighting these stories to demonstrate a larger societal issue.[63] Through the identification of sites of power that intrude on women's daily lives, 4B weaves what may be viewed as separate issues into a larger picture, revealing the patriarchal project. In working to identify and oppose the structures at play and their particular function in the ongoing systemic oppression of women, activists have taken the position of complete "counter-participation" in the social practices expected of women.[64] This form of resistance is their move toward liberation; a demand that society recognize the current status quo as unacceptable or bear the consequences. It stands as a way for women to define their lives not in "the terms of their relationships or ties to men" but to begin to understand their lives through a new lens.[65]

In its capacity as a legal critique, the 4B movement recognizes the insufficiency of formal equality altogether. The movement calls attention to the gap between existing legal frameworks–such as the reformation of the family register, amendments to statutory law, or criminal punishment for crimes against women–and the lived reality of a woman belonging to South Korean society. While courts have certainly adopted practices to achieve substantive equality or justice for victims, it is not enough to stop there. Even if laws have been passed to encourage the advancement of women's rights since the inception of the Republic of Korea, the reality is that

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[59]Jinsook Kim, *Sticky Activism: The Gangnam Station Murder Case and New Feminist Practices against Misogyny and Femicide*, 60 JCMS: Journal of Cinema and Media Studies 37 (2021).
[60]Ibid.
[61]Gowoon Jung, Yaquan Liang & Hyunsook Lee, *"I Feel Free and Comfortable": The Escape the Corset Movement in South Korea and the Question of Women's Agency*, 107 Women's Studies International Forum 102973 (2024).
[62]Ibid.
[63]Ash Schepens, *The Rise of the 4B Movement: Reimagining Futures Through Radical Resistance*, 9 MacEwan University Student eJournal (2025), https://journals.macewan.ca/muse/article/view/2902.
[64]Ibid.
[65]Ibid.

the wage gap between men and women in the country is over 30%, the most substantial of the 38 countries that make up the Organization for Economic Co-operation and Development.[66] Gendered violence remains a serious issue in Korea that has yet to be properly recognized and addressed as such. The lived experiences of women do not align with the language of law. The law cannot reach every corner of society. It cannot transform the longstanding norms and beliefs of a culture. Legal reform is wholly ineffective if there is no true action motivating a palpable change in the everyday practices of the population. The 4B movement exists because it does what the law can't. It creates a disturbance in the norms of South Korean society so tumultuous that it requires attention, igniting conversations that would not otherwise be had.

While the 4B movement is an incredibly powerful demonstration of frustration and disengagement with patriarchy, it is not without its own inadequacies. The movement lacks an intersectional approach in terms of its absence of consideration for the range of women's socioeconomic backgrounds. Many women may not be in a position financially to commit to a complete rearrangement of their lifestyles. Imparting an intersectional lens would be vital in terms of the next step in ensuring the movement gains more traction and is accessible for all women who wish to participate. It is important to critically examine the movement while still celebrating its merits and influence.

IIIb. Paths Forward: Legal Reforms and Cultural Transformation

IIIb-i. Legal Reforms

Though the law alone is not sufficient to address and dismantle the patriarchy, it is still crucial that reform is made. This binds citizens to comply with the law or otherwise face punishment. The protections that the law can provide for women are incredibly necessary and serve as a measure of advancement in women's rights. The recognition of the past wrongdoing done to women — as well as children — and the legislation that is created and passed in response, is characteristic of South Korea. Topics that generate conversations, questions, and frustrations from the public can not go unanswered by the government.

South Korea has already made progress in legal reform in response to major scandals and the resulting outrage that ensues among citizens, many of which have been previously mentioned. This includes the Act on Special Cases Concerning the Punishment of Sexual Crimes and the revision of the *hojuje* system. Although strides have been made in the legal field, there are still many concerning gaps in the legal system that pose a serious threat to women and leave room for criticism in the facilitation of equality for women. This applies to both civil, everyday life, and norms, as well as to victims in the case of a crime. This section explores possible recommendations for legal reforms and examines existing reforms that have been enacted.

The first reform is to assert the term femicide as its own category of crime. The origins of the word stem from the effort to bring awareness to the violent killing of women. Including the

[66] *Korean Women Earn 29% Less than Men - The Korea Herald*, https://www.koreaherald.com/article/10564875

prefix *fem* is partially a political choice, creating a distinction that calls attention to the particular violence this classification stipulates.[67] In cases of femicide, the motive of the intentional killing of women is primarily gender-related.[68] In its refusal to acknowledge homicides that have occurred, such as the Gangnam Station Murder, which retains the circumstances characteristic of femicide, the South Korean government gives the impression that it does not see legitimacy in the acknowledgment of these crimes as a symptom of the patriarchy and the society that perpetuates it. Should the classification of femicide be introduced, it could aid in creating a consciousness of the seriousness and frequency with which this crime occurs. Establishing a widespread awareness of the crime prompts an exploration of the root causes of the violence that could previously go untended. Additionally, it would allow for such crimes to be categorized and tracked, creating data that can be utilized to identify trends of violence and create strategies toward meaningful analysis of femicide in the South Korean context.

Another area in dire need of attention is addressing digital sex crimes. The first recommendation, which has already seen action by the government, is to properly confront this rampant problem and administer justice toward victims on a larger scale is to hold platforms, like Telegram, accountable for their role in the dissemination of sexually explicit and exploitative material. While the terms of service prohibit posting "illegal pornographic content on publicly viewable Telegram channels, bots, etc," there is virtually no enforcement of the policy, which has allowed it to be a platform rampant with illegal sexually explicit material.[69] In September 2024, the Seoul Metropolitan Police Agency launched an investigation against Telegram on the grounds of "aiding and abetting deepfake sexual crimes".[70] This came after the arrest and indictment of Pavel Durov, Founder of Telegram, by the French authorities in August of 2024.[71] The charges brought against him included the dissemination of images of child abuse, drug trafficking, and failure to comply with the requests of law enforcement.[72] The investigation by both South Korean and French authorities prompted the platform to be much more cooperative with governments, removing content that violates its terms of service when instructed by authorities.

In the same vein, the issue of deepfake pornography is a rising concern in South Korea. A 2023 study found that 53% of the world's deepfake pornography is generated in the country.[73] South Korean women have been targeted, their faces, names, and personal information spread online without their consent and attached to artificial intelligence-created sexual content. This is

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[67] *Theories of Femicide and Their Significance for Social Research - Consuelo Corradi, Chaime Marcuello-Servós, Santiago Boira, Shalva Weil, 2016*, https://journals.sagepub.com/doi/full/10.1177/0011392115622256

[68] *Five Essential Facts to Know about Femicide | UN Women – Headquarters*, https://www.unwomen.org/en/articles/explainer/five-essential-facts-to-know-about-femicide

[69] *Terms of Service*, TELEGRAM, https://telegram.org/tos

[70] 경찰, 텔레그램 법인 내사 착수…딥페이크 성범죄 방조 혐의 | 연합뉴스, https://www.yna.co.kr/view/AKR20240902082900004

[71] Bobby Allyn, *Telegram CEO Pavel Durov Indicted in France*, NPR, Aug. 28, 2024, https://www.npr.org/2024/08/28/nx-s1-5091295/telegram-ceo-pavel-durov-france-indicted.

[72] Ibid.

[73] SeungGyeong Ji, *#MeToo in an AI-Generated Deepfake Sexual Violence Era in South Korea*, 112 WOMEN'S STUDIES INTERNATIONAL FORUM 103146 (2025).

referred to as “deep fake sexual violence”, which scholar SeungGyeong Ji defines as, “gender-based violence that infringes on an individual's physical, mental, sexual, and/or economic integrity through acts of sexual conduct without the other party's consent, such as the nonconsensual filming or distribution of images (KSVRC, 2025), produced by AI technology.”[74] Deepfake sexual violence is an instrument leveraged for the humiliation of women, demeaning their existence and dignity.[75] In South Korea specifically, between 2020 and 2024, deepfake pornography became an increasingly frightening issue. Following the Nth room scandal, the consumer base of the Telegram chatrooms did not simply disappear. Instead, they shifted methods of viewing unconsensual sexually explicit material and began using AI technology to generate pornographic material of women.[76] It has been noted that much of the deepfake pornography generated in South Korea is the result of deliberate targeting of women who were previously in a relationship with the creator of such content.[77] This act could be interpreted as a form of revenge porn due to the intention to harm a woman’s, “ emotional, sexual, and psychological integrity and dignity.”[78] This makes the prominence of deepfake pornography especially concerning, as it significantly implies the suffering of a victim and is a complete infringement on their livelihood.

The legal response to the rise of deepfake pornography has been swift, with legislation taking multiple angles to combat the surge of content. Article 14 of The Act on Special Cases Concerning the Punishment of Sexual Crimes addresses the punishment of producers and consumers of deepfake pornography. On the producers' side, the law reads as follows:

(1) A person who edits, synthesizes, or processes photograph, video, or audio (hereinafter referred to as “photograph, etc.” in this Article) targeting the face, body or voice of a person for the purpose of dissemination, etc, in a form that may cause sexual desire or shame against the will of the person who is subject to video, etc. (hereinafter referred to as “editing, etc.” in this Article), shall be punished by imprisonment with labor for not more than five years or a fine of not more than 50 million won.[79]

(2) A person who has published, etc. a compilation, composite, or processed product (hereinafter referred to as "compilation, etc." in this paragraph) or a editing, etc. (including a duplicate of a duplicate; hereinafter the same applies in this paragraph) under paragraph (1), or even if it is not contrary to the intention of the person subject to the video material, etc. at the time of editing, etc. under paragraph (1), a person who dismisses the edited material, etc. against the intention of the person subject to the video

[74] SeungGyeong Ji, *#MeToo in an AI-Generated Deepfake Sexual Violence Era in South Korea*, 112 Women’s Studies International Forum 103146 (2025).
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] *ACT ON SPECIAL CASES CONCERNING THE PUNISHMENT OF SEXUAL CRIMES*, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=40947&lang=ENG

material, etc. after the death, shall be punished by imprisonment with labor for not more than five years or by a fine not exceeding 50 million won.[80]

(3) A person who commits a crime under paragraph (2) by means of information and communications networks against the will of the person subject to video works, etc., for the purpose of making profits shall be punished by imprisonment with labor for not more than seven years.[81]

For consumers of deepfake pornography, the statutory law passed by the National Assembly in 2024 calls for individuals who, "possess, purchase, store, or view" deepfake material to be punished with up to three years in prison or a fine of up to thirty-million won, or $22,500.[82]

In regulating platforms, namely Telegram, operators of online platforms must delete deepfake content and submit it to the Korean Communications Standards Commission within the first 24 hours of it being uploaded.[83] Further, to improve response time in the deletion of such material, the South Korean government created an AI system that works to identify digital sex crime materials, send requests for deletion, and monitor the statuses of deletions.[84] While the proactivity of the South Korean government is certainly admirable and displays a commitment to the protection of victims of sexual crimes as well as an effort toward preventing these crimes from occurring in the first place, these regulations are not without their shortcomings. Wrongdoers continue to evolve with government regulations and find new loopholes to exploit to avoid detection and punishment.

IIIb-ii. Sociocultural Reform

While legal reform plays a pivotal role in working to administer justice to women, there is another facet arguably more crucial to addressing gender inequality: cultural reform. It is the culture that continues to perpetuate misogynistic attitudes about women, enabling people to first believe it is permissible to hold such beliefs and actualize them in their daily lives, and to a more extreme degree, commit heinous crimes against women without an examination of the gender-based motive. This creates a dangerous climate for women who, devoid of allyship in the general public due to a lack of cultural awareness and willingness to challenge current norms and traditions, are subjected to situations that pose a threat to their livelihood without proper tools for attaining retribution. Through the refashioning of South Korea's social climate and confronting its role in the maintenance of the patriarchy, steps toward true substantive equality can be taken. This section explores what reform on the sociocultural level looks like for South Korea. While

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[80] *ACT ON SPECIAL CASES CONCERNING THE PUNISHMENT OF SEXUAL CRIMES*, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=40947&lang=ENG
[81] Ibid.
[82] *Assembly Passes Bills to Toughen Punishment for Deepfake Sex Crimes - The Korea Herald*, https://www.koreaherald.com/article/3480484 (last visited Apr. 1, 2026).
[83] Heejin Seok et al., *The Current Status and the Implications of South Korea's Response to Deepfake Sexual Crimes*, TACTEEN NAEIL ISSUE REPORT: DAY OF THE ELIMINATION OF SEXUAL VIOLENCE AGAINST CHILDREN (2025).
[84] Ibid.

these are lofty ideals that require a concerted effort and consistency over the course of many years, even a semblance of a shift in cultural attitudes about these issues can incite substantial progress critical to the improvement of the condition of women in South Korea.

To drive actual change forward, cultural transformation from multiple fronts allows for a far-reaching impact to be possible. The first of which is increasing media representation and awareness. The way the media frames these issues plays a significant role in shaping public perception. For example, mainstream news articles covering the Gangnam Station Murder quoted police in describing the brutal killing, which was clearly a textbook definition of femicide as a "typical crime committed by the mentally disturbed."[85] The media does not even venture to question the position of the police in its coverage of such events, allowing the narrative to be perpetuated: violent crimes against women are not part of a larger pattern, but are instead individual events with their own causes. In reporting violence against women without a critical lens, framing them outside of the sphere of misogyny and hate-motivated crimes, the general public adopts this frame into their own beliefs about such situations. They become facts of the crime, stripped of all context relating to gendered violence. Further, the public is not challenged to examine the larger pattern of systemic issues that are the root of the violence. This prevents any social critique from manifesting into a larger conversation that could actually motivate a cultural evolution.

The second front is accountability within interpersonal and community spaces. Structural change is not incited by a law coming into effect or a ruling being handed down. It begins in the most intimate spaces where individuals are free to converse with those they trust most without fear of judgment or punishment. At the heart of making true movement toward gender equality and justice is having tough conversations with those closest to you. For South Korean men especially, this means the willingness to confront misogyny where it thrives most abundantly: among friends, online, or face-to-face. The normalization of participating in the manosphere dialogue, consuming illegal sexual content, and dismissing the experiences of women as hyperbolized and inferior to those of men is a key component of gendered violence. It is what allows these crimes to persistently be perpetrated and justice to seldom be delivered. Honing in on peer accountability is an essential tool in cultural transformation. When men shed their passive role as bystanders in the debasement of women and actively work to reject it, the social permission afforded to misogyny erodes.

Finally, recognizing 4B as a legitimate response also helps to communicate the dire need for cultural change to happen. Understanding 4B requires understanding the conditions that catalyzed its creation. It is a movement responding to a failed system that has never served women and can no longer be tolerated. This recognition is crucial to begin to move toward a change in the cultural attitude surrounding conversations of women's rights and the ongoing negligence of such rights. Recognizing it as a rejection of the structures that have situated the organization of women's lives around men's needs also allows for a reframing of the question.

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[85]Ock Hyun-ju, *Gangnam Murder Was Not a Hate Crime: Police*, THE KOREA HERALD (May 22, 2016), https://www.koreaherald.com/article/964959

Instead of asking why women are withdrawing from society, the question becomes: what has South Korean society done to make such a dramatic withdrawal feel like the only option for women? This reshaping in itself is a form of cultural transformation, creating a path toward substantive equality.

IV. Conclusion

South Korea has strong legal frameworks for gender equality. Its Constitution explicitly prohibits gender discrimination, establishing provisions for the protection of women, and its legislature has enacted numerous statutory protections when major outrage arises. Yet, as examined through the three cases in this paper, legal foundations alone do not guarantee the equality it outlines and enacts. In each case, the law responded with strong amendments aimed at the advancement of women's lives, and in each case, that proved to be insufficient. The pattern described is not coincidental; it is structural.

The 4B movement emerges as a logical path forward when women experience such a tremendous failure in the securing of their freedoms and are subjected to violent violations of their livelihood on a mass scale. Without the disruption that 4B introduces into the consciousness of South Koreans, the status quo is allowed to remain, and the mindset of the culture seeks no shift. The current cultural framework, entrenched in patriarchy under the guise of maintaining tradition, inhibits the law from bearing any real effect on the lives of South Korean women. Women then see it necessary to construct their own methods of liberation separate from the institutions that harm them and their success. This separation forces an examination of society that the law, in the South Korean context, does not concern itself with.

Legal reforms remain essential to continuing to uplift and protect women, but it can not be the only piece of the puzzle. The law operates within a culture, and a culture that does not hold a genuine commitment to maintaining the equality the law proclaims will always inhibit the progress of society and the effectiveness of the law. Substantive equality is an all-encompassing standard. If it wants to succeed in its mission, it must reach the cultural, economic, and institutional ethos of society. Without this, the disconnect remains between what the law promises and what women's lived reality manifests into. Consequently, the law cannot deliver what it was designed to provide.

The question that remains is not whether the law is enough to effect change, but rather, is South Korean society, its institutions, men, and entire cultural understanding of self, prepared and willing to do the work to transform itself?

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ON MATTERS OF STATE COURTS PRESERVING ELECTORAL JUSTICE

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Abstract

Ensuring the fair representation of all voters remains a persistent challenge in American democracy. While there certainly exists constitutional and statutory protections that try to uphold the principle value that each citizen's vote ought to carry an equal weight, their protections do not always operate uniformly to serve minority voters. Today, this phenomenon can be observed in North Carolina and Texas, where partisan redistricting critically reduces the electoral influence of minority populations. Partisan redistricting describes the process by which electoral districts are drawn to unfairly advantage the concentration of a particular party's voters at the expense of the voting power of another. When states like North Carolina and Texas manipulate electoral maps, they intensify the challenges minority populations face in exercising a political voice. Through an analysis of *Baker v. Carr, Reynolds v. Sims*, and *Thornburg v. Gingles*, it becomes evident that it is gaps within the American legal system that allow these challenges to persist. In particular, the recent unwillingness of federal courts to adjudicate issues of electoral fairness unjustly allows states to create electoral maps diluting minority voting power devoid of federal intervention. Whereas current redistricting practices perpetuate systems of unequal representation, state courts ought to play a larger role to ensure that the votes of traditionally underrepresented minorities are adequately represented in the national electorate. State courts may do so by deriving power from their own state constitutions and the Voting Rights Act of 1965. By these means, state courts can begin to assert a more proactive role in reducing the challenges minority voters face in today's political landscape.

I. Introduction: Foundational Cases

Democratic governance is grounded in the principle belief that each citizen's vote ought to carry an equal weight. Certainly, these are the ideas to which today's voting laws seek to enforce. However, the practical process of upholding these beliefs make it difficult to ensure such equality. Whereas issues relating to the unfair apportionment of electoral districts continue to generate disputes over the dilution of minority voting power, it is difficult to assert that the weight of each vote is truly equal. The growing unwillingness of federal courts to adjudicate issues relating to partisan gerrymandering makes it difficult for minority voters to challenge unfair maps, which hinders their political representation. However, while minority voters face substantial challenges seeking judicial support today, federal courts have not always denied intervening in matters of electoral fairness. In fact, landmark cases like *Baker v. Carr* demonstrate a time when federal courts held a substantial role in determining whether or not states were handling elections fairly.[1] In *Baker,* the Supreme Court first recognized the judiciability of matters of electoral justice.[2] When voters in Tennessee challenged the state legislature's prolonged failure to reapportion its legislative districts despite substantial population shifts, the Court found it reasonable to intervene and declare Tennessee's negligence unconstitutional.[3] The Court believed that the disparities that resulted from the state's negligence diluted the weight of votes and gravely violated the Equal Protection Clause of the Fourteenth Amendment.[4] As a result, allegations of unconstitutional malapportionment became issues subject to federal judicial review and motivated the Court to take action.[5]

Similar to *Baker, Reynolds v. Sims* further explored issues of voter equality on the federal level to articulate the now-foundational "one person, one vote" principle.[6] In *Reynolds v. Sims*, voters in Jefferson County, Alabama alleged that the state's electoral districts were not drawn to reasonable proportions.[7] Where the Court intervened, it demonstrated that federal oversight could be used to ensure electoral fairness for underrepresented populations. In *Reynolds,* while certain districts housed nearly 41 times more eligible voters than Jefferson County, the voters argued that dramatic differences between district sizes diluted their vote and violated the Equal Protections Clause of the Fourteenth Amendment.[8] The Supreme Court decided that the Equal Protection Clause rendered such districting unconstitutional.[9] The rationale behind such a decision can be explained by the "one person, one vote" principle, which establishes that legislative districts ought to be drawn in a way that respects population so as to ensure that each citizen's vote carries substantially equal weight.[10] As a result, the Court formalized the "one person, one vote" principle as the governing standard for state legislative apportionment,[11] setting the standard for how federal courts believe states ought to behave in matters of electoral practice.

Building on the constitutional protections of the Equal Protection Clause, *Thornburg v. Gingles* addressed the issue of minority vote dilution through an observation of Section 2 under the Voting Rights Act of 1965; its ruling operationalized the ways in which courts can define instances of unfair districting and when it is appropriate to intervene.[12] In *Thornburg*, a group of Black voters in North Carolina argued that the structure of the state's districts obscurely diluted

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[1] *Baker v. Carr,* 369 U.S. 186 (1962)
[2] Id. at 208-209.
[3] Id. at 187-88.
[4] Id. at 194.
[5] Id. at 208-209.
[6] *Reynolds v. Sims*, 377 U.S. 533 (1964).
[7] Id. at 537-38.
[8] Id. at 545; U.S. Const. Amend. XIV, §1.
[9] Id. at 568.
[10] Id. at 561-63.
[11] Id. at 568.
[12] Thornburg v. Gingles, 478 U.S. 30 (1986); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301-10702).

minority voting strength, which prevented Black voters from electing representatives of their choice.[13] The voters claimed that such unfairly drawn districts violated Section 2 by intentionally reducing the concentration of Black voters in any singular district.[14] In response, the Court established a three-part framework for which courts must use to evaluate claims of racial vote dilution under Section 2 of the Voting Rights Act.[15] This framework was applied to Thornburg's case and would require higher burdens of proof for similar cases in the future. The Supreme Court placed the burden of proving unfair electoral districts on the plaintiffs to demonstrate three key conditions: first, that the minority population is sufficiently large to constitute a majority within a reasonably drawn district; second, that the minority group is politically cohesive; and third, that the majority population votes sufficiently as a bloc to typically defeat the minority's preferred candidate.[16] Altogether, this framework formalized the doctrinal basis through which courts can define and adjudicate unfairly drawn electoral maps.

Through the ways in which *Thornburg v. Gingles* operationalized the Voting Rights Act to address the structural barriers to minority political representation, its rulings illustrate the ways that federal courts can provide a legal pathway for minority voters to seek redress from unfair electoral maps.[17] Yet, while these frameworks have been legally established to guide federal protections for minority voters, their provisions are not adequately utilized by the courts to actualize protections for minority voters. Instead, today's legal landscape is characterized by a growing unwillingness by the federal courts to intervene in instances where minority voters suffer from unfairly drawn maps. As such, this note will use the aforementioned three cases to present and argue that as federal judicial intervention in redistricting disputes has declined, state courts have emerged as the critical institutions responsible for safeguarding minority voting rights.

Ia. The Role of Judicial Enforcement in Electoral Matters

Until recently, federal courts have long served as the primary forum in which citizens could challenge unfair electoral practices. Decisions like *Baker v. Carr*, are an example of such federal intervention. There, the Supreme Court found reasonable authority to hear cases challenging state legislative apportionment.[18] *Baker* gave courts the power to review any state action that may dilute the voting power of particular groups. In doing so, the Court set precedent for later rulings that further examine the constitutional alignment of state redistricting practices.[19]

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[13] Id. at 34-35.
[14] Id. at 35.
[15] Id. at 50-51.
[16] Id. at 50-51.
[17] *Thorburg*, 478 U.S. at 50-51; Voting Rights Act of 1965 § 2, 52 U.S.C. §10301.
[18] *Baker*, 369 U.S. at 208-09.
[19] Id. at 208-09.

Whereas courts prior have found it unreasonable to judge matters of equal voting protection on the basis of politics, *Baker v. Carr* set precedent by establishing unequal representation as an issue of legal concern.[20] In areas where districts had not been redrawn in over six decades in Tennessee, voters argued that the State of Tennessee ignored the 1901 Apportionment Act and neglected to redraw congressional district boundaries.[21] The voters claimed that this negligence resulted in a severe malapportionment that diluted the weight of their votes.[22] Notably, they argued that this disparity violated the Equal Protection Clause because inaction from the state prevented voters from being able to fully and adequately express their political opinions through the vote.[23] The Court ultimately held that claims alleging unequal representation under the Fourteenth Amendment were justiciable, meaningful, and therefore subject to review by federal courts:[24]

> "Appellants' claim that they are being denied equal protection is justiciable, and if discrimination is sufficiently shown, the right to relief under the Equal Protection Clause is not diminished by the fact that the discrimination relates to political rights."[25]

The ruling in *Baker v. Carr*, when taken together with *Reynolds v. Sims*, and later *Wesberry v. Sanders*, tells a cohesive story of how courts derive the power to adjudicate issues of electoral justice. *Reynolds v. Sims* exemplifies the court action that should take place when a citizen's right to exercise the "one person, one vote" principle is violated.[26] The Court's review of Alabama's state legislative districts further applied the findings of *Baker v. Carr* to require that districts be apportioned such that votes are substantially equal in weight.[27] Further, the decision of *Wesberry v. Sanders* extended these requirements to congressional districts to predicate its belief that federal electoral representation ought to uphold a one-person, one-vote standard.[28] Together, these decisions lay the critical foundations that define the precedence for how Courts act in matters pertaining to electoral justice.

