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Dear reader,

Thank you for reading and supporting *Tufts Undergraduate Law Review.*

This year has seen an immense reliance on the Supreme Court, lending it unprecedented power in deciding some of the most fundamental aspects of American politics and values, from challenges to birthright citizenship to the way Federal agencies might operate under the Major Questions doctrine to the president's power to influence foreign policy through economic manipulation. These cases demonstrate how as more contentious and political issues are placed under the purview of the Supreme Court, it is inevitable that legal issues take on both ideological and philosophical dimensions. Through their decisions, the Supreme Court has imposed certain interpretations of American ideals that differ from how much of the country might view the values they believe the Constitution and laws should uphold. This modern transformation of the American judiciary raises important questions about the role of our legal institutions moving forward. What is the role of the law? What values do we want the law to uphold? And how successful has the law been in pursuit of its goals? From analyzing the efficacy of the Fourteenth Amendment in promoting Voter Fairness to how Search and Seizure creates disparate treatments of the Trop v. Dulles framework, much of this issue seeks answers to different facets of these questions in an effort to help contribute to this evolving modern dilemma.

This publication would not have been possible without the unwavering support of the Jonathan M. Tisch College of Civic Life, the Tufts Community Union, and our generous donors for their continued patronage. We would also like to thank all of our writers and editors for their steadfast contributions to the Review. We, as editors of the Review, believe that legal scholarship should be available to all undergraduate students regardless of their intended career path. Legal analysis extends beyond the practice of law and is an essential tool in understanding how our society has, does, and will function. Undergraduate legal scholarship is especially important in upholding Tufts' commitment to civic engagement by helping the community understand the ways in which the law is and can be used to impact all facets of life.

Legally yours,

The Editors of the Tufts Undergraduate Law Review

Stop Punishing Residual THC

Adopting Evidence-Based Abstinence Verification in Federal Supervision

by Connor DeBoda A26

INTRODUCTION

Federal law requires individuals on probation and supervised release to "refrain from any unlawful use of a controlled substance" and submit to periodic drug testing.[1] A positive test result can trigger severe consequences, including sanctions, extended supervision, mandatory revocation, and reimprisonment.[2] The federal government employs immunoassay screening tests with a cutoff of 50 ng/mL for delta-9-tetrahydrocannabinol ("THC"), the main psychoactive compound in cannabis, followed by gas chromatography-mass spectrometry (GC-MS) confirmation testing at 15 ng/mL.[3]

These tests detect the presence of THC metabolites, but presence does not always equal recent use. THC is stored in fatty tissue and released slowly into the bloodstream over extended periods.[4] For regular cannabis users, THC can remain detectable in urine for weeks or even months after last use, long after any psychoactive effects have subsided.[5] A person who used marijuana before entering probation or federal custody may continue to test positive despite genuine abstinence.[6] Current testing protocols make no distinction between ongoing use and residual detection; a positive test is treated as proof of noncompliance regardless of timing or context.[7] Individuals on probation or supervised release therefore face sanctions or imprisonment not for violating their conditions, but for the reality of how the human body processes cannabis. Initial drug tests are often administered within the first 15 days of a supervisory period, when residual THC is most detectable in prior users.[8] Under 18 U.S.C. § 3583(g), if a defendant tests positive for controlled substances more than three times in one year, the court must revoke supervised release and impose imprisonment.[9] Even a single positive test can trigger discretionary revocation under § 3583(e).[10] Revocation proceedings carry fewer protections than criminal trials, no jury, and proof only by preponderance rather than beyond reasonable doubt.[11] The preponderance standard means that a court need only find it more likely than not that a violation occurred, a drastically lower bar than the reasonable doubt standard that governed the original conviction. This reduced burden of proof, combined with the inherent limitations of THC testing, creates a system where individuals can be reimprisoned based on scientific data that cannot distinguish between compliant and non-compliant behavior. The absence of a jury means that a single judge evaluates both the technical scientific evidence and the credibility of the individual's claims of abstinence, without the collective judgment that juries provide in weighing complex evidence. Drug testing is also the only mandatory condition of supervised release that imposes a non-preexisting obligation, unlike requirements to refrain from criminal conduct or drug possession. The testing mandate creates an affirmative duty that did not exist before sentencing.[12] Technical violations, including failed drug tests, accounted for 68% of the 17,498 supervision revocations.[13] Some experts believe that "when it comes to technical violations, drug testing is probably the number one pathway back into incarceration."[14]

The stakes of this issue extend beyond the immediate liberty interests of those under supervision. When individuals are wrongly sanctioned or revoked based on residual metabolites, they lose not just their freedom but also their employment, housing stability, and family connections. A person who has secured a job after release may lose that employment due to increased reporting requirements or community confinement imposed as a sanction for a positive test. Housing arrangements

often collapse when individuals must report to residential treatment programs or serve short periods of incarceration for technical violations. Parents under supervision may lose custody or visitation rights when positive drug tests are reported to family courts, even when those tests reflect only residual excretion. These collateral consequences create cascading harms that extend far beyond the immediate sanction, making successful reintegration dramatically more difficult and increasing the likelihood of actual recidivism. According to the National Institute of Justice, more than 44,000 collateral consequences exist nationwide that can create barriers to voting, employment, housing, and receipt of public benefits.[15] Collateral consequences include civil law sanctions and restrictions that attach to a person because of their criminal history and can affect the person's ability to function and participate in society.[16]

THE PROBLEM: WHEN SCIENCE AND LAW COLLIDE

The scientific reality of THC metabolism fundamentally undermines the accuracy of current testing protocols. When a person uses marijuana, THC is rapidly absorbed into the bloodstream and distributed throughout the body. Because THC is highly lipophilic, meaning it dissolves readily in fat but not in water, it accumulates in fatty tissues and is released back into the bloodstream slowly over time.[17] This lipophilic property distinguishes THC from most other commonly tested drugs, which are water-soluble and eliminated from the body much more quickly. Cocaine metabolites, for instance, typically remain detectable in urine for only two to four days after last use, even in chronic users.[18] Methamphetamine similarly clears within three to five days for most users.[19] [20] These shorter detection windows mean that positive tests for these substances more reliably indicate recent use. THC's unique pharmacokinetics create a detection window that can extend weeks or months beyond actual use, making it fundamentally different from other drugs in terms of the reliability of test results as indicators of compliance. The primary metabolite detected in urine drug tests is 11-nor-9-carboxy-Δ9-tetrahydrocannabinol (THCCOOH), which is non-psychoactive and can persist in the body long after the effects of marijuana have worn off.[21] The release of THC from fatty tissue into the bloodstream occurs continuously but at varying rates depending on factors like physical activity, diet, metabolic rate, and body composition. Individuals with higher body fat percentages may store more THC and release it more slowly over extended periods. Exercise and fasting can temporarily increase the release of stored THC, potentially causing transient increases in blood or urine cannabinoid levels even during periods of genuine abstinence. Research has demonstrated that moderate exercise can induce small but statistically significant increases in plasma THC levels in regular cannabis users, with these increases positively correlated with body mass index.[22] Food deprivation has also been shown in controlled studies to enhance the release of THC from adipose tissue back into the bloodstream.[23] These findings illustrate how physiological processes unrelated to new drug use can affect test results, further complicating the interpretation of positive tests as evidence of noncompliance.[24]

The detection window for THCCOOH varies dramatically based on frequency and chronicity of use. For occasional users who smoke a single marijuana cigarette, THCCOOH concentrations may remain above 15 ng/mL for 80 to 100 hours.[25] For chronic daily cannabis users, the picture is far more complex. In controlled studies where chronic users resided on a secure research unit during monitored abstinence, researchers found median detection times of 27 days after last use, with some participants testing positive beyond 70 days.[26] One study documented that urinary THC metabolite excretion in chronic users can extend for many weeks, making it impossible to use a single positive test as a biomarker of new drug exposure.[27] The 50 ng/mL initial screening cutoff and 15 ng/mL confirmation cutoff used in federal testing were established by the Department of Transportation and adopted widely across federal workplace and criminal justice programs.[28] These cutoffs were designed to detect drug use, not to distinguish between recent use and residual excretion. For someone who used marijuana regularly

before entering federal custody and then achieved genuine abstinence upon release, their first drug test within 15 days of release is likely to yield a positive result not because they violated their conditions, but because residual metabolites from pre-incarceration use remain in their system.

This is not a theoretical concern. The timing mandated by statute, one test within 15 days of release, creates maximum likelihood of detecting residual metabolites rather than new use. A person who last used marijuana the day before entering federal custody could easily test positive 15, 30, or even 60 days later despite perfect compliance with their supervised release conditions. Under current protocols, that positive test is treated identically to a test showing active, ongoing use. The individual faces the same sanctions, the same presumption of noncompliance, and the same risk of revocation.

Individuals who test positive, even when genuinely abstinent, face increased monitoring, modified conditions, or worse. The Sentencing Commission grades violations by severity, with positive drug tests potentially constituting Grade B or Grade C violations.[29] For those rebuilding their lives after incarceration, even non-revocation sanctions create barriers to employment, housing, and family reunification. Repeated positive tests from residual excretion count toward the statutory threshold of three tests triggering mandatory revocation under § 3583(g).[30] A chronic cannabis user who achieves genuine abstinence but continues testing positive from residual metabolites could accumulate three positive tests without ever violating their conditions, resulting in mandatory return to prison.

Congress has provided minimal procedural safeguards. Positive results must be confirmed using GC-MS, but only "if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results."[31] This confirmation requirement does not solve the underlying problem, GC-MS testing confirms the presence of THC metabolites with great accuracy, but it cannot determine when the detected substances entered the body.[32] The statute also instructs courts to consider whether substance abuse treatment programs "warrant an exception" to mandatory revocation requirements, but this provision offers little protection against an initial finding of violation.[33] The treatment exception presumes that positive tests indicate ongoing substance abuse requiring intervention, but this presumption fails when positive results stem from residual excretion rather than new use. Mandating treatment for someone who is already abstinent not only wastes limited treatment resources but also subjects the individual to unnecessary restrictions and requirements. Treatment programs typically involve substantial time commitments, mandatory group sessions, individual counseling, and additional drug testing, all of which interfere with employment and family obligations. Moreover, placing genuinely abstinent individuals in treatment groups with active users may expose them to environments that increase rather than decrease the risk of actual relapse.

As of 2024, 24 states and the District of Columbia have legalized recreational cannabis use, and 38 states permit medical marijuana.[34] Many individuals entering federal custody may have used marijuana legally under state law before their arrest. While federal law continues to classify marijuana as a Schedule I controlled substance, federal prosecutors have increasingly declined to pursue simple possession cases.[35] Against this backdrop of marijuana liberalization, subjecting individuals to reimprisonment based on test results that may reflect legal, pre-custody use seems both anomalous and unjust.

