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# ABOUT THE JOURNAL

The Claremont Journal of Law and Public Policy is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences around the globe. Together, we foster a community of students and professionals who are passionately engaged in learning and debating about the critical issues of our time.

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# BEHIND THE COVER



A portion of Charles DeWolf Brownell’s *Sky – Northern Cuba*

*Credit: The Metropolitan Museum of Art*

# LETTER FROM THE EDITORS

Dear Readers,

We are proud to present the latest issue of the Claremont Journal of Law and Public Policy, a publication that reflects not only rigorous scholarship but also the dedication of the community behind it. In this issue, we recognize the exceptional contributions of Utku Özgür (PO '29), recipient of the Byron Cohen Prize for excellence in research, writing, and analysis, and Alec Kong (PO '29), recipient of the Isaac Cui Prize for excellence in editing and editorial leadership. This edition continues CJLPP's tradition of elevating student voices that engage critically with the most pressing global issues in law and public policy.

This edition features seven pieces that collectively examine how legal frameworks, both past and present, shape power, governance, and access across different contexts. First, Utku Özgür examines sovereignty theory and interrogates its contradictions embedded in international law. Özgür reveals how the international system continues to privilege territorial stability, exposing sovereignty as an uneven and often strategically granted legal construct. Continuing this global analysis, Priscilla Matthews (PO '28) examines how the progressive constitutions of Bolivia and Ecuador fall short in practice. Matthews argues that states' economic development goals often outweigh concerns for Indigenous rights and environmental protections, and calls for reforms that can bridge the gap between paper and practice.

Elena Li (PO '28) critically examines predictive policing, arguing that it presents a constitutional "category error" by collapsing individualized suspicion into algorithmic probability. By doing so, Li demonstrates how these technologies undermine Fourth Amendment protections and recreate existing biases within the law enforcement system. Tinarie Dacres (PO '28) explores the promise of technological progress, focusing on AI literacy in education. He argues that without reform, current policy approaches risk reproducing longstanding racial and socioeconomic inequalities, and proposes a solution that treats access to AI as a civil rights issue rather than a purely technical concern. Max Goodman (PO '28) expands this conversation by examining the evolution of federal education policy from No Child Left Behind to the Every Student Succeeds Act. Goodman analyzes how inconsistent implementation has often exacerbated regional inequities, and reveals that a persistent trade-off between federal rigidity and state discretion leaves the goal of educational equity largely unfulfilled.

Marcela Strombeck (PZ '28) investigates the regulatory challenges posed by "ghost guns," arguing that existing judicial tests struggle to address the rapid advancement of 3D-printed firearms. She proposes tightening legal restrictions through mandatory serialization and stricter manufacturing regulations to ensure public safety. Finally, Sarah Ziff (PO '27) analyzes the Jones Act of 1920 and how it restricts modern offshore wind energy development. Ziff's analysis reveals how century-old national security statutes can inadvertently interfere with America's transition to clean energy.

We would like to extend our sincere gratitude to our editors and writers, whose dedication and care made this issue possible. Finally, we thank you, our readers, for engaging with us and making CJLPP part of your intellectual journey!

Happy reading,

Dannhi Nguyen  Graham Robbins

Co-Editors-in-Chief

# Sovereignty Theory and UN Recognition of Newly Decolonized States

## Introduction

In 1960, the United Nations General Assembly adopted Resolution 1514, declaring that "all peoples have the right to self-determination" and that "subjection of peoples to alien subjugation, domination and exploitation" denied their fundamental human rights.[1] Yet the institutional practice that followed told a different story. The same organization that proclaimed universal emancipation in 1960 also enforced a territorial international system built on colonial boundaries. The legal doctrine of *uti possidetis juris* ensured that independence meant continuity rather than a much-needed shake-up of the *status quo*.[2] *Uti possidetis juris* is a "modern principle according to which a change in sovereignty over a territory, especially due to independence following decolonization, does not *ipso facto* alter that territory's administrative boundaries as established by colonial authorities out of respect for succession to legal title by the new sovereign."[3]

While the United Nations framed its mission as decolonization, it simultaneously promoted and superimposed the borders created by European colonialism on newly independent peoples. To understand this discrepancy in application, one must examine the evolution of sovereignty theory itself, from the empirical foundations of modern statehood to its juridical formalization in the twentieth century. The Montevideo Convention famously established four criteria for statehood: a permanent population, a defined territory, a functioning government, and the capacity to enter into relations with other states.[4]

As Kalevi Holsti observed, the post-1945 international order replaced the pre-modern idea of sovereignty as a marker of actual power with a symbol of formal status, such that states were increasingly created through international recognition rather than through internal and naturally occurring consolidation of authority.[5] This shift allowed weak states to persist despite minimal state capacity. Robert Jackson and Carl Rosberg would later conceptualize this phenomenon as "juridical statehood," a form of sovereignty sustained not by domestic legitimacy but by external endorsement by international actors like the UN.[6]

My central claim in this article builds on that transformation, redefining sovereignty as a condition conferred through recognition rather than an expression of effective control in most post-colonial areas. While sovereignty theory and *uti possidetis juris* appeared to provide a framework of legal stability, their implementation through the UN system produced a politics of selective recognition.[7] The process was never symmetrical; entities with comparable empirical realities received starkly different treatment. The right to independence became contingent on conformity to inherited boundaries, and legitimacy derived less from self-determination than from international acceptance. Recognition, rather than actual capacity, became the threshold of statehood.