Ib. Examining the Constitutional Mandate of the One Person, One Vote Principle

The Fourteenth Amendment articulates that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property."[29] Through this statement, a principle

[20] *Baker*, 369 U.S. at 208-09.
[21] Id. at 187-88.
[22] Id. at 187-88.
[23] Id. at 194.
[24] Id. at 208-09.
[25] Id. at 237.
[26] *Reynolds*, 377 U.S. at 568.
[27] Id. at 561-63.
[28] *Wesberry v. Sanders*, 367 U.S. 1, 7-8 (1964).
[29] U.S. Const. Amend. XIV, § 1.

understanding of the "one person, one vote," was established. Whereas a citizen's right to life, liberty, and property are directly related to their ability to cast a fair and equally weighted vote, any state's denial of a citizen's right to a fair vote constitutes an abridgement of their rights. Thus, when states dilute the weight of minority votes, they are invalidating the "one person, one vote principle," on the basis that one minority no longer holds the same weight against others.[30]

This practical logic behind the "one person, one vote" principle is further solidified by previous discussions on the Court's decisions in *Reynolds v. Sims* and *Wesberry v. Sanders.*[31] As the rulings in *Reynolds* and *Wesberry* mandated the proportional representation of citizens across legislative and congressional districts, the Supreme Court upheld its belief that the influence of minority votes ought to be held in the same weight, proportion, and status as any other vote. Still, while these decisions indicate the Court's textual support of fair electoral practices, these decisions do not always translate into the effective enforcement of such ideals. Of course, the Equal Protection Clause provides a constitutional basis for courts to review and invalidate districting plans that effectively diminish the voting strength of particular groups.[32] However, the further examination and application of the Equal Protection Clause still remain contingent on the courts' willingness to adjudicate such claims. While the legal language and context for voter rights protections exists through federal documents like the Equal Protection Clause and the Courts' decisions in *Reynolds v. Sims* and *Wesberry v. Sanders*, the gaps in how these ideas are enforced make it difficult for minority voters to reliably challenge unfair electoral maps.[33]

Ic. Federal Statutory Protections Against Racial Vote Dilution

Where the Fourteenth Amendment may lack in specificity, the Voting Rights Act of 1965 (VRA) serves as the primary statutory support vehicle for preventing racial vote dilution.[34] In *Thornburg v. Gingles*, the Supreme Court used provisions in the Voting Rights Act to more concretely define the conditions under which minority voters ought to challenge state reapportionment plans.[35] Where the Equal Protection Clause finds any violation of the one person, one vote principle to be unconstitutional, the Court found efforts by states to dilute the weight of minority votes to a judiciable issue to which the Voting Rights Act is applicable.[36]

At the same time, however, the Court has also allowed the use of race to guide redistricting plans while cautioning against the overreliance on race as a dominant factor. In

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[30] *Reynolds*, 377 U.S. at 558.
[31] *Reynolds*, 377 U.S. at 561-68; *Wesberry*, 367 U.S. at 7-8.
[32] U.S. Const. Amend. XIV, § 1; *Reynolds*, 377 U.S. at 561-68.
[33] U.S. Const. Amend. XIV, § 1; *Reynolds*, 377 U.S. at 561-68; *Wesberry*, 376 U.S. at 7-8.
[34] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301-10702).
[35] *Thornburg*, 478 U.S. at 44-51.
[36] *Thornburg*, 478 U.S. at 35; U.S. Const. Amend. XIV, § 1.

Shaw v. Reno and *Miller v. Johnson*, the Court found districts drawn predominantly through racial considerations in violation of such provisions in the Equal Protection Clause.[37] These rulings establish that ideas of race may guide a state's redistricting efforts, while they may not dominate or constitute the main determinants of district boundaries. This intersection of federal statutory protections and constitutional limits positions itself in such a way as to establish a unique framework that allows the court to take two related actions. Where the Voting Rights Act allows the courts to intervene to protect minority voters from discriminatory redistricting practices, the Equal Protection Clause extends the courts' authority to enforce constitutional boundaries on the use of race as the dominant factor of districting.[38]

Id. Observing the Decline in the Federal Protection of Minority Voter Rights

Although constitutional and statutory mechanisms to protect minority voters formally exist, recent Supreme Court jurisprudence reflects a significant contraction in the scope and effectiveness of the federal enforcement of those such protections. Today, provisions in the Voting Rights Act no longer have the same reach over matters of unequal redistricting.[39] Instead, their provisions only serve as limited and reactive tools to support minority voters only when there is a judicial willingness to intervene. Additionally, today's federal courts also demonstrate an increasing unwillingness to adjudicate redistricting disputes, thereby reducing the availability of federal remedies for minority voters seeking means of legal challenge. The most consequential shift demonstrating this transition first occurred in *Shelby County v. Holder*.[40]

Prior to its ruling, Section 5 of the Voting Rights Act put voting districts under the supervision of the federal government through a process known as preclearance.[41] Preclearance required states to justify new electoral maps to ensure that new provisions allowed for the equal representation of all voting populations. Preclearance mechanisms provided a unique avenue for federal oversight in which unfair electoral maps could be struck down before they were certified by state legislatures. Specifically, upon redrawing district maps, states were required to submit new voting plans for federal approval.[42] States were burdened with requirements to demonstrate that their newly proposed electoral maps would not diminish the strength of minority voters, be it intentional or otherwise.[43] Alongside these regulations, Section 5 also required states with documented histories of discrimination to justify the legality of new electoral maps with increased scrutiny. Together, these mechanisms built into the Voting Rights Act gave the federal government a direct means of enforcing voting rights law and challenging discriminatory maps

[37] *Shaw v. Reno*, 509 U.S. 630, 639-52 (1993); *Miller v. Johnson*, 515 U.S. 900, 910-16 (1995).
[38] 52 U.S.C. § 10301; U.S. Const. Amend. XIV, § 1; *Shaw*, 509 U.S. at 639-42; *Miller*, 515 U.S. at 910-16.
[39] Voting Rights Act of 1965, 52 U.S.C. § 10301.
[40] *Shelby County v. Holder*, 570 U.S. 529, 544-57(2013).
[41] Voting Rights Act of 1965, 52 U.S.C. § 10304.
[42] 52 U.S.C. § 10304.
[43] 52 U.S.C. § 10304.

while offering minority voters additional levels of legal filtering against significantly unfair maps. However, despite these benefits, *Shelby County v. Holder* gravely dismantled these mechanisms in favor of a decentralized, state-centered, districting approach.[44]

In *Shelby County v. Holder*, the Court invalidated the Voting Rights Act's protective mechanisms and rendered Section 5's preclearance regime inoperative.

> "The Constitution provides that all States enjoy equal sovereignty. This principle applies not only to the terms upon which States are admitted to the Union, but also States' equal standing in the exercise of their sovereign powers… §5's preclearance requirement and its coverage formula raise questions because they differentiate between the States in ways that may no longer be justified."[45]

Through this decision, the Court eliminated the primary mechanism through which the federal government proactively involved itself in redistricting practices, even in light of larger race-based discriminatory concerns. The implications of this ruling are what constitute a significant enforcement gap in minority voting rights protection today. Whereas the preclearance operatives of Section 5 of the Voting Rights Act previously allowed the federal government to intervene on citizens' behalf on matters relating to unequal redistricting practices, this burden now falls on individual plaintiffs.[46] Now, citizens bear the responsibility to identify and challenge discriminatory practices only after they have taken effect. With a particular focus on how this ruling impacted the representation and ability of minority voters to achieve electoral justice, *Shelby County v. Holder* created a new legal landscape that would render minority voters more susceptible to unfair electoral maps that can now bypass a system of lacking federal regulation.[47] More broadly, this shift produces a legal enforcement gap that widens the difference between the formal existence of legal protections for minority voters and their actual enforcement. While the Voting Rights Act exists in writing to protect the equal rights of all American voters, the absence of active Section 5 preclearance mechanisms cripple the Act's ability to enforce any voter equality of the sort.[48]

The disappointing differences between written protection and practical enforcement of voter rights protection is only further exacerbated by cases like *Rucho v. Common Cause*.[49] In *Rucho v. Common Cause,* the North Carolina Democratic Party sued Republican Lawmakers for drawing the state's new 2016 electoral maps to advantage a Republican majority. When brought to the Supreme Court, the Court decided that federal courts should not review claims of electoral

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[44] *Shelby County*, 570 U.S. at 544-57.
[45] S*helby County*, 570 U.S. at 543-44.
[46] 52 U.S.C. § 10304; *Shelby County*, 570 U.S. at 557.
[47] *Shelby County*, 570 U.S. at 557.
[48] 52 U.S.C. § 10304; *Shelby County*, 570 U.S. at 557.
[49] *Rucho v. Common Cause*, 588 U.S. 684 (2019).

unfairness, as the act of redrawing district maps should be left freely to the political process and not the decision of the courts. By removing partisan gerrymandering claims from federal judicial review, the Court effectively diminished citizens' abilities to seek redress for significantly growing concerns of unfair districting practices.

As federal courts continue to narrow the scope of justiciable claims while simultaneously elevating the burden of proof required to invoke the Voting Rights Act for questions of voter protection, discriminatory redistricting practices may persist unchecked.[50] Although the court's ruling did not deem partisan gerrymandering to be explicitly acceptable, its opinion laid the legal foundation for the decline in federal judge intervention in matters of electoral justice.

In light of these constraints, declines in federal willingness to participate in the protection of minority voter rights raises questions as to where impacted voter communities can seek legal help elsewhere. While the principles articulated in *Baker v. Carr*, *Reynolds v. Sims*, and *Thornburg v. Gingles* have not been formally repudiated, the mechanisms through which these decisions are enforced have been substantially constrained by the rapid decline of federal courts to adjudicate matters of voter rights protection.[51] To that end, where unfair redistricting practices persist, and gaps in federal enforcement continue to grow, there now stands a new need for alternative sources of legal protection for voting communities facing discrimination. Such avenues should be independent of the federal court system. In that respect, state courts present themselves as viable alternatives to support the protection of minority voting rights in a way that can substitute recent losses in federal protection.[52]

Ie. Where State Constitutional Enforcement Serves as a Critical Safeguard for Minority Voters

Whereas federal courts have become less involved in adjudicating electoral disputes, state courts have assumed increased doctrinal significance in regulating legislative districting. Independent of the provisions of the Voting Rights Act, state courts exercise the authority to interpret and enforce their own constitutional provisions to govern electoral matters. Today, recent decisions in Pennsylvania demonstrate how these powers can be exercised.

In *League of Women Voters v. Commonwealth* (Pa. 2018), the Pennsylvania Supreme Court challenged and successfully invalidated redistricting plans under the Pennsylvania State Constitution's Free and Equal Elections Clause. Here, the League of Women Voters of Pennsylvania challenged the constitutionality of the state's 2011 congressional districting plan. The League argued that the state's map systematically diluted the influence of Democratic voters

[50] *Rucho*, 588 U.S. at 701; *Thornburg*, 478 U.S. at 44-51.
[51] *Baker v. Carr*, 369 U.S. at 209; *Reynolds*, 377 U.S. at 561-68; *Thornburg*, 478 U.S. at 44-51.
[52] *League of Women Voters v. Commonwealth*, 178 A.3d 737, 818 (Pa. 2018).

by dividing neighborhoods of high democratic concentration into separate districts. This manipulation, as the League contended, subordinated traditional districting principles of population equality and therefore violated the Free and Equal Election Clause.

In agreement with this argument, the Court found the state's redistricting plans gravely violated the constitutional principles of electoral equality.[53] Without reliance on the Equal Protection Clause of the Fourteenth Amendment, the state courts of Pennsylvania exemplified the means by which similar state courts can impose substantive constraints on the manner in which legislative districts are drawn.[54] In this way, the court's decision reaffirms that state constitutional guarantees may exercise power over legislative districting without reliance on federal protections.

The constitutional legitimacy of state judicial review was also addressed by the United States Supreme Court in *Moore v. Harper*, where a Republican-controlled North Carolina General Assembly passed new congressional maps that were challenged on the basis of extreme partisan gerrymandering.[55] WhereHarper et al. believed the new redistricting maps constructed a significant Republican advantage, their case sought to challenge the state legislature to ask itself whether the Elections Clause of the Constitution granted state legislatures the exclusive authority to regulate federal elections, insulated from review by state courts under such state constitutional provisions.[56] To that extent, the Court's decision upheld its belief that state courts retain the authority to adjudicate redistricting disputes.[57]

> "The Elections Clause does not vest exclusive and independent authority in state legislatures to set the rules regarding federal elections… nor does it insulate state legislatures from the ordinary exercise of state judicial review."[58]

While the Court found the Elections Clause to give state legislatures the power to regulate the "Times, Places and Manner" of congressional elections, it also found that such powers are subject to the constraints imposed by their state constitutions.[59] By affirming this principle, the Court's decision reinforces that state courts are capable of reviewing legislative districting plans that contravene constitutional requirements. Alongside the decision of *League of Women Voters v. Commonwealth*, the Court's opinion in *Moore v. Harper* demonstrates that state judicial review remains operative and essential to safeguarding voters and ensuring fair representation.[60]

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[53] *League of Women Voters*, 178 A. 3d at 818.
[54] Id.; Pa. Const. art. I, §5.
[55] *Moore v. Harper*, 600 U.S. 1 (2023).
[56] *Moore*, 600 U.S. at 6-11; U.S. Const. art. I, § 4, cl. 1.
[57] *Moore*, 600 U.S. at 22.
[58] Id.
[59] *Moore*, 600 U.S. at 22-26; U.S. Const. art. I, § 4, cl. 1.
[60] *League of Women Voters*, 178 A.3d at 818; *Moore*, 600 U.S. at 22.

II. Discussion and Application

IIa. Observing the Role of State Judicial Authority as a Primary Check on Partisan Maps

If federal courts are failing to act as effective gatekeepers against unfair electoral districting, state courts can assume their role. Whereas minority voters can no longer count on federal courts to reliably protect their rights, state courts now hold a particular responsibility to review and challenge assaults against them. *League of Women Voters v. Commonwealth* demonstrates this transition by highlighting the ways in which state courts can both derive and exercise power to review the actions of state legislatures.[61] Specifically, states like Pennsylvania exercise the authority to more directly intervene with issues of unfair electoral districting by using their state constitutions to provide voters with protections that are additional and separate from federal guarantees. To the likes of *League of Women Voters v. Commonwealth*, the Court interpreted state constitutions to be independent charters of governance.[62] It established states as capable of using such powers delegated to them through state constitutions to oversee the actions of state legislatures. Practically, these powers can be used by state courts to oversee legislature-drawn electoral maps. When necessary, they must also be used to challenge unfair maps. The ability of state courts to exert such influence over state legislatures is particularly important because it holds legislature-drawn maps to a higher standard of integrity than federal courts have been in the past. Namely, while it is more difficult to prove that electoral maps are drawn with discriminatory intent through Equal Protection jurisprudence, state courts can arbitrate the fairness of electoral maps without such burdens.[63]

As most state constitutions, like that of Pennsylvania, have established commitments to safeguard "free and equal elections," they can use such provisions to justify the expansion of their role in adjudicating electoral matters.[64] The broad commitments their state constitutions make to ensuring electoral fairness establish state courts' abilities to adopt flexible powers and address the inequities that result from unfair districting practices. As these clauses are not restricted by the same constraints faced by federal Equal Protection law, state courts may act even in the absence of explicit discriminatory intent.[65] This means that state courts have a much lower prerequisite burden of proof to justify their intervention in matters of state electoral justice. As such, state courts observe growing flexibility to proactively define and challenge electoral injustices themselves to supplement the gaps where federal law places undue burdens of proof on minority voters to achieve similar levels of electoral justice.[66]

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[61] *League of Women Voters*, 178 A.3d at 818.
[62] Id. at 784-85.
[63] Id. at 818; *Shaw*, 509 U.S. at 644-45.
[64] Pa. Const. art. I, § 5; *League of Women Voters,* 178 A.3d at 784-85.
[65] *League of Women Voters,* 178 A.3d at 818; U.S. Const. Amend. XIV, § 1.
[66] *Thornburg*, 478 U.S. at 44-51; *Shelby County*, 570 U.S. at 557.

The mechanics of these arguments are reinforced by *Moore v. Harper*.[67] In this decision, the Court rejected previously understood notions that the Elections Clause found in Article I, Section 4 of the Constitution vests the exclusive authority to oversee and regulate federal elections.[68] New interpretations expand this capacity to include the allowance of powers to the state courts that give them permission to invalidate unfair electoral maps drawn by their state legislatures. By extension, it also reveals that actions of state legislatures still remain subject to the purview of state judicial review. As a result, the Court's decision in *Moore v. Harper* creates the legal foundations on which cases challenging electoral injustice may proceed.[69]

Where federal adjudication has receded, state courts retain both interpretive competence and structural legitimacy to exercise the review of electoral maps.[70] To that end, state courts now play a significant role in maintaining electoral justice through the means of reviewing and challenging maps they deem unjust. These allowances are powerful tools that allow minority voters to seek the rights protection they are currently being denied by unwilling federal courts.

IIb. Consequences of Federal Withdrawal

The contraction of federal oversight elevates the role of state courts as the primary guarantors of electoral fairness. Through *Shelby County v. Holder*, the Supreme Court decided the preclearance conditions of Section 5 of the Voting Rights Act to be inoperative.[71] Whereas preclearance previously served as a federal prevention mechanism against unfair electoral maps, invalidations of Section 5 preclearance practices placed the burden of enforcing fair electoral maps onto minority voters themselves. This means that Section 5's preclearance mechanisms can no longer challenge maps that diminish minority voting strength before they take effect.[72] Instead, minority voters can only challenge the fairness of electoral maps after the harm caused by unfair districting has occurred.[73] This shift unfairly forces minorities into vulnerable positions that allow electoral inequities to persist through entire election cycles before judicial intervention can occur. Without proper means for redress on the federal level, minority voters lack reliable ways to challenge electoral maps.

The consequences of such federal inaction are compounded by *Rucho v. Common Cause*.[74] While *Shelby* substantially reduced the ability of the federal government to prevent

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[67] *Moore*, 600 U.S. at 22.
[68] Id. *a*t 22-26; U.S. Const. art. I, § 4, cl. 1.
[69] *Moore*, 600 U.S. at 22.
[70] Id.; League of Women Voters, 178 A.3d at 818.
[71] *Shelby County*, 570 U.S. at 557; 52 U.S.C. § 10304.
[72] *Shelby County,* 570 U.S. at 557.
[73] Ibid.
[74] *Rucho*, 588 U.S. at 695-701.

unfair maps from being drawn at the outset, *Rucho* also reduced federal courts' ability to support minority voters seeking court support to challenge unfair maps after such maps have been instituted. Specifically, through *Rucho v. Common Cause*, the Court decided that partisan gerrymandering no longer fell under the jurisdiction of federal judicial review.[75] Its decision eliminated both preventative and remedial mechanisms for minority voters to seek electoral justice from federal courts on the grounds that such issues are overly political.

> "Partisan gerrymandering claims present political questions beyond the reach of the federal courts… Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions."[76]

Therefore, in the absence of federal intervention, state courts must assume the interpretive authority to review and invalidate legislative maps to protect minority voters in ways that the federal government no longer guarantees it will champion as a result of decisions like *Rucho v. Common Cause*.[77] Of course, this reallocation of responsibility is not a result of the Court conferring new powers to state courts.[78] Instead, it simply acknowledges the constitutional powers they already havewithin their state constitutions. Now, it is up to state courts to exercise such powers as effective mechanisms to protect minority voting rights where they are most vulnerable.

IIc. Dangers of Unequal Minority Representation in a Fragmented Legal Landscape

In a legal landscape where state courts are the primary institutions interacting with issues of electoral fairness, the representation of minority voters increasingly depends on the geographical happenstance of citizens. While certain states may use their power to defend minority voting rights more aggressively than others, those who live in states where their courts do not proactively defend their rights may suffer in comparison. That is, where certain citizens are provided robust judicial protection from unfairly drawn electoral maps, others remain confined to the uncertainty of constitutional interpretations. The variance found between the voter protections provided in conservative and liberal state constitutions does well to demonstrate this phenomena.

For example, the Free and Equal Elections Clause in Pennsylvania's state constitution provides clear grounds for judicial enforcement on matters of electoral injustice.[79] Conversely,

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[75] Ibid.
[76] *Rucho*, 588 U.S. at 701.
[77] Ibid.
[78] *Moore*, 600 U.S. at 22.
[79] Pa. Const. art. I, § 5; *League of Women Voters*, 178 A.3d at 818.

more conservative states like Texas have largely relied on federal litigation under the Voting Rights Act to address such issues, which leaves minority voting strength subject to greater vulnerability.[80] As a result, these gaps produce a judicial system in which the protection of minority voting strength varies dramatically between states. In effect, principles such as "One Person One Vote" are no longer secured solely by national doctrine. Instead, it relies inconsistently on the interpretive approach of state judiciaries exercising constitutional mandates.[81]

These developments mark a broader transition in American redistricting jurisprudence. Past decisions like *Baker v. Carr* and *Reynolds v. Sims* nationalized the protection of electoral equality.[82] By declaring matters relating to electoral justice judiciable and mandating that maps be drawn in ways that support substantial population equality across districts, the Supreme Court solidified representational fairness as a matter of federal concern. Together, those decisions suggested that equal protection is a matter that requires significant constitutional attention that is enforceable through national judicial supervision.[83] Yet, while such issues of electoral justice should be judiciable on the federal level, more recent jurisprudence has altered the practical enforcement of such ideals today. Now, *Shelby County v. Holder* effectively disabled the preclearance mechanism of the Voting Rights Act that previously functioned as a critical safeguard against discriminatory districting.[84] Increasing the burdens minority voters face, *Rucho v. Common Cause* withdrew federal adjudicative authority over partisan gerrymandering claims.[85] While neither decision directly rejected the principle of electoral equality, they effectively shifted the responsibility of enforcing such protections away from federal courts and onto other actors.

Today, such rules produce a legal landscape that decentralizes the protection of minority voting rights. While Section 2 of the Voting Rights Act continues to prohibit racial vote dilution and the Equal Protection clause also remains operative, their functions are limited to being reactive under substantial evidentiary constraints, which make it increasingly difficult for minority voters to seek timely relief.[86] For example, *Thornburg v. Gingles* requires burdensome proof of geographic compactness and significant political cohesion, which renders the process for seeking relief complex and resource-intensive for minority voters.[87] As such, federal law now establishes mere baseline protections for minority voters, rather than a comprehensive framework ensuring equal representation. Today, these shifts have meaningful consequences.

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[80] Voting Rights Act of 1965, 52 U.S.C. § 10301.
[81] *Reynolds*, 377 U.S. at 558; *Rucho* 588 U.S. at 701.
[82] *Baker v. Carr*, 369 U.S. at 209; *Reynolds*, 377 U.S. at 561-68.
[83] *Baker v. Carr*, 369 U.S. at 209; *Reynolds*, 377 U.S. at 561-68.
[84] *Shelby County*, 570 U.S. at 557; 52 U.S.C. § 10304.
[85] *Rucho*, 588 U.S. at 701.
[86] 52 U.S.C. § 10301; U.S. Const. amend. XIV, § 1.
[87] *Thornburg*, 478 U.S. at 44-51.

When federal courts decline to evaluate the structural implications of partisan electoral maps, the enforcement of substantive representational equality migrates elsewhere to the locus of state judiciaries.[88]

The critical question, therefore, revolves around how states can, will, and actively choose to use their powers to proactively protect minority voters in their communities. Effective use of such power is apparent in those states where courts interpret the constitutional guarantees of free and equal protection expansively. In those states, courts will address the distortions that federal courts currently decline to adjudicate by taking measures to fight for the protection of minority voter rights themselves. For example, Pennsylvania's invalidation of a partisan congressional map demonstrates the ability state courts have to identify and evaluate instances of unfair electoral districting.[89] There, state courts derived such powers from their state constitution.[90] As a result, Pennsylvania state courts were able to effectively judge and invalidate electoral maps that unfairly diluted the voting power of minority citizens. This action allowed state courts to intervene on minority voters' behalves to create an electoral landscape that more accurately reflected the diversity of its citizens. Conversely, citizens residing in states where constitutional provisions are constructed narrowly confront significant representational dilution despite satisfying formal population equality.[91]

A modern example of where the decentralization of electoral mapping oversight comes at the expense of minority voters are recent gerrymandering disputes in South Carolina. To this challenge, *Alexander v. South Carolina State Conference of the NAACP* becomes an illustrative example.[92] In *Alexander v. South Carolina State Conference of the NAACP*, the Legal Defense Fund and the ACLU sued South Carolina's state Governor and the South Carolina Election Commission for diluting the black vote in the state's new 2020 redistricting map.[93] Unlike *League of Women Voters v. Commonwealth*, where the state Supreme Court exercised its judicial review powers to proactively invalidate unfair electoral maps, South Carolina's state courts neglected to support minority voters' challenge of the legislature's post-2020 redistricting plans.[94]

Following such examples, it becomes clear that in a legal landscape where federal courts decline to adjudicate matters of unfair electoral maps, minority political influence depends significantly upon the willingness of state courts to operationalize those standards within their

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[88] *Rucho*, 588 U.S. at 701; *Shelby County*, 570 U.S. at 557.
[89] *League of Women Voters*, 178 A.3d at 818.
[90] *Rucho*, 588 U.S. at 701; *Shelby County*, 570 U.S. at 557.
[91] *Reynolds*, 377 U.S. at 561-68.
[92] *Alexander v. South Carolina State Conference of the NAACP,* No. 22-807, slip op. At 1 (U.S. May 23, 2024)
[93] Id., slip op. At 2-4.
[94] *Alexander*, No. 22-807, slip op. At 12-13; *League of Women Voters*, 178 A.3d at 818.

own constitutional frameworks.[95] The purpose of such action is to render minority representation contingent in ways that were less pronounced during the height of federal oversight. The variability between the protection of minority voter rights underscores the extent to which state courts now function as the principal protectors of minority voters and meaningful representational inclusion.[96]

IId. Utilizing State Intervention to Foster Electoral Justice

State courts now have the opportunity to nurture a new legal environment to protect minority voters from unfair congressional districting. During a time when federal oversight on issues of unfair districting continues to contract, state courts ought to elevate themselves from what was previously a supplementary role to become the primary actors ensuring the protection of minority voting rights.[97] Decisions like *Moore v. Harper* affirmed that state legislatures do not have authority to oversee election matters.[98] Instead, the Court found that state legislatures are also subject to the review of state courts.[99] As a result of this decision, the Court affirmed that state courts have the power to enforce the constitutional guarantees that protect suffrage and equality in actions conducted by state legislatures.[100] Within this framework, state courts are uniquely positioned to address the structural inequities in districts where federal courts have declined to take action. This power is both empowered by constitutional provisions and now institutionally affirmed by the unwillingness of federal courts to involve themselves in electoral disputes.[101]

To that end, the responsibility of state courts to protect minority voter rights is twofold: first, state courts must enforce the formal guarantees of equality offered by constitutional rights; further, they must do so while actively interpreting the structural principles of representational fairness in a proactive manner. In jurisdictions with expansive constitutional provisions, such as Pennsylvania's "Free and Equal Elections" clause, courts have invalidated maps that unequally distribute electoral power.[102] In reference to Pennsylvania, courts intervened even in the absence of explicit discriminatory intent, demonstrating the interpretive and agentic powers state courts now possess.[103]

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[95] *Rucho*, 588 U.S. at 701; *Shelby County*, 570 U.S. at 557.
[96] *League of Women Voters*, 178 A. 3d at 818; *Alexander*, No. 22-807, slip op. At 12-13.
[97] *Shelby County,* 570 U.S. at 557; *Rucho*, 588 U.S. at 701.
[98] *Moore*, 600 U.S. at 22.
[99] Ibid
[100] Id. at 22-26.
[101] *Moore*, 600 U.S. at 22; *League of Women Voters,* 178 A.3d at 818.
[102] Pa. Const. art. I, § 5; *League of Women Voters,* 178 A. 3d at 818.
[103] *League of Women Voters*, 178 A.3d at 818.