THE SOLUTION: EVIDENCE-BASED ABSTINENCE VERIFICATION

A solution exists that would dramatically improve the accuracy of drug testing while requiring only modest changes to current protocols. Researchers led by Eugene Schwilke and colleagues at the National Institute on Drug Abuse developed and validated a mathematical model for distinguishing new cannabis use from residual cannabinoid excretion in chronic daily cannabis users.[36] The Schwilke method uses creatinine-normalized THCCOOH concentrations and compares specimen pairs collected over

time. By analyzing the ratio of THCCOOH to creatinine across multiple tests and applying statistical models that account for the expected decline in metabolite concentrations during abstinence, the method can identify when metabolite levels increase in ways that indicate new use rather than residual excretion.[37]

The model works by establishing prediction intervals at varying probability levels (80%, 90%, 95%, 99%) that provide upper ratio limits for each urine specimen pair. Ratios above these limits suggest cannabis re-use, while ratios at or below the limits are consistent with continued abstinence and residual excretion.[38] The method has been validated through controlled studies involving both model development and independent validation cohorts, and it has been shown to accurately distinguish new use from residual excretion in both adults and younger users.[39] Some clinical, workplace, and criminal justice drug testing programs have already begun implementing this approach with success.[40]

Adopting evidence-based abstinence verification protocols like the Schwilke method in federal supervised release would not require statutory changes. The Administrative Office of the U.S. Courts, in consultation with the Secretary of Health and Human Services, has the authority to determine testing procedures "of equivalent accuracy" to GC-MS.[41] The Administrative Office could issue updated guidance incorporating creatinine-normalized analysis and ratio-based assessment of specimen pairs. While the Schwilke model has been acknowledged as a major advancement in understanding urinary cannabinoid excretion and has been cited in over 40 peer-reviewed articles, it has not yet been implemented as widely warranted in routine drug testing practice at the institutional level.[42] The primary barriers to implementation are not technical but organizational, including a lack of knowledge among drug testing personnel about proper interpretation methods and the absence of expert guidance for applying mathematical models to distinguish occasional from chronic users.[43] These challenges are readily addressable through training programs and updated testing protocols. Federal agencies have successfully implemented training curricula for drug testing programs in probation and parole settings, demonstrating that systematic educational initiatives can overcome knowledge gaps among testing personnel.[44] Probation offices already collect multiple specimens over time from individuals under supervision, making implementation straightforward from a logistical perspective.

The benefits of such a change would be substantial. Individuals who achieve genuine abstinence would no longer face sanctions or revocation based on residual metabolites from pre-incarceration use. Probation officers would have more accurate information about whether someone under their supervision is complying with conditions or actively using drugs. Courts would make revocation decisions based on actual noncompliance rather than biochemical artifacts. The change would reduce unnecessary incarceration, lower the costs of supervision, and improve outcomes for individuals trying to successfully reintegrate into society. Beyond these immediate benefits, adopting scientifically accurate testing protocols would address fundamental due process concerns. The Supreme Court has recognized that individuals on supervised release possess a liberty interest that, although conditional, includes many of the core values of unqualified liberty and its termination inflicts a grievous loss.[45] While revocation proceedings do not require the full panoply of rights applicable in criminal trials, due process still demands that the procedures used to establish violations be fundamentally fair and minimize the risk of erroneous deprivation of liberty.[46] Current THC testing protocols that cannot distinguish compliance from noncompliance arguably fail this basic fairness requirement, potentially subjecting individuals to arbitrary deprivation of liberty based on scientifically inadequate evidence. The constitutional requirement that supervised release conditions involve no greater deprivation of liberty than reasonably necessary further supports the adoption of more accurate testing methods.[47]

Some might argue that distinguishing residual excretion from new use is unnecessarily complex or that the current binary system is simpler

to administer. But simplicity should not trump accuracy when liberty interests are at stake. The Schwilke method requires only that probation offices analyze specimen pairs and apply validated models, tasks well within the capability of modern forensic laboratories at minimal additional cost. The marginal costs of implementing ratio-based testing are minimal compared to the substantial costs of wrongful revocation. Each unnecessary revocation imposes direct costs on the federal prison system, which averaged over 40,000 dollars[48] per inmate annually as of recent estimates, plus the indirect costs of interrupted employment, lost tax revenue, and increased likelihood of recidivism. Evidence-based testing that reduces erroneous revocations would therefore generate net savings for the criminal justice system while simultaneously advancing fairness and rehabilitation goals.[49] Others might contend that individuals should simply avoid all marijuana use, including use before supervision, making the problem self-inflicted. This fails for several reasons. Many use marijuana legally under state law before federal prosecution. Supervised release monitors the compliance with release conditions, not pre-supervision conduct. Criminal justice sanctions should be proportionate to wrongdoing; reimprisoning someone for biochemistry rather than noncompliance violates this principle.

CONCLUSION

The mismatch between THC testing protocols and scientific reality reflects imprecision in how supervised release conditions are drafted and applied. Conditions requiring abstinence from controlled substances are ubiquitous, but the tools used to monitor compliance have not kept pace with scientific understanding. This is not unique to marijuana. Drug testing generally involves thresholds, detection windows, and interpretive challenges that can lead to false conclusions about compliance. But the problem is particularly acute with THC due to its unique pharmacokinetic properties.

The issue also illuminates tensions in modern drug policy. The federal government maintains that marijuana is a dangerous Schedule I drug with no accepted medical use, yet states increasingly reject this characterization. Individuals are subject to federal supervision conditions prohibiting marijuana use despite living in states where such use is legal. They are tested using protocols that cannot distinguish pre-custody from post-custody use, or residual from active metabolites. The result is a patchwork system that enforces prohibition through supervision conditions and drug testing while the broader legal landscape moves toward liberalization. This disconnect between federal prohibition and state-level legalization creates perverse outcomes where individuals may have engaged in perfectly lawful behavior under state law immediately before federal custody, only to face reimprisonment weeks or months later when residual metabolites from that lawful use trigger positive tests. The injustice is compounded by the fact that federal prosecutors have increasingly declined to pursue simple marijuana possession cases, effectively acknowledging the diminishing federal interest in criminalizing personal cannabis use. Yet the supervised release system continues to impose severe consequences for the biochemical remnants of conduct that would not itself warrant prosecution.[50]

As of September 30, 2024, 109,174 people were serving terms of supervised release, representing 90% of all individuals under post-conviction supervision.[51] Drug offenses accounted for 41% of those under supervision.[52] Federal supervised release and probation drug testing must evolve to incorporate scientific evidence about THC detection windows. Current protocols, which use binary cutoffs without considering residual excretion, create a significant risk of sanctioning or incarcerating individuals who have achieved genuine abstinence. The Schwilke method and similar evidence-based approaches offer a solution that would dramatically improve accuracy while requiring only modest changes to existing testing guidelines. The Administrative Office of the U.S. Courts should issue updated guidance adopting creatinine-normalized analysis for distinguishing new marijuana use from residual excretion. Until such changes are made federal drug testing will continue to enforce conditions of supervised release in ways that are

scientifically inaccurate and fundamentally unjust. This is a question of whether our criminal justice system will align its enforcement mechanisms with scientific reality, and whether we will hold people accountable only for what they have actually done, not for the biochemistry of how their bodies process drugs used before supervision began.

Notes

1 18 U.S.C. § 3583(d) (2018).
2 Id. § 3583(e)(3), (g).
3 49 C.F.R. § 40.87 (2024) (establishing initial test cutoff of 50 ng/mL for marijuana metabolites and confirmation test cutoff of 15 ng/mL for THCCOOH); see also SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., MANDATORY GUIDELINES FOR FEDERAL WORKPLACE DRUG TESTING PROGRAMS, 73 Fed. Reg. 71,858 (Nov. 25, 2008).
4 See Robert S. Goodwin et al., Urinary Elimination of 11-Nor-9-Carboxy-Δ9-tetrahydrocannabinol in Cannabis Users During Continuously Monitored Abstinence, 32 J. ANALYTICAL TOXICOLOGY 562, 563 (2008).
5 Eugene W. Schwilke et al., Differentiating New Cannabis Use from Residual Urinary Cannabinoid Excretion in Chronic, Daily Cannabis Users, 106 ADDICTION 499, 499 (2011).
6 Id. at 500 (finding median detection times of 27 days after last use for daily cannabis users, with some participants testing positive beyond 70 days).
7 See 49 C.F.R. § 40.87(c) (requiring laboratories to report results at or above cutoff as "confirmed positive" without consideration of timing).
8 18 U.S.C. § 3583(d).
9 18 U.S.C. § 3583(g)(4).
10 Id. § 3583(e).
11 See Supervised Release Violations, OFFICE OF THE PUB. DEFENDER, https://wvn.fd.org/supervised-release-violations.
12 Drug Testing in the Era of Mass Supervision, FED. PUB. DEFENDER, DIST. OF KAN. (July 2024), https://ks.fd.org/blog/2024/07/8702-drug-testing-era-mass-supervision#:~:text=Nichols%20on%20Monday%2C%20July%201,imposes%20a%20 non%2Dpreexisting%20obligation.
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21 Id.
22 Albert H.C. Wong et al., Exercise Increases Plasma THC Concentrations in Regular Cannabis Users, 37 Drug & Alcohol Dependence 168 (2013).
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24 A.A. Westin et al., Can Physical Exercise or Food Deprivation Cause Release of Fat-Stored Cannabinoids?, 16 Basic & Clinical Pharmacology & Toxicology 467 (2014)
25 Schwilke et al., supra note 5, at 499.
26 Ellis GM Jr, Mann MA, Judson BA, Schramm NT, Tashchian A. Excretion patterns of cannabinoid metabolites after last use in a group of chronic users. Clin Pharmacol Ther. 1985 Nov;38(5):572-8. doi: 10.1038/clpt.1985.226. PMID: 3902318.
27 Robert H. Lowe et al., Extended Urinary Delta9-Tetrahydrocannabinol Excretion in Chronic Cannabis Users Precludes Use as a Biomarker of New Drug Exposure, 105 DRUG & ALCOHOL DEPENDENCE 24, 24 (2009).
28 49 C.F.R. § 40.87 (2024).
29 U.S. SENTENCING GUIDELINES MANUAL § 7B1.1 (U.S. SENTENCING COMM'N 2024).
30 18 U.S.C. § 3583(g)(4).
31 18 U.S.C. § 3583(d).
32 Schwilke et al., supra note 5, at 504.
33 18 U.S.C. § 3583(d).
34 State Medical Cannabis Laws, NAT'L CONF. OF STATE LEGISLATURES (updated 2024), https://www.ncsl.org/health/state-medical-cannabis-laws
35 See Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to All U.S. Att'ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013).
36 Schwilke et al., supra note 5, at 499.
37 Id. at 503-04.
38 Id. at 504.
39 Randi M. Schuster et al., Urinary 11-nor-9-carboxy-tetrahydrocannabinol Elimination in Adolescent and Young Adult Cannabis Users During One Month of Sustained and Biochemically-Verified Abstinence, 33 J. PSYCHOPHARMACOLOGY 197 (2020).
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43 Id. (noting that "For drug testing personnel, in charge of acting on the final analytical result, even if THC-COOH/CREA results are available, knowledge of proper interpretation may be lacking" and explaining that "different models must be applied for occasional and chronic users, respectively").
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45 Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (holding that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a grievous loss on the parolee").
46 Id. at 483-84 (requiring procedural guarantees to minimize risk of error in revocation proceedings).
47 18 U.S.C. § 3583(d) (requiring that conditions of supervised release "involve no greater deprivation of liberty than is reasonably necessary").
48 Annual Determination of Average Cost of Incarceration Fee (COIF), 88 Fed. Reg. 65,405 (Sept. 22, 2023).
49 See generally FAYE S. TAXMAN, EVIDENCE-BASED TREATMENT PRACTICES FOR DRUG-INVOLVED ADULTS IN THE CRIMINAL JUSTICE SYSTEM, NAT'L CRIM. JUST. REFERENCE SERV. (discussing costs and benefits of evidence-based practices in criminal justice drug treatment).
50 See Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to All U.S. Att'ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) (already cited in article at footnote 35).
51 Post-Conviction Supervision, supra note 16.
52 Id.

Free Speech or Jawboning?

Brendan Carr, Jimmy Kimmel, and the First Amendment

by Anna Fattaey and Meredith Doherty, A26

ABSTRACT:
In September 2025, following the murder of Charlie Kirk, Federal Communications Commission ("FCC") Chair Brendan Carr criticized broadcasters following late-night talk show host Jimmy Kimmel's comments about the situation. This paper examines the constitutionality of Carr's comments in light of Kimmel's subsequent removal from the air. Following Supreme Court precedent from *National Rifle Association of America v. Vullo* and *Murthy v. Missouri*, this paper applies the four criteria previously used by courts to determine whether the speech of a government official is impermissibly coercive and thus violates the First Amendment. In applying these four criteria to the Carr and Kimmel case, it is clear that Carr's statements would be classified as unconstitutional coercion in a court following the precedent set by *Vullo* and *Murthy*.