The remainder of my article develops these arguments in four sections. Section I traces the theoretical and historical foundations of sovereignty and recognition, from the Montevideo Convention to the codification of *uti possidetis juris* and the UN's narrowing interpretation of self-determination. Section II examines the African context, focusing on how the 1964 Organization of African Unity resolutions entrenched colonial boundaries and produced a continent-wide lack of successful secessionist cases. The conclusion reflects on post-1945 sovereignty as an unequal form of freedom and an enduring system of order that privileges legality over justice, with the Palestinian case revealing the enduring human costs of this legal-political hierarchy.

## I. Theoretical and Historical Foundations of Recognition

### *A. Sovereignty Theory and the Montevideo Convention*

Modern sovereignty theory emerged alongside the codification of international law in the early twentieth century. The Montevideo Convention on the Rights and Duties of States (1933) articulated four defining criteria of statehood: a permanent population, a defined territory, a functioning government, and the capacity to enter into relations with other states.[8] These criteria reflected the prevailing belief that sovereignty could be assessed objectively through observable facts of governance and practical control.

Yet even this framework contained enduring ambiguities. By emphasizing the "capacity to enter into relations with other states," the Montevideo Convention embedded international recognition within the very definition of sovereignty.[9] Thus, the act of acknowledgment by others became a constitutive, not merely declaratory, component of legal personality. A state existed not only because it governed but because others accepted its claim to do so. By adding a sociological dimension to this legal concept, Joel Migdal's *Strong Societies and Weak States* shows that many post-colonial states "couldn't penetrate society, regulate social relationships, or extract resources," yet they endured because international recognition substituted for domestic

1 Declaration on the Granting of Indep. to Colonial Countries and Peoples, Dec. 14, 1960.
2 Giuseppe Nesi, Oxford Pub. Int'l L.: Uti Possidetis Doctrine Oxford Pub. Int'l L. (2018).
3 Aaron X. Fellmeth & Maurice Horwitz, Uti possidetis (iuris) - Oxford Reference Guide to Latin in Int'l L. (2011).
4 Montevideo Convention on the Rts. and Duties of St., Dec. 26, 1933.
5 Kalevi J. Holsti, The St., War, and the St. of War, 61-81 (2010).
6 Robert H. Jackson & Carl G. Rosberg, *Why Afr.'s Weak St. Persist: The Empirical and the Jurid. in St.*, 35 World Pol. 1 (1982).
7 Freddy D. Mnyongani, *Between a Rock and a Hard Place: The Rt. to Self-Determination versus Uti Possidetis in Afr.*, 41 The Comp. and Int'l L. J. of S. Afr. 463-479 (2008).
8 Montevideo Convention, *supra* note 4.
9 *Id.*

legitimacy.[10]

### *B. The Rise and Codification of Uti Possidetis Juris*

If the Montevideo Convention set the rules of sovereignty, *uti possidetis juris* determines how those rules would be applied. Originally developed in nineteenth-century Latin America to prevent boundary disputes after independence from the Iberian powers, the principle required that new states respect the administrative borders of their colonial predecessors.[11] As Steven Ratner explains, "the juxtaposition of *uti possidetis* and self-determination began in Latin America, where the Creoles who wrested independence from their Spanish brethren beginning in the early nineteenth century seized upon the idea as a way of setting boundaries of the new countries."[12] To the Creole leadership, *uti possidetis* served "to ensure that no land in South America remained *terra nullius* upon independence, open to possible claim by Spain or other non-American powers, and to prevent conflicts among the new states of the former empire by adopting a set of extant boundaries."[13] Thus, it functioned as a legal device to preserve stability by transforming colonial demarcations into international boundaries and embedded the colonial map within the modern framework of sovereignty.

The International Court of Justice formalized this doctrine in its 1986 judgment in *Frontier Dispute (Burkina Faso v. Republic of Mali)*. The Court reasoned *uti possidetis juris* to be a general principle inherently linked to the process of achieving independence wherever it occurs, and that its main function is to ensure respect for the territorial boundaries in place at the moment independence is attained.[14] By elevating a Latin American convention into a universal rule, the Court transformed *uti possidetis* into a cornerstone of post-colonial international law. The decision effectively turned the colonial map into the legal foundation of statehood and extended the territorial logic of colonialism into the era of independence. As inherited colonial boundaries were treated as legally binding, international law sharply narrowed the conditions under which new claims to sovereignty could be recognized, privileging states that fit inherited territorial templates while delegitimizing alternative political systems that lacked colonial administrative pedigree.

Arman Sarvarian argues that *uti possidetis juris* didn't simply evolve into a universally binding rule of customary international law because its presumed obligatory application lacks precedential support and conflicts with the principle of consent, and that instead the law of state succession remains neutral on the delimitation of successor states' frontiers, making *uti possidetis* only one of several methods available when new states determine boundaries by mutual agreement.[15]

Even this limited consensus carried significant consequences for the post-colonial order. In theory, *uti possidetis juris* promoted peace by discouraging interstate war and removing incentives for revisionist claims.[16] In practice, however, it internalized conflict within states by locking in arbitrary boundaries drawn without regard for ethnic, religious, linguistic, or cultural realities and institutionalizing a map that ignored the lived geography of newly independent societies.[17] The result was a fragile stability. International peace was maintained through fixed borders, even as domestic stability was steadily undermined by the very boundaries meant to secure it.[18]

Nevertheless, one must also acknowledge that the leaders of the newly independent African states had few realistic alternatives. Given the fragility of post-colonial political order and the high risk of territorial fragmentation, adherence to inherited colonial boundaries may have represented the safest and most viable option available to them. However, this structural constraint shouldn't be mistaken for neutrality or justice. While *uti possidetis* offered short-term stability, it simultaneously entrenched an unequal legal order that prioritized international recognition over popular legitimacy and long-term political inclusion.