Whereas state-level adjudication can practically enforce federal voter rights protection commitments, state courts are uniquely capable of transforming formal constitutional protections into practical political representation.[104] State courts do this by exercising proactivity in identifying and interpreting instances of unfair congressional districting today. Thus, where state courts exercise their authority rigorously, minority communities can enjoy substantial protection from unfair electoral maps. The opposite is also true. Where courts refrain from acting, legal guarantees of electoral fairness may remain largely symbolic with little practical enforcement.[105]

State courts are central to the facilitation of electoral justice and, by extension, the protection of minority voters. As federal laws provide a normative baseline for the voter rights that are to be respected, state courts provide the vital means through which those rights are to be realized.[106] The effectiveness of minority rights protection depends on the capacity and willingness of state courts to enforce constitutional commitments, solidifying state-level adjudication as the cornerstone of electoral equity in a post-*Shelby* era.[107]

III. Conclusion

The right to an equal vote is one worth protecting, and, as it was prescribed to us by the Founding Fathers, it is a right we ought to protect for every citizen. While the legal language to protect the rights of voters certainly exists on the federal level through the Equal Protection Clause and the Voting Rights Act of 1965, the practical enforcement of its provisions are weak and rapidly declining.[108] For minority voters today, this puts their right to vote gravely in harm's way. *Shelby County v. Holder* was the primary juncture that marked the transition that demonstrated the federal government's growing unwillingness to lead the fight for electoral justice.[109] When the Court invalidated the preclearance mechanisms of Section 5 of the Voting Rights Act, it deconstructed the primary mechanism the federal government used to oversee the protection of citizens' voting rights.[110] Whereas the preclearance mechanism allowed the federal government to observe, judge, and intervene in unfair processes of map reapportionment, its invalidation allowed states to redistrict with more independence at the expense of minority voters.

While the preclearance mechanism used to preemptively protect minority voters from the creation of unfair electoral maps, the invalidation of Section 5 preclearance provisions means that citizens now bear the considerable burden of recognizing and challenging unfair electoral

[104] *League of Women Voters*, 178 A.3d at 818; *Moore*, 600 U.S. at 22.
[105] *Alexander*, No. 22-807, slip op. At 12-13.
[106] 52 U.S.C. § 10301; U.S. Const. amend. XIV, § 1; *League of Women Voters,* 178 A.3d at 818.
[107] *Shelby County*, 570 U.S. at 557; *Moore*, 600 U.S. at 22.
[108] U.S. Const. amend. XIV, § 1; 52 U.S.C § 10301.
[109] *Shelby County*, 570 U.S. at 544-57.
[110] Id. at 557; 52 U.S.C. § 10304.

maps themselves.[111] Still, even when voters do seek to challenge unfair maps, they are met with insurmountable hurdles to prove that such maps were drawn with malicious intent by the state legislature. Decisions like *Thornburg v. Gingles*, which imposed substantial evidentiary burdens on plaintiffs seeking to challenge electoral maps, make it both difficult and unlikely that minority voters will succeed in overturning unfair districts.[112] These challenges are only further exacerbated by decisions like *Rucho v. Common Cause*, where the Court decided that matters of partisan gerrymandering should not be heard under the scope of federal judicial review entirely.[113] Together, a lack of federal protection and a legal landscape that continues to make it increasingly difficult for minority voices to challenge unfair electoral maps create a situation in which minority communities will have no means of ensuring that their voices are adequately represented in the electorate. To that end, substantial action must be taken by state courts to substitute the protectionist role that the federal government once played in the pursuit of protecting minority voting rights across the country.

The state protection of minority voting rights can be made possible through the use of state constitutions to justify interventions on minority voters' behalf. Whereas minority voters must surpass substantial barriers to achieve electoral justice themselves, state courts can play an important role in supporting their efforts to have a political voice equal to that of their peers.[114] The decision of *League of Women Voters v. Commonwealth* provides a strong foundation for the ways that state courts might begin to exercise such powers.[115] Pennsylvania was able to intervene by arguing that its state constitution's "free and equal" elections clause could be used to challenge unfair electoral maps. More states ought to follow suit and adopt similar measures to proactively protect voter rights within their communities.[116]

Such action is not unprecedented. In fact, *Moore v. Harper* reaffirms that the actions of state legislatures are still subject to the ordinary exercise of state judicial review.[117] This decision further demonstrates the powerful ways in which state courts can wield their power as a tool to check unfair and unequal electoral maps produced by state legislatures.[118] In this way, state courts hold the immense power to actively intervene in matters of electoral justice on behalf of minority voters to advance the protection of voting rights.

Whereas this country was founded on the principles of diversity and free speech, unfair districting practices that seek to suppress the voice of minority voters critically undermine both.

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[111] *Shelby County*, 570 U.S. at 557; 52 U.S.C. § 10304.
[112] *Thornburg*, 478 U.S. at 44-51.
[113] *Rucho*, 588 U.S. at 701.
[114] *Thornburg*, 478 U.S. at 44-51; *Shelby County*, 570 U.S. at 557.
[115] *League of Women Voters*, 178 A.3d at 818.
[116] Id. at 784-85; Pa. Const. art. I, §5.
[117] *Moore*, 600 U.S. at 22.
[118] Ibid.

Minority voters contribute significantly to the vibrancy of the American electorate. Yet, they are silenced through the construction of unfair electoral districts to which they have no means to challenge. When the federal courts decline to hear issues relating to electoral fairness, as in *Rucho v. Common Cause*, they effectively decline minority voters as a means of challenging unfair vote dilution.[119] By removing claims of partisan gerrymandering from federal adjudication, the Court significantly narrowed the avenues through which voters may challenge structural distortive electoral maps.[120] Thus, citizens today disproportionately struggle in a situation where state legislatures pass unfair electoral maps while the federal government fails to provide them with adequate support to check and challenge them.

To that extent, state courts can fill the gap where federal courts have become unreliable support to minority voters. State courts derive the power to review the actions of their state legislatures through the powers delegated to them in their own state constitutions.[121] Reaffirmed through cases like *League of Women Voters. V. Commonwealth* and *Moore v. Harper,* not only do states have the ability to derive such powers from their state constitutions, but they also have the duty to exercise such powers of judicial review to challenge unfair districting practices.[122] By interpreting state constitutional guarantees broadly and engaging proactively with claims of electoral inequity, state courts can support minority voters in the ways that they need most during a time when the federal courts are no longer a reliable source of protection.

Still, while state courts can certainly serve as an effective way to support voting rights in a status quo where federal courts are temporarily unwilling to do so, state-level enforcement alone cannot serve as a permanent substitute for comprehensive federal voting rights protections. In the absence of federal protection, the extent to which minority voting rights are protected will vary depending on geography.[123] In jurisdictions where courts interpret electoral guarantees expansively, minority voters will be substantially more protected against unfair districting practices than those minorities living in states that decline to intervene.[124] This divergence produces a fragmented legal landscape that is not sustainable in the long run. Therefore, while state mediation is a strong recommendation for how minority voter rights can be protected in the status quo, it is not a model that should be adopted with a long-term vision. However, in an effort to lessen the stress minority voters are struggling with today, state courts ought to assume roles of heightened significance to adjudicate issues of unfair electoral districting.[125]

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[119] *Rucho*, 588 U.S. at 701.
[120] Id.
[121] *Moore*, 600 U.S. at 22.
[122] *League of Women Voters*, 178 A.3d at 818; *Moore*, 600 U.S. at 22.
[123] *Shelby County*, 570 U.S. at 557; *Rucho*, 588 U.S. at 701.
[124] *League of Women Voters*, 178; A.3d at 818; *Alexander*, No. 22-807, slip op. At 12-13.
[125] *Moore*, 600 U.S. at 22; *League of Women Voters,* 178 A.3d at 818.

The fight to protect minority voting rights is not simple. Similarly, the path to doing so is not direct. However, state courts provide a valuable solution to support the voting rights of minorities during a time when federal courts refuse to do so. In this pursuit, mechanisms within state constitutions and independent state judicial review allow state courts to become first responders to growing violations against the rights of minority voters today.[126] Where the federal government has certainly abandoned its responsibility to protect the equal voting rights of all citizens, state courts ought to exercise the authority that they have to ensure that such promises of equal representation amount to more than the aspirational language of this nation's founding documents, but rather a practical application that honors its guarantees.[127]

[126] *Moore* 600 U.S. at 22; L*eague of Women Voters*, 178 A.3d at 818.
[127] U.S. Const. amend. XIV, § 1; *Shelby County,* 570 U.S. at 557; *Rucho*, 588 U.S. at 701.

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Sign Here: Consent, Coercion, and the Fiction of Voluntary Departure in U.S. Immigration Law

By Sofia Flores

Abstract

United States immigration enforcement frequently relies on a mechanism known as "voluntary departure," in which noncitizens agree to depart the country without undergoing formal removal proceedings. Although this framework appears to preserve individual choice, migrants often make these decisions while detained, without legal representation, and under significant informational and linguistic constraints.

Immigration doctrine nevertheless treats signed voluntary departure agreements, which result in the waiver of procedural and appeal rights, as sufficient evidence of meaningful consent. This Note argues that voluntary departure operates as a legal fiction that maintains the appearance of consent while obscuring the structural pressures shaping migrants' decisions.

Drawing on philosophical accounts of coercion developed by Alan Wertheimer and Pascal Brixel, the theory of structural injustice articulated by Iris Marion Young, and the immigration ethics scholarship of Joseph Carens and Javier Hidalgo, this Note examines how immigration law treats formally expressed agreement as meaningful consent despite the institutional pressures embedded in detention and enforcement practices.

Through analysis of 8 U.S.C. § 1229c, 8 C.F.R. § 1240.26, and administrative decisions from the Board of Immigration Appeals, the Note demonstrates how immigration law relies on formal consent while systematically overlooking the conditions under which migrants make these decisions.

It further draws on constitutional due process doctrine, including the *Mathews v. Eldridge* balancing framework and analogous waiver standards from criminal and contract law, to argue that immigration enforcement's treatment of consent is doctrinally atypical as well as normatively deficient. Recognizing these pressures reveals the limits of voluntariness as a legal concept and suggests the need for a structurally honest approach to consent in immigration enforcement.

I. Introduction

Ia. Voluntary Departure and the Language of Choice

United States immigration law describes voluntary departure as a choice.[1] A noncitizen facing removal may agree to leave the country rather than continue through formal proceedings, often avoiding some of the legal penalties associated with a removal order: most notably, certain

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[1] Exec. Office for Immigration Review, U.S. Dep't of Justice, *Do You Just Want to Go Home? Information on Voluntary Departure* (Jan. 2022), https://www.justice.gov/eoir/page/file/1480811/dl.

bars on future reentry. On its face, the option appears to preserve agency. The individual agrees to depart, and that agreement is treated as legally meaningful.

Yet the language of choice obscures the lived realities of migrants. Terms like "voluntary," "waiver," and "consent" imply that the individual has full knowledge of their options and genuine practical alternatives. It allows the system to treat formal compliance as a sufficient indicator of autonomous decision-making without examining the conditions that produced it. Voluntary departure depends foundationally on the assumption that agreement equals autonomy. The conditions under which migrants make these decisions complicate that assumption considerably. Many individuals accept voluntary departure while detained, without consistent access to legal counsel, and under significant pressure to resolve their cases quickly.

This Note argues that voluntary departure operates less as a genuine exercise of choice and more as a legal mechanism that converts constrained decisions into evidence of consent. Immigration doctrine does not simply fabricate voluntariness but relies on a deliberately narrow version of it. By treating formal agreement as sufficient, the system preserves the appearance of fairness while avoiding scrutiny of the institutional pressures shaping migrants' decisions. That reliance is not only troubling, but as this Note argues, is also at odds with how American law treats consent and waiver in comparable high-stakes contexts.

Ib. The Gap Between Legal Terminology and Institutional Reality

That gap between formal language and institutional reality is not accidental. As Daniel Kanstroom has argued, American deportation law has long operated by obscuring the coercive parts of enforcement.[2] Juliet Stumpf's account of "crimmigration," the convergence of criminal and immigration enforcement logics, reinforces this point: when removal is treated as an administrative rather than punitive matter, the procedural protections are systematically withheld.[3] The result is a legal framework in which coercive outcomes are made invisible by the vocabulary used to describe them.

The constitutional backdrop intensifies this concern. The plenary power doctrine, rooted in *Chae Chan Ping v. United States*[4] and *Fong Yue Ting v. United States*,[5] grants Congress and the Executive branch sweeping authority over immigration matters with minimal judicial review. As a structural matter, this shields immigration enforcement from the constitutional scrutiny that would otherwise apply to the deprivation of fundamental liberty interests. Plenary power has thus

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[2] DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007), https://www.jstor.org/stable/j.ctv1p6hp5m.

[3] Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 376–82 (2006).

[4] *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

[5] *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

created the conditions under which a thin conception of consent can exist without challenge, not because it is justified, but because the doctrine has largely barred the opportunity for inquiry.[6]

Philosophical accounts of consent deepen the critique. Alan Wertheimer argues that when the alternatives available to a person are severely constrained, formally expressed agreement may be morally and practically compromised, regardless of whether overt force was used.[7] Pascal Brixel extends this analysis, demonstrating that an option framed as a benefit can nonetheless function as coercion when the background conditions make refusal prohibitively costly.[8] Iris Marion Young, writing from a structural perspective, emphasizes that institutional processes can systematically limit individual choice in ways that produce unjust outcomes even without any identifiable wrongdoer.[9]

Taken together, these frameworks suggest that voluntary departure may misrepresent the autonomy of migrants' decisions, treating legally recognized agreement as sufficient while ignoring the pressures and constraints surrounding it. This Note develops that argument across five parts. Part II examines the statutory and doctrinal framework governing voluntary departure, including how courts have addressed waivers and due process. Part III traces the historical construction of thin consent in American deportation law. Part IV sets out the philosophical foundations. Part V analyzes how voluntary departure operates in practice. Part VI proposes a more realistic and doctrinally coherent approach to consent in immigration law.

II. Legal Framework of Voluntary Departure

IIa. Statutory Structure and the Architecture of Waiver

Voluntary departure is governed by 8 U.S.C. § 1229c and may be granted either before the conclusion of removal proceedings or at their close.[10] In both cases, the noncitizen agrees to depart the United States within a specified period, typically at their own expense. In exchange, they may avoid certain legal consequences associated with a formal removal order, including multi-year bars on reentry.[11] The statutory structure presents this arrangement as a benefit: discretionary relief that offers migrants an alternative within the enforcement system.

Access to voluntary departure is conditioned on compliance with a series of procedural requirements that assume informed and voluntary decision-making. Under 8 C.F.R. § 1240.26 and INA § 240B, a noncitizen seeking voluntary departure at the conclusion of proceedings

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[6] David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 Okla. L. Rev. 29, 35–40 (2015).

[7] Alan Wertheimer, *Coercion,* pg. 172–85 (1987).
[8] Pascal Brixel, *Freedom First: On Coercion and Coercive Offers*, 111 Phil. & Phenomenological Res. 106, 110–17 (2025).
[9] Iris Marion Young, *Responsibility for Justice* 52–63 (2011).
[10] Immigration and Nationality Act § 240B, 8 U.S.C. § 1229c.
[11] *Id.* § 1229c(b)(1)(D) (conditioning eligibility for post-conclusion voluntary departure on, *inter alia*, or a showing of good moral character for the preceding five years).

must: (1) waive or withdraw all other forms of relief; (2) concede removability; (3) relinquish the right to appeal; (4) post a bond; (5) provide travel documentation; and (6) agree to depart within sixty days at their own expense.[12] Pre-completion voluntary departure carries somewhat less demanding eligibility requirements but still requires a waiver of all pending claims and an express waiver of the right to appeal.[13]

These are not incidental conditions. Accepting voluntary departure is not simply choosing to leave but agreeing to abandon legal claims, forgo further review, and comply with a set of procedural and financial obligations simultaneously. The cumulative effect is to compress the range of available options in ways that the statute's framing as "relief" glosses over. A migrant who might otherwise pursue asylum, cancellation of removal, or other forms of relief must decide whether to abandon those claims in exchange for a more immediate resolution. The law presents this as a choice, but the migrant is pressured down this path from the outset.

IIb. The "Knowing and Voluntary" Standard and its Formalistic Application

Courts and administrative bodies generally uphold voluntary departure agreements as valid so long as they are made "knowingly and voluntarily."[14] In practice, however, this standard functions as a formality rather than a safeguard. The Board of Immigration Appeals' treatment of waiver across a series of precedents reveals a consistent pattern: adjudicators rely on the presence of a signed form or an affirmative statement on the record without closely examining whether the individual understood the rights being relinquished or the consequences of that decision.

In *Matter of Arguelles-Campos*, the Board of Immigration Appeals (or the BIA) articulated the framework governing voluntary departure eligibility under the post-Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (or IIRIRA) statutory scheme.[15] The decision establishes that pre-completion voluntary departure requires an express waiver of the right to appeal all issues, and that this waiver is a structural precondition for obtaining the relief.[16] The BIA's analysis focuses on whether the procedural requirements were satisfied, not on whether the waiver was accompanied by genuine comprehension of what was being surrendered. The inquiry ends, in practice, where the documentation begins.

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[12] Voluntary Departure, 8 C.F.R. § 1240.26(c)(1) (2025).
[13] *Id.* § 1240.26(b)(1)(i) (pre-completion voluntary departure requirements including waiver of all pending relief and express waiver of the right to appeal).
[14] *Matter of Ocampo*, 22 I. & N. Dec. 1301, 1302 (B.I.A. 2000) ("Voluntary departure may not be granted prior to the completion of removal proceedings without an express waiver of the right to appeal by the alien or the alien's representative.").
[15] *Matter of Arguelles-Campos*, 22 I. & N. Dec. 811 (B.I.A. 1999); *H. Rept. 104-828 - ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996*, https://www.congress.gov/committee-report/104th-congress/house-report/828/1 (last visited Mar. 23, 2026).
[16] *Id.* at 815–16 (articulating the eligibility requirements and confirming that waiver of appeal is a structural precondition under § 240B(a)).

Matter of Rodriguez-Diaz offers a partial corrective and in doing so exposes the fragility of the existing standard. There, the BIA held that a simple inquiry at the close of hearing, asking whether the respondent accepted the decision as "final," was insufficient to constitute a valid waiver of appeal rights where the respondent was unrepresented and there was no affirmative showing that he understood the implications of his answer.[17] The BIA acknowledged, at least implicitly, that the unrepresented migrant did not understand the substance of the question being put to him. The structural conditions that produced the confusion were left untouched.

Matter of Ocampo reinforced this pattern by confirming that voluntary departure prior to the completion of proceedings cannot be granted without an express waiver of appeal rights, and that this requirement reflects the statute's design to conclude cases "promptly and decisively."[18] The BIA's explicit invocation of administrative efficiency as a rationale is significant. It acknowledges, seemingly without discomfort, that the waiver requirement serves institutional interests in case resolution that may clash with the migrant's interest in meaningful deliberation.

Taken together, these decisions illustrate how the "knowing and voluntary" standard functions in practice. It is invoked as a requirement but rarely examined as a substantive question. The presence of a form or signed agreement is typically sufficient. What the migrant understood — and whether they had the information, the time, and the capacity to understand it — is largely treated as irrelevant once the formal threshold is met.

IIc. Constitutional Due Process and the *Mathews* Framework

The narrow scope of immigration voluntariness standards becomes more apparent when compared against the constitutional framework governing procedural due process. In *Mathews v. Eldridge*, the Supreme Court established a three-part balancing test for evaluating whether administrative procedures satisfy due process requirements: courts must weigh (1) the private interest at stake; (2) the risk of erroneous deprivation through existing procedures, and the probable value of additional procedural safeguards; and (3) the government's interest, including the administrative burden of additional process.[19] While *Mathews* arose in the context of Social Security benefits, it has been applied across a broad range of administrative contexts, including immigration proceedings.[20]

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[17] *Matter of Rodriguez-Diaz*, 22 I. & N. Dec. 1320 (B.I.A. 2000). 1321 ("The simple inquiry at the end of the hearing, focusing on acceptance of a decision as 'final,' was not adequate to ensure that the unrepresented alien understood the import of the Immigration Judge's question.").

[18] *Matter of Ocampo*, 22 I. & N. Dec. at 1302 (noting that pre-completion voluntary departure "was created, in whole or in part, to conclude cases promptly and decisively" (citing Matter of Cordova, 22 I. & N. Dec. 966 (B.I.A. 1999))).

[19] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

[20] *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (applying the *Mathews* balancing test to an exclusion proceeding); *see also* Bradley J. Wyatt, *Even Aliens Are Entitled to Due Process: Extending* Mathews v. Eldridge *Balancing to Board of Immigration Appeals Procedural Reform*, 12 Wm. & Mary Bill Rts. J. 605, 610–15 (2004).

Applied to voluntary departure, the *Mathews* framework produces an interesting case study. The private interests at stake include family separation, loss of legal claims, potential return to dangerous conditions, and long-term bars on reentry. The risk of erroneous deprivation under current procedures is significant: migrants frequently lack counsel, face language barriers, and are asked to make decisions under time pressure without adequate information. While the government's interest in efficient case resolution is real, it is difficult to argue that efficiency concerns justify the level of procedural fragility that currently characterizes the voluntariness inquiry.[21]

The constitutional case is complicated, however, by the plenary power doctrine. Courts have historically been reluctant to impose robust procedural requirements on immigration enforcement, citing congressional and executive authority in immigration matters.[22] This Note does not argue that due process doctrine, as currently applied, straightforwardly requires the reforms proposed below. It argues, rather, that the *Mathews* framework reveals the voluntariness inquiry to be inadequate, and that immigration law's insulation from normal constitutional scrutiny is part of what allows that inadequacy to persist.

IId. Comparative Doctrinal Context: Waivers in Criminal and Contract Law

The irregularity of immigration enforcement's approach to voluntariness is sharpened by comparison with other legal domains. In criminal proceedings, the Supreme Court has held that waivers of constitutional rights must be "voluntary" and "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[23] In *Brady v. United States*, the Court emphasized that a guilty plea, of which a voluntary departure agreement essentially is, is "a grave and solemn act to be accepted only with care and discernment."[24] Courts in the criminal context consider the totality of the circumstances, including the adequacy of counsel, the defendant's comprehension, and the presence of coercion.[25] Mere documentation is not sufficient.

The analogy to plea bargaining is instructive for another reason. *Brady* itself acknowledges the tension between systemic pressure and formal consent: the defendant pleaded guilty in part to avoid the death penalty, a choice made under conditions that were hardly neutral. The Court upheld the plea, but subsequent doctrine has continued to grapple with the boundary between permissible incentivization and impermissible coercion.[26] Immigration law does not grapple with this boundary at all. It treats the threat of formal removal, indefinite detention, and

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[21] *Mathews*, 424 U.S. at 335.
[22] *Chae Chan Ping*, 130 U.S. at 603–04; *Fong Yue Ting*, 149 U.S. at 713.
[23] *Brady,* 397 U.S. 742, 748 (1970).
[24] *Brady,* 397 U.S. 747 (1970).

[25] *Brady,* 397 U.S. 749–50. (1970).

[26] *Brady*, 397 U.S. at 750–53 (acknowledging that plea incentives create pressure while holding that such pressure does not automatically render a plea involuntary).

the loss of legal claims as simply background rather than as a variable weighing on the quality of consent.

Contract law offers a parallel critique. Agreements made under duress may be voided even when formally executed, and courts will inquire into the circumstances of the agreement, for example the nature of the pressure, the availability of alternatives, and whether the party had a meaningful opportunity to refuse.[27] The doctrine of unconscionability goes further, permitting courts to refuse enforcement of agreements that are procedurally defective (where one party lacked meaningful choice,) or substantively oppressive, irrespective of formal consent.[28] Immigration law applies no comparable scrutiny to voluntary departure agreements. The signed form is the end of the inquiry, not the beginning of it.

III. The Historical Construction of Thin Consent

IIIa. Voluntary Departure as Administrative Technology

The instability of the consent standard for voluntary departure is not a recent development or an oversight. It is the product of a deliberate historical choice, embedded in the enforcement system to resolve the tension between the coercive reality of removal and the liberal vocabulary of choice by adopting the latter without the substance.