JAWBONING AND LEGAL PRECEDENT

Jawboning is formally defined as "the use of public appeals to influence the actions especially of business and labor leaders."[1] In relation to the First Amendment, the speech of a government official is classified as jawboning when it coerces a private party to suppress their, or another actor's, free speech. What started gaining prominence in the United States during WWII as a result of government influence on the private business sphere[2] would come to be formally defined and ruled on in 2024 with the Supreme Court cases *National Rifle Association of America v. Vullo*[3] and *Murthy v. Missouri*.[4] Both cases ruled that jawboning is unconstitutional when imposed upon the free speech of an individual in the private sector.

The first Supreme Court case citing jawboning as a significant legal issue was *NRA v. Vullo* (2024) in which the Supreme Court unanimously ruled in the favor of the National Rifle Association ("NRA"), that Maria Vullo, superintendent of the New York State Department of Financial Services ("DFS"), "attempt[ed] to coerce private parties in order to punish or suppress views that the government disfavors."[5] Following the Parkland, FL school shooting, Vullo used her influence and position as the superintendent of the DFS to encourage banks and insurers to cease affiliations with gun promotion organizations such as the NRA. The NRA argued that this coercion imposed on their right to free speech, protected under the First Amendment, by stifling their gun-promotion advocacy. The court unanimously decided, based on precedent set by *Bantam Books v. Sullivan*, that jawboning is unconstitutional and that a government entity's "threat of invoking legal sanctions and other means of coercion" against another party to suppress disfavored speech violates the First Amendment.[6] The *Vullo* court found that "a government official cannot do indirectly what she is barred from doing directly."[7] Thus, according to the Vullo court, even indirect coercion, in addition to blatant suppression of speech, is a violation of the First Amendment.

In the case of *Missouri v. Murthy*, the Supreme Court ruled that the government did not coerce or definitively influence the actions of third-party social media companies, like Facebook, to take down false or misleading videos pertaining to COVID-19 or election information. In *Murthy*, various government officials put out guidance about moderating and restricting false or misleading content on social media platforms. The plaintiffs argued that this guidance infringed upon their First Amendment right to free speech on these platforms. The *Murthy* court did not deem the government's speech as jawboning because the defendants could not provide enough evidence that the third party had perceived this guidance to be a threat, nor that there were feared consequences that changed the

way in which these companies moderated content and algorithms.

Both *Vullo* and *Murthy* involved two different instances of free speech. The first is the question of the degree to which government officials can exercise their free speech before it becomes impermissibly coercive. The second is the free speech of a third party whose speech may be threatened or limited by the speech of a government official.

BRENDAN CARR AND JIMMY KIMMEL

Following the death of Charlie Kirk, Jimmy Kimmel, on his late-night talk show "Jimmy Kimmel Live," commented on Kirk's murder and the President's reaction to the event.[8] Shortly after Kimmel's show aired, Federal Communications Commission ("FCC") chair Brendan Carr spoke on a podcast titled "The Benny Show" about Kimmel's comments. Carr argued that Kimmel's speech follows a pattern of "news distortion" by "lying to the American people."[9] His comments on the podcast were aimed at broadcasters such as Nexstar, which owns local broadcasting stations that air ABC, the channel that airs Kimmel's show. Carr attempted to influence these broadcasters to remove Kimmel from the air by alluding to potential regulatory action the FCC could take. Hours after the podcast went live, ABC announced that it would be pulling Kimmel's show from the air.[10]

The *Vullo* court cites *Bantam Books, Inc. v. Sullivan*, (1963) to assess the criteria used in distinguishing between permissible attempts at persuasion and impermissible attempts at coercion. Following the precedent set in *Sullivan*, The Second Circuit Court of Appeals has relied on four criteria in determining the permissibility of speech in similar cases: "(1) word choice and tone; (2) the existence of regulatory authority; (3) whether the speech was perceived as a threat; and, perhaps most importantly, (4) whether the speech refers to adverse consequences."[11] In applying these standards to Carr's comments, one can determine whether, the speech can be reasonably understood as jawboning.

The word choice and tone of Carr's statements unequivocally constitute a threat. Among many statements that could be construed as a threat, the most relevant to this case is "we can do this the easy way or the hard way." Carr's word choice implies that the broadcasters he is referring to in his speech can either comply with his demands and therefore succumb to Carr's coercion, or be met with adverse consequences. Even Senator Ted Cruz acknowledged Carr's threatening speech. "That's right out of Goodfellas," he remarked on his podcast shortly following Kimmel's removal from the air.[12] Cruz's reference to common mob language points to a general understanding of such language as inherently threatening.

In determining whether Carr had "regulatory authority" when he was making his speech, the Supreme Court's decision in *Vullo* can offer a useful framework. The Court determined that in her role as DFS Superintendent, Vullo had "regulatory and enforcement authority" over the insurance companies and financial service institutions conducting business in New York.[13] Further, the Court found that Vullo even had the power to "impose significant monetary penalties" against such companies and institutions.[14] This regulatory authority determined by the court directly pertained to the alleged threats Vullo made. Lloyd's, the insurance provider Vullo attempted to coerce into disassociating with the NRA, could reasonably be impacted by Vullo's retaliatory actions. Following this same framework, Carr's coercive speech aimed towards the broadcasters also falls within his regulatory authority. As the chair of the FCC, Carr has authority over all of the commission's official actions. In discussing how the licensed broadcasters should act following Kimmel's speech, Carr explains that they are "running the possibility of fines or license revocation from the FCC if [they] continue to run content that ends up being a pattern of news distortion."[15] Both of these consequences are within the FCC's, and therefore Carr's, regulatory authority. Therefore, given the Vullo court's finding that Vullo's speech, by nature of its relationship to her regulatory authority, was coercive and thus unconstitutional, it follows that Carr's speech was coercive in the same manner.

In determining whether Carr's speech was determined as a threat, courts may need more information than is presently available to the public. The dissent in *Murthy* argues that "Facebook's responses to the officials' persistent inquiries, criticisms, and

threats show that the platform perceived the statements as something more than mere recommendations."[16] The dissent points to internal communications at Facebook, including emails, that convey their desire to comply with the White House's desires to avoid adverse consequences. Access to this communication is what allowed the Murthy dissent to claim that the actions taken by Facebook were due to illicit coercion by the White House rather than their own volition. Similar information was used to decide *Vullo*. Such information is not available at present regarding the Carr case. Thus, while one can point to ABC's pulling of Kimmel off the air as evidence that the broadcasters perceived Carr's speech as threatening, this may not be enough. One could argue that this sequence of events merely constitutes a coincidence. Without evidence of the broadcasters' internal communications, proving that it was a threat, rather than coincidence, would be challenging.

As for whether the consequences Carr refers to are adverse for the broadcasters, it is clear that the monetary consequences would be classified as such. Without licenses, the broadcasters would be unable to air television and thus make a profit. In threatening license revocation and monetary fines, Carr is threatening the broadcasters' ability to sustain their business.

DISCUSSION

Following the framework set out by the Sullivan court and the precedent set by the Vullo court, Brendan Carr's speech and the ensuing action taken by Nexstar and similar broadcasters fit the legal standard for jawboning. However, an important consideration to make in determining how a court might rule in a case like this is who the petitioners are. In *Murthy*, the court did not rule in favor of the petitioners in part because they were not the actors whose free speech was central to the case. The court states that they had "been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment."[17] The court did not rule in favor of the petitioners in the case because the party whose speech was suppressed was not an active part of the case. Following this line of reasoning, if Kimmel were to petition, courts would be following precedent in not ruling in his favor due to the absence of Nexstar in the case. If Nexstar were to petition, though, this issue that the Murthy court found would not apply. Despite questions of how the petitioners would impact an actual court ruling, the facts of the case, following the Sullivan framework, do point towards unconstitutional jawboning. Cases like *Vullo*, *Murthy*, and potentially Kimmel are essential in ensuring that freedom of speech is protected from the threats of overreaching government officials.

Notes

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3 *National Rifle Association of America v. Vullo*, 602 U.S. 175 (2024).

4 *Murthy Surgeon General, et al. v. Missouri, et al.*, 603 U.S. (2024)

5 *Vullo*, 602 U. S. at 180.

6 *Vullo*, 602 U.S. at 180.

7 *Vullo*, 602 U.S. at 190.

8 Palm Beach Post, FCC vs. Jimmy Kimmel: Brendan Carr Condemns Charlie Kirk Comments, Challenges Local Broadcasters (Youtube, Sept. 18, 2025), https://www.youtube.com/watch?v=ved5hVb4yfM (on file with the author).

9 *Id.*

10 Mandalit del Barco, *Abc Pulls Jimmy Kimmel Off Air After Comments Made About the Charlie Kirk Killing*, NPR (2025), https://www.npr.org/2025/09/18/nx-s1-5544559/abc-jimmy-kimmel-comments-charlie-kirk (last visited Oct. 29, 2025).

11 *Vullo*, 602 U.S. at 189.

12 Palm Beach Post, *supra* note 8

13 *Vullo*, 602 U.S. at 192.

14 *Id*

15 Palm Beach Post, *supra* note 8

16 *Murthy*, 603 slip op. at 32. U.S.

17 *Murthy v. Missouri*, 603 U.S., slip op. at 9.

Falling Through the Cracks

Unaccompanied Migrant Minor Exploitation and Labor Enforcement

by Lily Turcotte-Keen A28

ABSTRACT:
In recent years, child labor violations have been on the rise as hundreds of thousands of unaccompanied migrant children enter the U.S., opening the door to the scrutiny of labor laws and enforcement mechanisms as they enter the workforce. Despite federal statutory frameworks that prohibit the employment of minors in certain industries, enforcing such protections for unaccompanied migrant children becomes exceedingly difficult. Through analysis of federal statutes, U.S. Department of Labor ("DOL") enforcement data, and investigative reports, this paper argues that the U.S. has a flawed enforcement system that cannot effectively verify ages, track children's sponsors, and coordinate interagency enforcement, creating gaps in oversight that allow unaccompanied migrant children to fall through the cracks. However, there are opportunities for reform that include strengthening age-verification systems, increasing oversight for the sponsors of unaccompanied minors, and establishing a coherent framework of information sharing between relevant federal enforcement agencies. These provide hope that statutory labor protections can be adequately enforced to protect some of the nation's most vulnerable.

INTRODUCTION

As reported by the U.S. Department of Labor ("DOL"), the U.S. has experienced a rise in illegal child labor, with findings of violations increasing 69 percent between 2018 and 2022.[1] Many of these minors are unaccompanied migrant workers, who are especially vulnerable to unsafe conditions, long hours, and difficult-to-enforce legal protections. With almost 400,000 unaccompanied migrant children crossing the U.S.-Mexico border since 2021,[2] the adequacy of labor laws and enforcement mechanisms has come under growing scrutiny.

The Fair Labor Standards Act of 1938 ("FLSA") was the first major piece of legislation establishing federal standards for child labor, including: setting minimum age requirements for both nonagricultural and agricultural positions, limiting the hours minors may work during school and non-school periods, and identifying occupations deemed too hazardous for minors.[3] Despite these restrictions, violations persisted and, in recent years, have increased, revealing the weaknesses in the law's capacity to protect modern child workers.

In response to enforcement failures, the Biden Administration introduced a cross-departmental task force combating child labor in hazardous conditions: the Interagency Task Force to Combat Child Labor Exploitation, aiming to prompt more coordinated efforts among federal agencies to strengthen oversight and enforcement of federal protections.[4] After its creation, the DOL reported a "44 percent increase in children found employed in violation of federal law and an 87 percent increase in penalties assessed from the same time period in the previous fiscal year."[5] Despite innovative approaches that the DOL has taken to protect children under current statutes, enforcing these standards exposed the depth of the crisis in the U.S.