### *C. The United Nations and the Transformation of Self-Determination*

The UN's embrace of *uti possidetis juris* coincided with its redefinition of self-determination. Resolution 1514 (1960) proclaimed the right of all peoples to independence, but Resolution 2625 (1970) clarified that self-determination shouldn't be interpreted as authorizing the break-up of existing states.[19] Hence, the General Assembly drew a line between decolonization and secession. Once a colony became independent within its inherited borders, its internal groups that had no common features with the ruling groups could no longer claim the same right to self-determination.[20]

Having witnessed the devastation of two world wars, the post-war international order prioritized the sanctity of borders over the fluid nature of ethno-cultural identities in diverse post-colonial states. Pierre Englebert and Rebecca Hummel capture the consequences of this logic most sharply by arguing that Africa's post-colonial sovereignty was sustained less by internal legitimacy than by external recognition.[21] The persistence of African states, they write, reflects "the benefits to African regional elites (and those who depend on them) of weak sovereign states," where international legitimacy substitutes for domestic authority.[22] Therefore, independence didn't generate empirical strength; it redistributed juridical privilege. Recognition by the international community provided access to economic aid packages and immunity from external interference and gave the political elites

10 Joel S. Migdal, Strong Soc'y and Weak St.: St.-Soc'y Rel. and St. Capabilities in the Third World (2020).
11 Nesi, *supra* note 2.
12 Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New St.*, 90 Am. J. Int'l L. 590-624 (1996).
13 *Id.*
14 Frontier Disp. (Burkina Faso v. Republic of Mali), Judgment, Dec. 22, 1986 P.C.I.J.
15 Arman Sarvarian, *"Uti Possidetis Iuris" in the Twenty-First Century: Consensual or Customary?*, 22 Int'l J. on Minority and Group Rts. 511-32 (2015).
16 Anne Peters, *The Principle of Uti Possidetis Juris: How Relevant is it for Issues of Secession?*, Self-Determination and Secession in Int'l L. 95-137 (2014).
17 Steve Allen & Joshua Castellino, *Reinforcing Territorial Regimes: Uti Possidetis and the Rt. to Self-Determination in Mod. Int'l L.*, Amicus Curiae 20-25 (2003).
18 *Id.*
19 Declaration on Principles of Int'l L. concerning Friendly Rel. and Cooperation among St. in accordance with the Charter of the United Nations, Oct. 24, 1970.
20 Annie Stilz, *On Colonialism and Self-Determination*, 32 Soc. Phil. and Pol'y 1-24 (2015).
21 Pierre Englebert & Rebecca Hummel, *Let's Stick Together: Understanding Afr.'s Secessionist Deficit*, 104 Afr. Aff. 399-427 (2005).
22 *Id.*

strong incentives to preserve inherited colonial borders.[23]

This phenomenon is called the "weak sovereignty equilibrium," a condition in which African rulers uphold each other's territorial integrity because their own power depends on the maintenance of externally validated sovereignty.[24] This ensuing equilibrium produced what they call a "secessionist deficit."[25] Despite deep ethnic and regional cleavages, few African states have fragmented since independence. The relative absence of secession, they argue, isn't evidence of national unity and homogeneity but of a political economy in which sovereignty itself becomes a tradable resource that elites can convert into juridical legitimacy.[26]

### *D. Sovereignty in the Post-Colonial Order as Status Without Power*

The UN's recognition system transformed sovereignty into a performative status detached from actual capacity. Robert Jackson and Carl Rosberg's distinction between empirical and juridical statehood clarifies this change. They show that some African states "manage to persist when important empirical conditions of statehood are absent," which is why analysis must give "sufficient attention to the juridical properties of statehood."[27] In practice, post-colonial jurisdictions were "endowed with legitimacy" as inherited units and protected through the Organization of African Unity (OAU) principles of "sovereign equality of member states; non-interference; respect for sovereignty; peaceful settlement of disputes; and the illegitimacy of subversion."[28]

Holsti situates this recognition-centered model of statehood within the post-1945 international order and observes that in the wake of decolonization little attention was paid to the internal political character of new states and that the United Nations abandoned the minority-protection regime developed in inter-war Europe. The principle of self-determination became equated with decolonization itself, "decolonization was the act of self-determination," which meant that post-colonial political systems were largely insulated from international evaluation.[29] In this context, the UN routinely affirmed the legitimacy of new states without seriously assessing whether they satisfied the traditional criteria of statehood.[30] By recognizing every decolonized entity as sovereign, the international community replaced functional criteria of governance with a purely formal one. Hence, legal equality among states masked profound inequalities in administrative capacity, economic strength, and internal legitimacy, and produced an order in which recognition, not actual performance, defined membership in the global community.

International recognition didn't simply legitimize weak states; it also financed their persistence. Englebert and Hummel note, "international sovereignty entitles regimes to official development assistance," a flow of external rent that "fuels their networks of patronage and funds the transformation of the state itself into a resource."[31] Because internationally legitimate governments are much more likely to attract foreign operators, foreign aid and investment rewarded sovereignty as a matter of status rather than of capacity. The problem would go on to intensify in resource-dependent economies, where "the consequent premium on sovereignty" increases the value of controlling the state apparatus itself.[32] Englebert and Hummel show that sovereignty also functions as a protective legal shield. In the Democratic Republic of the Congo, an "elite network" extracted billions from the mining sector under the cover of state authority, illustrating how "sovereignty is a legal artifice" that shields predation behind the façade of international legitimacy.[33]

Migdal's "strong societies, weak states" framework appears in Englebert's own phrasing: "sovereignty shields political elites from the penalties associated with the 'weak state-strong society' dichotomy," allowing failed institutions to persist long after they have lost effectiveness.[34] In this context, sovereignty functions as a barrier that sustains authority without actual capacity. Therefore, the classical sequence of statehood is inverted upside down since recognition now comes before legitimacy.[35] Holsti's account helps clarify this outcome, showing how formal equality at the point of entry replaces meaningful scrutiny of state effectiveness.[36]

This theoretical background sets the stage for the next section's analysis of Africa's sovereignty settlement, in which *uti possidetis juris* provided the legal architecture for a continent-wide equilibrium of weak but enduring states.