As Kanstroom documents, American deportation law has always operated through what he calls a "second system" — a parallel legal architecture that deploys administrative processes to accomplish what the formal criminal system cannot, precisely because those administrative processes carry fewer procedural obligations.[29] The classification of deportation as a civil rather than criminal proceeding, established in *Fong Yue Ting*, was the foundational move: once removal was characterized as civil, the procedural protections associated with criminal punishment (such as the right to counsel, the right to jury trial, and the prohibition on retrospective punishment) could be withheld without constitutional difficulty.[30] The vocabulary of choice was added not to protect migrants but to legitimize outcomes that would otherwise require justification.

Historian Adam Goodman has documented this history in the context of voluntary departure specifically. Goodman identifies voluntary departure as one of three primary "coercive mechanisms" of the American deportation machine alongside formal deportation and self-deportation through fear, and argues that it became dominant precisely because it is the most

[27] Restatement (Second) of Contracts § 175 (1981) (duress).
[28] *Id.* § 208 (unconscionability).
[29] Kanstroom, *supra* note 1, at 5–9.
[30] *Fong Yue Ting*, 149 U.S. at 730 (holding that deportation is not punishment and therefore does not trigger criminal procedural protections); *see also* Kanstroom, *supra* note 2, at 91–97 (analyzing the consequences of the civil/criminal distinction for procedural rights).

efficient of the three.[31] By encouraging migrants to sign away their due process rights, immigration authorities avoid the costs of formal proceedings, the risk of appellate reversal, and the institutional burden of establishing removability through adversarial process. The "voluntariness" of the agreement is what makes the efficiency possible. A signed form forecloses appeal, terminates proceedings, and produces a legally clean outcome at minimal institutional cost.

Goodman's account reinforces what Kanstroom identifies as the characteristic logic of post-entry social control: the use of administrative discretion, rather than formal adjudication, to manage "illegal” populations in ways that produce predictable outcomes without triggering constitutional scrutiny.[32] Voluntary departure is the expression of that logic as it converts the coercive pressure of the enforcement system into a formal record of individual choice.

IIIb. IIRIRA and Formal Consent

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) consolidated and significantly tightened the voluntary departure framework in ways that accelerated this logic. By bundling the waiver of all pending relief with the grant of voluntary departure, IIRIRA transformed what had been a relatively simple agreement to leave the country into a comprehensive legal transaction that terminates multiple rights simultaneously.[33] The statutory requirements examined in Part II such as concession of removability, waiver of appeal, withdrawal of all other relief, and bond posting are largely products of the post-IIRIRA era.

Stumpf's “crimmigration” thesis helps explain why IIRIRA produced this particular system. As immigration enforcement adopted the processing logic of the criminal system by prioritizing rapid case resolution and compliance over substantive fairness, the institutional incentives of the immigration court system shifted accordingly.[34] Voluntary departure became not simply one option among several but the preferred resolution: faster than formal removal, less resource-intensive than contested proceedings, and immunized from appeal by the waiver it requires. The consent standard that the BIA developed in the post-IIRIRA decisions examined in Part II reflects these institutional priorities. It is designed to produce valid agreements efficiently, not to scrutinize whether those agreements reflect genuine understanding.

The result, as Kanstroom notes, is that American deportation law has become increasingly "standardless" in its treatment of consent in the sense that the standards it has are of form rather than of substance.[35] The presence of a signature signifies the presence of

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[31] Adam Goodman, *The Deportation Machine: America's Long History of Expelling Immigrants* (2020); *see also* Institution for Social and Policy Studies, Yale University, *A Nation of Deportees: An Interview with Adam Goodman* (Mar. 8, 2022), https://isps.yale.edu/news/blog/2022/03/a-nation-of-deportees-an-interview-with-adam-goodman.
[32] Kanstroom, *supra* note 3, at 5–8.
[33] *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in sections of 8 U.S.C.); *see also Matter of Arguelles-Campos*, 22 I. & N. Dec. at 813–14 (summarizing the post-IIRIRA voluntary departure framework).
[34] Stumpf, *supra* note 1, at 390–95.
[35] Kanstroom, *supra* note 4, at 219.

understanding. The agreement is recorded. The case is closed. And the conditions that produced the agreement recede from legal view.

IV. Theoretical Framework

The gap between formal agreement and meaningful choice requires a framework for analysis that moves beyond doctrine. Philosophical accounts of coercion and autonomy provide that framework by shifting the question from whether consent was expressed to whether the conditions under which it was expressed were adequate to make it morally and legally meaningful. This Part develops four interlocking theoretical accounts and places them in dialogue with one another, examining where they agree, where they diverge, and what their combined voice reveals about voluntary departure in American immigration law.

IVa. Coercion Without Force: Wertheimer and Brixel

Alan Wertheimer's account of coercion offers a foundational starting point. For Wertheimer, coercion does not require overt force or explicit threat, but emerges when the structure of available options is made such that one path becomes overwhelmingly preferable, not because it is genuinely desirable, but because the alternatives have been made sufficiently costly.[36] The coercer, on this account, need not threaten the victim directly, but need only arrange the landscape of options in a way that makes a particular choice effectively inescapable.[37]

The formal act of consent remains, but it no longer does what consent is supposed to do: signal that the individual has freely chosen among genuinely open alternatives. Wertheimer's framework is careful about the baseline against which coercion is measured. On his account, a proposal is coercive only if it makes the recipient worse off relative to a morally appropriate baseline: a standard that has led to significant debate about how that baseline should be defined.[38]

This is where Pascal Brixel's contribution becomes essential. Brixel deepens this analysis through his distinction between coercive threats and coercive offers. A coercive offer, on Brixel's account, is one that exploits a vulnerability in the recipient's situation not by worsening it, but by taking advantage of the degree to which it has already been constrained.[39] Voluntary departure fits this structure precisely. The migrant who is offered voluntary departure is not being made worse off relative to their pre-detention baseline because they were already facing removal proceedings.

Yet the offer is structured to exploit the vulnerability of their current situation: detained, without counsel, under time pressure, and uncertain about the future. Voluntary departure is not a

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[36] Wertheimer, *supra* note 1, at 72–85.
[37] Wertheimer, *supra* note 2, at 90–93.
[38] Wertheimer, *supra* note 3 at 202–17 (discussing the baseline problem in coercion analysis).
[39] Brixel, *supra* note 1, at 112–14.

threat in any direct sense because the migrant is being offered an out, so to speak. The option is genuinely valuable to them in that context, and may even be seen as a benefit. But the value of that offer is inseparable from the costs of refusing it. Brixell suggests that true freedom first requires not just the absence of explicit threats but the presence of genuinely open alternatives, and the detained migrant, by definition, does not have them.[40]

Read together, Wertheimer and Brixel identify two distinct but complementary coercive mechanisms at work in voluntary departure. Wertheimer identifies the arrangement of options (departure versus continued detention) as the structural source of pressure. Brixel identifies the exploitation of situational vulnerability (detention, uncertainty, and urgency) as the mechanism through which that pressure operates on the migrant's decision. Neither analysis alone fully captures what happens in a voluntary departure proceeding. Together, they describe it with considerable precision.

Applied to immigration enforcement, these frameworks show the inadequacy of the law's formalism. A migrant who accepts voluntary departure while detained, without counsel, and under time pressure has formally consented. Whether that consent reflects autonomous choice is a different question that requires examining the options that were *actually* available and the conditions under which the decision was made. The law asks the first question and declines to ask the second.

IVb. Autonomy and the Range of Meaningful Options: Raz and Shiffrin

Joseph Raz adds an important dimension to this analysis. Autonomy for Raz is not simply the capacity to choose, it also depends on the availability of an adequate range of meaningful options.[41] A person confronted with a choice between two constrained or harmful alternatives exercises formal choice but not substantive autonomy. The narrower the option set, the less the act of choosing can express the chooser's own values and judgment. This has direct implications for voluntary departure: the choice migrants typically face is not between departure and some neutral status quo, but between departure and continued detention pending proceedings whose outcome is uncertain, whose duration is unpredictable and whose costs include separation from family, loss of employment, and exposure to the pressures of indefinite confinement. Neither option is especially favorable, and thus the game becomes selecting the path with the least life-altering consequences.

Seana Shiffrin presses the point further by raising that consent carries moral weight because it functions as a kind of self-authorization: by consenting, a person takes responsibility for the outcome and authorizes another party to act in a way that affects them.[42] The law's tendency to treat consent as enough, regardless of the circumstances that produced it, runs directly against this insight. And it runs against the parallel insight in *Brady*: that a plea entered

[40] Brixel, *supra* note 2, at 115.
[41] Joseph Raz, The Morality of Freedom 369–78 (1986).
[42] Seana Valentine Shiffrin, *Back-Door Lies and Promising under Coercion*, 130 MIND 265 (2021), https://academic.oup.com/mind/article/130/517/265/5923748.

to avoid a worse outcome demands more careful judicial attention, not less. Immigration law does not demand even the rational-weighing standard that *Brady* applies, only the presence of a signature.

IVc. Structural Injustice and Institutional Constraint: Young and Schmid

Iris Marion Young shifts the analysis from individual interactions to the institutional level and in doing so provides an account that neither Wertheimer, Brixel, Raz, nor Shiffrin can fully supply. Structural injustice, for Young, arises not from isolated acts of coercion but from the ordinary operation of social and bureaucratic processes that systematically constrain the options available to certain groups.[43] These constraints do not require intentional wrongdoing by any identifiable actor, but are embedded in institutional routines: in the ordinary procedures that officials follow, the ordinary incentives they respond to, and the ordinary assumptions that govern how cases are processed. The result is that individuals within the system face a landscape of options that has been shaped, in advance and impersonally, by forces that are rarely made acknowledged.

Young's account introduces a dimension that the individual-focused coercion frameworks cannot capture: the question of responsibility. Wertheimer and Brixel analyze coercion in terms of what one party does to another. Young's structural account insists that the relevant moral analysis often cannot be located in any particular interaction at all, and that the wrong is distributed across the system, embedded in its design, and reproduced by the way it functions.[44] No immigration judge who accepts a voluntary departure agreement is necessarily doing anything wrong by the standards his or her system provides. The wrong lies elsewhere.

Lukas Schmid extends Young's framework into the immigration context, arguing that structural injustice is particularly acute for undocumented migrants because their legal vulnerability is itself a product of institutional arrangements rather than individual culpability.[45] The conditions that make voluntary departure feel necessary — detention, lack of counsel, administrative pressure — are not coincidental features of individual cases. They are predictable outputs of a system that has been constructed over time to process migrants efficiently rather than fairly. Stumpf's crimmigration thesis adds a further layer: by treating removal as administrative rather than punitive, immigration law insulates these structural pressures from the procedural scrutiny that the criminal justice system, whatever its own limitations, at least formally demands.[46]

Where Young and Schmid diverge from Wertheimer and Brixel is instructive. The coercion frameworks identify what happens to individual migrants in individual proceedings. Young and Schmid identify what happens to migrants as a class, systematically, through the

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[43] Young, *supra* note 1, at 52–63.
[44] Young, *supra* note 2, at 95-100.
[45] Lukas Schmid, *Structural Injustice and Socially Undocumented Oppression: Changing Tides in Refugee and Immigration Ethics*, 24 Ethical Theory & Moral Prac. 1047, 1052–57 (2021).
[46] Stumpf, *supra* note 2, at 390–95.

operation of institutional processes that no individual actor controls or intends. Both levels of analysis are necessary. The coercion frameworks explain why a particular voluntary departure agreement may not reflect genuine consent. The structural frameworks explain why the conditions that undermine genuine consent are reliably reproduced across thousands of proceedings, and why the problem is not an occasional failure of the system but a predictable feature of it.

IVd. Synthesizing the Framework

Combining these accounts produces a layered critical framework. Wertheimer and Brixel identify the mechanism: constrained alternatives that make formal agreement a predictable rather than freely chosen outcome. Raz and Shiffrin identify the conceptual deficiency: agreement produced under these conditions cannot bear the weight the law places on it. Young and Schmid identify the structural source: the constraints are generated and maintained by institutional processes that operate below the level of individual intent. The doctrinal comparisons developed in Part II identify the legal anomaly: immigration's voluntariness standard is narrower than what American law requires in criminal, civil, and administrative contexts involving comparable stakes.

Applied to voluntary departure, this synthesized framework reveals what the law obscures. The question is not whether migrants sign forms or affirm their decisions on the record. It is whether the conditions under which they do so are adequate to make those acts of agreement morally and legally meaningful. The existing doctrine provides no tools for asking that question, and as Part III demonstrates, the absence of those tools is the product of a deliberate historical construction, not an oversight.

V. Voluntary Departure in Practice

The formal structure of voluntary departure assumes that migrants are making informed and voluntary decisions within a legal process that, while adversarial, remains fair. In practice, those decisions are shaped by conditions that narrow the range of meaningful options in ways the statutory framework neither acknowledges nor addresses.

Va. Detention and the Structure of Constrained Choice

Detention plays a central and underappreciated role in this dynamic. Noncitizens in removal proceedings are frequently held for uncertain periods, with limited access to legal resources, restricted communication with family and support networks, and no clear endpoint to their confinement. Under these conditions, the decision to accept voluntary departure is often driven less by long-term legal strategy than by the immediate and pressing desire for release.

This is not an irrational response but, in many respects, a reasonable one. But Wertheimer's framework is instructive: the rationality of a constrained choice does not establish its voluntariness.[47] A migrant who accepts departure in order to escape indefinite detention has made a decision that is explicable and even understandable. What she has not done, in any robust sense, is freely chosen to leave. The choice was made available to her in a form that made it very difficult to refuse — and the statutory scheme, as *Arguelles-Campos* makes clear, conditions the availability of that choice on the simultaneous surrender of all other legal claims.[48]

The *Mathews* framework is again helpful here. The private interest at stake — liberty from continued detention, combined with the loss of pending legal claims — is substantial. The risk of wrongful deprivation is high, given that detained migrants typically lack counsel and face decision-making under time pressure. And the marginal administrative burden of more meaningful voluntariness inquiry would be modest. The current procedures are constitutionally suspect, even if the plenary power doctrine shields them from direct challenge.

Vb. Time Pressure and the Absence of Meaningful Deliberation

Time pressure further constrains decision-making in ways the law does not adequately account for. Immigration proceedings for detained individuals move quickly, and migrants may be asked to decide whether to accept voluntary departure without sufficient time to consult counsel, investigate available forms of relief, or fully understand the consequences of waiver.

Beauchamp and Childress's account of informed consent (developed in the biomedical context but in theory applicable wherever autonomous decision-making is at stake) identifies adequate information and sufficient time for deliberation as necessary conditions of valid consent.[49] Neither condition is reliably satisfied in the voluntary departure context. Information about available relief is often incomplete or inaccessible, particularly for migrants without legal representation. The time given for deliberation is frequently shortened by institutional pressures that have nothing to do with the individual migrant's situation. *Rodriguez-Diaz* itself acknowledged this problem: the BIA found that the unrepresented respondent likely did not understand what he was being asked to agree to, even after a judicial inquiry.[50] The decision remedied the problem in the individual case. It did not address the structural conditions that produced it.

Vc. Language, Counsel, and the Conditions of Understanding

Even where procedural safeguards formally exist, access to them is not guaranteed. Many migrants navigate removal proceedings without legal representation, and those who do have counsel may encounter them only briefly or under significant time constraints. Without

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[47] Wertheimer, *supra* note 4, at 176–80.
[48] *Matter of Arguelles-Campos*, 22 I. & N. Dec. at 815–16.

[49] Tom L. Beauchamp & James F. Childress, *Principles of Biomedical Ethics* 120–30 (7th ed. 2013).

[50] *Matter of Rodriguez-Diaz*, 22 I. & N. Dec. at 1321.

consistent guidance, individuals may not fully understand either the consequences of accepting voluntary departure or the alternatives available to them.

Language barriers compound the problem substantially. Legal terminology surrounding waiver, appeal, and relief is technically complex, and translation (if available) does not always ensure genuine comprehension.[51] A migrant told, through an interpreter, that signing a form means she can leave today rather than remain detained may understand the immediate practical consequence while remaining entirely unaware of what she has surrendered: pending claims, appellate rights, and protections she may not know she had.

This is precisely the informational failure that Beauchamp and Childress identify as fatal to meaningful consent.[52] The law's treatment of the signed form as sufficient does not resolve this problem, it papers over it, and does so in a manner that would not be allowed in comparable legal contexts. For example, a criminal defendant's waiver of trial rights is invalid if they lacked genuine understanding of what they were waiving, regardless of what they signed.

Vd. Administrative Efficiency and the Normalization of Constrained Agreement

Voluntary departure also serves institutional interests that shape how it is presented and used. Immigration courts operate under significant and well-documented caseload pressures, and voluntary departure provides a mechanism for resolving cases quickly without extended proceedings, appellate review, or the administrative costs of formal removal.[53] *Matter of Ocampo* acknowledged as much, noting that pre-completion voluntary departure was designed to conclude cases "promptly and decisively."[54] This function is not merely visible in judicial opinions but is embedded in the incentives for the process.

When voluntary departure is consistently framed as the most efficient resolution, it gradually comes to appear as the most reasonable one, particularly for detained individuals who have limited ability to evaluate alternatives. Over time, this framing becomes normalized. What begins as one option among several becomes an expected outcome. As Young suggests, this normalization is itself a feature of structural injustice: constraints become invisible when they are sufficiently routine.[55] As Stumpf's crimmigration framework demonstrates, the administrative logic of efficiency is exactly what drives the procedural thinning that makes such normalization possible.[56]

Renée Nicole Souris offers a sharper diagnosis still. Drawing on virtue ethics, Souris argues that cruelty in immigration enforcement is not an incidental byproduct of administrative

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[51] Joseph Wszalek, *Ethical and Legal Concerns Associated With the Comprehension of Legal Language and Concepts*, 8 AJOB NEUROSCI 26 (2017), https://pmc.ncbi.nlm.nih.gov/articles/PMC6433146/.
[52] Beauchamp & Childress, *supra* note 1, at 131–36.
[53] *FY2024 EOIR Immigration Court Data: Caseloads and the Pending Cases Backlog*, https://www.congress.gov/crs-product/IN12492 (last visited Apr. 1, 2026).
[54] *Matter of Ocampo*, 22 I. & N. Dec. at 1302.
[55] Young, *supra* note 3, at 95–100.
[56] Stumpf, *supra* note 2, at 400–05.

pressure but is, in meaningful respects, constitutive of how the system operates.[57] Enforcement practices are designed not merely to process migrants but to discourage and deter. On this account, the conditions that make voluntary departure feel like the only viable option are not failures of the system. They are among its intended outputs. This reframing matters for how the Note's critique should be understood: it is not simply that voluntary departure falls short of an ideal of consent that the system is otherwise trying to achieve. It is that the system is structured to produce agreement under pressure, and the language of voluntariness provides the legal cover that makes that structure sustainable.

VI. Rethinking Consent in Immigration Law

The legal framework governing voluntary departure reflects a broader commitment to formal consent: once agreement is expressed, the decision is treated as valid, with limited attention to the circumstances that surrounded it. This approach simplifies adjudication, but it does so by trading substantive fairness for administrative convenience — a tradeoff the law makes without ever quite acknowledging it is making one.

VIa. The Inadequacy of Formal Consent

Consent, as a legal concept, is meant to signal autonomy. It indicates that an individual has made a meaningful choice and that the outcome reflects their own judgment about their own situation. When agreement is produced under conditions of structural constraint, that signal becomes unreliable. The presence of consent does not guarantee the presence of freedom, and treating it as though it does turns a safeguard into a formality.

This critique is not novel to immigration law. Joseph Carens argues that the treatment of migrants within enforcement systems cannot be evaluated solely by reference to procedural compliance, but must be evaluated against the substantive conditions of fairness and dignity that procedural categories are designed to protect.[58] Javier Hidalgo makes a related point: when enforcement systems are themselves structurally unjust, the choices they generate cannot be straightforwardly treated as free.[59] Kristin Heyer's analysis of internalized border enforcement reinforces this: migrants who have learned, through experience, that resistance is costly may comply without consenting in any meaningful sense.[60] Souris adds a harder edge: a system built around demoralization does not extract thin consent accidentally. It extracts it by design.[61]

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[57] Renée Nicole Souris, *"The Cruelty Is the Point": Virtue Ethics and Immigration*, 56 Polity 434, 440–45 (2024).
[58] Joseph Carens, *The Ethics of Immigration* 155–65 (2013).
[59] Javier S. Hidalgo, *Unjust Borders: Individuals and the Ethics of Immigration* 88–95 (2019).
[60] Kristin E. Heyer, *Internalized Borders: Immigration Ethics in the Age of Trump*, 79 Theological Stud. 146, 152–56 (2018).
[61] Renée Nicole Souris, *"The Cruelty Is the Point": Virtue Ethics and Immigration*, 56 POLITY 434 (2024); JOSEPH CARENS, THE ETHICS OF IMMIGRATION (2013), http://ebookcentral.proquest.com/lib/northeastern-ebooks/detail.action?docID=1336461

The BIA's decisions illustrate the doctrinal consequences of ignoring these considerations. In *Matter of M-A-S-*, the Board upheld a voluntary departure agreement despite evidence of procedural irregularity, treating the signed waiver as facially sufficient.[62] What the decision did not ask, and what the doctrine does not require it to ask, is whether the circumstances surrounding the waiver were adequate to make it genuinely voluntary.

VIb. The Counterargument: Agency, Strategy, and the Value of an Option

The strongest defense of voluntary departure does not deny that migrants face difficult circumstances. It argues, rather, that voluntary departure genuinely expands migrants' options by offering an alternative that many would rationally prefer. Eliminating or restricting voluntary departure in the name of substantive consent would leave migrants worse off, not better, removing one of the few levers of agency available to them within a constrained system.

This argument has real force and should not be dismissed. Migrants do make decisions, and those decisions can reflect genuine strategic judgment about how best to navigate an adverse situation. For a migrant who has no viable legal claims, no ties to the United States, and who faces indefinite detention pending a proceeding whose outcome is uncertain, voluntary departure may be not merely the best available option but an unambiguously better one than the alternative. The ability to avoid a formal removal order, preserve some flexibility regarding future reentry, and end a period of confinement is not nothing.

Moreover, the paternalism concern is legitimate. A legal framework that invalidates constrained choices on the ground that they were not made under ideal conditions risks substituting the judgment of legal institutions for the judgment of migrants themselves, and doing so in ways that may serve institutional interests more than individual ones. Migrants are not passive recipients of state action. They are agents who make decisions, very often sophisticated ones, within the constraints they face.

The critique developed in this Note does not deny any of this. What it denies is that the idea of constrained choice is sufficient justification for treating <u>any</u> given choice as evidence of autonomous consent. The argument proceeds at two levels. First, as Shiffrin establishes, consent given under significant pressure may fail to bear the full moral weight the law assigns to it even when it is rational and strategic because rationality under constraint is not the same as autonomy, and because legal systems should not routinely use the former as a proxy for the latter.[63] Second, and more practically, the problem is not that voluntary departure exists as an option but that the law uses agreement to it as a device for extinguishing all other claims without adequate scrutiny of whether the decision to agree was genuinely informed. The migrant who strategically accepts departure knowing exactly what they are surrendering presents no issue. The problem is the law's systematic failure to distinguish them from the migrant who accepts under time pressure, without counsel, and without understanding the alternatives they are giving up.

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[62] *Matter of M-A-S-*, 24 I. & N. Dec. 762, 766–67 (B.I.A. 2009).
[63] Shiffrin, *supra* note 1, at 380–85.

Democratic legitimacy in immigration enforcement requires not only procedural compliance but substantive conditions of fairness, which must be ones that a fair system could endorse.[64] The voluntary departure framework, on this account, fails not because it offers an option but because it offers that option in a way that systematically prevents meaningful evaluation of its terms. A fair system could offer voluntary departure. It could not simultaneously deprive migrants of the conditions necessary to choose it meaningfully and then treat their choice as autonomous.

This is the point at which the counterargument reaches its limit. The defense of voluntary departure as an agency-preserving option assumes that the choice between departure and formal proceedings is made under adequate conditions. The evidence examined in Part V demonstrates that this assumption is routinely false. The law does not simply rely on consent but works to create it. By turning constrained decisions into legally sufficient agreement, immigration doctrine maintains the appearance of fairness while leaving the underlying structural pressures entirely intact.

VIc. Toward a More Structurally Honest Framework

A more realistic approach to consent in immigration law would not eliminate voluntary departure as an option. The mechanism can serve legitimate purposes, and migrants can benefit from it in genuine ways. What it would do is treat voluntariness as a substantive question rather than a formal threshold, and could back that commitment with specific, enforceable changes to the statutory and regulatory framework in a several ways:

(1) Mandatory pre-waiver consultation. Congress should amend 8 U.S.C. § 1229c to require that any voluntary departure agreement be preceded by a mandatory consultation period with either retained counsel or a government-funded legal advisor. This is not merely a practical reform; it has a doctrinal analogue in the criminal context, where the validity of a guilty plea is dependent on the availability and quality of counsel. The absence of a comparable requirement in immigration law is an anomaly, and one that *Rodriguez-Diaz* itself implicitly recognized when it found that an unrepresented migrant could not be said to have knowingly waived his rights.[65]

(2) Substantive voluntariness inquiry. The Executive Office for Immigration Review (EOIR) should amend the Immigration Court Practice Manual and 8 C.F.R. § 1240.26 to require that immigration judges conduct an individualized voluntariness inquiry that examines detention status, access to counsel, language comprehension, and the time available for deliberation before accepting a voluntary departure agreement. The existing approach, which treats documentation as sufficient, should be replaced with a standard that mirrors the totality-of-circumstances inquiry that [66]

[64] Sarah Song, *Justice, Collective Self-Determination, and the Ethics of Immigration Control*, 40 J. Applied Phil. 26, 33–37 (2023).
[65] *Matter of Rodriguez-Diaz*, 22 I. & N. Dec. at 1321.
[66] *Brady*, 397 U.S. at 749–50.