The persistence of child labor violations despite renewed departmental commitments to their enforcement underscores the existence of deeper, structural problems rooted in the FLSA and enforcement practices themselves. The FLSA standards were crafted in the industrial economy of the 1930s, which does not directly translate to a modern labor system characterized by rising levels of immigration. Though many of these minors are legally protected, enforcing those protections remains difficult.

Despite federal statutory frameworks prohibiting the employment of minors in hazardous industries along with other age-based regulations, enforcement of such protections becomes exceedingly diffi-

cult, especially when applied to unaccompanied migrant children. A fragmented enforcement system that cannot effectively verify ages, track children's sponsors, and coordinate enforcement allows for gaps in oversight and enables employers to exploit unaccompanied migrant children, allowing them to slip through the cracks.

This paper will first examine the existing legal and regulatory frameworks for child labor, addressing federal labor protections and notable enforcement successes. Next, it will dive into structural inefficiencies that allow migrant child laborers to slip through the cracks of enforcement, beginning with challenges in age-verification procedures, followed by addressing problems in the sponsorship process, and finally addressing jurisdictional gaps. Lastly, the paper will address possible opportunities for reform.

EXISTING LEGAL AND REGULATORY FRAMEWORKS

The Fair Labor Standards Act is the primary piece of legislation that protects employees from unfair labor practices by outlining appropriate conditions and prohibitions for child laborers. These standards provide universal protections, ensuring that children work in safe conditions and have sufficient time for schooling.

According to the FLSA, employees in non-agricultural, non-hazardous positions must be at least 16 years of age to work uncapped hours for all occupations, and at least 14 years of age for restricted hours.[6] The maximum number of hours per week for children ages 14 and 15 depends on the time of the year. Generally, during school periods, they may not work more than 18 hours per week, and during non-school periods, no more than 40 hours per week.[7] Importantly for all minors under the age of 18, the FLSA prohibits their employment in positions deemed hazardous by the Secretary of Labor under the Hazardous Occupations Order ("HO") process. HO provisions ban employment in occupations including manufacturing and storing of explosives, mining, demolition, work with woodworking machines, work with power-driving machines such as balers and compactors, and roofing operations, among others.[8] These provisions are enforced by the DOL's Wage and Hour Division ("WHD"), and those who are deemed in violation of the provisions are subject to civil money penalties ("CMP"), temporary restraining orders, preliminary injunctions, among other penalties.

All child workers are protected under the provisions of the FLSA, including migrant children. The DOL does not consider a worker's immigration status when determining employer compliance with federal child labor provisions; employers who violate any provisions are subject to CMP regardless of whom they employ. Federal case law confirms this principle. In Lucas v. Jerusalem Café, LLC, the Eighth Circuit held that "the FLSA protects unauthorized aliens," meaning that employers must extend to undocumented workers the same minimum wage, hour, age, and working-condition protections that apply to authorized employees.[9]

Still, there are specific pieces of legislation that may reinforce protections for unaccompanied migrant child workers. The Trafficking Victims Protection Reauthorization Act ("TVPRA"), originally passed in 2000, sharpened the protections for trafficking victims, "[adding] new criminal provisions prohibiting forced labor" and increasing federal attention to the enforcement of these labor provisions.[10] Although the TVPRA is aimed at trafficking victims, many migrant children fall under this category due to the conditions of their entry into the U.S. Research by the Congressional Research Service finds that 75-80 percent of migrant children are brought into the U.S. by smugglers, who often sell unaccompanied children into situations of prostitution and forced labor and consequently make them victims of human trafficking.[11] While the TVPRA does not directly reform child labor laws, it is a crucial framework for identifying and protecting children who are victims of trafficking and exploitative labor practices in the U.S.

Additionally, the Department of Health and Human Services ("HHS") has initiatives aimed at vetting sponsors of unaccompanied minors to ensure they are not engaging in exploitative practices.[12] Under the provisions of the TVPRA of 2008, HHS is "required to assume custody of and provide care for all unaccompanied alien children from the time they are transferred into HHS...until they are released to a vetted sponsor."[13] By doing so, HHS

and the Department of Homeland Security ("DHS") attempt to ensure that migrant children are placed into safe environments without being released into exploitative situations. This centralizes responsibility to the investigators of HHS and establishes a system of accountability for sponsors of unaccompanied migrant children. Both the TVPRA and HHS provide safeguards to help reduce the risks of trafficking and forced labor among migrant youth in the U.S.

In many cases, these statutes help provide needed protection to migrant children and allow the federal government to successfully prosecute employers who are out of compliance with federal law. One such success was following the investigation into Packers Sanitation Services Inc. ("PSSI"), where a total of 102 children were found to have been employed illegally in meatpacking plants across eight states.[14] The WHD found PSSI had violated the FLSA and HO provisions, with the *Washington Post* reporting that the children "attended middle school and high school during the day while working at the facilities."[15] The investigation emphasized the practical value of enforcement mechanisms in addressing child exploitation. PSSI subsequently agreed to comply with the FLSA's standards and ensure future compliance with federal law, taking steps such as reviewing existing policies, providing managerial training, and employing outside compliance specialists who will report to the WHD for a period of three years.[16] Additionally, PSSI paid $1.5 million in CMPs.[17] By holding large companies such as PSSI, one of the biggest food sanitation contractors in the country, legally accountable, the federal government's capacity for enforcement becomes clear. This investigation reinforced the role of federal oversight in protecting child workers, with former Solicitor of Labor Seema Nanda remarking, "this case [is] a powerful reminder that all workers in the United States are entitled to the protections of the Fair Labor Standards Act and that an employer who violates wage laws will be held accountable."[18] The PSSI case is one piece of a broader crackdown by the DOL on child labor violations in the U.S., with the DOL implementing strategies to "achieve more impact" in 2024, with the WHD recovering $273 million in back wages and damages.[19]

The success of the PSSI case demonstrates how DOL labor standards can work as meaningful frameworks to combat exploitative child labor practices when enforced thoroughly. Though a federal success, it also exposes federal vulnerabilities. In the PSSI case, widespread violations occurred across multiple states without previous detection, suggesting that child labor in the U.S. is not confined to singular incidents but is a systematic problem in need of addressing.

STRUCTURAL INEFFICIENCIES & ENFORCEMENT PRACTICES

While the PSSI case demonstrates an important success for child labor enforcement in the U.S., the fact remains that child labor violations have been increasing in recent years. Despite recent efforts to improve enforcement by the DOL, structural inefficiencies continue to limit the federal government's ability to address violations proactively. Presently, enforcement remains largely reactive rather than preventive, hampered by barriers such as age-verification procedures and limited oversight over sponsor families by HHS, exacerbated by a persistent jurisdictional vacuum and lack of sufficient resources that hinder interagency cooperation.

Challenges in Age-Verification

These enforcement challenges become especially clear when examining the outcomes of recent child labor cases for both non-migrant and migrant children. In 2024, Acting Secretary of Labor Julie A. Su filed a temporary restraining order and preliminary injunction against Mar-Jac Poultry of Alabama following investigations by the WHD that found four minors under the age of 18, and one individual who had turned 18 seven days before the search, working in the company's "Jasper Plant."[20] Su filed for expedited relief, claiming that "[the] Defendant had violated the...[FLSA] by employing oppressive child labor for the production of commercial goods," and that they violated HO Order 10 (HO10).[21] One glaring problem in the case was the age-verification procedures, which became exceedingly difficult with respect to migrant workers. The court stated that the DOL failed to establish that Mar-Jac had employed these minors knowingly, stating that

"[the] Defendant has presented evidence that all of the minors provided it with false documentation, which states that the minors were over the age of eighteen."[23] The court added that the Defendant submitted the provided documents through E-Verify, a system operated by the U.S. that can be used verify age documentation–though was never the explicit purpose of the database–which found the documentation to be valid, and that in rejecting this result, Mar-Jac "could possibly have been exposed... to liability for discrimination under the Immigration Reform and Control Act of 1987 (IRCA), 8 U.S.C. § 1324b(a)(6)".[24] The court, having also established that Mar-Jac could not rely on appearance or assessment to prove the ages of their employees, concluded that they had no reasonable knowledge of the age of the minors.[25] After confirming that the Plaintiff could not establish a substantial likelihood of success for the preliminary injunction and temporary restraining order and stating that they could not prove that Mar-Jac acted with the requisite scienter, the court ultimately denied Su's motion.[26]

This decision sheds light on an important issue in enforcing child-labor protections, especially for minors, when it comes to age verification. These verification systems are structurally unreliable, as proven in the Jasper Plant. Many unaccompanied migrant children intentionally misstate their age on presented documents,[27] often not because they want to defraud their employers, but because they are left with limited choices to support themselves and their families. In many cases, lying about age is a survival strategy in the current labor system. Hannah Dreier, a reporter for the *New York Times*, notes how migrant children are pressured into illegal work, needing to send money back to their families, while also being "in debt to their sponsors for smuggling fees, rent and living expenses".[28] Employers, who often hire for dangerous work, rely on documentation that appears valid. The government does not currently have the right resources to support unaccompanied migrant children while also enforcing labor protections. In other words, there is currently a structural environment in which age verification is nearly impossible. Addressing the underlying economic pressures and enforcement mechanisms becomes paramount in strengthening child-labor enforcement as it pertains to age-verification procedures.

Improperly Vetted Sponsor Placements

Failures in the current age-verification system cannot be fully understood without examining the role of sponsors to unaccompanied minors, who can intensify the financial and social pressures that push minors into hazardous working conditions. Sponsor relationships, one of the first layers of protection for unaccompanied minors, remain one of the least monitored components of the immigration system. This gap begins to explain how minors can be forced into exploitative labor before federal safeguards are triggered.

Under the Biden Administration, pressures of increasing numbers of unaccompanied minors forced Department of Health and Human Services caseworkers, those in charge of ensuring sponsors are vetted and safe, to race to place minors in homes.[29] While HHS is typically meant to check in with minors following their placement to ensure they are not being exploited or kept in dangerous conditions, it was reported that they lost contact with over a third of unaccompanied migrant children that they placed.[30] In February 2025, the Department of Homeland Security ("DHS") worked to increase welfare checks, finding that agents identified sponsors who subjected children to conditions of neglect, had child sexual abuse material, and had forced minors into illegal labor.[31] In 2021, it was reported that of the 138,917 minors placed with sponsors, 11.8 percent were placed with distant relatives or non-family sponsors, with HHS stating this trend could increase chances for exploitation of minors.[32]

These findings reflect a deeper structural failure in how the U.S. is managing the welfare of unaccompanied migrant children. HHS lost contact with a significant number of minors placed in sponsor homes, many of whom did not know their sponsors at all. Minors will not receive the protection of the FLSA and HO10 if they are not being monitored, whether in their sponsor homes or in their workplaces. Though initiatives to increase welfare checks have increased over the past couple of years,[33] without more meaningful systematic oversight, the line between sponsor and trafficker

can become blurred, and the current system will continue to prioritize processing over protection.

Jurisdictional Gaps

The failures in sponsor oversight do not occur in isolation, but rather within a jurisdictional vacuum in which various agencies lack clear authority and responsibility to enforce specific protections once children are placed in homes. Although IRCA 8 U.S.C. § 1232 establishes HHS as responsible for the "care and custody" of these minors, and the Flores Agreement placed HHS's predecessor in charge of terminating placements with sponsors. The 2016 Majority Staff Report of the Senate Permanent Subcommittee of Investigations notes that "[HHS] claims that it has no responsibility for the care and safety of [unaccompanied minors] after they are placed with the sponsors it selects]." [34] These agencies, however, often lack the jurisdiction HHS attributes to them because released migrant children are not formally placed in state foster care systems, which is what grants local entities their authority.[35] Because of this, even when federal authorities become involved, exploitation could have already occurred in a legal and operational void.