## II. The African Settlement: Uti Possidetis Juris and the Secessionist Deficit

### *A. The 1964 OAU Resolution and the Logic of Stability*

The most significant institutional expression of *uti possidetis juris* in Africa came through the OAU's 1964 Cairo Resolution on Border Disputes. Adopted less than a decade after the first wave of independence, the resolution declared that "all Member States pledge themselves to respect the borders existing on their achievement of national independence."[37] The OAU's decision effectively enshrined colonial borders as the foundation of African statehood.

The newly independent states faced immediate and existential threats including irredentism, ethnic conflict, and territorial fragmentation.[38] "For their part, African political elites, largely trained in Western political theory, were prepared to accept existing colonial boundaries on the attainment of national independence as an acceptable manner in which to maintain order but also to quell separatist threats arrayed against their newly forged states."[39] By freezing the map at the moment of independence, they sought to prevent external aggression and internal secession.

In practice, however, the OAU resolution institutionalized Africa's "sovereignty equilibrium."[40] It ensured that every state, regardless of its administrative capacity or internal legiti-

23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*
27 Jackson, *supra* note 6.
28 *Id.*
29 Holsti, *supra* note 5, at 61-81.
30 *Id.*
31 Englebert, *supra* note 21, at 399-427.
32 *Id.*
33 *Id.*
34 *Id.*
35 Amy E. Eckert, *The Constr. of St. in Int'l Pol.*, Univ. of Denver Int'l Stud. Ass'n (1999).
36 Holsti, *supra* note 5, at 61-81.
37 Org. of Afr. Unity, Resol. AHG/Res. 16 (I), July 21, 1964.
38 Enver Hasani, Uti Possidetis Juris: From Rome to Kosovo, 27 The Fletcher F. of World Aff. 85-97.
39 Allen, *supra* note 17, at 20-25.
40 Englebert, *supra* note 21, at 399-427.

macy, enjoyed the same juridical protection. Recognition became an insurance policy for weak rulers.[41] The cost of stability was the entrenchment of arbitrary frontiers and the silencing of legitimate self-determination claims by groups that didn't belong to the dominant political coalition in the newly independent states.[42] Their grievances, whether rooted in cultural distinctiveness or unequal access to state resources, were presented as threats to territorial integrity rather than as expressions of political agency.[43] Self-determination, once framed as a collective right of colonized peoples, narrowed into a doctrine that protected existing states rather than the diverse populations contained within them.

Jeffrey Herbst offers a structural explanation for the weakness of post-colonial states. He argues that Africa's sparse population and vast geography discouraged the emergence of centralized authority long before European conquest.[44] As James Robinson summarizes, "unlike in Europe, land wasn't and isn't scarce in Africa. Rather, labor was scarce," so precolonial states "didn't fight over land, but rather people."[45] Without the constant threat of war over territory, rulers lacked the incentive to develop effective bureaucracies or growth-inducing taxation systems.[46] The European partition of Africa, rather than correcting this, merely "layered artificial boundaries upon pre-existing spatial fragmentation."[47]

When independence arrived, these borders were internationalized, and the United Nations "enforced the colonial boundaries that had largely determined the form that the new nations took."[48] The outcome was a system of states whose sovereignty depended not on internal consolidation but on external validation, what Jackson and Rosberg would later call "quasi-states," sustained by recognition rather than effective control.[49] It reduced the risk of interstate war while entrenching a continental order defined more by juridical existence than by political or institutional strength. The paradox was that fragile states endured precisely because their weakness was protected by customary international law.[50]

### *B. The Continent's Secessionist Deficit*

Africa's "secessionist deficit" is one of the defining mysteries of its post-colonial political order. Despite high levels of instability and deep ethnic diversity, the continent has experienced remarkably few instances of successful state fragmentation. Between 1960 and 2001, only ten of sub-Saharan Africa's forty-eight states witnessed a secessionist conflict, and only Eritrea's separation from Ethiopia resulted in a lasting new state.[51] Englebert and Hummel observe that "most of these have been short-lived, quite minor in scope, and unsuccessful," even if "thirty African states have provided the stage for at least one non-secessionist domestic conflict."[52]

Compared to other regions, the difference is extraordinary: "since 1960, forty-four percent of domestic conflict years in the Middle East and North Africa, forty-seven percent of those in Asia, and eighty-four percent of those in Europe have had separatist content, as against twenty-seven percent in sub-Saharan Africa."[53] Africa's wars have been overwhelmingly internal but rarely territorial. The continent's abnormally low incidence of successful secession stands in sharp contrast to what one might expect given its multi-ethnic configuration.[54]

Table 1. The Likelihood of Secession, 1960-2001.[55]

| *Region* | *Probability of secessionist conflict* | *Probability that a conflict is secessionist* |
|---|---|---|
| Asia | 0.16 | 0.47 |
| Europe | 0.06 | 0.84 |
| Latin America & Caribbean | 0.00 | 0.00 |
| North Africa & Middle East | 0.08 | 0.44 |
| Sub-Saharan Africa | 0.06 | 0.29 |