(3) Decoupling waiver from eligibility. The current statute, as interpreted in *Arguelles-Campos*, conditions voluntary departure on the simultaneous waiver of all other forms of relief.[67] This grouping amplifies the pressure on migrants by making the acceptance of departure contingent on the abandonment of claims that may have independent merit. Congress should consider amending INA § 240B to decouple eligibility for voluntary departure from the mandatory waiver of pending claims, permitting adjudicators to grant voluntary departure while preserving the migrant's right to administrative review of other relief applications.

(4) Right to counsel for detained respondents. More broadly, Congress should extend a statutory right to appointed counsel in removal proceedings involving detained respondents. The absence of such a right is a structural deficiency that underlies virtually every failure of meaningful consent documented in this Note. Voluntary departure, waivers, and concessions of removability cannot be truly voluntary in the absence of informed, independent legal advice. Several circuit courts have acknowledged this problem in the due process context; legislative action would resolve it directly.[68]

These changes would not transform voluntary departure into a fully unconstrained choice, no reform within the existing enforcement structure can accomplish that, but they would make the law more honest about what it is doing. As Schmid argues, structural injustice in immigration is perpetuated in part by the invisible constraints it imposes.[69] Making those constraints visible within doctrine, within adjudication, and within the standards by which agreement is evaluated is a necessary condition for addressing them.

The deeper question, as Hidalgo and Carens each suggest, is whether a system structured around efficiency can ever fully satisfy the conditions for meaningful consent.[70] That question exceeds the scope of this Note. But it sits behind every voluntary departure agreement. In every signed form, every inadequate discussion of waiver, and every case resolved without appeal. The law does not ask it. It should.

VII. Conclusion

Voluntary departure is presented as a mechanism that preserves choice within immigration enforcement. In practice, it depends on a conception of choice that is narrower than the label suggests. Migrants agree to depart, but they do so within an environment that has slashed their options, shortened their deliberation, and conditioned their agreement on the surrender of rights they may not fully understand.

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[67] *Matter of Arguelles-Campos*, 22 I. & N. Dec. at 815–16.

[68] *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that defense counsel's failure to advise a noncitizen defendant of immigration consequences of a guilty plea constitutes ineffective assistance); *Lassiter v. Dep't of Soc. Servs*., 452 U.S. 18 (1981) (declining to recognize a categorical right to counsel in civil proceedings, though acknowledging that due process may require it in particular cases).

[69] Schmid, *supra* note 1, at 1057–60.

[70] Hidalgo, *supra* note 1, at 95–100; Carens, *supra* note 1, at 160–65.

By focusing on formal agreement, the law avoids engaging with those conditions. Consent becomes a proxy for legitimacy, even when the decision behind it is structurally constrained. What results is not simply a mismatch between doctrine and reality, but a system that depends on that gap. The fiction of voluntariness is not incidental to how voluntary departure works, it *is* how voluntary departure works.

Wertheimer and Brixel identify how constrained alternatives undermine the voluntariness of formally expressed agreement. Young and Schmid reveal how those constraints are generated and maintained by institutional processes that operate independently of individual intent. Raz and Shiffrin establish why agreement produced under such conditions cannot bear the weight the law assigns to it. And Carens, Hidalgo, and Heyer remind us that the ethical evaluation of immigration enforcement cannot stop at procedural compliance, it must ask whether the conditions of decision-making are ones that a just system could defend.

The constitutional framework, examined through the lens of *Mathews v. Eldridge*, points in the same direction: where the private interest is substantial, the risk of wrongful deprivation high, and the cost of additional process modest, due process demands more than a signature. The doctrinal comparisons with criminal and contract law underscore that immigration's approach to voluntariness is an outlier, and one that is difficult to justify on any ground other than the historical accident of plenary power deference.

The agreement is recorded. The case is closed. What remains unexamined — and what the law is not structured to examine — is the institutional arrangement that made the decision possible in the first place. How a legal system treats consent under constraint reveals something about what it actually values. Voluntary departure reveals that immigration law values resolution. The question this Note leaves open, and that the law must eventually answer, is whether resolution and justice are the same thing.

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The Legal Permissibilities and Boundaries of Offshore Investments in Private Equity

By: Charline Apard

Abstract

Private equity is the pooling of capital to invest in non-public companies with the goal of gaining returns on those investments. Globally, there has been a rapid growth in the number of funds and assets under management in the private sector. In private equity, investors typically consist of pension funds, high-net-worth individuals, and endowments. Usually, these funds are legally structured as limited partnerships, allowing them to receive pass-through taxation, limited liability, and flexibility in governance. Driven by the advantages of limited partnership structures, offshore funds are structured to replicate limited partnerships for tax neutrality and investor flexibility—inadvertently creating a regulatory gray zone that complicates enforcement against financial misconduct.

Some common jurisdictions of offshore funds consist of the Cayman Islands, Bermuda, the British Virgin Islands, and Luxembourg. The purpose of these funds is tax optimization, asset protection, enhanced privacy, and management of foreign currencies. Due to overlap in offshore regulations and the lack of strict standards, compliance is respected but often confused with legal ambiguity. In an illustrative case on the topic, *Federal Republic of Nigeria v. JPMorgan Chase*, offshore structures were observed to help obscure ownership of funds as they were owned by politically exposed persons. In this case, JPMorgan Chase Bank acted as an intermediary and was ruled as not legally liable, because compliance with standard Anti Money Laundering/Know Your Client regulations was deemed as sufficient, despite a clear failure in transparency and regulatory enforcement in the fund. This case demonstrated that offshore structures in private equity are legal, however, functionally opaque. These funds can create gaps between jurisdictions, leading to compliance but not outcome-based enforcement.

Offshore private funds are ultimately legal, but create a fragile system, causing reason to question regulatory design, cross-border enforcement effectiveness, and systemic transparency in financial systems.

I. Introduction

Private equity is a way for investors to make returns from non-publicly traded companies by pooling money into funds. This includes money from pension funds, other private funds, foreign institutions, high-net-worth individuals, insurance companies, and nonprofits.[12] The concept of private equity has, in recent years, been a popular topic of conversation in the financial field. The industry has reportedly grown very rapidly. The total number of private equity funds has increased by more than half to nearly 16,000 (see *figure (a)* below), and the aggregate gross funds assets have more than doubled to a sum of nearly amounting $5 trillion from 2016 to 2021. The capitalization in private equity comes from finding the most opportunistic timing to sell the portfolio companies through mergers and acquisitions, initial public offerings, or secondary offerings to other PE firms.

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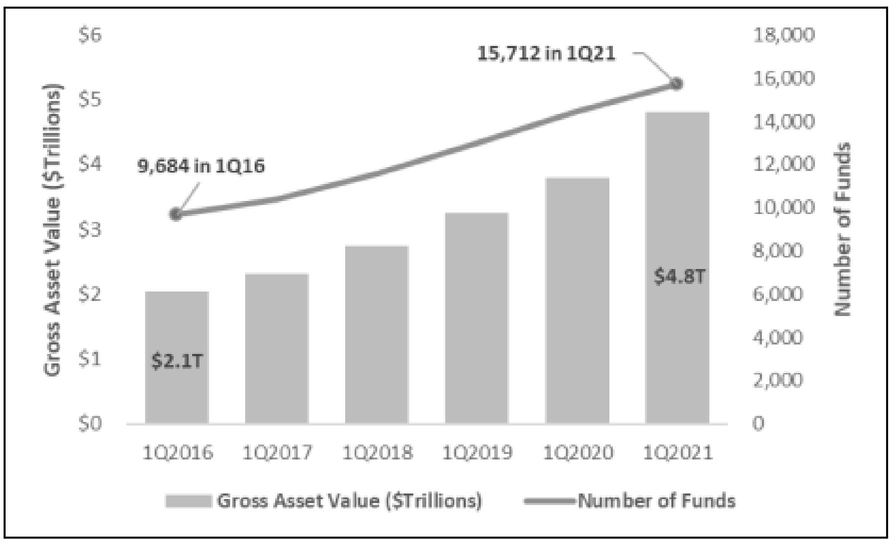
[1] Su, E. (2022). Private Equity and Capital Markets Policy (Report No. R47053). Congressional Research Service. https://www.congress.gov/crs-product/R47053

[2] Lampiaou & Sokolovich (Arsenio Law). (n.d.). Private Equity Across Jurisdictions: Structuring for Legal Efficiency. Arsenio Law Insights. hfundttps://www.arseniolaw.com/insight/private-equity-across-jurisdictions-structuring-for-legal-efficiency

While private equity funds are rapidly evolving, backed by hours of strategic investment decisions, the laws set by the Securities and Exchange Commission (SEC) scrutinize financial sector actors enough to avoid exploitation. However, a largely debated topic concerning private equity funds is the concept of offshore structures. Commonly found in the Cayman Islands, British Virgin Islands, Bermuda, Luxembourg, and more, offshore funds are investment funds set up in remote locations. These locations are tax-neutral and allow non-taxable US entities to invest in American assets without being compliant with American tax law.[3] While they are still subject to American laws, the legal ambiguity behind these laws in practice remains an appealing factor for many looking to set up funds. Offshore structures, in recent years, have gained immense popularity and have raised concerns over financial transparency, compliance, and tax treatments.[4,5]

Ultimately, offshore structures used by private equity funds are inherently compatible with financial transparency laws; however, the legal permissibility of these structures creates persistent transparency risks due to uneven disclosure regimes, ownership opacity, and enforcement gaps—making offshore private equity a legally compliant but structurally incapable of ensuring meaningful transparency.

Figure (a)



[6]

Figure (b)

[3] Kuan, J. (2006, January 1). Offshore approach. Private Funds CFO. https://www.privatefundscfo.com/offshore-approach/

[4] AIMA. (2022, April 1). The truth about offshore alternative investment funds. Alternative Investment Management Association. https://www.aima.org/article/the-truth-about-offshore-alternative-investment-funds.html

[5] Lampião & Sokolovich (Arsenio Law). (n.d.). *Offshore Fund Formation & Structuring*. Arsenio Law Practice Areas. (https://www.cbiglaw.com/offshore-fund)

[6] Su, E. (2022). *Private Equity and Capital Markets Policy* (Report No. R47053). Congressional Research Service. (https://www.congress.gov/crs-product/R47053)

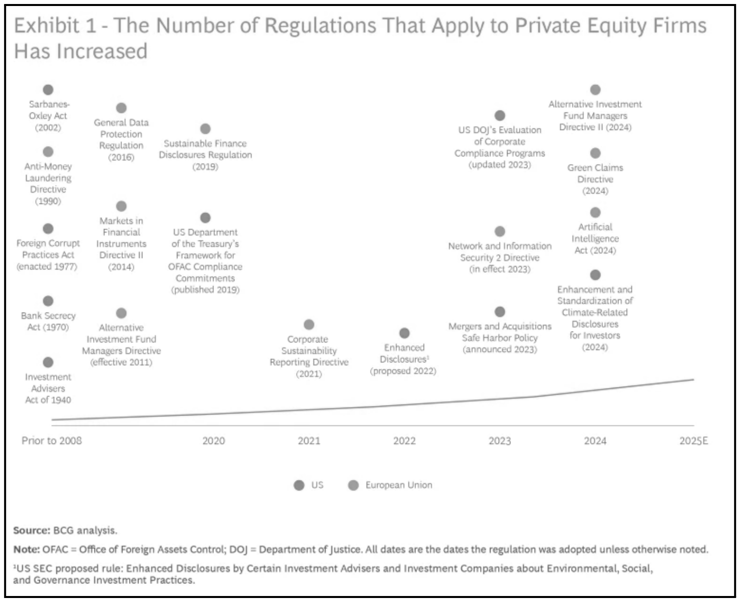


Exhibit 1 - The Number of Regulations That Apply to Private Equity Firms Has Increased

Source: BCG analysis.
Note: OFAC = Office of Foreign Assets Control; DOJ = Department of Justice. All dates are the dates the regulation was adopted unless otherwise noted.
¹US SEC proposed rule: Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices. [7]

II. Legal Regulations in Private Equity

Two common legal structures to organize a business are partnerships and corporations. In partnerships, two or more people retain profits as "co-owners." Commonly known partnerships in business are with Goldman Sachs or Deloitte. Regulated and defined by the Uniform Partnership Act, partners are given shared responsibility to manage the business's obligations.[8] While types of partnerships can be expanded upon based on the nature of the agreement (limited and general partnerships), partnerships generally receive pass-through taxation in which profits or losses pass directly to partners rather than being taxed at the entity level.[9] Secondly, corporations, such as Apple or Microsoft, are legal entities created under state law that are separate from their shareholders. Ownership of corporations is divided into stock fractions, held by its owners who receive limited liability in the management of those ownership rights. Unlike partnerships, corporations are mostly taxed under the corporate income tax regime. This system can lead to double taxation when profits are taxed at the corporate level and again when distributed as dividends under the Internal Revenue Code 11.[10]

In private equity, funds usually structure themselves as partnerships instead of corporations. In partnerships, funds have greater contractual flexibility and a more beneficial tax treatment, avoiding double taxation. Corporations, conversely, are completely separate legal entities that fall under formal governance requirements. Therefore, the use of partnerships rather than corporations allows investors to

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[7] Suo, J., Tang, T., Tsang, C., & West, A. (2024, February 29). *The Regulatory Climate Is Getting Hotter for Private Equity*. Boston Consulting Group. (https://www.bcg.com/publications/2024/the-regulatory-climate-is-getting-hotter-for-private-equity)

[8] Legal Information Institute. (n.d.). *Revised Uniform Partnership Act of 1997 (RUPA)*. Wex, Cornell Law School. https://www.law.cornell.edu/wex/revised_uniform_partnership_act_of_1997_(rupa)

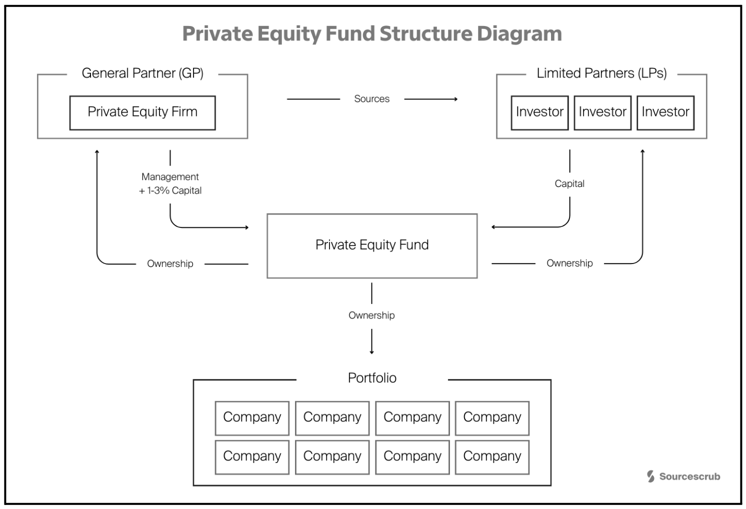
[9] Hurst, V. S. (2023). *Principles of Partnership and Other Unincorporated Business Organizations* (2nd ed.). West Academic Publishing. (https://subscription.westacademic.com/Book/Detail/28313)

[10] 26 U.S.C. § 11 - Tax imposed. Legal Information Institute, Cornell Law School. (https://www.law.cornell.edu/uscode/text/26/11)

structure management rights, profit allocations, and investment terms through a Limited Partnership Agreement (LPA).

Within the broader partnership structure, private equity funds most often engage in what is called Limited Partnerships. This sub-structure allows for a fund to consist of a general partner and limited partners. General partners manage funds, have fiduciary duties and unlimited liability, while limited partners are passive investors whose liability is limited to the amount of capital they invest into a fund.[11] While defining the American jurisdiction, it also outlines expected capital commitments, distribution waterfalls, management authority, fiduciary duties, and removal rights.

Figure (c)



12

This legal structure is popular in private equity since it allows funds to be treated as "pass-through" entities for taxation purposes. This means the funds themselves are not subject to paying entity-level income taxes, and the profits/losses that derive from the fund can flow through directly to limited partners who will then be taxed individually, allowing an avoidance of double taxation on revenues from funds.[13] Private equity funds can pool capital from all sorts of investors, for example, pension funds, endowments, individuals, sovereign wealth funds, and more. Pass-through taxation is beneficial because investors can span across many jurisdictions and taxation categories, which would constitute multiple fund-level taxes, creating an inefficient system for cross-border capital pooling.[14] Tax transparency through this structure ensures that the revenues through these vehicles are protected and not buried under a secondary tax. If a private equity fund were taxed at an entity level, investors would be

[11] Legal Information Institute. (n.d.). *Limited Partnership*. Wex, Cornell Law School. (https://www.law.cornell.edu/wex/limited_partnership)

[12] SourceScrub. (2024, May 15). How Private Equity Funds are Structured. SourceScrub Blog. https://www.sourcescrub.com/post/how-private-equity-funds-are-structured

[13] 26 U.S.C. § 701 - Partners, not partnership, subject to tax. Legal Information Institute, Cornell Law School. https://www.law.cornell.edu/uscode/text/26/701

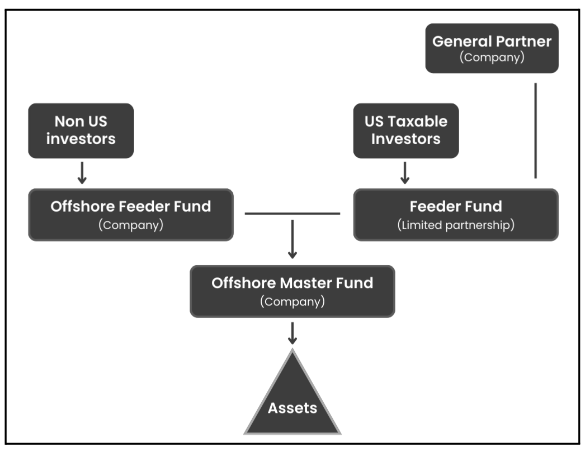
[14] Wolters Kluwer. (2024, January 2). LLC pass-through taxation: What small business owners need to know. Expert Insights. https://www.wolterskluwer.com/en/expert-insights/llc-pass-through-taxation-what-small-business-owners-need-to-know

subject to taxation twice—at the fund level and the distribution level.[15] Tax neutrality preserves a statutory tax status for tax-exempt investors by preventing indirect taxation through the fund vehicle itself.[16] Therefore, pass-through is preferred in the private equity sector as it allows for investors to be taxed in accordance with their domestic tax regimes rather than being subject to a single jurisdiction's tax system.

Outside of the United States' scope of jurisdiction, offshore private equity funds replicate the limited partnership model in jurisdictions designed for international investment, allowing them flexibility in judicial application. Offshore funds are not revolutionizing private equity and are designed to preserve the advantages of limited partnerships. They are the same legal entity type, just in a different jurisdiction.

Unlike the common understanding, offshore funds are ultimately not designed as a vehicle for secrecy, but rather are designed for tax neutrality. Private equity depends on tax neutrality to avoid fund-level taxation. Limited partnership structures are generally recognized legally as pass-through vehicles. If offshore jurisdictions used corporations instead, they would reintroduce double taxation and ultimately reduce returns for investors in the funds.[17] Generally, partnership laws in the Cayman Islands and other common regions for offshore structures are drafted to resemble models from Delaware and England. Institutional investors committing to funds have a general expectation of limited liability, general partner control, and general contractual/flexible terms via the limited partnership agreement. Due to their familiarity with these expectations, offshore jurisdictions replicate the limited partnership statutes to ensure legal predictability for these investors.[18]

Figure (d)



[19]

As a further illustration of offshore jurisdictions and how these replicate limited partnership structures, the following table compares key legal and regulatory features across the British Virgin

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[15] Metrick, A., & Yasuda, A. (2010). The Economics of Private Equity Funds. Review of Financial Studies, 23(6), 2303-2341. https://web.stanford.edu/~piazzesi/Reading/MetrickYasuda2010.pdf

[16] Morriss, A. P., Yandle, B., & Dorchak, A. (2008). Tax Havens, Tax Competition, and Economic Development. William & Mary Law Review, 50(1), 197-257. https://scholarship.law.wm.edu/wmlr/vol50/iss1/4/

[17] 26 U.S.C. § 701 - Partners, not partnership, subject to tax. Legal Information Institute, Cornell Law School. https://www.law.cornell.edu/uscode/text/26/701

[18] Exempted Limited Partnership Act (2025 Revision). (2025). Cayman Islands Legislation. https://legislation.gov.ky/cms/images/LEGISLATION/PRINCIPAL/2001/2001-0005/2001-0005_2025%20Revision.pdf

[19] Harneys. (2025). Cayman Islands Investment Funds. Harneys Funds Hub. https://www.harneys.com/funds-hub/cayman/

Islands, Cayman Islands, Guernsey, and Jersey. While keeping the benefits of private equity funds, they also diverge in the degree to which information about fund entities is disclosed, maintained, and made accessible. These distinctions determine the transparency of ownership and accessibility of regulatory documents, making it relevant in the context of enforcement.

Each jurisdiction respects and is structured under compliance systems, including beneficial ownership registries and economic substance reporting. However, access to these systems from regulatory authorities is often restricted. Therefore, the same legal features that make offshore jurisdictions attractive for cross-border investment may also complicate regulatory oversight, reinforcing the practical challenges of enforcing accountability within different jurisdictions' offshore frameworks. See the exhibit below for the variance in regulatory mechanisms.

Figure (e)

Feature	British Virgin Islands	Cayman Islands	Guernsey	Jersey
Publicly Available Documents	Certificate of Incorporation, Memorandum & Articles (M&A), Registered Agent/Office info, and a list of Director names.	Name, Reg No., Type, Reg Office, Capital/Shares, Initial Subscribers, Financial Year End, and Director names.	Name, Reg No., Reg Office, Director names, Resident Agent, M&A, Special Resolutions, and Annual Validations	Certificate of Incorporation, M&A, Reg Office, Special Resolutions, and Entity Profile including shareholder/significant person names
Register of Shareholders	Filed with Registrar but not public (unless company elects).	Kept at Reg Office; open to inspection for a "proper purpose" for a fee.	Initial subscribers are public; otherwise not public.	Shareholder names in the entity profile are publicly available for a fee.
Beneficial Ownership Registry	Private; accessible by competent authorities. Limited particulars accessible to those with a "legitimate interest".	Private; maintained at reg office. Accessible by competent authorities or law enforcement	Private; managed by Resident Agent. Accessible by competent authorities and certain regulated businesses for CDD.	Private; submitted to Registrar. Accessible by competent authorities and law enforcement; not currently public.
Accounting & Audit Disclosure	Must maintain records; not public. Audit only if regulated by BVI FSC.	Must maintain records; not public. Audit only if regulated by CIMA.	Financial statements must be produced; filed with Revenue Service	Produced for 18-month periods. Only public or JFSC-regulated

			but not public.	companies must file; not public.
Economic Substance Reporting	Requires annual reporting of "relevant activities" (e.g., holding business, fund management) to authorities.	Annual notification to Tax Information Authority regarding "relevant activities" is required.	Legal persons must file additional info in annual tax returns to identify "relevant activities".	In-scope entities must disclose relevant activity info in annual returns for compliance assessment.
Tax Information Exchange	Numerous exchange agreements in place; reporting under FATCA/CRS.	Numerous exchange agreements in place; reporting under FATCA/CRS.	Numerous exchange agreements in place; reporting under FATCA/CRS.	Numerous exchange agreements in place; reporting under FATCA/CRS.

[20]

III. Federal Republic of Nigeria v. JP Morgan Chase

IIIa. Case Brief

In 2022, offshore structures and the accusatory claims that they relieve funds of additional spending were highlighted in *Federal Republic of Nigeria v. JP Morgan Chase*, under the United Kingdom's higher courts' jurisdiction. In this case, Nigeria sued JPMorgan Chase seeking recovery for 875 million dollars as misappropriated funds involved in a corrupt oil transaction involving offshore entities, through Malabu Oil & Gas Ltd. The company at the center of the transaction, Malabu Oil & Gas Ltd., was structured through offshore entities that obscured its true ownership. Though connected to Nigeria by name, its beneficial interests were controlled by political figures who were anonymously involved in the entity, due in part to offshore secrecy.

JPMorgan served as the defense in this case, as they mis-assessed the transaction, but their liability was found to be limited as they only served the role of a correspondent bank. They processed the wire transfers through its London branch, rather than as a structuring party to the offshore arrangement. The Nigerian government authorized the release of the funds, making JPMorgan the intermediary executing client instructions rather than an active participant in the underlying deal. This distinction proved legally significant in the case, highlighting that financial institutions can participate in offshore financial flows, even dishonest ones, while remaining insulated from liability due to the narrow scope of their obligations.

In this case, the premise of the suit constituted ill intent on JPMorgan's part by purposefully neglecting their Anti-Money Laundering (AML) or Know Your Client (KYC) obligations under the transaction. The Federal Republic of Nigeria argued that JPMorgan was in breach of the Quincecare Duty of Care, which, in the words of the court itself, "is the duty on a bank not to follow a customer's

[20] Mourant. (2024, June 25). Offshore Private Equity Holding Structures: A Comparison. Mourant Guides. https://www.mourant.com/guides/offshore-private-equity-holding-structures-a-comparison/

instructions where the relevant bank is 'put on enquiry' that it may in fact facilitate a fraud on the customer." JPMorgan countered the allegations by providing proof of reasonable due diligence and reports, maintaining that no information discovered in their checks triggered the Quincecare Duty.

The High Court agreed and ruled in favor of JPMorgan Chase in this case, holding that JPMorgan did not owe any duty of care to protect Nigeria from financial losses caused by its own officials' corruption. The Court explained that the findings in JPMorgan's due diligence were not sufficient to put the bank "on inquiry" of fraud, and therefore the Quicicare Duty was never triggered. Accordingly, the court determined insufficiency on the part of modern financial transparency frameworks, not JPMorgan. While compliance with AML and KYC requirements may satisfy regulatory standards, banks were able to and allowed transactions that compromised the broader policy goals of preventing corruption and illicit financial flows.