Amplifying this consequence is the absence of an interagency framework between the agencies closely involved with immigration, such as DHS, HHS, and the DOL, and placement of unaccompanied minors in the U.S. Before 2018, no formal framework was established between federal departments regarding the placement and exchange of unaccompanied migrant children, with DHS and HHS failing to establish a memorandum of understanding, according to a 2008 report.[36] Although a "Statement of Principles" was established in 2004, it expressed clearly that the document "does not resolve all outstanding issues," with the implication being a lack of information exchange between departments during their transfer.[37] A specific unaccompanied minor intake team reported that the information they receive from DHS is limited, with 13 facilities reporting that they received "little or no information about a child" before they arrived at placement facilities, and they desire basic information such as "medical and mental health conditions or behavioral issues."[38]

While this initial report was published in 2008, many of these deficiencies persist despite their longstanding recognition. In 2021, a formal Memorandum of Agreement was signed between DHS and HHS, but a report from the Office of Inspector General in 2025 noted how the U.S. Immigration and Customs Enforcement ("ICE"), an agency within DHS responsible for laws concerning immigration, does not have the location and status of all migrant children after their release from HHS custody.[39] The report notes that when ICE does not share information regarding hearings for unaccompanied minors, "HHS personnel are unable to determine if [unaccompanied minors] need wellness checks or post-release services for individuals at an increased risk of being trafficked."[40]

These structural gaps continue downstream to the enforcement of labor regulations. Namely, DOL's WHD, the primary enforcement agency for child labor violations, faces challenges enforcing these laws. DOL's Office of Inspector General 2025 Review of WHD Efforts to Address Child Labor Law Violation Challenges notes that the WHD investigation is hindered by staffing shortages, with only 720 investigators at the end of FY 2023.[41] Additionally, the WHD had outdated data-sharing technologies wherein investigators are not able to streamline the investigation process, further placing strain on the limited number of investigators. Finally, the report emphasizes that WHD is hampered by language barriers that may prevent migrants from understanding their FLSA protections and open the door to labor exploitation for all non-English speakers.[42] Child labor protections are only as effective as the agencies that are tasked with implementing them. Given that WHD lacks sufficient resources to amply enforce and address all child labor complaints, it cannot meaningfully safeguard vulnerable populations, such as unaccompanied migrant children, leaving them exposed to possible exploitation in the workplace.

Together, these jurisdictional gaps create a system where it is often impossible to ensure the safety and livelihood of unaccompanied migrant children once they leave federal custody. By failing to delineate responsibilities to ensure information flow and allocate necessary resources to enforcement agencies, the current federal system leaves vulnerable

populations exposed to harm while simultaneously allowing employers to exploit these gaps. Statutory protections will remain insufficient when the jurisdictional architecture cannot translate the FLSA and state labor protections into meaningful oversight.

OPPORTUNITIES FOR REFORM

Given these structural inefficiencies, it is clear that the current system of enforcement is ineffective in holistically protecting vulnerable populations, especially unaccompanied migrant children. Despite the recent upsurge in enforcement by the DOL and other enforcement agencies, reforms are needed to meaningfully address child labor violations on the scale on which they are occurring. These reforms must not simply strengthen legal standards themselves, but focus on the institutional and jurisdictional architecture responsible for enforcing them. While no single piece of legislation or reform policy will be sufficient in counteracting years of institutional gaps, a coordinated and multifaceted approach may work to rebuild federal enforcement practices and offer a realistic pathway toward the protection of some of the most vulnerable populations. What follows are proposals aimed at reinforcing federal infrastructure and reducing opportunities for exploitation, ensuring that statutory protections function in the way they were designed.

First, the Mar-Jac case clearly illustrated the structural inadequacies of the current age-verification system in the U.S. The difficulty lies in the economic incentives that many unaccompanied minors feel to obtain a job, causing them to lie about their ages to do so.[43] Once employers have federally verified an employee's age, they are discouraged from questioning the validity of that documentation, as doing so may violate IRCA.[44] A possible remedy for these problems could be establishing a centralized federal age-verification database for unaccompanied minors. Though some employers argue that this database is the current e-Verify system, its primary function is not to verify the ages of employees. This database could be managed by all federal actors involved in minor placement and labor investigations, including DHS, HHS, and the DOL. Additionally, mitigating financial burdens may alleviate the pressures many unaccompanied minors face when placed in sponsor homes. Potential measures include providing minors with monthly stipends and creating school or community based support programs that reduce the need for underage employment altogether. Finally, employer re-verification for minors whose documents are issued outside of the U.S. or were established during state immigration proceedings would reinforce verification safeguards by targeting loopholes that allow minors to work under falsified documents and allow them to be verified. However, it is important to note that there may be great difficulties in enforcing age documentation when many migrant children are incentivized, even forced, to work. Economic and social pressures push many children to lie about their age and acquire documentation that may pass through federal verification platforms or work without any documentation at all. Enforcement of labor protections cannot counteract the desperation that pushes children into hazardous labor positions in the first place. Expanding post-release services and creating economic assistance programs may help to reduce pressure placed on unaccompanied minors to enter the workforce.

Second, it is important to address the systematic failures in sponsor vetting and follow-up for unaccompanied minors. With HHS losing contact with a significant proportion of minors after they leave federal facilities, [45] and DHS uncovering numerous cases of exploitation within sponsor homes, it is clear that exploitation frequently occurs in sponsor homes, not just the workplace.[46] This problem is exacerbated by efforts to rapidly place minors in sponsor homes, limited check-ups with these homes, and little resource sharing among federal agencies.[47] To address this problem, mandatory post-release home visits and unannounced inspections for placements that may be considered higher-risk by local authorities or HHS, including non-family sponsorships. By intervening early in potentially exploitative home environments, federal agencies can prevent abuse before it escalates. Strengthening front-end sponsor vetting processes through more rigorous background checks, verification of financial stability, and cross-agency data sharing could also reduce the number of unaccompanied minors placed in unsafe households. Together, these measures work

to create a more reliable system of oversight that emphasizes the safety of minors.

Last, there exists a jurisdictional vacuum that enables gaps in information sharing between key federal enforcement agencies, including DHS, HHS, DOL, and WHD. Even after the 2021 Memorandum of Agreement, the lack of information sharing undermines wellness checks, hinders tracking efforts, and can potentially leave agencies unaware of minors at risk for child labor violations. It is necessary to rework the current memorandum of understanding between various agencies, requiring the transfer of data between integral federal agencies, as well as create a new, streamlined case-management system wherein all agencies can access migrant child welfare information. A formal interagency framework is necessary to enforce the FLSA and HO mechanisms and make sure no minor slips through the cracks. This reform could provide the structural foundation necessary for sponsor oversight and enforcement of federal labor laws. However, WHD and other enforcement agencies remain severely understaffed and underfunded. These barriers directly impede WHD's ability to enforce and investigate complaints, so exploitation could continue for years before it is addressed. Strengthening WHD's capacity to address the volume and complexity of violation complaints is paramount in instituting jurisdictional reform. To do so, it may be necessary to increase funding toward these investigative agencies.

CONCLUSION

The recent rise in illegal child labor, especially among unaccompanied migrant children, demonstrates a structurally outdated system of enforcement within the U.S., which allows for the exploitation of populations that the FLSA was designed to protect. Existing federal frameworks, including the FLSA, HO provisions, TVPRA, and sponsor placement protocols, demonstrate the existence of statutory frameworks that were meant to protect unaccompanied migrant children from labor exploitation. PSSI and similar cases demonstrate that, when enforcement mechanisms work, they can hold employers accountable and stop widespread exploitation. However, the case also exposes potential limitations. Age-verification barriers, improper sponsor placement procedures, and persistent gaps in information sharing between federal enforcement agencies prevent exploitation from being identified early. Federal protections can break down under the stress of these gaps, leaving unaccompanied migrant children vulnerable in the workplace and in sponsor homes. Reforming these mechanisms requires reworking the enforcement institution by strengthening age-verification procedures, mandating sponsor oversight, and creating interagency information systems that will not allow minors to fall through the cracks of enforcement. The path forward requires strong, unilateral commitment, but it is necessary to prevent the exploitation of migrant children in the U.S.

Notes

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Measuring Inequality

The Fourteenth Amendment's Limits and Voter Access Challenges Across State Lines

by Camille Utter A28

ABSTRACT:
This article explores the tension between the Fourteenth Amendment's guarantee of equal protection under the law and the harsh realities of voter access inequality, focusing on Massachusetts and Texas as contrasting case studies. Massachusetts, despite its progressive voter access policies, continues to exhibit enduring structural barriers. Texas employs a restrictive legal framework that actively limits voting rights. This article examines how promises of equal protection often fall short in the face of socioeconomic disparities and state voting policies, bringing into question the efficacy of the Fourteenth Amendment. Ultimately, this article considers the distinction between constitutionally unavoidable inequality and unconstitutional disenfranchisement, and what that distinction should mean for the future of voting rights.

INTRODUCTION

The Fourteenth Amendment has profoundly impacted society by granting citizenship to formerly enslaved people, extending Bill of Rights protections to all citizens, and establishing the legal principles of due process and equal application of the law. The most frequently cited provision in the amendment, known as the Equal Protection Clause, embodies a constitutional commitment to fairness and equality under the law.[1] It mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[2] This deceptively simple promise has dictated a variety of landmark Supreme Court cases, most notably *Brown v. Board of Education* (1954), *Roe v. Wade* (1973), *Bush v. Gore* (2000), *Reed v. Reed* (1971), and others.[3]

Initially, the clause was understood as a response to racial discrimination[4] in the post-Civil War era. Over time, however, the Supreme Court began to expand the scope of the clause, interpreting it to prohibit a broader range of state-sponsored inequalities.[5] In practice, the clause's promising rhetoric is often undermined by persistent systemic social and economic inequalities.[6] The enduring tension between formal equality and the lived experience of structural inequality underscores a central problem in the United States: the law's promise of equal protection without guaranteeing equal access.

Few areas reveal this tension more starkly than the right to vote. Disparities in voter identification requirements, polling access, early voting availability, and administrative efficacy produce a political landscape in which democratic participation depends not solely on citizenship, but also on one's geography, income, and race.[7] Legally, although the Supreme Court has repeatedly treated voting as a fundamental right,[8] the practical accessibility of voting remains uneven across states. These inequalities expose the Fourteenth Amendment's inability to guarantee equal political participation. While some states have enacted reforms designed to expand access, barriers persist, disproportionately affecting marginalized populations.[9] The persistence of these barriers calls into question the limitations of the Equal Protection Clause in ensuring meaningful equality in voter access, particularly when constitutional protections must confront deeply rooted social, economic, and political structures. Can a system that is formally inclusive yet functionally exclusionary still claim to provide "equal protection of the laws?"

This article examines these issues through a comparative lens, focusing on two states with contrasting approaches to voter access: Massachusetts and Texas. Massachusetts serves as a case study in passive structural barriers, where progressive policies coexist with socioeconomic and technical obstacles that inhibit voter participation. Texas exemplifies active restrictive policies, where legislative measures and administrative rules limit access, especially for marginalized communities. Through these two case studies, this article examines the practical reach of the Equal Protection Clause and the boundary between unavoidable inequality and unconstitutional disenfranchisement.

This article argues that current interpretations of the Equal Protection Clause fail to address structural voter inequalities. Courts prioritize formal equality over substantive participation, a core limitation that allows both passive and active disenfranchisement to shape and distort political participation nationwide.

To establish this, the article proceeds as follows: Section II situates this discussion within the historical and legal framework of the Fourteenth Amendment and relevant voter access law. Sections III and IV present in-depth case studies of Massachusetts and Texas, highlighting passive and active barriers to voting. Section V offers an analysis of the findings, exploring the roles of judicial interpretation, the distinction between passive and active disenfranchisement, and the limits of constitutional promises. Section VI concludes by summarizing the implications for voting rights, offering some potential solutions and considering the future legal challenges that could come up when bridging the gap between the law and lived reality.