These statistical findings matter because they reveal a structural contradiction at the heart of post-colonial sovereignty. A negative Africa coefficient means that, even after controlling for variables that typically increase the likelihood of secession, such as population size, cultural heterogeneity, economic underdevelopment, and political instability, African states still experience far fewer secessionist conflicts than the global model predicts.[56] In other words, Africa's political environment should, by all conventional metrics, be fertile ground for territorial fragmentation, yet secession remains unusually rare. This gap between predicted and observed outcomes directly supports my central claim that juridical sovereignty and international recognition reshape political incentives more powerfully than the internal conditions of states themselves.[57] If the Montevideo criteria or domestic legitimacy were truly determinative, Africa would exhibit far higher rates of fragmentation. Instead, the data shows that the international system suppresses the expected political consequences of weak governance and deep diversity. Hence, the negative coefficient quantifies the constraining effect of the recognition regime, demonstrating empirically that territorial continuity is preserved by systemic incentives rather than by domestic cohesion.[58]

Englebert and Hummel emphasize that this anomaly can't be attributed to cultural cohesion or the success of national integration. "There rarely are clear cultural lines of demarcation along which African countries could be partitioned," they note, "but there usually are no clear cultural lines of demarcation between African states either, making this argument merely a

41 *Id.*
42 *Id.*
43 Hasani, *supra* note 38, at 85-97.
44 Jeffrey I. Herbst, St. and Power in Afr.: Comp. Lessons in Auth. and Control (2014).
45 James A. Robinson, *St. and Power in Afr. by Jeffrey I. Herbst: A Rev. Essay*, 40 J. of Econ. Literature 510-519 (2002).
46 *Id.*
47 *Id.*
48 *Id.*
49 Jackson, *supra* note 6.
50 Allen, *supra* note 17, at 20-25.
51 Englebert, *supra* note 21, at 399-427.
52 *Id.*
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.*

matter of inertia."[59] Nor does ethnic uniformity offer an explanation. "Neither Eritrea nor Somaliland is ethnically or culturally more uniform than Ethiopia or Somalia," and secessionist efforts on the continent tend to be "fewer but also more lukewarm and shorter-lived than elsewhere."[60]

These findings emphasize that Africa's territorial durability stems from structural conditions rather than cohesion. Low administrative capacity and limited state penetration make both governance and secession costly, while the international system continues to reward juridical continuity over meaningful transformative political change. This general weakness interacts with the "weak sovereignty equilibrium" described earlier, in which international recognition carries high material value.[61] The result is a self-reinforcing order in which both rulers and challengers, whom Charles Tilly and Mancur Olson would describe as self-seeking and rational political entrepreneurs, view separation as an irrational choice.[62] The costs of breaking away are too high, and the rewards of recognized sovereignty are too concentrated at the center. Africa's borders don't persist because states possess robust governing capacity, but rather because a calculated political and economic calculus upholds them. Therefore, Africa's secessionist deficit isn't evidence of cohesion but of constraint, since peace is maintained through external endorsement rather than internal legitimacy.

Although Englebert and Hummel compellingly demonstrate that external recognition functions as a form of political capital, the deeper implication of their argument is that the international system actively reshapes the incentives of domestic elites. The "weak sovereignty equilibrium" doesn't simply preserve inherited borders; it reorganizes political behavior by making territorial integrity more valuable than institutional development.[63] External rents flow through the state, so elites have strong reasons to prioritize control of the juridical shell over the creation of accountable governance. In this environment, sovereignty becomes a resource that actors compete to capture rather than a framework for collective political life. This helps clarify why secessionist projects rarely escalate into sustained campaigns. The rational strategy for would-be challengers is capturing the state center, where the external benefits of recognition accumulate.[64] The international community itself constructs the political marketplace in which African actors operate.[65] Secession becomes irrational because the UN rewards compliance with inherited borders and punishes attempts to revise them.

### *C. Case Studies of Secessionist Movements in Africa*

The African record of secession reveals that sovereignty in the post-colonial era has been upheld by political interests rather than by normative or legal principles. Of the more than fifty post-colonial states on the continent, only Eritrea and South Sudan have achieved internationally recognized independence through secession.[66] Others, like Biafra and Somaliland, have failed despite meeting many of the Montevideo Convention's criteria for statehood.[67] These cases, spanning from the late 1960s to the present, reveal how legality operates selectively and how recognition depends on
geopolitical calculation rather than consistent application of international law.

Biafra's failed bid for independence from Nigeria between 1967 and 1970 set the defining precedent for Africa's post-colonial approach to secession.[68] When the Eastern Region of Nigeria declared itself the Republic of Biafra, it met several of the Montevideo criteria: a defined population, an organized government, and effective control over substantial territory. Yet despite a catastrophic humanitarian crisis that claimed more than a million lives through famine and warfare, no major international power granted recognition.[69] The OAU's position was clear: the territorial integrity of member states was "non-negotiable," and internal conflicts were to be treated as domestic matters.[70] Henceforth, Biafra's defeat solidified a continental consensus that stability, not legitimacy, was the most essential thing to protect at all costs.[71]

Eritrea represents one of the few cases where secession succeeded. Following three decades of armed struggle against Ethiopian rule, Eritrean forces captured Asmara in 1991, coinciding with the collapse of Ethiopia's central government. The subsequent UN-supervised referendum in 1993, in which over 99 percent of voters supported independence, led to Eritrea's international recognition and admission to the United Nations.[72] Yet even this apparent triumph of self-determination occurred under exceptional circumstances. Eritrea's recognition wasn't justified as a challenge to *uti possidetis juris* but as the restoration of a colonial boundary that had existed under Italian administration.[73] The absence of a functioning Ethiopian government, combined with the support of major powers, enabled a move that might otherwise have been considered illegal secession to be accepted as a stabilizing outcome.[74]