Importantly, the High Court noted that banks are not obligated to act as de facto anti-corruption enforcers beyond their defined regulatory duties, placing the onus on the regulators to ensure transparency. In their decision, the court reflected a broader enforcement gap in financial transparency law, where courts defer to formal compliance and oppose imposing liability without clear legislative mandates, even when offshore structures are used in ways that undermine public accountability.

Federal Republic of Nigeria v. JPMorgan Chase has direct implications for offshore structures commonly used in private equity, as the offshore entities used in the Malabu Oil & Gas transaction mirror the layered ownership and jurisdictional fragmentation of private equity fund structures, particularly those domiciled in tax-neutral jurisdictions. Private equity funds rely on offshore jurisdictions for tax neutrality, regulatory flexibility, and investor confidentiality, often using layered entities that resemble the structures at issue in the case. The court's reasoning suggests that so long as these structures comply with current proper disclosure and AML requirements, they remain legally permissible despite their potential to operate with opacity, reinforcing the conclusion that offshore private equity funds are not inherently unlawful but remain highly vulnerable to abuse in the absence of strict and consistent enforcement/laws[21].

IIIb. Case Application

Federal Republic of Nigeria v. JP Morgan Chase is a landmark case analyzing the opacity of offshore financial structures. In this case, the Malabu Oil & Gas transaction involved a complex chain of entities and politically exposed persons, making beneficial ownership difficult to identify. The court acknowledged that Malabu Oil & Gas Ltd. was beneficially owned by former officials in Nigeria who were widely alleged to have been involved in corrupt activities. Still, they concluded that JPMorgan was able to proceed as if Malabu were a collection of legitimate corporate entities.[22] Malabu's structure involved offshore shell companies and intermediaries, which confused the connection between the entity and politically exposed persons.[23] Since the ownership of the entity chains couldn't be verified, concerns were raised, but little action followed. The court's decision strongly supports allowing financial institutions to interact with offshore entities without legal liability when acting in a limited role.

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[21] High Court of Justice of England and Wales. (2022). The Federal Republic of Nigeria v. JPMorgan Chase Bank, N.A. [2022] EWHC 1447 (Comm). https://www.judiciary.uk/wp-content/uploads/2022/06/Nigeria-v-JP-Morgan-Chase-judgment-140622.pdf

[22] Reuters. (2021, March 17). Nigeria's OPL 245 oilfield licence bribery cases. Reuters Business. https://www.reuters.com/business/energy/nigerias-opl-245-oilfield-licence-bribery-cases-2021-03-17/

[23] BBC News. (2021, March 17). Shell and Eni cleared of corruption in Nigeria oil case. BBC World News. https://www.bbc.com/news/world-europe-56434890

Had this event happened in just one jurisdiction, domestic structures would have had much stricter disclosure rules, more regulatory oversight, and clearer pathways to determine the true ownership of the entities. It is therefore not unreasonable to conclude that the Quincecare Duty, a pre-existing regulatory framework, would have been triggered under such circumstances. Domestic corporate registries often require more transparent ownership filings. Courts and JPMorgan may have had more direct proof of wrongdoing or negligence. The transaction in question crossed many borders and involved Nigerian state actors, offshore companies, and JPMorgan's London branch. This made it hard for any one legal system to have full oversight over the transaction. JPMorgan's due diligence was mostly based on what the Nigerian government and other parties said, not on independently verified ownership data. This illustrates the difficulty in tracing beneficial ownership across offshore structures and the importance of stronger legal repercussions.

Through the layering of multiple legal vehicles, investigations of funds are much more difficult to conduct. Additionally, the multitude of jurisdictions creates fragmented regulatory oversight, limits in information-sharing, and different disclosure standards to keep track of. JPMorgan’s KYC/AML process relied mostly on representations from counterparties, reflecting limitations in cross-border information-sharing. Despite internal concerns identifying the transaction as high-risk, the bank’s compliance with existing AML and KYC obligations was deemed legally sufficient by the court. This decision highlights how offshore structures’ regulatory thresholds across various jurisdictions ultimately complicate enforcement.

Offshore financial structures are legally green-lit to facilitate questionable transactions without necessarily being in violation of the law. The legal framework of offshore structures leads to a prioritization of procedural compliance over systemic transparency. The court explicitly rejected imposing broader duties on the bank to act as a de facto anti-corruption regulator. This demonstrates that offshore structures operate within a legally compliant framework that nevertheless leaves significant transparency gaps. This principle is directly applicable to private equity, as offshore private funds, which emulate limited partnership structures across jurisdictions for tax neutrality and investor flexibility, similarly function legally while preserving opacity that can complicate systemic monitoring and enforcement, thereby reinforcing the idea that such structures are legally permitted yet inherently susceptible to policy instability.

IV. Structurally Lawful, Functionally Obscure

The decision in *Federal Republic of Nigeria v. JPMorgan Chase Bank* illustrates how existing regulatory frameworks may prove insufficient when applied to highly opaque offshore entities. Malabu Oil & Gas presented itself as a legitimate entity, and JPMorgan treated it accordingly. The Quincecare duty was not triggered because, based on the information available at the time, the bank lacked sufficient grounds to halt the transaction. Had Malabu in fact been legitimate, it would have represented a lawful offshore structure—yet one sufficiently opaque to obscure underlying risks. Similarly, offshore private equity funds are entirely legal and operate within the bounds of applicable compliance regimes. However, this section argues that the central concern is not illegality, but rather the ability of such structures to operate within the law while evading meaningful regulatory scrutiny.

IVa. Legal Legitimacy of Offshore Private Equity Structures

By nature, offshore private equity funds are not unlawful. While they are strategic, they shouldn't be regarded as dishonest. These funds are legally recognized extensions of domestic investment frameworks, which simply mimic limited partnership structures in different jurisdictions.[24] Offshore jurisdictions have intentionally designed their legal systems to mirror Delaware/English partnership laws, which ensures consistency and predictability for international investors.[25, 26] These jurisdictions do not create fundamentally different legal entities, but they simply imitate these familiar and globally accepted structures into tax-neutral environments to oversee cross-border investment.[27]

The legality of offshore funds is inherently determined and supported by compliance with established regulatory frameworks. These funds must remain compliant with previously mentioned Anti-Money Laundering (AML) obligations, Know Your Customer (KYC) requirements, and economic substance reporting regimes.[28] However, these compliance systems are designed primarily to ensure procedural processes are compliant, rather than to establish a full level of transparency of activities offshore. Offshore regulators often have to compromise their oversight as they balance extreme market competitiveness. This can lead jurisdictions to intentionally lax public disclosure requirements to attract global capital, further complicating compliance enforcement.[29] However, despite weak disclosure requirements, offshore funds are still capable of checking most compliance boxes in the majority of jurisdictions. As a result, while offshore private equity funds operate fully within the bounds of the law, they still expose a structural limitation in their regulatory design. Compliance is achievable without necessarily producing comprehensive transparency. Therefore, the central issue is not whether offshore private equity structures are legal, as they clearly are, but rather whether the legal frameworks governing these funds are sufficient to ensure meaningful accountability in practice.

IVb. Formal Compliance vs. Substantive Transparency

In *Federal Republic of Nigeria v. JPMorgan Chase Bank*, the court explored whether the bank complied with its legal duties rather than whether the offshore structure facilitated corruption. This case demonstrated that courts evaluate financial conduct by looking at liability, emphasizing whether actors followed existing regulatory procedures rather than whether the underlying financial structure was in some way contributory. While JPMorgan was formally compliant, the elusive offshore entity they were dealing with made true substantive transparency essentially impossible.

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[24] U.S. Securities and Exchange Commission. (2024). Private Funds Statistics. Division of Investment Management. https://www.sec.gov/divisions/investment/private-funds-statistics

[25] Cayman Islands Monetary Authority. (2020). Private Funds Act Summary. CIMA Regulatory Summaries. https://www.cima.ky/upimages/commonfiles/Private_Funds_Act_Summary_1614176285.pdf

[26] BVI Business Companies Act, 2004. (2004). British Virgin Islands Financial Services Commission. https://www.bvifsc.vg/sites/default/files/resources/bvi_business_companies_act_2004.pdf

[27] OECD. (2024). Global Forum on Transparency andelusive Exchange of Information for Tax Purposes. Organisation for Economic Co-operation and Development. https://www.oecd.org/tax/transparency/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes.htm

[28] Financial Action Task Force. (2023). The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. FATF-GAFI. https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html

[29] Tax Justice Network. (2022). Financial Secrecy Index 2022. Tax Justice Network. https://taxjustice.net/reports/financial-secrecy-index/

In a similar vein, there exists a tension between the level of compliance various jurisdictions require for offshore funds and the true level of substantive transparency the funds ultimately provide. As seen in *Federal Republic of Nigeria v. JPMorgan Chase Bank*, formal compliance requirements exist for offshore structures in the form of various filing obligations, declaring beneficial owners, obtaining AML certifications, and more. However, offshore structures routinely fail to provide substantive transparency.[30] The struggle for clarity does not derive from FATCA and OECD's Common Reporting Standards, but rather the sophistication of these legal structures. Through complex structural features, such as layered holding, nominee arrangement, and their opaque nature as discussed through this note, offshore structures challenge the expectations of transparency and coherence for financial reporting.[31] Regulatory authorities still hold responsibility for allowing such a lack of substantive transparency. The Foreign Account Tax Compliance Act, for example, does not allow for the free flow of financial information across various countries.[32] The IRS, as another notable example, receives more information on US owners of foreign accounts than a foreign owner of a US account. This asymmetry reveals a structural flaw in global reporting regimes, whereby efforts to combat financial secrecy may instead reallocate, rather than eliminate, opacity.

This challenge is secondarily supported by normative drift, which occurs when ethical expectations and acceptances of standards shift due to inconsequential deviance from regulations.[33] While often, deviance is categorized as regulatory capture, which implies subversion of rules by interested parties, normative drift is when deviation *becomes* the legal standard. Essentially, regulation ceases to generate the conduct it was designed to compel.

The Quincecare duty is a primary victim of normative drift in the regulatory sector. The Quincecare duty was first recognized in the 1988 case, *Barclays Bank v Quincecare,* and was defined as the duty banks ought to be held liable for losses caused by misappropriation or fraudulent activities.[34] Addressed again in 2023, in *Philipp v Barclays Bank*, Quincecare failed to be legally confined to that same original definition. In Philipp, the court reframed the Quincecare duty as a limited application of general contractual principles, holding that it does not extend to situations in which a customer themselves authorizes a fraudulent payment.[35] While the application of broad definitions is a

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[30] Triple Tax. (2025). FATCA & CRS Library. Triple Tax Regulatory Services. https://www.tripletax.eu/fatca-crs-library

[31] QWealth Report. (2026, March 18). Top Offshore Jurisdictions for Privacy & Asset Protection in 2026. QWealth Report - International Asset Protection and Diversification Blog. https://qwealthreport.com/offshore-jurisdictions-en/offshore-transparency-from-incorporation-to-bank-review/

[32] Congressional Research Service. (2024, May 15). Taxation of Private Equity and Hedge Fund Fees. In Focus (IF12166). https://www.congress.gov/crs-product/IF12166

[33] Kozak, S. M. (2023). Litigating Policy Drift: Frozen Categories and Thresholds in Court. Perspectives on Politics, 21(4), 1269-1284. https://www.cambridge.org/core/journals/perspectives-on-politics/article/litigating-policy-drift-frozen-categories-and-thresholds-in-court/384CA41F0DAEEFBD57EFBE6E7A470392

[34] Quinn Emanuel Urquhart & Sullivan, LLP. (2024, February 23). The Revival of the Banker's Quincecare Duty in England: Accelerating Claims Seeking to Recover Losses for Fraudulent Misappropriation. Client Publications. https://www.quinnemanuel.com/the-firm/publications/the-revival-of-the-banker-s-quincecare-duty-in-england-accelerating-claims-seeking-to-recover-losses-for-fraudulent-misappropriation/

[35] Maitland Chambers. (2023, July 12). The Supreme Court hands down a landmark judgment narrowing the scope of the Quincecare duty: Philipp v Barclays Bank UK PLC. Resources & Articles. https://www.maitlandchambers.com/resources/articles/the-supreme-court-hand-down-a-landmark-judgment-narrowing-the-scope-of-the-quincecare-duty

long-standing practice within the legal field, the Quincecare doctrine, dormant for many years, failed to be stress-tested and illustrated perfectly the cycle of normative drifts, in which new norms persist despite the initial intent.

Most significantly, normative drift has led to a lack of efficacy in the enforcement of compliance laws offshore. While statutory alignment with normalized conduct globally has become an accepted and growing trend, actual enforcement in many offshore jurisdictions remains limited due to resource constraints, lack of independent regulatory institutions, or general will. Legal regulators evaluating offshore funds' compliance must distinguish between legislative form and enforcement function.[36]

IVc. Jurisdictional Fragmentation and Regulatory Arbitrage

Offshore private equity structures are defined by jurisdictional fragmentation. Jurisdictional fragmentation occurs when a fund entity is distributed across multiple legal systems, each with different and distinct regulatory requirements and enforcement codes. This fragmentation complicates these funds' oversight, as no single authority possesses a complete, transparent view of the fund's ownership structure and activities.[37] Jurisdictions may enforce compliance on an individual level, but inconsistencies in disclosure standards, accessibility to data, and the general regulatory scope end up creating gaps in the interactions of these systems.[38]

This enables regulatory arbitrage where financial actors will purposefully invest in jurisdictions offering legal conditions that benefit themselves, such as jurisdictions with reduced disclosure obligations and better confidentiality protections.[39] While this is illegal, as it is an established norm for firms to structure operations in ways that maximize efficiency, it weakens the overall effectiveness of global financial regulation through exploiting these inconsistencies between jurisdictions. By layering entities across multiple offshore locations, private equity funds are able to reduce transparency without being in violation of legal requirements governing them. This diffuses regulatory scrutiny in private funds.[40]

Regulators' enforcement is challenged by jurisdictional fragmentation. This is particularly prominent in cross-border investigations as they require coordination between numerous regulatory bodies that practice under differing legal standards and resource capacities.[41]

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[36] OVZA. (2024, November 12). Offshore Companies and Data Protection Laws: Navigating Global Compliance. OVZA Blog. https://ovza.com/offshore-companies-data-protection-laws/

[37] Zoromé, A. (2007, April 1). Concept of Offshore Financial Centers: In Search of an Operational Definition. IMF Working Papers (WP/07/87). https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Offshore-Financial-Centers-24054

[38] OECD. (2024). Exchange of Tax Information. Organisation for Economic Co-operation and Development. https://www.oecd.org/tax/exchange-of-tax-information/

[39] Investopedia. (2024, May 22). Regulatory Arbitrage: Definition, Example, and How It Works. Investopedia. https://www.investopedia.com/terms/r/regulatory-arbitrage.asp

[40] Morley, J. (2014). The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation. Yale Law Journal, 123(5), 1228-1279. https://yalelawjournal.org/article/the-separation-of-funds-and-managers-a-theory-of-investment-fund-structure-and-regulation

[41] World Bank. (2023, November 13). Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT). World Bank Financial Sector Briefs. https://www.worldbank.org/en/topic/financialsector/brief/anti-money-laundering-and-combating-the-financing-of-terrorism

As shown in *Federal Republic of Nigeria v. JPMorgan Chase*, when financial transactions raise red flags in various activities or ownerships, they are still faced with the inability to reaffirm information across different jurisdictions. Regulators are more often prevented from establishing sufficient evidence to impose liability. Consequently, jurisdictional fragmentation does not eliminate regulation but rather serves as a way to disperse it. This creates a system in which oversight exists formally, but remains functionally limited.

Figure (f)

[42]

IVd. Capital Mobility over Transparency

Conclusively, the governing laws on offshore funds reflects a prioritization of capital gains and mobility over comprehensive regulatory transparency. Offshore funds are structured to facilitate capital flow across numerous borders by reducing tax burdens and regulatory overlap. This enables investors abroad to invest in a particular fund without being subjected to overlapping tax regimes.[43] This is

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[42] BCG. (2024, February 21). The Regulatory Climatereflect Is Getting Hotter for Private Equity. Boston Consulting Group Publications. https://www.bcg.com/publications/2024/the-regulatory-climate-is-getting-hotter-for-private-equity

[43] OECD. (2024). Base Erosion and Profit Shifting (BEPS). Organisation for Economic Co-operation and Development. https://www.oecd.org/tax/beps/

supported by key features such as flexible governance structures and pass-through taxation to enable funds to act as neutral investment vehicles instead of entities subject to layered taxation.

However, the same features that promote investors' strategy and capital mobility inherently cause a limit on transparency. While remaining legally compliant, funds often rely on features such as nominee directors, layered holding companies, and private beneficial ownership registries. All of these features ultimately obscure investors' identities.[44] This information is attainable to regulators in most instances, but rarely available for public visibility, limiting external accountability for compliance.[45]

Inherently, this supports a system in which transparency is regarded as conditional. Rather than being embedded in the enforcement of the structures themselves, information access depends entirely on cross-border cooperation, the capacity of regulators, and their initiatives to conduct checks. Therefore, capital mobility is prioritized, and the legal system prioritizes optimizing investment efficiency and attracting foreign capital instead of deterring financial misconduct.[46]

IVe. The Transparency Paradox in Offshore Private Equity

Offshore funds are legally compliant and widely common in our financial system. However, they are, at the same time, able to obscure and divert from crucial financial information required by financial regulators in domestic systems. This illustrates the fundamental paradox of offshore funds. These funds operate legally and are globally permissible as they adhere to AML and KYC requirements and other legal frameworks, reinforcing their legal legitimacy.[47] Since these offshore funds rely on complex structures across multiple jurisdictions, they can obtain a level of opacity that challenges the objectives of financial transparency legislation.[48]

The distinction between functional transparency and formal legality raises this fundamental paradox. While procedural requirements imposed by law might be met, they are often insufficient to ensure that financial activity is fully transparent—visibly and feasibly traced. In *Federal Republic of Nigeria v. JPMC*, offshore structures that raised significant accountability and corruption concerns are not subject to legal enforcement. Instead, the legal system validates the structure while staying limited in its capability to tackle the risks this fund poses to the global financial system.

Ultimately, this underscores a key tension in the regulatory space. These funds are not problematic or in violation of the law. Instead, they pose limitations to the legal frameworks in this sector and let procedural compliance overshadow substantive transparency. This gap between the two allows these structures to function as both legitimate vehicles for investments, but also potential instruments of

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[44] Financial Action Task Force. (2023). Beneficial Ownership. FATF-GAFI. https://www.fatf-gafi.org/en/topics/beneficial-ownership.html

[45] OECD. (2024). Beneficial Ownership Transparency. Organisation for Economic Co-operation and Development. https://www.oecd.org/tax/transparency/beneficial-ownership/

[46] IMF. (2024, January 31). Offshore Financial Centers: A New Approach to Analyzing Financial Flows. IMF Policy Papers. https://www.elibrary.imf.org/view/journals/063/2024/004/article-A001-en.xml

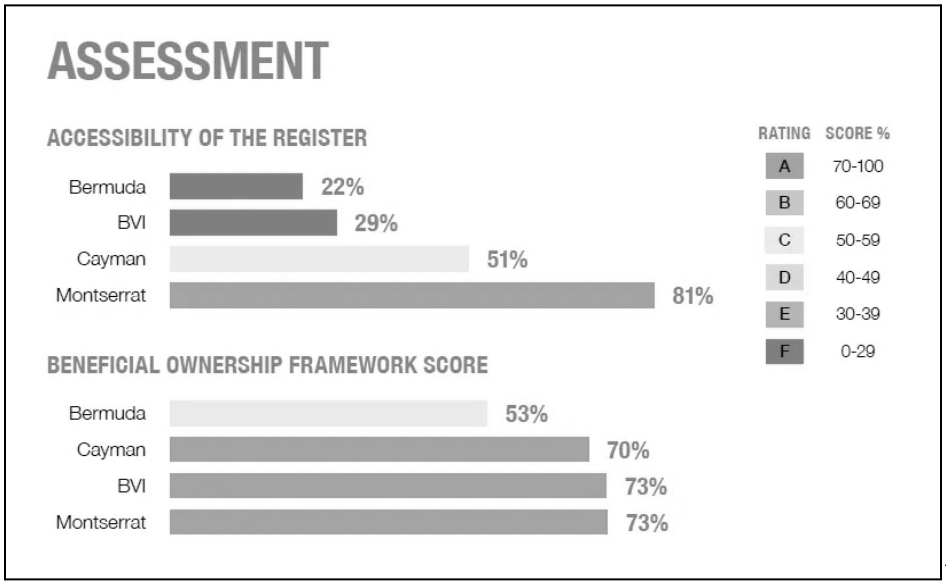
[47] Financial Action Task Force. (2023, November). International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations. FATF-GAFI. https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf

[48] Transparency International UK. (2024, May 22). Opening the Door on Offshore Secrecy: Tracking the Use of Anonymous Companies to Invest in UK Property. Transparency International UK Publications. https://www.transparency.org.uk/publications/opening-offshore-secrecy

opacity in the investment space. This paradox reinforces the need for regulatory approaches that address whether rules are effectively followed based on regulatory goals.

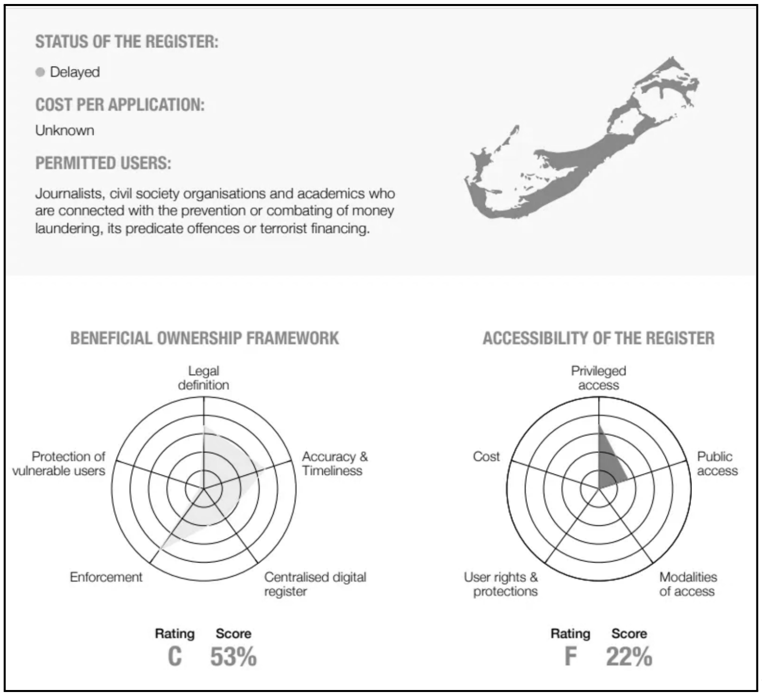
In the exhibits below, the Transparency International Organization assesses various jurisdictions' accessibility to regulators. In one of these assessments, Bermuda and the British Virgin Islands score moderately well on the beneficial ownership framework. Both range from 53% to 73%, suggesting the existence of legal mechanisms that can recognize ownership. However, when examining how accessible these registers are, their scores drop from 22%–29%. This discrepancy shows that transparency is not determined by the legal frameworks in place but rather by the extent to which information is accessible when needed.

Figure (g)



[49]

[49] Transparency International UK. (2024, May 22). Opening the Door on Offshore Secrecy: Tracking the Use of Anonymous Companies to Invest in UK Property. Transparency International UK Publications. https://www.transparency.org.uk/publications/opening-offshore-secrecy



[50]

V. Conclusion

While they are legally permissible, offshore private equity funds pose a structurally fragile challenge to the global financial systems. These funds replicate limited partnership models in jurisdictions that are tax-neutral. This offers them benefits such as capital efficiency, investor flexibility, and increased global accessibility. Legally, these funds are well established and are grounded in financial norms and regulatory compliance frameworks. Yet, with jurisdiction fragmentation, regulatory arbitrage, and the prioritization of capital mobility over transparency, these funds promote a systemic opacity in the financial system.

In *Federal Republic of Nigeria v. JPMC*, we see the consequences of these dynamics. It displays how financial institutions may be in compliance with formal legal obligations while participating in transactions that undermine regulatory objectives. This case highlights prominent limitations in the financial regulatory space through its emphasis on procedural compliance and its failure to address the risks associated with the complexity of offshore funds.

Ultimately, offshore private equity funds pose a regulatory challenge, not a legal one. These structures abide by globally accepted laws, but they exist while challenging these laws' effectiveness. While the lack of effectiveness does not immediately raise concern about the permissibility of offshore structures, it raises awareness of the shift needed in compliance with existing rules and accountability in our financial system.

[50] Transparency International UK. (2024, May 22). Opening the Door on Offshore Secrecy: Tracking the Use of Anonymous Companies to Invest in UK Property. Transparency International UK Publications. https://www.transparency.org.uk/publications/opening-offshore-secrecy

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Transparency International UK. (2024, May 22). Opening the Door on Offshore Secrecy: Tracking the Use of Anonymous Companies to Invest in UK Property. Transparency International UK Publications. https://www.transparency.org.uk/publications/opening-offshore-secrecy

Triple Tax. (2025). FATCA & CRS Library. Triple Tax Regulatory Services. https://www.tripletax.eu/fatca-crs-library

World Bank. (2023, November 13). Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT). World Bank Financial Sector Briefs. https://www.worldbank.org/en/topic/financialsector/brief/anti-money-laundering-and-combating-the-financing-of-terrorism

Zoromé, A. (2007, April 1). Concept of Offshore Financial Centers: In Search of an Operational Definition. IMF Working Papers (WP/07/87). https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Offshore-Financial-Centers-24054

Intent Without Impact: Structural Inequality and the Limits of Equal Protection

By: Shriya Kashyap

Abstract

This paper argues that the modern interpretation of the Equal Protection Clause has moved away from its initial purpose: addressing systematic racial inequality. The Fourteenth Amendment was designed during the Reconstruction era to change systems that limited Black Americans' full participation in civic life, but the Supreme Court has narrowed its scope by asking plaintiffs to prove discriminatory intent. Through cases such as *Washington v. Davis*, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, and *McCleskey v. Kemp*, the Supreme Court shifted its focus on equal protection from the effects of government action to the motives of decision-makers.