LEGAL AND HISTORICAL FRAMEWORK

Ratified in 1868 in the aftermath of the Civil War, the Fourteenth Amendment was designed to secure the civil rights of newly freed slaves and prevent states from enacting racially discriminatory laws.[10] Central to the Fourteenth Amendment is the Equal Protection Clause, which mandates that no state may deny a citizen equal protection under the law.[11] Over time, the Supreme Court extended its scope to cover other classifications, including gender, dis-

ability, and indirectly, socioeconomic status.[12]

The Equal Protection Clause should rely on two main legal principles: consistency and fairness in context. Formal equality requires consistency, where individuals in similar circumstances must be treated alike. Substantive equality takes context into account, acknowledging that identical treatment may fail to produce meaningful equality when underlying disparities exist.[13] For example, when offering identical voting hours to everyone, communities overlook barriers such as limited transportation, long work shifts, or unequal distribution of polling places across neighborhoods, which ultimately restricts voters' ability to participate equally. Historically, however, the Supreme Court has struggled to deliver on both formal and substantive equality.[14] For example, *Bush v. Gore* (2000), which resolved the disputed 2000 presidential election between George W. Bush and Al Gore, prioritized formal equality by invalidating recount procedures in Florida that produced inconsistent treatment of voters. For instance, different counties used different standards to determine whether a ballot counted, meaning identical ballots could be accepted in one place but rejected in another. This decision highlighted the constitutional importance of uniform application of election rules, underscoring the Court's commitment to consistency over contextual fairness in election administration.[15] A similar prioritization of formal equality appears in *Shelby County v. Holder* (2013), which struck down a key provision in the Voting Rights Act (1965) that required certain states with histories of discrimination to obtain federal clearance before changing voting laws. By insisting that all states be treated the same, regardless of their distinct histories of voter suppression, the Court again elevated formal equality over the need for substantive protections to address entrenched racial disparities in voting access.[16] Both cases illustrate how the Court's repeated reliance on formal equality can leave structural disparities unnoticed, revealing a consistent judicial unwillingness to address the deeper context that substantive equality requires.[17]

Voter access inequalities can be understood along two broad axes: passive structural barriers and active restrictive policies. Passive barriers are those that arise from social, economic, or procedural factors that impede participation despite formally neutral laws. Examples include limited transportation to polling sites, restrictive work schedules, complicated registration processes, and limited outreach to marginalized communities. Active restrictive policies, on the other hand, are deliberate legal or administrative measures that constrain access.[18] These include factors such as strict voter ID requirements, limits on early voting, reductions in polling locations, and restrictions on eligibility for vote-by-mail.[19]

Historically, both passive and active barriers have had disproportionate impacts on racial minority and low-income voters.[20] In the post-Reconstruction era, Southern states used literacy tests, poll taxes, and grandfather clauses to disenfranchise Black citizens despite the formal guarantees of voting access in the Fourteenth Amendment.[21] Although modern laws eliminate racial discrimination, structural barriers continue to limit access in ways that may not trigger constitutional intervention, such as bureaucratic obstacles and socioeconomic disadvantages. In Massachusetts during the 2020 general election, voter turnout was relatively high, with 71%[22] of eligible voters participating, surpassing the national average at the time of 66%.[23] However, registration and turnout rates remained lower among low-income residents,[24] racial minorities,[25] and individuals with physical and mental disabilities.[26] Texas, by contrast, exhibits lower overall participation rates, particularly among marginalized populations,[27] where turnout rates hovered at 60.8%[28] of eligible voters in 2020. These disparities reveal that the promise of equal protection ultimately relies not just on legal guarantees but on the broader ecosystem of policies and social conditions which continue to either enable or restrict political participation.

Finally, the judicial framework for evaluating voter access claims is complex. Courts typically assess whether a law or policy imposes a burden on the right to vote, and then whether that burden is justified by legitimate state interests, navigating the tension between the Fourteenth Amendment's promise of equal protection and the states' authority to regulate elections. The balancing test applied in *Anderson v. Celebrezze* (1983) and *Burdick v. Takushi* (1992), also known as Anderson-Burdick balancing, emerged from the Supreme Court's efforts to evaluate laws that regulate voting rights and ballot access to determine when they create constitutionally significant inequalities. In *Anderson*, which challenged

early filing deadlines for independent presidential candidates, the Court held that the severe burden the law had on allowing independent candidates to get on the ballot outweighed the state's interest in giving voters sufficient time to consider candidates, asserting that the Equal Protection Clause requires courts to consider not only the regulation itself but also its impact on voters.[29] *Burdick* later refined this approach, upholding Hawaii's ban on write-in voting by emphasizing that not all restrictions on voting access are unconstitutional.[30] Together, these cases established that minor procedural burdens, ones serving valid state interests like preventing fraud or ensuring orderly elections, are generally tolerated, while severe restrictions that significantly limit ballot access or voter participation may qualify as unconstitutional disenfranchisement.[31] Unfortunately, this distinction leaves significant room for interpretation, blurring the line between tolerable inequality and violations of the Equal Protection Clause.

Overall, the legal and historical framework illustrates that the Equal Protection Clause established both formal guarantees and interpretive flexibility, leaving courts to navigate the balance between formal equality and substantive equality. Understanding this context is vital in evaluating the contrasting experiences of voter access in Massachusetts and Texas, as the subsequent sections will demonstrate.

MASSACHUSETTS AND PASSIVE STRUCTURAL BARRIERS

Massachusetts presents a revealing case study in the tension between formal legal protections and structural obstacles to voter access. The state has historically enacted progressive policies aimed at expanding registration and turnout; however, persistent socioeconomic disparities and procedural hurdles continue to impact the practical exercise of the right to vote.

Over the years, Massachusetts has employed a variety of policies intended to facilitate voter participation. Among these reforms is the 2022 Voting Opportunity to All for Students and Seniors (VOTES) Act,[32] which introduced key provisions that improved voting access in Massachusetts by simplifying voter registration procedures, expanding early voting access, and increasing outreach for underrepresented populations. These provisions included enforcing a later voter registration deadline of 10 days rather than 20, decoupling voter registration from the census[33] and pairing voter registration with the Registry of Motor Vehicles, creating easy-to-navigate online registration sites, ensuring uniform and accessible polling sites, expanding early in-person voting,[34] and making permanent the pandemic-era policy allowing mail-in voting for any reason,[35] all of which aimed to reduce administrative and logistical barriers for voters.[36] Data indicates that these reforms have had measurable effects. Voting initiatives under the VOTES Act increased participation among constituents, including a strong increase in ballots cast by mail,[37] which demonstrates the potential of policy interventions to reduce the effects of structural disadvantages on voter turnout.

Despite these policy reforms, structural barriers persist, especially among marginalized communities. Socioeconomic disparities, including income inequality, limited access to transportation, and nontraditional work schedules, disproportionately burden racial minority and economically marginalized voters, constraining their ability to participate even when inclusive policy exists.[38] In Massachusetts, although voting access improved as part of the VOTES Act's reforms, substantial local disparities remain.[39] The ten highest-turnout communities in the 2022 Massachusetts state election had household incomes between approximately $160,000 and $759,000, while the ten lowest-turnout communities had incomes between approximately $68,000 and $132,000. In less wealthy, more racially diverse municipalities, turnout was at an all-time low, whereas in wealthy, primarily White municipalities, a much larger percentage of constituents voted.[40]

Procedural obstacles, such as the requirement to register in advance of the election, disproportionately affect populations with low mobility or limited access to digital registration platforms. During the 2024 general election, there were 50 incidents in Massachusetts that hindered voting for people with disabilities due to malfunctioning voting assistance machines and a lack of accessible polling places. Additionally, more than 150 otherwise eligible voters were turned away from the polls for missing the state's registration deadline, which is 10 days before the election.[41] Polling site distribution is also uneven, with urban centers often experiencing higher voter density per polling location, leading

to long lines and increased wait times. To reduce these issues, urban municipalities could require more early voting sites to meet the standard of one site per 35,000 residents in order to reduce long lines in high-density areas.[42] Because the number and location of early voting sites and ballot drop boxes are left to local discretion, disparities persist in Massachusetts communities. In particular, communities of color have experienced longer lines and reduced access largely because they are more likely to live in densely populated municipalities with fewer available sites and historically under-resourced local governments.[43] These examples collectively illustrate that while legal reforms are necessary, they are insufficient to guarantee equitable access in practice. Even with state efforts to rectify discrepancies in voter access, inherent structural inequalities remain the primary barriers to voting access for marginalized voters in Massachusetts.[44]

The case *Chelsea Collaborative v. Gavin* (2018) exemplifies the tension between progressive policy and enduring structural barriers. Plaintiffs challenged Massachusetts' 20-day voter registration cutoff, arguing that it effectively disenfranchised marginalized populations in violation of the Equal Protection Clause, because individuals with limited access to information, transportation, or flexible work schedules faced greater difficulty registering in time. The court ultimately upheld the cutoff, reasoning that the state's procedural deadlines were reasonable and served legitimate administrative interests, including election integrity and ballot verification.[45] Notably, as mentioned before, the 20-day cutoff was subsequently reduced to 10 days in the VOTES Act (2022), rectifying many of the concerns raised in *Chelsea*.

The *Chelsea* decision underscores a central feature of Massachusetts' voting landscape: even in a state with access-expanding policies, procedural rules, though neutral on paper, can yield unequal outcomes in practice. The case illustrates that passive disenfranchisement arises not from intentional exclusion but from the combination of voting policies with structural inequalities, highlighting the weaknesses of relying solely on formal legal equality.

Massachusetts exemplifies how the Equal Protection Clause guarantees formal equality, but lived equality remains dependent on socioeconomic realities unique to individual citizens. Courts must distinguish between burdens that are overly severe, targeted, or unjustified, which could constitute unconstitutional disenfranchisement, and more inherent or unavoidable obstacles, such as long lines or limited polling locations in densely populated areas, which may be tolerated if the state can justify them with administrative or procedural interests. This tension highlights the challenge of determining when structural inequalities cross the line from unfortunate but inevitable constraints to constitutional violations, illustrating the limits of formal constitutional protections in ensuring democratic participation.

TEXAS AND ACTIVE RESTRICTIVE POLICIES

Texas presents a contrasting approach to voter access, characterized by state-sponsored restrictions. The legal framework governing elections in Texas has increasingly emphasized procedural rigidity and eligibility constraints, most notably through Senate Bill 1 ("SB 1"), enacted in 2021.[46] SB 1 imposes strict voter identification requirements, limits the availability of drop boxes, restricts early voting hours, criminalizes certain forms of assistance to voters, such as the collection of ballots, and more.[47]

Texas also enforces strict voter ID laws[48] that require government-issued photo identification for in-person voting.[49] The policies limiting accepted forms of identification for voters in Texas are widely considered the strictest in the nation.[50] Although these measures are framed as preventative actions against fraud, empirical evidence indicates that instances of voter impersonation are extremely rare.[51] Most reported incidents of voter fraud are traceable to other sources, such as clerical mistakes or bad data matching.[52] In fact, a Texan citizen is more likely to get struck by lightning in their lifetime than impersonate another voter.[53] Given the extreme rarity of voter fraud, the severity of Texas's identification requirements raises concerns about the intensity of the restrictions relative to the burden on voter access.