South Sudan provides the second and most recent example. After years of civil war and humanitarian catastrophe, the Comprehensive Peace Agreement (2005) paved the way for an independence referendum in 2011.[75] The UN and the African Union recognized the overwhelming vote for secession. The principle of territorial integrity was temporarily suspended, not abandoned, under the weight of humanitarian urgency.[76]

In contrast, Somaliland, which reasserted its independence from Somalia in 1991, remains unrecognized despite demonstrably meeting all four Montevideo criteria.[77] Its exclu-

59 *Id.*
60 *Id.*
61 *Id.*
62 Charles Tilly, Coercion, Cap., and Eur. St.: AD 990-1992 (2011).
63 Englebert, *supra* note 21, at 399-427.
64 *Id.*
65 *Id.*
66 John Campbell, S. Sudan's Challenge to Afr. Colonial Borders Council on Foreign Rel. (2011).
67 *Id.*
68 Charles R. Nixon, *Self-Determination: The Nigeria/Biafra Case*, 24 World Pol. 473-497 (1972).
69 *Id.*
70 Rafiqul M. Islam, *Secessionist Self-Determination: Some Lessons from Katanga, Biafra and Bangladesh*, 22 J. of Peace Res. 211-221 (1985).
71 S. K. Panter-Brick, *The Rt. to Self-Determination: Its Application to Nigeria*, 44 Int'l Aff. 254-266 (1968).
72 Frederick Cowell, *Recognising Secessionist Claims: The Org. of Afr. Unity and Afr. Union's Complex Rec.*, 2 J. of Afr. Union Stud. 25-42 (2013).
73 Terence McNamee, *The Map of Afr. After the Indep. of S. Sudan*, Konrad Adenauer Stiftung 46-60 (2012).
74 *Id.*
75 Rogaia Mustafa Abusharaf, *Seeds of Secession*, Transition 73-89 (2013).
76 McNamee, *supra* note 73, at 46-60.
77 Hussein M. Adam, *Formation and Recognition of New St.: Somaliland in Contrast to Eritrea*, 21 Rev. of Afr. Pol. Econ. (1994).

sion emphasizes the political nature of recognition. Without the spectacle of mass violence or crisis, Somaliland's claim generates little international attention for a bid of successful statehood. To external actors, its separation isn't viewed as legitimate self-determination but as a potential threat to Somalia's fragile unity and to the broader regional balance.[78] This exemplifies the problem with post-colonial sovereignty: Somaliland exercises effective governance, arguably more so than many internationally recognized African states, yet remains unrecognized.

Although Eritrea, South Sudan, Biafra, and Somaliland are often discussed together as secessionist cases, a closer comparison reveals a consistent logic that reinforces the broader argument of this article. Each case demonstrates that recognition depends less on legal merit than on the alignment of political conditions that make independence useful, or at least tolerable, to the international system. Eritrea's recognition succeeded because the restoration of a prior colonial boundary allowed the international community to frame independence as stabilizing rather than revolutionary.[79] South Sudan followed a similar pattern: its recognition was presented as the only viable route to end a catastrophic civil war, which transformed secession from a legal dilemma into an international peace obligation.[80] Biafra, by contrast, demonstrates the opposite dynamic. Even though it exercised effective control and faced a humanitarian emergency, the OAU opposed recognition and major powers perceived Nigeria's unity as strategically essential.[81] Somaliland illustrates the final dimension of this logic. Its institutions function more effectively than those of the parent state, yet it receives no recognition because its separation threatens regional stability and lacks the humanitarian crisis that has justified other secessions.[82] Examining the cases together shows that the international community rewards secession only when it produces an outcome viewed as more stabilizing than the preservation of existing borders. Where this isn't the case, even strong empirical statehood is insufficient to overcome the conservative architecture of recognition.

Together, these cases show that African secession is more of a matter of geopolitics than of legality. The OAU's 1964 resolution created a presumption against change, one that can only be overridden by exceptional circumstances, such as military collapse, humanitarian disaster, or international consensus. Recognition, when it occurs, doesn't flow from consistent legal reasoning but from selective political calculation.[83]

### *D. The Consequences of Juridical Stability*

The African settlement institutionalized Jackson and Rosberg's idea of "durable weakness."[84] Juridical sovereignty ensured that even the most fragile states persisted as members of the international community. As they observe, "the serious empirical weaknesses and vulnerabilities of some African states haven't led to enforced jurisdictional change."[85] Although the absence of interstate conflict may appear desirable, the legal insulation of sovereignty weakened the incentives for institutional growth and reform. States endure as members of the international community even when they fail empirically. This endurance carried significant costs. "Self-determination came to a halt in Black Africa at the inherited (colonial) frontiers," freezing political evolution at the moment of decolonization.[86] What emerged wasn't merely state weakness but a distinctive politics of dependence, where external recognition became the central resource of statecraft.[87] Sovereignty ceased to reward authority rooted in social legitimacy and instead favored compliance with the diplomatic norms of the post-colonial order.

This system also redefined the meaning of self-determination. Although the UN Charter framed it as the right of peoples to determine their political status, in practice, it became synonymous with the preservation of inherited borders.[88] Populations within those borders might remain excluded from effective participation in governance, yet their collective territory is treated as inviolable.[89] The doctrine that once promised emancipation from colonial domination now functions to preserve a broken *status quo* that entrenches historical inequalities.