The paper also shows how this framework operates in the real world, specifically in the contexts of housing, education, and criminal justice, where policies can often result in unequal outcomes without a direct discriminatory purpose. It argues that the emphasis placed on intent limits the courts' ability to address structural inequality, since many forms of discrimination come from processes rather than a direct act of bias. The paper also considers certain doctrinal and legislative responses, including expanding disparate impact frameworks, in order to align the Equal Protection Doctrine closer to the Fourteenth Amendment.

I. Introduction

The Equal Protection Clause was created to help battle systems of racial inequality, not just specific targeted acts of prejudice.[1] Ratified after the Civil War, the framers created the Fourteenth Amendment to respond to a social order against hierarchy that was deeply embedded in the legal system as well as daily life. Its purpose was to prevent states from keeping systems that denied Black Americans full citizenship, even after slavery formally ended.[2] However, over time, the Supreme Court has reshaped the Equal Protection Doctrine around a requirement that forces plaintiffs to prove discriminatory intent. This shift in interpretation has drastically narrowed the reach of the Clause and essentially prevents its ability to address modern issues and systemic inequality, such as in areas such as housing, criminal justice, and education.

II. Historical Foundations and Doctrinal Change

IIa. Reconstruction and Structural Equality

[1] The Equal Protection Clause, Nat'l Const. Ctr., https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/702#the-equal-protection-clause.
[2] 14th Amendment: Simplified Summary, Text & Impact, History (2025), https://www.history.com/articles/fourteenth-amendment

The historical context of the Fourteenth Amendment proves that its framers understood that discrimination was a structural problem. After emancipation, southern states implemented Black Codes, which essentially preserved many of the conditions of slavery. These laws restricted where ex-slaves could live and work, criminalized employment, limited their access to courts, and enforced harsh labor contracts.[3] Many laws produced unequal racial outcomes, regardless of whether they were written in directly discriminatory language or neutral terms.

Many members of Congress, specifically radical Republicans, realized that racial inequality was still present without needing openly racist language, and as a result, Reconstruction lawmakers focused more on substantive rights rather than policing intent.[4] They were more concerned with whether people could genuinely participate in crucial aspects of daily life, such as the economy or the community—not if lawmakers were racially motivated.[5] In the eyes of Congress, equality was essentially about real-world outcomes.

This broader idea was represented in Reconstruction-era legislation. The Civil Rights Act of 1866 gave all citizens equal rights, including the rights to make contracts, own property, access courts, and more. This statute focused on whether individuals were being denied equal protection, directly combating the nation's history of Black Codes. The Fourteenth Amendment made this approach constitutional by granting Congress and the courts the authority to shut down systems that produced racial subordination, in cases of both direct and indirect discrimination.

IIb. Rise of Formal Equality

Despite the Fourteenth Amendment's expansive purpose, the Supreme Court limited the reach of the Equal Protection Clause. In the late 19th century, the Court adopted a more formal view of equality that focused on whether a law explicitly classified and discriminated against people by race.[6] With this approach, laws were more likely to be abolished if they openly differentiated between different racial groups. However, laws that appeared neutral on the surface level were upheld, even while reinforcing racial hierarchy or discrimination. The idea of "separate but equal" illustrated this new conception of equality. By treating neutrality on the surface as sufficient, the Court essentially allowed states to have segregated systems that were actually unequal by practice.[7] The Court assumed that equality was satisfied as long as laws avoided explicit racial differentiations.

Although later, the Court rejected de jure segregation, it did not fully abandon this framework. De jure discrimination is discrimination that is formal and enforced through laws,

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[3] Black Codes (1865), National Constitution Center – constitutioncenter.org, https://constitutioncenter.org/the-constitution/historic-document-library/detail/mississippi-south-carolina-black-codes-1865.

[4] Joseph M. Tracy, Reconstruction Courts and Rights Enforcement: Examining an Enigmatic Jurisprudence, 5 N.C. Cvl. Rts. L. Rev. 67 (2025).

[5] Eric Foner, Reconstruction, Encyclopaedia Britannica, https://www.britannica.com/event/Reconstruction-United-States-history

[6] Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111 (1997).

[7] Adam Volle, Separate but Equal, Encyclopaedia Britannica, https://www.britannica.com/topic/separate-but-equal

which should be differentiated from discrimination that arises from social practices and customs.[8] Since explicit racial discrimination and separation became unconstitutional, subtler forms of discrimination started gaining traction. Housing segregation was still evident through zoning laws and lending practices. Educational inequality was seen through school district zoning and funding. Policing was shaped by discretionary decisions that were negatively impacting communities of color. With these new developments, a new question arose: Would the Equal Protection Clause adapt to address discrimination that was structural rather than explicit classification?

IIc. The Start of the Intent Requirement

Rather than changing constitutional protections to help battle against these new forms of inequality, the Supreme Court ended up moving in a different direction. In the latter half of the 20th century, the Court required plaintiffs to show that the policy they were challenging was adopted with discriminatory intent.[9] With this framework, unequal results were not enough for proof. Plaintiffs had to prove that decision-makers acted because of, not in spite of, a policy's harmful effects on a specific group of people.

This shift changed the real meaning of discrimination under the Constitution. Discrimination turned from being an institutional design to one specific individual's notice. The main focus moved away from whether a policy established inequality and more towards if an individual could be proven to be biased. As a result of this, the Equal Protection Doctrine became more centered on intent, even though discrimination started to become more of a systematic issue and not an explicit, direct act.

The Fourteenth Amendment does not claim this narrow approach, and its wording does not speak in terms of notice or intent. However, the Court still justified the intent requirement as a way to limit the judicial branch's involvement in policymaking. Their main concern was that if they had to hear disparate-impact cases, it would force the Court to evaluate many social and economic policies, something the Court did not want to get involved in.[10]

The requirement of intent is not in line with how discrimination acts today. Many modern policies are created through complicated processes that include many inputs, institutions, and numerous constraints. Inequality is usually seen through the combination of effects of multiple policies over time, rather than just one single decision made with a discriminatory purpose. By requiring proof that a specific official acted with intent to discriminate, the courts are failing to account for how power and inequality function. In addition to this, intent is very hard to prove and very easy for decision-makers to hide. Legislators and others in power are aware of

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[8] Richard Glenn, De Jure Segregation, EBSCO Research Starters, https://www.ebsco.com/research-starters/law/de-jure-segregation
[9] Robert G. Schwemm, From *Washington* to *Arlington Heights* and Beyond: Discriminatory Purpose in Equal Protection Litigation, 1977 U. Ill. L.F. 961 (1977).
[10] Balrina Ahluwalia, *Washington v. Davis*, 426 U.S. 229 (1976), FindLaw (2024), https://caselaw.findlaw.com/court/us-supreme-court/426/229.html

constitutional restrictions and therefore do not express their discriminatory motives openly. Policies are often drafted in neutral terms while still producing serious racial disparities and discrimination. As long as policymakers avoid direct statements of bias, laws and anything that reinforces inequality are shielded from constitutional scrutiny.[11] This approach proves to be problematic on multiple occasions. It allows governments to achieve discriminatory results indirectly by using neutral-looking policies that exclude certain groups without legal consequences. At the same time, it places a heavy burden on plaintiffs, as they are meant to prove that there was intent despite having limited access to administrative records and internal deliberations.

In addition to practical effects, the requirement of having intent weakens the expressive role of constitutional law. When courts acknowledge that there are serious racial disparities but deny any real relief because "intent can be proven," they give off the message that systemic inequality is accepted under the Constitution. Under this idea, the courts essentially say that the Constitution is against only the most obvious and intentional discrimination while allowing subtler, but often equally harmful, practices to continue.

This divide between the legal doctrine and the experiences of individuals undermines the reach of the Equal Protection Clause. For those who experience discrimination as persistent, a narrower focus on intent can lead to a negative reality for some people. Although the Constitution promises equal protection, it doesn't offer much relief when inequality comes from systemic issues rather than explicit bias.

III. *Washington v. Davis*

IIIa. Establishing the Intent Standard

The modern intent requirement in the Equal Protection Doctrine came from *Washington v. Davis*, a decision that changed how constitutional discrimination claims would be evaluated in the future. Prior to hearing this case, the Court had not stated an opinion on whether racial disparities alone were enough to prove a constitutional violation. In *Washington v. Davis*, the Court ruled that showing a policy has unequal racial effects is not enough by itself to receive strict scrutiny under the Equal Protection Clause and that there must also be proof that the policy had the intent to discriminate. This decision started a shift away from the equality framework mainly concerned with outcomes, and towards a legal doctrine focused on decision makers' intentions.

This case arose from an individual challenging a written test used by the Washington, D.C. police department in recruiting procedures. African American applicants failed this test at significantly higher rates than white applicants, and the plaintiffs argued that the exam violated the Constitution due to its racially disparate effects. Importantly, the plaintiffs did not present

[11] April J. Anderson, Equal Protection: Strict Scrutiny of Racial Classifications, Cong. Rsch. Serv. (2023), https://www.congress.gov/crs-product/IF12391.

evidence showing that the test had been designed or adopted with a discriminatory purpose. Instead, their argument was mainly that the Equal Protection Clause should not allow government practices that produce racial inequalities, regardless of whether discriminatory intent could be proven.[12] This argument demonstrated a broader understanding of discrimination that was prominent during the civil rights era, particularly in contexts like employment discrimination law, where disparate impact frameworks were already appearing.

IIIb. Limiting Equal Protection to Purpose

The Supreme Court rejected this argument and said that disproportionate racial impact alone does not go against the Constitution. Justice White, writing the opinion for the majority, said that the Equal Protection Clause is mainly concerned with official action that is motivated by a discriminatory purpose. As the Court explained, “A purpose to discriminate must be present, which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination.” According to the Court, a law or policy that seems to be neutral is not unconstitutional even if it affects racial groups differently. Instead, plaintiffs have to demonstrate that decision makers acted “because of” and not “in spite of” the policies' wrong effects on a specific group. By adopting this opinion, the Court transformed what constitutional discrimination meant from a question of whether inequality exists to whether or not a specific person or group could be shown to have acted with unacceptable intent.

The Court's reasoning was mainly based on institutional concerns. The majority expressed worry that allowing disparate impact alone to prove constitutional violations would require courts to review a wide range of social and economic policies that produce unequal outcomes. Because many governmental actions, such as public employment practices or education policies, create a difference among racial groups, the Court was scared that a purely effects-based standard would pull the courts deep into evaluating public policy, taking up much of their time. By requiring proof of discriminatory intent, the Court argued that there was a limiting rule that would prevent the Equal Protection Clause from becoming a general promise of social equality. In this sense, the intent doctrine did not come from the Constitution, which does not mention motive, but rather came from the Court's effort to limit the reach of the judiciary.

Although the Court did acknowledge the risk of the racial disparities that might be evidence of discrimination, it emphasized that statistical disparities are typically not enough to prove intent. Instead, plaintiffs must present other evidence indicating that decision-makers purposefully adopted a policy with the intention of disadvantaging a specific racial group. This standard created a barrier for plaintiffs who do not typically have access to the internal deliberations, communications, or records that are necessary to demonstrate that decision-makers had a motive. As a result, policies that produce severe racial inequalities, even when well

[12] *Washington v. Davis*, 426 U.S. 229 (1976)

documented, typically withstand constitutional review so long as policymakers avoid openly expressing discriminatory intent.

The decision in *Washington v. Davis* also created a conceptual shift in how discrimination is understood under the Constitution. Early Reconstruction-era views of equality focused mainly on whether government actions kept racial hierarchies in place or prevented people from fully participating in the economy and civic life.[13] In contrast to this, the "intent-based framework" that was introduced in *Washington v. Davis* treats discrimination mainly as a matter of individual bias rather than institutional. Under this approach, inequality becomes constitutionally important only when it can be connected to the motives of specific officials. Patterns of structural disadvantage, even when severe, fall outside of constitutional review unless they can be linked to clear evidence of having discriminatory intent.

This ruling also created a gap between constitutional law and civil rights law. Congress has typically recognized that discrimination can operate through neutral policies but still produce unequal outcomes. For example, employment discrimination laws under Title VII allow plaintiffs to challenge policies that have unjustified disparate impacts, even when the intent to discriminate cannot be shown. In contrast, the constitutional rule set in *Washington v. Davis* offers narrower protection. A policy that would violate federal civil right laws because of its discriminatory effects can still be considered constitutional if discriminatory intent cannot be proven. The Court's shift in interpretation of the Equal Protection Clause is narrower than the equality goals that were originally represented in civil rights legislation.

Over time, the intent doctrine had consequences. Government agencies and legislatures could add policies that were formally neutral while still knowing that those policies would likely produce unequal racial outcomes. As long as policymakers avoided openly expressing their discriminatory motives, policies like these would generally be safe from constitutional review. This dynamic encourages decision-making practices that perpetuate inequality indirectly rather than explicitly. Inequality started to be more prominent through administrative rules, technical procedures, and other decisions that appeared neutral on the surface but actually produced longstanding disparities.

This decision ended up marking more than a technical change. It changed the underlying purpose of the Equal Protection Doctrine. Instead of being a tool to dismantle systems that support and sustain racial hierarchy, the Clause became mainly focused on identifying clearly provable acts that were intentional acts of discrimination. This transformation narrowed the ability for constitutional law to respond to modern forms of inequality, which tends to operate through institutional structures rather than explicit discrimination. The cases that followed *Washington v. Davis* would further reinforce this idea, which made the legal standards for proving intent and strengthening these barriers that plaintiffs must overcome a lot harder.[14]

IV. *Village of Arlington Heights v. Metropolitan Housing*

[13] Rebecca E. Zietlow, Free at Last! Anti-Subordination and the Thirteenth Amendment, 90 B.U. L. Rev. 255 (2010).
[14] *Washington v. Davis*, 426 U.S. 229 (1976)

IVa. Intent in Neutral Policies

After *Washington v. Davis*, the Supreme Court continued to impose and solidify the intent requirement in the case *Village of Arlington Heights v. Metropolitan Housing Development Corporation*. While *Washington v. Davis* established that showing disparate racial impact is not enough to violate the Equal Protection Clause, *Arlington Heights* addressed the issue of how courts should determine if discriminatory intent exists when government decisions are written in neutral terms. Although the Supreme Court presented their approach as realistic, the decision essentially reinforced the same barriers created by *Washington v. Davis* and restricted plaintiffs from challenging policies that maintain racial inequality.

This case came from a zoning dispute in Arlington Heights, a suburb outside of Chicago. At the time, Arlington Heights was a very white community without much affordable housing. The Metropolitan Housing Development Corporation (MHDC), a nonprofit developer, suggested building low- to moderate-income housing on land that was zoned for single-family homes. This development was intended to be racially integrated and address the shortage of affordable housing in the region surrounding it. Since this proposed project did not comply with the current zoning classification, the MHDC needed approval from the Village to rezone this piece of land.

Although planning staff encouraged this, and there was evidence showing the need for this affordable housing, the Village of Arlington Heights denied this rezoning request, preventing starting the construction of the housing project. This outcome had severe racial implications, as Black residents in this region were much more likely than white residents to rely on low- and moderate-income housing. This essentially excluded Black families from moving into Arlington Heights. The plaintiffs in this case argued that this denial for the rezoning request violated the Equal Protection Clause by reinforcing racial segregation through a seemingly neutral zoning decision.[15]

Unlike the plaintiffs in *Washington v. Davis*, those challenging the decision in *Arlington Heights* wanted to present a broader understanding of discrimination. They did not rely only on statistical evidence of racial impact, but instead argued that discriminatory intent could be inferred based on the context surrounding the decision. In this case, it included the suburb's long history of excluding multifamily housing, the racial consequences of the zoning denial, and local officials' response to the request for proposed development. The plaintiffs claimed that the Equal Protection Clause should impact governmental actions that encourage or turn a blind eye to racial separation, even when maintaining neutral language.

The Supreme Court unanimously rejected the Equal Protection violation claim, and while writing for the Court, Justice Powell reaffirmed the principle that was established in *Davis*: plaintiffs have to prove that a government action was motivated by discriminatory intent and not that it resulted in racially unequal outcomes. As the Court stated, "Disproportionate impact is not irrelevant, but it is not the sole touchstone of invidious racial discrimination." However, the

[15] *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

Court did acknowledge that discriminatory intent is rarely explicit, saying that government officials and other residents are unlikely to openly state their racial motives, especially in the modern era. As a result, the Court acknowledged that intent must be inferred from circumstantial evidence, rather than from direct proof.

To guide courts in making decisions, the Supreme Court outlined factors they believed would be relevant to an intent-based claim. These factors include the historical background of the decision, particularly if it showed a pattern of discriminatory actions; the events leading up to the challenged decision; any deviation from substantial decision-making practices; the legislative or administrative history of the decision, including statements made by decision makers; and the disparate impact of the policy itself. Looking at this framework, this test appeared to offer plaintiffs an opportunity to demonstrate intent without uncovering explicit racial bias.

IVb. Zoning, Neutral Justifications, and Hidden Inequality

Even with this multifactor test, the Court said that the plaintiffs had failed to prove that there was discriminatory intent in *Arlington Heights*. The Court emphasized that zoning decisions have a wide range of considerations and that opposition to affordable housing could be explained by concerns that are not related to race. This included opposition to increased traffic, more strain on public services, changes to property values, etc. Although these concerns had a disproportionate impact on Black residents, the Court still treated them as “neutral” justifications that had no impact on racially motivated intent.

This reasoning exposed a flaw in the *Arlington Heights* case. Although the Court said that race did not need to be the only motivating factor, it required plaintiffs to show that race did play a significant and decisive role in the decision. This essentially meant that if the government could give any believable reason that wasn't about race, courts would usually reject the equal protection claim. This makes it very hard to prove discrimination because the courts focus on whether someone meant to discriminate, not if the policy actually creates racial inequality.

This decision also shows how discrimination operates in the modern world. By focusing on the motives of individual decision makers, the Court treated discrimination as an issue of personal bias, such as an individual being racist, rather than institutional design. This fails to account for systemic realities: many policies produce racial inequality even when no single person acts with racial hostility. Structural discrimination is often present in routine and established systems, not through openly discriminatory choices.

Zoning laws show this problem clearly. Zoning has played a major role in racial segregation in the U.S. Minimum lot sizes, restrictions on multifamily housing, single-family zoning, etc., have all limited access to communities in the suburbs for low-income and minority residents. These policies are typically not framed in racial terms, but they are very exclusionary. Under the *Arlington Heights* case, however, practices such as these are protected from constitutional challenge unless plaintiffs can show clear evidence of discriminatory intent.

The Court's view of disparate impact makes the Equal Protection Clause weaker when it comes to structural inequality. Even if a law clearly harms one racial group more than others, it alone is not enough to prove that it is unconstitutional, since the court says that you must show that the government meant to discriminate. This tends to shift attention away from what actually happens in the real world and focuses on what officials believe, even though real-world results typically show the clearest evidence of inequality.

The *Arlington Heights* framework places a heavy burden on plaintiffs. Local governments do not typically publish detailed records explaining the reasoning behind their decisions. Officials are also very careful to avoid explicit references to races, especially under constitutional constraints. Even when race influences outcomes, it is typically expressed indirectly or is padded with technical policy language.

This decision also highlights a tension between what the constitution states and lived experience. Residential segregation in the U.S. did not arise from a single act but rather a series of decisions, including zoning, lending, development, and public investment. By isolating intent to a specific moment in time, *Arlington Heights* ignores how inequality is shown through numerous patterns in the modern world. As a result, segregation is not seen as an unfortunate circumstance but rather an outcome of neutral governance.

Similar to *Washington v. Davis*, the court was also worried about its own role, which played into the Court's reasoning. They did not want to get too involved in zoning and land use decisions, which they believed should be reserved for local governments to decide. The Court believed that if unequal impact alone was enough to prove a constitutional violation, judges would be responsible for reviewing and evaluating many social and economic policies. The requirement to prove intent essentially acted as a way to limit the Court's involvement. While this protected the Court's boundaries, it undermined the Court's impact by taking a step back and indirectly allowing discrimination to persist.

The results of *Arlington Heights* extended beyond housing. This decision has shaped Equal Protection claims in education, employment, voting rights, etc. In each area, plaintiffs faced the same challenge, that unequal outcomes were caused by intentional discrimination rather than neutral policy choices. As long as the government was able to offer neutral explanations, constitutional claims were likely to fail even when disparities were severe.

Together, the precedent set in both *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing* established a clear shift in the Equal protection doctrine. Proving discrimination is no longer a system that keeps racial hierarchy alive but is a problem of individual motives. Although the court did acknowledge that discrimination can be subtle and embedded into institutions, it would not adapt constitutional standards to help reflect that. Instead, it adopted rules that prioritize the government's justifications and minimize the significance of harm on residents.

Ultimately the *Arlington Heights* case showed that the intent requirement isn't just a neutral rule regarding evidence; it makes it much harder to prove discrimination. By requiring proof of intent in situations where discrimination is usually indirect and built into systems, the

Court protected many forms of racial inequality from being challenged in court. The Equal Protection Clause, which was meant to break down the improper system of racial inequality, focused more on obvious acts of bias. This eventually led to later decisions, especially in *McClesky v. Kemp*, where the Court applied the intent rule even more strictly and widened the gap between constitutional law and real-world inequality. [16]

V. McClesky v Kemp

Va. Statistical Evidence v Constitutional Proof

With the context of *Washington v. Davis* and *Arlington Heights* both made it very hard to prove discrimination, *McKlesky v. Kemp* made it impossible in most contexts. This case shows one of the strongest applications of the intent requirement, and it shows how the Equal Protection Clause doesn't really address systemic racial inequality anymore.

McCleskey v. Kemp involved the death penalty in Georgia. Warren McCleskey, a Black man, was sentenced to death for killing a white police officer during a robbery. During the trial, there was no direct evidence that the jurors or prosecutors were openly biased towards him. Rather, McCleskey's claim relied on a statistical study known as the Baldus study. This study looked at over 2000 murder cases in Georgia and found a significant disparity when it came to death penalty sentencing. Defendants accused of killing white victims were much more likely to receive the death penalty compared to those accused of killing Black victims. In addition, this study also showed that Black defendants who killed white victims faced the highest likelihood of being sentenced to death [17].

Even after it controlled over 200 variables (severity of the crime, defendants' criminal history, etc.), race still played a large role. The study showed that the race of the victim, and to a smaller degree, the defendant's race, affected whether the death penalty was given. Overall, the evidence suggested that Georgia's death penalty system was influenced by racial bias.

McClesky argued that this violated the Equal Protection Clause. He did not claim that one specific juror in his trial acted out of racial discrimination. Instead, he argued that the entire system was affected by racial disparities so severe that they could not be ignored. His claim showed that discrimination is not just about one person choosing to act with prejudice. Instead, it is about how an entire system can be set up in a way that leads to unequal outcomes for different racial groups. The issue was not what someone intended, but if the structure of the system itself produces racial inequality.

Vb. The Limits of Challenging Systemic Bias

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[16] *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).
[17] *McCleskey v. Kemp*, 481 U.S. 279 (1987).

The Supreme Court rejected his claim. In a 5-4 decision, the Court said that the statistical evidence showing racial disparities was not alone enough to prove an Equal Protection violation. Justice Powell wrote for the majority and said that McCleskey would have to prove that decision-makers in his specific case acted with a discriminatory purpose. They said that general evidence about systematic disparities wasn't enough for his case.

The reasoning came directly from *Washington v. Davis* and *Arlington Heights*. The Court again emphasized that the Constitution is mainly concerned about intentional discrimination. The statistical disparities might be worrying, but they do not prove that anyone acted in a discriminatory manner against race. For McCleskey to win his case, he needed proof that the prosecutors or jurors in his case deliberately discriminated against him based on race. However, this requirement set the bar extremely high. It required McClesky to prove what each of the individual decisionmakers were thinking during his trial. However, due to the secrecy behind jury deliberations and the information used to make decisions also having to be kept discrete, this type of evidence is impossible to obtain. The Court required direct proof of intentional bias in a context where this proof is typically not available.

One of the most important parts of this case is not just what the Court said about intent, but rather why they said it. The majority were concerned with what would happen if McCleskey's argument were accepted. If statistical disparities by themselves were enough to prove a constitutional violation in the death penalty context, similar claims could be brought up across the entire justice system. Justice Powell worried that a rule like this would lead to challenges in sentencing practices and jury selections, among other things. Since racial disparities exist in many areas of the criminal justice system, recognizing and accepting systemic discrimination based on statistical evidence could require courts to review other larger parts of governmental policy. Essentially, the Court was scared that accepting this structural understanding of discrimination would expand the reach of the Equal Protection Clause. Rather than addressing these disparities, the Court chose to limit the constitutional doctrine.

This concern reflects the same institutional issues seen in *Washington v. Davis*. The court signaled that it did not want the Equal Protection Clause to become a guarantee against social inequality. By requiring proof of intent in individual cases, the Court created a principle that shields systematic inequality from constitutional review.

McClesky highlights a deeper shift. Under the Reconstruction-era understanding of the Fourteenth Amendment, discrimination was a system that maintained racial hierarchy. It did not require proof that one specific official continuously intended to discriminate. Instead, there was more focus on whether the government structures denied full citizenship. However, in *McClesky*, discrimination became defined as an individual's fault. Unless a specific person could be shown to have faced racial hostility or intent, the Constitution was not to be used as a basis. The existence of a racially skewed system would not be enough; other proof was required.