These policies disproportionately affect racial minority, low-income, and disabled voters. For example, racial minorities and low-income voters, who are less likely to possess the necessary forms of identification, face greater obstacles under the Texas voter ID requirement, often because obtaining an ID can require documents like birth

certificates, proof of residence, or transportation to government offices: barriers that disproportionately impact those with limited financial resources, access to transportation, or flexible time off work.[54] In Texas, Black, Latino, and Asian voters consistently have their ballots rejected at far higher rates than White voters due to incorrect or missing IDs.[55] Existing factors rooted in systemic racism, such as a lack of resources in various languages and economic barriers, combined with strict voter ID restrictions, produce heavy disparities in voter access for racial minorities in Texas.[56] Similarly, restrictions on early voting and mail-in ballots increase the impacts of logistical challenges for workers with nontraditional or inflexible[57] schedules and for individuals with disabilities.[58]

Empirical evidence substantiates concerns about disproportionate barriers to voter participation in Texas. In the 2020 election, Texas reported a widening of the turnout gap between White and non-White voters, citing prominently low participation among minorities, with approximately 53.1% of Latino voters[59] and 59.1% of Black voters turning out compared to the 65.4% of White voters.[60] Other non-White racial groups followed similar patterns of lower turnout. [61] Geographic disparities also amplify the effect of restrictive policies, as rural and minority-majority counties often have fewer polling places and longer travel times, intensifying barriers to participation.[62]

The ongoing case *League of United Latin American Citizens v. Texas* (*LUPE v. Texas*) (2021) challenges SB 1 under the Voting Rights Act, the Americans with Disabilities Act, and the Equal Protection Clause, asserting that the law imposes discriminatory burdens on racial minority and disabled voters.[63] The plaintiffs argue that the combined effect of voter ID requirements, limits on early voting, and restrictions on ballot assistance amounts to active disenfranchisement, intentionally targeting groups with historically lower access, including voters with limited English proficiency, disabilities, less or no formal education, and community or faith-based groups.[64]

Evenwel v. Abbott (2016) provides additional context regarding the extent of state power in shaping electoral representation and voter equality. In the case, the Court addressed the question of whether states must use the total population or the voter-eligible population in drawing legislative districts. Plaintiffs argued that calculating the number of people in each district based on total population causes some districts to have far more voters than others, and that jurisdictions should instead be required to draw districts based on eligible voters. Although the Court upheld the use of total population based on the foreseeable negative impacts of drawing districts based on eligible voters on minority representation,[65] the decision underscores the broader principle that state policies can shape who holds political power and who can exercise the right to vote, highlighting that variations in state rules and practices directly affect voter access and equality across jurisdictions.

Together, *LUPE* and *Evenwel* illustrate the challenges faced by voters in states with actively restrictive policies. Texas exemplifies active disenfranchisement, where state action constrains access, creating a scenario in which the Equal Protection Clause is directly under strain. Unlike Massachusetts, where procedural burdens arise indirectly, Texas demonstrates how intentional legislative design can systematically undermine the exercise of the right to vote. The contrast between Massachusetts and Texas highlights the spectrum of barriers to voting: on one end, structural and procedural obstacles produce indirect, often unavoidable disparities; on the other, state-enforced restrictions can actively shape who can exercise their constitutional right to vote. This contrast provides the foundation for the following comparative analysis.

COMPARATIVE ASSESSMENT AND CONSTITUTIONAL LIMITS

It's worth noting the judiciary's central role in mediating the tension between formal legal equality and practical voter access. In Massachusetts, courts have generally upheld legitimate rules while simultaneously recognizing the importance of access-expanding reforms. The decision in *Chelsea Collaborative v. Galvin* (2018) illustrates this approach: although plaintiffs challenged the 20-day registration cutoff, the court found the deadline reasonable and not in violation of the Equal Protection Clause.[66] This reasoning aligns with the Anderson-Burdick balancing mentioned earlier, under which courts weigh the burden a law imposes on voters against the state's interests in regulating elections, highlighting the delicate balancing act between fairness and access.

Massachusetts courts have tended to balance administrative efficiency with ballot access, largely prioritizing procedural legitimacy over addressing the indirect effects of structural inequality. Courts in Massachusetts support reasonable election regulations, without expecting courts to remedy all structural inequalities.[67]

In Texas, judicial intervention has been more quarrelsome. Challenges to SB 1 and restrictive voter ID laws illustrate the difficulty of labeling unconstitutional disenfranchisement when state policies are framed as neutral safeguards against fraud.[68] Courts must navigate complex issues regarding intent, impact, and historical discrimination.

As demonstrated by Massachusetts and Texas, judicial interpretation significantly affects the practical realization of constitutional guarantees, with courts in different jurisdictions taking varying approaches to fulfilling equality.

A central tension in both states is the distinction between formal legal equality and lived equality. Formal equality refers to the uniform application of laws and policies, ensuring that all citizens are subject to the same rules. Lived equality, by contrast, is the actual ability of individuals to effectively exercise their rights, accounting for socioeconomic, logistical, and institutional factors.

In Massachusetts, legal reforms such as same-day registration and online voter platforms expand formal equality by ensuring that all eligible voters have the same legal opportunities to register and cast a ballot. However, these reforms do not fully achieve substantive equality because they do not eliminate underlying structural barriers that continue to make it more difficult for low-income voters, racial minorities, and individuals with disabilities to navigate the process. As a result, even with progressive policies in place, lived equality remains uneven across communities. By contrast, Texas illustrates how state law itself can actively limit both formal and lived equality, imposing barriers that directly constrain lived access.

The contrast between Massachusetts and Texas underscores the importance of distinguishing passive from active disenfranchisement. As discussed before, passive disenfranchisement occurs when structural factors create barriers to participation. These obstacles often arise without deliberate intent to discriminate and are tolerated by courts as part of the complexity of elections. Active discrimination, on the other hand, entails legislative or administrative measures designed to restrict voter participation. Texas exemplifies this phenomenon through SB 1, restrictive voter ID laws, and targeted reductions in ballot access.[69] Courts evaluating active disenfranchisement must consider both the discriminatory intent and the impact of state policies, weighing the burden imposed on voters against the intended effects.

This distinction is critical; passive barriers may fall within the scope of constitutionally tolerable inequality, even if they disproportionately affect marginalized groups, whereas active restrictions raise direct constitutional concerns and are more likely to violate the Equal Protection Clause.

The ultimate question is how to draw the boundary between constitutionally tolerable inequality and unconstitutional disenfranchisement. The Fourteenth Amendment provides a formal guarantee of equal protection; however, it does not obligate states to eliminate all disparities arising from social or economic conditions. Structural socioeconomic inequalities may generate uneven participation even under neutral laws. By failing to take into account the realities of structural inequalities, neutral procedures effectively reinforce injustice.[70] Yet, these disparities often fall outside the reach of judicial solutions. By contrast, policies that actively impose burdens on historically marginalized populations (like Texas's voter ID requirements or SB 1 restrictions) present a clearer constitutional problem. Under the Voting Rights Act, courts have increasingly considered both intent and effect in evaluating voting rights cases, emphasizing the principle that equality under the law cannot be achieved merely through neutral rules when their practical operation excludes certain voters,[71] raising concerns about the impact and future of policies like SB 1. All in all, comparing Massachusetts and Texas illustrates that the distinction between tolerable and unconstitutional inequality has real consequences for democratic participation. Drawing this line requires careful balancing that accounts for both structural conditions and state policy choices.

CONCLUSION

This article has examined the gap between the Fourteenth Amendment's formal guarantees and the lived realities of voter access in the United States.

Comparing Massachusetts and Texas shows how constitutional promises of equal protection can falter in practice: Massachusetts expands access but still produces unequal outcomes due to socioeconomic and procedural barriers, while Texas imposes state-enforced restrictions that more directly raise constitutional concern. These differences highlight the fact that formal equality does not ensure substantive equality. Courts must navigate this tension, weighing administrative interests, legislative intent, and real-world impact to determine when state policies amount to unconstitutional disenfranchisement.

Distinguishing between passive and active disenfranchisement clarifies the stakes. Passive forms expose the limits of judicial remedies and point to the need for broader structural reform, whereas active restrictions invite more direct judicial and legislative intervention. In the end, the comparison between Massachusetts and Texas shows that the boundary between permissible inequality and unconstitutional exclusion depends on the interplay of law, policy design, judicial interpretation, and social context.

Ultimately, the struggle to reconcile the promise of equal protection with the practical reality of exercising the right to vote will continue to define American democracy. Understanding the mechanisms of passive and active disenfranchisement provides critical guidance for scholars, policymakers, and courts seeking to ensure that constitutional guarantees are realized in practice, rather than remaining aspirational principles.

Addressing both passive and active disenfranchisement requires a dual strategy that combines structural reform with legal considerations. Courts should adopt a more responsive interpretation of the Equal Protection Clause and the Voting Rights Act, recognizing that systematic burdens on access (regardless of intent) can amount to unconstitutional exclusion when they consistently disadvantage marginalized populations. Legislatively, states should expand automatic[72] and same-day voter registration,[73] standardize polling site accessibility, and mandate equity checks to identify communities facing disproportionate barriers.[74] Federal oversight, perhaps through a modernized preclearance framework[75] inspired by Section 5 of the Voting Rights Act,[76] could ensure that state reforms do not reintroduce discriminatory effects under the guise of administrative efficiency. Beyond the legal sphere, civic education initiatives, equitable resource allocation, targeted voter education, and outreach to low-income and minority communities are essential to bridging the gap between formal rights and lived participation. Only by integrating these judicial, legislative, and social reforms can the United States move closer to fulfilling the Fourteenth Amendment's promise of equal participation in democracy.

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Trop, Roper, Brown, Terry

A Map of the Court's Selective Moral Vision

by Leah Munoz A28

ABSTRACT:

This paper examines the Supreme Court's selective and inconsistent recognition of human dignity across criminal justice jurisprudence, arguing that the Court's failures stem not from doctrinal gaps but from discretionary application of principles it already possesses. Drawing on *Trop v. Dulles*, *Brown v. Board of Education*, and *Terry v. Ohio*, this paper demonstrates that the Court has repeatedly articulated tools capable of protecting dignity, acknowledging structural harm, and integrating empirical evidence about human development. These tools, however, are invoked only in narrow, sympathetic contexts–juveniles, schoolchildren, and specific historical injustices–while being withheld from prisoners, stop-and-frisk targets, and capital defendants whose claims implicate the same constitutional principles. This paper highlights how doctrines such as "reasonable suspicion" in policing, "deliberate indifference" in prison medical care, and procedural barriers under the Prison Litigation Reform Act systematically allow human suffering to continue unredressed, even as the Court rhetorically affirms the foundational importance of dignity. By tracing the tension between doctrinal capacity and selective judicial will, this paper argues that the Supreme Court's jurisprudence functions as a moral paradox: it possesses the resources to protect humanity yet persistently administers a system that erases it. Ultimately, the Court's challenge is not the creation of new legal principles but the courage to apply the principles it has already recognized consistently and meaningfully.

The American criminal justice system operates through a fundamental paradox: it claims legitimacy by defending human dignity while systematically erasing the humanity of those it processes in practice. Although the Supreme Court declared in *Trop v. Dulles* that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man," the Court has simultaneously developed doctrines that make it exceedingly difficult to challenge practices that violate this principle.[1] Defendants become case numbers, moral questions dissolve into procedural technicalities, and the weight of human suffering is converted into administrative efficiency.

In such light, the Supreme Court's uneven willingness to acknowledge the full humanity of those before it reveals that these contradictions arise not from gaps in doctrine but from the Court's selective use of existing frameworks. Historically, the Court has articulated principles that, if applied consistently, would offer powerful protection for human dignity. *Trop v. Dulles* establishes the centrality of dignity in Eighth Amendment analysis; *Brown v. Board of Education* demonstrates the Court's capacity to recognize and remedy structural forms of subordination; and *Terry v. Ohio* reflects an awareness that police encounters inflict dignitary harms that the Constitution must take seriously. These commitments, however, are inconsistently applied in narrow, sympathetic contexts, while being withheld from prisoners, stop-and-frisk targets, and capital defendants whose claims are no less legitimate. Ultimately, the result is a doctrinal landscape marked by the Supreme Court's inconsistent application of existing frameworks that can ensure equal definition and recognition of human dignity before the law.