The internalization of conflict further exposes this contradiction. As Nils Petter Gleditsch's dataset demonstrates, "internal conflict has been the dominant form of conflict throughout most of the post-World War II period, and certainly since the late 1950s."[90] Between 1946 and 2001, 225 armed conflicts were recorded, 163 of which were internal and only 42 interstate.[91] Africa accounted for a disproportionate share of these, with "almost the entire continent" forming part of a global "zone of conflict."[92] This pattern makes clear that *uti possidetis juris* deterred interstate war but did so by redirecting violence inward. Conflict became a struggle for control of governmental power and the juridical and economic rents associated with sovereignty rather than a contest over borders.[93] Therefore, continental stability masked a deepening struggle within states, where domestic peace and justice were sacrificed to preserve the international order.

The OAU's embrace of *uti possidetis juris*, together with the UN's reinforcement of its logic, produced a regional order that is stable yet stagnant. Africa's borders remain almost exactly as they were at independence, but the sovereignty contained within them often functions as a legal fiction.[94] It is a structure designed less to empower citizens than to preserve the international order itself.[95] Sovereignty has ceased to describe the capacity to govern and instead came to define the right to stand still.

## Conclusion

The analysis I have developed demonstrates that the post-colonial international order rests on a fundamental contradiction. Sovereignty theory and *uti possidetis juris* provided a legal framework that allowed dozens of decolonized states to enter the international system with territorial stability and formal

78 *Id.*
79 *Id.*
80 McNamee, *supra* note 73, at 46-60.
81 Cowell, *supra* note 72, at 25-42.
82 Adam, *supra* note 77.
83 Hasani, *supra* note 38, at 85-97.
84 Jackson, *supra* note 6.
85 *Id.*
86 *Id.*
87 *Id.*
88 Hasani, *supra* note 38, at 85-97.
89 *Id.*
90 Nils Petter Gleditsch et al., *Armed Conflict 1946-2001: A New Dataset*, 39 J. of Peace Res. 615-637 (2002).
91 *Id.*
92 *Id.*
93 *Id.*
94 Mnyongani, *supra* note 7, at 463-479.
95 Hasani, *supra* note 38, at 85-97.

equality, yet the United Nations' recognition practices reveal that this stability was achieved by converting sovereignty into a selective and strategically allocated status. Borders weren't preserved because they reflected political legitimacy or social cohesion, but because they offered the most predictable basis for managing global risk.

These dynamics aren't limited to African or post-colonial cases. The Palestinian struggle, in particular, demonstrates how firmly entrenched this logic remains. One can argue that the empirical capacity of the Palestinian Authority has not significantly improved, and in recent years has, in almost all respects, deteriorated, yet the gruesome humanitarian catastrophe in Gaza and the unprecedented international visibility of the conflict have pushed recognition debates in ways that formal institutional performance alone never did. What has changed is not Palestinian state capacity but the global political context, the media environment, and the sheer scale of civilian suffering, possibly amounting to acts of genocide under international law.

I argue that nearly all secessionist cases reveal an international system that still prioritizes territorial continuity over representational legitimacy and continues to process new claims through the conservative logic of the post-colonial settlement. A couple of cases appear as exceptions only because they arose at moments when humanitarian catastrophe, parent-state collapse, and great-power alignment made the maintenance of inherited borders more destabilizing than their revision. These patterns reinforce my central claim that sovereignty in the contemporary international system functions less as a realization of self-determination than as a legal and diplomatic status conferred to preserve order. It is granted sparingly, withheld broadly, and justified through legal language even when driven by strategic interests. For many communities, the right to self-determination exists in principle but remains inaccessible in practice.

Unless the international community confronts the question of territorial order and political legitimacy, sovereignty will continue to function as an unequal freedom. As such, it is imperative for scholars and policymakers alike to rethink the foundations of sovereignty in ways that align international recognition with effective and accountable governance on the ground. *Fiat justitia, ruat caelum*.

**This piece was written by Utku Özgür and edited by Alec Kong.**

# Plurinationalism on Paper: Indigenous Rights and the Gap Between Constitutional Recognition and Practice in Bolivia and Ecuador

## Introduction

In the early twenty-first century, Latin America emerged as a global pioneer in constitutional innovation. This was most evident in Ecuador and Bolivia, where the 2008 and 2009 constitutions, respectively, enshrined a radical rethinking of the relationship between the state, nature, and Indigenous peoples. Both nations broke from Western legal paradigms by integrating principles such as *Buen Vivir* (living well), *Pachamama* (the rights of nature), and plurinationalism, concepts that recognize Indigenous peoples as distinct political nations within the state, challenging both colonial hierarchies and the unitary nation-state model through communal, ecological, and intercultural governance.[1] The world celebrated these constitutions internationally as blueprints for decolonial and ecological constitutionalism, signaling a shift toward more inclusive and sustainable forms of governance.[2]

However, despite their progressive language, both constitutions struggle to coexist with deep-rooted extractivist economies and centralized political systems that still favor state-led development over Indigenous autonomy.[3] Oil drilling in Ecuadorian parts of the Amazon rainforest and road construction through Bolivia's Indigenous territories, most notably the Yasuní-ITT initiative and the Isiboro Sécure National Park and Indigenous Territory, known by its Spanish acronym TIPNIS, reveal the tensions between constitutional ideals and lived realities.[4] Across both countries, Indigenous leaders who resist these incursions often face political repression, co-optation, or criminalization, revealing that constitutional promises of autonomy remain vulnerable when they conflict with state development agendas. These contradictions expose a gap between stated rights and their implementation, calling into question whether formal legal recognition alone can transform historically unequal power relations.[5]

This paper argues that although the 2008 Ecuadorian and 2009 Bolivian constitutions represent groundbreaking achievements in embedding Indigenous rights, collective land claims, and environmental protections into national law, the persistence of extractivist economic models, centralized state power, and weak enforcement mechanisms has produced a profound gap between constitutional ideals and lived realities. Section I outlines the constitutional innovations of both countries, highlighting how *Buen Vivir*, *Pachamama*, and plurinationalism sought to decolonize national law. Section II analyzes the structural barriers that perpetuate the gap between ideals and reality. Examples include economic dependence, institutional centralization, and political entrenchment, and the section proposes reforms such as strengthened Free, Prior, and Informed Consent (FPIC) frameworks, Indigenous co-governance institutions, and enforceable rights of nature. Section III examines how the structural barriers highlight the contradictions between these legal ideals and their implementation, focusing on the TIPNIS conflict in Bolivia and the Yasuní-ITT initiative in Ecuador as case studies that exemplify constitutional tensions.