This approach essentially downplays how modern discrimination operates. In many contexts, racial inequality isn't a result of openly racist decision-makers. Instead, it is produced through historical patterns, institutional practices, bias, etc. While each decision may appear to be neutral, the overall effect reinforces racial hierarchy. The Baldus study showed exactly that. No single person needed to state racial bias for the system for there to be unequal results. Yet the court treated the absence of explicit bias as a decision.[18]

McCleskey created a gap between interpreting the Constitution and the lived experience of individuals. Racial disparities in the criminal justice system are often very documented. Sentencing outcomes and the application of the death penalty reflect racial differences. However, under the ruling of *McClesky*, these disparities do not violate the Constitution unless a plaintiff can prove that there was intentional discrimination in a specific case. This essentially suggests that in systemic racial inequality, even when statistically proven, it is constitutionally acceptable as long as it cannot be traced to an explicit discriminatory purpose. The Equal Protection Clause, which was meant to remove racial hierarchy from the system, becomes limited to only taking action for the most obvious and intentional acts of bias.

The dissenting justices realized that this was a problem. Justice Brennan argued that the Baldus study presents a serious constitutional problem. He warned that the majority's decision essentially cushioned the criminal justice system from meaningful Equal Protection review. He believed that when real statistical evidence shows that race significantly affects who lives and dies, the Court cannot just ignore it. Although his famous statement that he would “no longer tinker with the machinery of death” came later in *Callins v. Collins*, his dissent in *McClesky* already showed a deep concern about the fairness of race in capital punishment [19]. Despite the dissents, the majority opinion stood. *McClesky* is one of the strongest examples of the Court prioritizing its institutional limits over addressing systemic inequalities. The impact of *McClesky* is beyond the death penalty. The decision reinforced the claim that statistical disparities are not enough to prove constitutional discrimination. This has influenced Equal Protection claims in policing, sentencing, voting, etc. In each of these contexts, plaintiffs have faced the same challenge. Even when disparities are severe and documented, they must connect their disparities to intentional discrimination by specific decision-makers. As long as the government can offer “race-neutral" explanations, the courts are likely to reject the claim. This makes it easier for structural inequality to continue. Policymakers and officials do not need to express their discriminatory motives; they only need to avoid evidence of intent. The way the Court interprets the Constitution does not require governments to eliminate racial disparities; it only prohibits them from openly intending to create them.

When *McClesky* is viewed next to *Washington v. Davis* and *Arlington Heights*, a clear pattern is seen. The Equal Protection Clause has shifted from addressing systems of racial hierarchy to focusing on an individual's intent. Discrimination then becomes more of an issue of motive rather than structure.

This interpretation is difficult to understand and interpret considering the history behind the Fourteenth Amendment. The Amendment was designed to provide equal protection to all

[18] David C. Baldus, Charles Pulaski & George Woodworth, Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. Crim. L. & Criminology 661 (1983).
[19] Justice Studies, The death penalty-justice blackmun’s declaration, https://www.justicestudies.com/pubs/death_disucssion.html.

citizens after the Reconstruction era. Reconstruction lawmakers understood that discrimination could still occur through laws that appeared neutral but still were racially discriminatory, so they focused more on equality and real-world participation in civic and economic life.

The modern intent doctrine is the opposite of this. It allows governments to maintain policies that lead to racial disparities, as long as they avoid clear evidence of discrimination. The requirement of intent is usually justified as a way to protect the judicial branch from overreach since the Supreme Court has expressed concern about becoming too involved in policymaking. However, this comes at a cost to many residents. It narrows the meaning of what the Equal Protection Clause can cover and leaves many forms of inequality without a way to fix them using the Constitution.

McClesky v. Kemp represents the Court's move towards an intent-based Equal Protection Doctrine. The decision essentially confirmed that even an overwhelming amount of statistical evidence of racial disparity isn't enough to show a constitutional violation without proof of discrimination in a specific case.

The cases *Washington v. Davis*, *Arlington Heights*, and *McKelesky v. Kemp* reshape the Equal Protection Clause that prioritizes motives over outcomes. Now, the clause is primarily used to address explicit, intentional discrimination rather than systemic racial inequality. This shift in the way it is being interpreted has severe consequences in the modern day. As discrimination today happens through larger systems and institutions rather than explicitly racist laws, the Equal Protection Clause has become less able to deal with the kinds of inequality it was initially intended to fix. The difference between what the Constitution is meant to be and what people are actually experiencing keeps growing. This raises the important question about whether the current doctrine still matches what the initial Amendment stated it would [20].

VI. Doctrinal Discussion

VIa. Redefining Discrimination as Individual Motive

The cases above create more than just evidence and instead reflect a transformation of what equality really means under the Constitution. The Equal Protection Clause was originally designed to challenge systems that accepted and encouraged racial hierarchy, whether that be through systems of legal commands or more indirect forms of exclusion. However, the intent doctrine has moved away from this. By requiring proof of discriminatory intent, the Supreme Court has defined discrimination as an individual motive rather than institutional design. This shift has led to the Clauses' reach being much less capable of addressing racial inequality in the modern world. The main point of this problem centers around the Court choosing to treat discrimination mainly as a question of intent [21]. Under this ideal, the main issue is not if a law, policy, or system creates racial inequality, but if a particular decisionmaker can be shown to have

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[20] *McCleskey v. Kemp*, 481 U.S. 279 (1987).
[21] K.G. Jan Pillai, Shrinking Domain of Individious Intent, 9 Wm. & Mary Bill Rts. J. 525 (2001).

acted with a discriminatory purpose. Instead of looking at whether government action reinforces racial hierarchy or does not allow for equal protection in different aspects of life, the doctrine asks if there is enough evidence to show that someone acted out of racial bias. By doing this, the law shifts away from the structure of inequality and shifts more towards the mindset of what an individual thinks.

VIIb. Why Intent Fails in Modern Systems

The Fourteenth Amendment, which came out of the Reconstruction period, was meant to break down a system based on racial domination. The framers understood that inequality could continue to exist even when it wasn't always stated openly. Their concern was more about whether Black Americans would be able to fully participate in civil life. Equality, due to this, was tied to actual experiences. Modern doctrine moves away from this, as it emphasizes motive more than whether inequality is actually being produced. This change also shows that the Court now sees discrimination in an individualized way. This has led the Clause to be much narrower and less useful when it comes to addressing how discrimination actually works today. This is likely not how the Fourteenth Amendment was initially meant to be interpreted.

This change also illustrates how the Court approaches discrimination in a more individualized way. With the view of the intent framework, discrimination is more of a personal fault. It is something that can be traced to one singular actor for acting improperly. However, that is not how discrimination works in the modern day. Since modern racial inequality is built into institutions and policies that seem neutral on the surface, it is not about a singular person. This is what makes the current doctrine a bad fit for modern inequality. Racial disparities are created through the effects of many policies, historical patterns, and practices. Housing inequality, school segregation, and policing disparities are usually not the result of a singular person admitting prejudice. Rather, they develop through multiple decisions made over time, each of which may seem like a neutral policy on its own. Looking at an individual decisionmaker's motive in a moment does not capture the issue with the larger process.

The requirement of intent also turns out to be problematic, as it is extremely hard to prove and easy to hide. Policies that produce serious racial disparities are defended using neutral reasons such as claiming safety, efficiency, or budget concerns. While those explanations might seem legitimate on paper, they do not erase the harm that the policies have caused. As long as the government is able to give an explanation and avoid explicit bias, courts typically treat the policy as constitutionally acceptable, leading to the law allowing subtle discrimination rather than stopping it.

In this sense, the rule of intent does not fail to catch discrimination but rather makes it easier for governments to continue it indirectly. If the Constitution only criticizes policies when plaintiffs prove intent, then the government has an incentive to make these decisions harder to trace. With this view, racial inequality does not need to be eliminated, but rather its evidence needs to be hidden. This is one of the biggest weaknesses of the doctrine: it allows harmful systems to continue as long as the wording is written carefully.

VIc. Judicial Restraint vs. Equality

The Court has justified this approach by talking about judicial restraint. In these cases, the justices were worried that if disparate impact alone were enough to prove a constitutional violation, then courts would have many more cases to review. Zoning, school systems, employment rules, criminal justice policies, and other areas of government would produce unequal outcomes. The Court sought to avoid turning the Equal Protection Clause into a mechanism for reviewing such inequalities.

This concern is understandable to an extent. Courts cannot solve every social problem, and not every case of unequal discrimination should become a constitutional case. However, the problem turns out to be that the Court's solution goes too far in the other direction. While trying to avoid being too involved in policymaking, the Court weakened the EPC so much that it is unable to respond to serious racial inequality anymore. The doctrine protects the courts from having to hear too many hard cases, but it does so at the expense of making constitutional equality less meaningful.

VId. The Gap Between Law and Lived Experience

The requirement of intent also weakens the role of constitutional law. The decisions of the Court do not just decide who wins and loses, but they also send a message of what the Constitution cares about. When courts admit that racial disparities exist and are severe but don't provide any relief due to lack of intent or discriminatory purpose, it sets legal precedent that systematic inequality is not a concern of the U.S. legal system. It suggests that the Constitution protects only against explicit forms of racism, while more subtle but still harmful systems are allowed to continue. This has created a serious gap between doctrinal intention and the lived experiences of individuals. For many, discrimination isn't limited to hate crimes or other racially motivated acts of violence. It is typically a pattern affecting where people live, what schools they go to, their policies, what resources their communities have, and how institutions treat them. When the law does not acknowledge these patterns without explicit proof of a motive, they will continue to impact individuals negatively. The Constitution promises equal protection, but the doctrine doesn't help much when inequality comes from systems rather than explicit intent.

The modern doctrine treats motive as being more important than outcome itself, but consequences should have more of an impact. A government policy that produces racial bias should not be out of the scope of the Constitution just because no individual actor openly admitted bias. The power of the government can shape numerous things, such as where people live, how they experience citizenship, and their overall quality of life. A doctrine that has a heavy focus on intent ignores that government actions can still reinforce inequality without direct, obvious prejudice. As a result of this, the law cares more about intent rather than the effects of their actions.

However, intent should not be irrelevant. Proof of a discriminatory purpose should still matter, and intentional racism should always be unconstitutional. However, the main problem is that intent has become the main factor. If plaintiffs cannot prove intent, then major patterns of racial inequality are not enough for constitutional review. Discrimination can operate in multiple ways, and intent should not be the only way that the Constitution recognizes it.

Ultimately, the modern EPC is a much narrower interpretation than what originally shaped the Fourteenth Amendment. Instead of protecting systems against racial hierarchy, it focuses on acts of intentional bias. This shift leads the constitution to be ill-equipped when addressing inequality in the modern world. Discrimination is often perpetuated through systems and institutions rather than open prejudice, but the Court struggles to address these problems. This results in limited protection against the type of inequality the EPC was meant to prevent, although it may seem easy for courts to apply.

VII. Application

The problems created by the intent doctrine become much easier to look at once analyzed how inequality actually works in practice. Modern racial inequality does not usually appear only through discriminatory laws. Instead, it is usually developed through systems, policies, and institutions, which might seem neutral on the surface but have unequal outcomes over time. Housing, education, and the criminal justice system are all just examples of how inequality can still be pertinent without an individual openly admitting bias. Since the Equal Protection doctrine focuses so much on intent, many of these inequalities are considered outside of constitutional protection. As a result, the Constitution fails to address the same kinds of systemic discrimination it was initially designed to prevent.

VIIa. Housing

Housing policies are one of the best examples to see how structural inequality acts in modern society. Residential segregation in the current world is not typically produced through laws that classify people by race but instead develops through zoning rules, developmental decisions, etc. that appear neutral but have exclusionary effects. Examples include single-family zoning, minimum lot sizes, high development requirements, and others that can all limit who can live in certain communities. These policies are often justified through neutral reasons such as traffic control, preserving neighborhood culture, or protecting property values. When looking at these policies on paper, none mention race, making it seemingly neutral.

However, these policies can still have major consequences. Since housing is closely connected to income, wealth, and historical segregation, restrictions on affordable housing can sometimes exclude certain groups of residents.[22] Even when it is evident that there is no openly racist language, the result can still be heavily segregated communities. Therefore, housing inequality is not due to one discriminatory law but rather comes out through many policies that shape who has access to certain neighborhoods.

The decision in *Village of Arlington Heights v. Metropolitan Housing* shows why the intent doctrine often struggles to address this type of inequality. In this case, the Supreme Court acknowledged that discriminatory intent is usually not explicit and can typically be inferred. However, the Court still had a requirement that plaintiffs needed to prove that race played a large role in the decision being challenged. This requirement essentially creates an obstacle: Governments can provide explanations that are neutral about race to explain their zoning decisions; as long as these explanations appear to be reasonable and not directed at anyone, courts can accept them even if the policy has serious racial consequences.

This can create a tension between housing segregation's negative impact and continuing to abide by the Constitution. Housing inequality is treated as a result of neutral policy choices rather than intentional discrimination through structures and institutions. Even when zoning policies are actually exclusionary, it is still the plaintiffs' role to prove that it was the decision-makers' fault and that they intended to discriminate. However, since officials do not typically have concrete evidence of racial motivation, this narrow requirement makes it extremely difficult to prove. Essentially, the framework established in *Arlington Heights* allows many forms of legally protected exclusion to go unnoticed when it comes to housing policy.

VIIb. Education

Educational inequality is another way the intent doctrine does not address structural discrimination. Students of schools in the U.S. are shaped by residential patterns, local funding, and boundaries of school districts. Since public schools are usually funded through local property taxes, areas with higher property values usually have better-funded schools. This funding can lead to large disparities in resources, staff, facilities, and other opportunities for students across districts.[23]

These inequalities are closely tied to residential segregation. When neighborhoods are separated by race and economic background, school systems are usually reflective of those separations. Typically, the result is that students in minority communities attend school with fewer resources and fewer opportunities.[24] This pattern isn't typically caused by a single law that

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[22]Margery Austin Turner & Solomon Greene, Causes and Consequences of Separate and Unequal Neighborhoods, Urban Inst., https://www.urban.org/racial-equity-analytics-lab/structural-racism-explainer-collection/causes-and-consequences-separate-and-unequal-neighborhoods

[23] How Money Matters: Education Funding and Student Outcomes, Learning Pol'y Inst. (2025), https://learningpolicyinstitute.org/product/how-money-matters-factsheet

[24] Michael Hansen et al., Unequal Opportunity: Race and Education, Brookings (2023), https://www.brookings.edu/articles/unequal-opportunity-race-and-education/

separates students by race. Rather, it develops through a combination of housing policies, school funding, zoning for districts, and other administrative decisions. Under a system that emphasizes the effects of inequality, these disparities can raise constitutional concerns regarding upholding equal protection. However, the decision established in *Washington v. Davis* makes it difficult to call out those inequalities. In *Washington v. Davis*, the Court said that a policy with a negative racial impact does not violate the Equal Protection Clause unless the plaintiff can prove that there was discriminatory intent.

When this is applied to education, this rule creates a major impact. Since school finding systems, district boundaries, and other administrative rules often produce large racial disparities, many can be negatively impacted by this. Although these policies are typically written in neutral language and are justified through reasons such as budgeting and efficiency, they typically result in a system where the effects are clearly unequal. Plaintiffs are still forced to prove that a policy was created to specifically discriminate against a racial group, while this does not reflect the reality and emergence of educational inequality. Disparities seen at school are typically a result of long-term structural factors rather than one specific discriminatory decision. Funding systems, residential patterns, and other historical inequalities all interact with one another, which eventually leads them to reinforce each other over time. Since the doctrine focuses on proving intent at a specific moment, it does not usually recognize those broader dynamics at play. Essentially, many educational inequalities are outside of the scope of the Equal Protection Clause.

VIIc. Criminal Justice

The criminal justice system is a strong example of how the intent doctrine fails in practice. Policing, sentencing, and incarceration all have large racial disparities. Studies have consistently shown that minority communities experience higher rates of arrests, imprisonment, court cases, police stops, etc.[25] These disparities are often the result of historical biases and discretionary decision-making through the criminal justice system. However, these decisions are rarely tied to a single discriminatory decision. Criminal justice decisions are made by many different people, including police officers, prosecutors, judges, and juries. While each decision may appear to be neutral when viewed individually, the overall pattern can still produce unequal outcomes throughout the system. In this way, inequality is seen through a combination of policies and practices rather than explicit racial biases. The case of *McCleskey v. Kemp* illustrates how the intent doctrine can limit constitutional review. In this case, statistical evidence showed that there were strong racial disparities in the consideration of the death penalty. The defendants accused of killing white victims were much more likely to receive the death penalty than those

[25] Megan Lowry, To Reduce Racial Inequality in the Criminal Justice System, Government Should Explore Ways to Reduce Police Stops, Detention, and Long Sentences, Says New Report, Nat'l Acads. (2022), https://www.nationalacademies.org/news/to-reduce-racial-inequality-in-the-criminal-justice-system-government-should-explore-ways-to-reduce-police-stops-detention-and-long-sentences-says-new-report

accused of killing black victims. Even after having control variables for so many other factors, race still played a major role in sentencing outcomes.

Regardless of this evidence, the Supreme Court rejected the equal protection claim period. The Court ruled that the statistical disparities are not enough to prove a constitutional violation, and the defendant would have to show that the decision makers in their specific case were acting out of discriminatory intent. Since there was no direct evidence of racial bias by the prosecutor, jurors, or any other party involved, the court concluded that it was not a constitutional violation. This case showed that the intent doctrine can still shield inequality from the Constitution. Even when there is strong statistical evidence that proves that racial disparities are prevalent in a system, that evidence may not be enough to show discrimination under the Equal Protection Clause, and plaintiffs must still identify a specific person who acted with a discriminatory purpose for their individual case.

This requirement tends to be difficult to prove, especially as internal processes like jury deliberations, prosecutorial charging decisions, police officer discretion, and legislative intent are strictly confidential and sometimes not documented.[26] As a result, proving discriminatory intent can almost be impossible, even when there is a larger pattern of inequality proven. The doctrine does not treat systemic disparities as a constitutional issue unless they can be traced to a specific individual or specific discriminatory motive. This can create a major gap between constitutional law and the reality of the criminal justice system. While structural inequalities and discrimination in criminal justice and sentencing may be recognized and statistically proven, the equal protection framework does not typically have the power to address it.[27] The Constitution becomes more focused on identifying individuals who acted out of bias rather than analyzing if the system created unequal outcomes.

These examples show a broader implication of the intent doctrine. Housing segregation, educational inequality, and criminal justice disparities are not usually caused by one discriminatory decision but instead are produced through structural flaws. Since the modern Equal Protection Clause requires there to be proof of intent, it fails to recognize these forms of inequality as a constitutional issue. The cases *Washington v. Davis*, *Arlington Heights v. Metropolitan Housing*, and *McCluskey v. Kemp* all established this in different ways. *Washington v. Davis* said that disparate impact alone does not violate the Equal Protection Clause and that proof of discriminatory intent is also required. *Arlington Heights* made it very difficult to find discriminatory intent, especially when governments provide explanations that are neutral for their policies. *McCluskey* showed that even with strong statistical evidence, systematic disparities may still not be enough without proof of intent.

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[26] Racial Profiling: Constitutional and Statutory Considerations for Congress, Cong. Rsch. Serv. (2020), https://www.congress.gov/crs-product/LSB10524

[27] Aliza Hochman Bloom, Inferable Discrimination: A Landmark Decision Addresses Selective Law Enforcement, Am. Const. Soc'y (2024), https://www.acslaw.org/expertforum/inferable-discrimination-a-landmark-decision-addresses-selective-law-enforcement/

When these decisions are combined, they create a doctrine that focuses more on Automotive than structural flaws. Policies that produce racial inequality are often not a violation of the Constitution, as long as decision-makers avoid being openly discriminatory. In this case, the Equal Protection Clause has become less capable of addressing forms of inequality that are prevalent today. The constitutional framework then becomes something that condemns explicit racism but isn't able to confront systematic discrimination.

VIII. Recommendations

The cases seen throughout this paper show a consistent pattern: the Equal Protection Doctrine has unfortunately become unable to protect against the structural racial inequality that the Fourteenth Amendment was designed to prevent. In order to close the gap between constitutional rights and real-world inequality, meaningful reform is needed.

The most direct path would be for the Supreme Court to reconsider what intent meant as established in *Washington v. Davis*. The intent requirement does not appear in the Fourteenth Amendment and was mainly adopted because the court wanted to limit its own role, not because it reflected the original meaning of equal protection. Legal scholars have argued that the relationship between equal protection and disparate impact has a deeper underlying meaning about whether the Constitution should address racial hierarchy or individual acts of bias.[28] A new standard would not eliminate intent but would place a heavier emphasis on strong statistical evidence, like the Baldus study presented in *McClesky v. Kemp*. Statistical evidence should be able to support a constitutional claim on its own, especially when presented with a documented history of flawed decision-making processes.

Even without a doctrinal shift, Congress will still be able to establish a meaningful change through Section 5 of the Fourteenth Amendment, which gives it the power to enforce the Amendment through legislation. Congress could expand disparate impact protections to areas of state and local government that are not covered by existing laws using the same framework that was used in Title VII of the Civil Rights Act. Under Title VII, a plaintiff can make a prima facie case of discrimination by showing that a neutral policy actually has a disproportionate effect on a certain group of people, after which the burden moves to the defendant to explain and justify the process.[29] If this framework is expanded to housing, education, policing, and criminal sentencing, it would have a positive impact on many situations that the EPC does not currently address. Scholars have argued, “disparate impact should not be beyond the reach of the Constitution when government actors use systems that clearly and consistently affect people of color."[30]

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[28] Richard A. Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 494 (2003).
[29] Janice Shaw Clothier, Civil Rights: Defendant’s Burden of Proof in Title VII Disparate Treatment Cases, 21 Washburn L.J. 143 (1981).
[30] Valencia Richardson, Data-Driven Discrimination: A Case for Equal Protection in the Racially Disparate Impact of Big Data, 1 Geo. L. Tech. Rev. 37 (2017).

Ultimately, both reforms lead to the solution needing to be a return to a more understanding meaning of equality. The Reconstruction framers were more concerned with if people could actually participate in civil and economic life, not just if the laws were written in neutral language. The current doctrine allows governments to keep policies alive even if they end up creating serious racial disparities, as long as these policies avoid openly expressing discriminatory intent. This creates a Constitution that does not allow blatant racism but still allows structural inequality to continue. By restoring the Equal Protection Clause and changing the broader ideas to make up the Clause would mean recognizing that equal protection typically needs more than just written policies.

IX. Conclusion

The Equal Protection Clause was created for a specific purpose. After the Civil War, the Fourteenth Amendment was created to break down the system of inequality that has been built into daily American life and law. The framers of the Reconstruction era understood that inequality could still exist even without openly racist language. Their main focus was to ensure that Black Americans could actually participate in civic and economic life, not whether the laws were neutral or not on paper. Essentially, their view of equality was about creating real-world outcomes.

The three main cases in this paper show how far the modern Equal Protection Doctrine has moved away from that original purpose. Through *Washington v. Davis*, *Arlington Heights v. Metropolitan Housing*, and *McCleskey v. Kemp*, the Supreme Court has established the framework that plaintiffs need to prove that a specific decisionmaker acted with a discriminatory purpose. They essentially said that showing that a policy produces serious racial disparities on its own is not enough. As a result, the Equal Protection Clause has become a much narrower scope than it was initially intended to be and now is unfortunately no longer capable of addressing the kinds of inequality it was initially designed to prevent.

This has had serious real-world consequences. Housing is segregated through zoning policies and development decisions that might appear neutral on the surface but constantly exclude minority residents from certain neighborhoods. Education is also impacted by school funding systems and district boundaries that often have longstanding residential segregation. The criminal justice system shows that there are large disparities in policing, sentencing, incarceration, etc., all of which have been documented across different studies. In each of these categories, the requirement of intent makes it hard for plaintiffs to bring a case forward, even when the evidence of inequality is strong. As long as the government or institutions can offer neutral explanations for these policies and avoid openly expressing discriminatory motives, courts will typically accept those explanations. This is one of the biggest weaknesses of the current doctrine, as it fails to eliminate discrimination. With this framework, policymakers do not need to get rid of racial disparities altogether; they just need to avoid evidence of intent.

The Supreme Court is able to justify this by claiming judicial restraint. The justices were worried that if disparate impact alone was enough to prove a constitutional violation, courts would be responsible for reviewing a large range of social and economic policies. To an extent, that concern is understandable, as courts cannot take on so many cases, but the solution has gone too far. By limiting the Equal Protection Clause to only the most intentional acts of bias, the Court has changed the meaning of inequality.

The intent requirement also weakens the role of constitutional law. When courts acknowledge racial disparities are prevalent but deny relief because intent cannot be proven, they send the message that systemic inequality is not the problem of the Constitution. Discrimination isn't always someone saying something openly racist. It often manifests through patterns in where one lives, what schools they attend, how they are treated by police, what resources they have access to, etc. When the law does not acknowledge these problems unless motive can be proven, it creates a disconnect between what the Constitution promises citizens and what the people actually experience.

Reform is possible if the Supreme Court reconsiders the intent standard that was established in *Washington v. Davis* that created the initial disconnect from the Fourteenth Amendment. In addition, under Section 5 of the Fourteenth Amendment, Congress also has the power to expand disparate impact protections into areas that aren't currently covered by current civil rights law. Both solutions would essentially bring the Equal Protection Doctrine closer to the equality that created the Fourteenth amendment. The framers were not focused on whether the laws were written in neutral language but rather on if people were being treated equally in their daily lives.

The Fourteenth Amendment promised equal protection to all. It was meant to address real and all types of inequality, rather than just openly discriminatory laws. The current doctrine doesn't address that, as discrimination operates through institutions rather than explicit acts of prejudice. Structural inequality does not require one person to admit bias for it to cause harm. Until the doctrine is reformed to address how inequality actually works, the gap between what the Constitution promises and what it actually delivers continues to grow.

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