This paper proceeds in two central sections to trace how the Supreme Court selectively applies its

own principles for recognizing human dignity. Section A, "The Fourth Amendment: Seeing Dignity, Enabling Discrimination," examines *Terry v. Ohio* and *Whren v. United States* to show how the Court acknowledged dignitary harm in police stops while perpetuating doctrine to make patterns of racialized surveillance constitutionally invisible. Section B, "The Eighth Amendment: Acknowledging Humanity, Tolerating Cruelty," analyzes *Estelle v. Gamble, Hudson v. Palmer*, and the procedural barriers imposed by the Prison Litigation Reform Act to demonstrate how recognition of dignity exists in theory but is systematically denied in practice. Throughout, this paper juxtaposes these selective failures with cases in which the Court successfully integrates dignity, structural awareness, and empirical evidence to illustrate that the Court possesses the doctrinal tools to protect humanity but exercises them inconsistently, revealing a jurisprudence shaped by discretionary moral choice rather than doctrinal necessity.

A. THE FOURTH AMENDMENT: SEEING DIGNITY, ENABLING DISCRIMINATION

Terry v. Ohio marks the Supreme Court's acknowledgement that police stops cause dignitary harm, even as it embraced a doctrinal framework incapable of preventing that harm from being imposed repeatedly on particular communities.[2] Chief Justice Warren's opinion contained remarkable candor about police stops' psychological and social effects, acknowledging that they inflict "great indignity," arouse "strong resentment," and intrude upon "the sanctity of the person" in ways that cannot be dismissed as merely momentary inconvenience.[3] Having recognized this harm with unusual explicitness, the Court created a doctrinal framework for permissible police stops: reasonable suspicion based on articulable facts assessed through individualized inquiry.[4] Such doctrine fails to perceive when dignitary intrusions become discriminatory patterns. When "reasonable suspicion" becomes post-hoc rationalization for racial profiling or constant surveillance transforms particular neighborhoods into zones of perpetual monitoring, Fourth Amendment protections prove hollow despite formal doctrinal acknowledgment.

The "reasonable suspicion" standard appeared neutral in formulation, as officers need articulable facts justifying their actions.[5] This apparent neutrality in doctrinal structure, however, produces systematic discrimination in operational application. Between 2004 and 2012, New York City police conducted 4.4 million stops under stop-and-frisk policies authorized by *Terry*.[6] Specifically, Black and Latino residents were stopped at vastly disproportionate rates, comprising over 80% of all stops despite representing only about half the city's population.[7] However, contraband and weapons were found more frequently on white residents stopped during this period, suggesting that the reasonable suspicion justifying stops correlated with race rather than with actual criminal activity.

What makes *Terry's* failure constitutional rather than merely operational or remediable is that the doctrinal framework prevents lower courts from recognizing these patterns as Fourth Amendment violations. Reasonable suspicion analysis examines each stop individually through case-by-case adjudication. The question's individualized structure precludes asking whether stop-and-frisk policies systematically target communities of color, whether "reasonable suspicion" functions as a post-hoc rationalization for racial profiling that officers would deny consciously engaging in, or whether the cumulative effect of constant surveillance inflicts precisely the dignitary harm Chief Justice Warren acknowledged stops inherently involve. By individualizing constitutional analysis, *Terry* makes structural discrimination legally invisible, not because courts cannot see racial patterns in enforcement data, but because the Fourth Amendment provides no framework for treating such patterns as constitutionally relevant to reasonableness analysis.

Whren v. The United States similarly makes racial profiling constitutionally unaddressable by preserving the framework that precludes discriminatory intent from Fourth Amendment analysis.[8] The case arose when police officers patrolling a "high drug area" used minor traffic violations as the basis to stop a vehicle and then proceeded to investigate its occupants for suspected drug crimes.[9] After discovering crack cocaine during the stop, the officers arrested the occupants, prompting a constitutional challenge that centered on whether

such pretextual policing could be reconciled with the Fourth Amendment.[10] The Supreme Court held unanimously that subjective intent cannot invalidate otherwise lawful stops, that Fourth Amendment analysis must focus on objective justification rather than subjective motivation.[11] Justice Scalia reasoned that requiring courts to assess officers' actual motivations would create unworkable uncertainty in Fourth Amendment doctrine, that constitutional law demands clear ex ante rules protecting both officers and citizens.[12]

The logic appears unassailable in its commitment to doctrinal clarity and administrability while concurrently failing to protect against the precise practices the Fourth Amendment is intended to prevent. Because minor traffic violations are ubiquitous in American driving, officers can single out any vehicle until observing some infraction, providing objective probable cause for a stop.[13] When officers possess this discretion, the Fourth Amendment's "objective" standard becomes constitutional cover for racial profiling. Empirical studies confirm this dynamic. Despite *Whren's* objective standard that supposedly prevents discriminatory enforcement, Black drivers remain disproportionately stopped for traffic violations across jurisdictions, with disparities greatest during daylight hours when a drivers' race is visible to officers and smallest at night when race is difficult to determine.[14] "Driving while Black" transforms ordinary travel into constitutional vulnerability, yet *Whren* prevents courts from relying on police intent to determine why particular vehicles attract police attention.[15]

Recognizing these racially disparate outcomes makes clear that the very dignitary harms *Terry* acknowledged cannot be assessed meaningfully unless courts treat such systemic patterns as constitutionally relevant. If stops inflict "great indignity" as *Terry* explicitly acknowledges, and if Fourth Amendment reasonableness exists to protect dignitary interests rather than merely property rights, then systematic patterns demonstrating that particular communities bear disproportionate dignitary burdens must become constitutionally relevant to reasonableness analysis rather than remaining beyond constitutional cognizance.[16] Statistical evidence demonstrating stark racial disparities in stop patterns would shift constitutional burdens in light of a responsibility to recognize such inequalities. States must prove through empirical evidence rather than mere assertion that targeting particular communities serves legitimate law enforcement purposes, that observed disparities reflect differential rates of actual criminal activity rather than differential rates of official surveillance, and that surveillance practices serve penological necessity through means that minimize rather than maximize disparate impact on protected communities.

B. THE EIGHTH AMENDMENT: ACKNOWLEDGING HUMANITY, TOLERATING CRUELTY

Estelle v. Gamble held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain'... proscribed by the Eighth Amendment," establishing that constitutional protections extend beyond the formal conditions of confinement and also include any additional punishment through the denial of basic human needs.[17] The Court acknowledged that incarcerated persons depend entirely on prison authorities for medical care, creating constitutional obligations the state cannot evade through administrative convenience or budgetary constraints. Thus, inadequate medical care can constitute punishment violating the Eighth Amendment even when such inadequacy results from systemic failures rather than intentional cruelty.[18] The holding appeared to vindicate dignity as a constitutional principle by recognizing that the Eighth Amendment protects not merely against torture and physical brutality but against conditions that deny prisoners the basic requirements of human existence.[19]

The "deliberate indifference" standard's application over four decades, nevertheless, reveals how doctrine systematically betrays the principles it articulates. Courts require proof of subjective awareness and intentional disregard, effectively immunizing systemic neglect that operates through bureaucratic indifference rather than through individual malice that can be more readily proven.[20] Prison officials claim they followed established protocols, submitted proper medical request paperwork, and made reasonable medical judgments given resource constraints, and courts defer to these

assertions even when prisoners die from eminently treatable conditions after complaints of serious symptoms went unaddressed for days or weeks.[21] Between 2001 and 2019, over 5,000 prisoners died in state custody from inadequate medical care, with many deaths occurring after repeated requests for treatment were ignored, minimized as malingering, or responded to with grossly inadequate interventions that any competent medical professional would recognize as insufficient.[22] The courts acknowledge these deaths as tragic outcomes reflecting regrettable resource constraints, yet rarely find constitutional violations because the "deliberate indifference" standard focuses constitutional analysis on individual officials' subjective state of mind rather than on systemic failures.[23]

Hudson v. Palmer extended the pattern of acknowledging prisoners' dignity while developing a doctrine that tolerates its systematic denial by holding that prisoners possess no Fourth Amendment privacy rights in their cells, that security concerns justify unlimited searches without meaningful judicial oversight.[24] Chief Justice Burger reasoned that institutional security imperatives override privacy interests that the Fourth Amendment doctrine protects in other contexts: prisons must maintain order to protect both prisoners and staff, contraband threatens institutional stability in ways that justify intrusive search procedures, and constitutional limits on search authority would compromise administrators' ability to manage dangerous populations confined in close quarters.[25] The decision reveals disciplinary rationality's constitutional operation with unusual clarity. Dignity does not disappear entirely from constitutional analysis, but dignity must yield whenever it conflicts with administrative imperatives that prison officials invoke to justify practices that would be constitutionally intolerable in other contexts.

The Prison Litigation Reform Act of 1996 institutionalized *Hudson's* logic of deference to institutional authority through procedural barriers that make it extraordinarily difficult for incarcerated persons to vindicate whatever constitutional rights doctrine formally acknowledges.[26] The statute requires exhaustion of administrative remedies even when such remedies are demonstrably futile or designed to frustrate rather than resolve legitimate grievances; imposes filing fees on indigent plaintiffs that most prisoners cannot afford given institutional wages of pennies per hour; caps attorney's fees at levels that make prisoner representation economically unviable for most attorneys; and limits injunctive relief in ways that prevent courts from ordering systemic reforms even when constitutional violations are proven.[27] Between 1995 and 2012, the filing rate of prisoner civil-rights suits fell by nearly 60% despite increasing incarceration, and the share of cases in which prisoner-plaintiffs obtained relief declined significantly, indicating that the Prison Litigation Reform Act has heavily constrained meaningful judicial oversight of prison conditions.[28] In this way, when constitutional protections exist only on paper because procedural barriers prevent their vindication, those protections become constitutional fictions that maintain the appearance of rights without providing their substance.

CONCLUSION

The Supreme Court has already declared that dignity forms the Eighth Amendment's foundation, that people possess capacity for transformation, that patterns reveal structural injustices individual cases obscure, that scientific evidence matters to constitutional meaning. These are not controversial propositions requiring theoretical innovation. They are the Court's own words. Yet, contemporary doctrine operates as though these principles exist in hermetically sealed compartments, applicable to sympathetic juveniles but not to prisoners dying from medical neglect, relevant to school segregation but not to racialized surveillance, meaningful when considering capital punishment but irrelevant when examining the daily degradations that constitute punishment's lived reality. This fragmentation is not intellectually defensible. It is moral evasion dressed in doctrinal sophistication, a jurisprudence that speaks eloquently about human dignity while systematically refusing to perceive the humans whose dignity it claims to protect.

What makes this failure particularly urgent is that history is rendering it increasingly indefensible on its own terms. Mass incarceration has not reduced crime to levels justifying its social costs. Aggressive surveillance has not made targeted com-

munities safer–indeed, as this essay has discussed, evidence suggests it has fractured the police-community trust that effective law enforcement requires. Sentences measured in decades have not demonstrated superiority over shorter terms in preventing recidivism. The carceral state's animating assumptions–that safety requires maximum control, that punishment must foreclose transformation, that constitutional rights impede rather than facilitate justice–are collapsing under empirical scrutiny.

Ultimately, courts can reconstruct doctrine to honor the dignity they proclaim as foundational, making constitutional protections meaningful rather than merely formal, or they can maintain frameworks that everyone knows permit systematic cruelty while pretending not to see it. The first path requires judicial courage; the second requires only continued complicity in a constitutional order that has lost the capacity to recognize the humanity it was designed to protect. This is a failure not of constitutional text but of constitutional imagination, not of legal resources but of moral will. The Court possesses every tool it needs to protect human dignity; what remains is the will to use them. The challenge, therefore, is not doctrinal innovation but moral consistency: applying to all people the principles the Court already applies to some. Selective recognition of dignity is not a compromise between principle and pragmatism. Rather, it is the constitutional consecration of hierarchy, a jurisprudence that determines whose suffering matters by determining whose humanity it will see. Ultimately, until the Court applies its principles universally, the Eighth Amendment's promise of dignity remains what it has always been: a constitutional commitment the system honors in its exceptions and betrays in its rules.

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