## I. Constitutional Innovations

At the start of the twenty-first century, Ecuador and Bolivia embarked on ambitious constitutional projects that sought to redefine their legal foundations. Both countries emerged from decades of neoliberal restructuring, Indigenous mobilization, and environmental degradation that exposed deep inequalities in governance and representation. The constitutional assemblies of 2008 and 2009 attempted to reform and decolonize the state. These new constitutions advanced a vision of law that was participatory, ecological, and plural, recasting Indigenous knowledge and communal life as essential components of national identity.[6]

### *A. Ecuador: Buen Vivir and the Rights of Nature*

Under former President Rafael Correa, Ecuador's 2008 Constitution represented a revolutionary break from conventional development models. Grounded in the Andean Indigenous principle of *Sumak Kawsay,* or *Buen Vivir,* it proposed a framework in which social well-being and ecological harmony supersede economic growth as the measure of progress.[7] *Buen Vivir* institutionalized a decolonial vision that centers collective reciprocity, community, and balance with nature rather than competition and accumulation.

Ecuador's constitution was the first in world history to grant legal personhood to nature (*Pachamama*), recognizing that "nature, or Pacha Mama, where life is reproduced and exists,

1 Catherine Walsh, *Development as Buen Vivir: Institutional Arrangements and (de)Colonial Entanglements*, 53 Dev. 15 (2010), https://www.desenredando.org/public/varios/2011/Walsh_Development_as_Buen_Vivir.pdf.
2 Boaventura de Sousa Santos, *The Law of the Excluded: Indigenous Justice and Plurinationality in Bolivia and Ecuador*, in Law and the Epistemologies of the South, 288 (2023), https://repository.law.wisc.edu/s/uwlaw/media/309550.
3 Rickard Lalander, *Rights of Nature and the Indigenous Peoples in Bolivia and Ecuador: A Straitjacket for Progressive Development Politics?*, 3 Iberoamerican J. of Dev. Stud. 148 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554291.
4 Cristina Espinosa, *The Riddle of Leaving the Oil in the Soil—Ecuador's Yasuní-ITT Project from a Discourse Perspective*, ScienceDirect, 2012, https://www.garn.org/wp-content/uploads/2021/09/Espinosa_YasuniITT_2013.pdf.
5 Anna F. Liang, *Re-Producing Territory: Between Resource Nationalism and Indigenous Self-Determination in Bolivia*, ScienceDirect, 2019, https://www.sciencedirect.com/science/article/pii/S0016718519303331.
6 Santos, *supra* note 2.
7 Walsh, *supra* note 1.

has the right to integral respect for its existence."[8] The provision enabled individuals and communities to legally defend ecosystems against harm, marking a grand shift from anthropocentric to biocentric jurisprudence.[9] The constitution furthermore guaranteed collective land rights, intercultural education, and mechanisms for Indigenous self-governance. These mechanisms were extensive: it guaranteed collective ownership and inalienability of communal territories, the constitution formally recognized *Indigenous territorial districts* with authority over land management, resource use, and internal political organization; it affirmed *Indigenous legal jurisdiction*, allowing communities to apply their own customary laws and resolve internal conflicts according to ancestral norms; and it institutionalized *intercultural participation* in state governance through representative bodies such as the Council for the Development of Nationalities and Peoples of Ecuador (CODENPE). In theory, these innovations aimed to reverse centuries of exclusion and ecological exploitation. These extensions included:

#### *i. Indigenous Territorial Districts*

The constitution formally recognized *circunscripciones territoriales indígenas* (indigenous territorial constituencies), granting Indigenous nations authority over land management, resource use, and local governance. In theory, these districts could serve as autonomous political units capable of exercising exclusive jurisdiction.[10] These districts were conceived as a foundation for territorial autonomy, rooted in the principle that Indigenous peoples predated the modern state.

#### *ii. Recognition of Indigenous Legal Jurisdiction*

Indigenous communities gained the right to apply customary law (*derecho propio*) to resolve internal disputes. This provision affirmed legal pluralism, situating Indigenous justice systems as parallel and equal to ordinary courts.[11]

In theory, coordination mechanisms (*coordinación y cooperación*) were supposed to facilitate interaction between Indigenous and ordinary courts. However, scholars note that in practice, jurisdictional boundaries remain contested, often leaving Indigenous courts overshadowed by state institutions.[12] For example, Bolivia's Law 073 of Jurisdictional Demarcation (2010) limits Indigenous jurisdiction to matters "traditionally dealt with" by Indigenous authorities and excludes them from judging major criminal offenses, effectively restricting their autonomy despite constitutional promises of equal hierarchical status between jurisdictions.[13]

#### *iii. Intercultural State Institutions*

Representative bodies such as CODENPE institutionalized Indigenous participation in national decision-making processes. These were designed to embed interculturality throughout state governance, not merely in symbolic spaces.[14]

CODENPE was initially conceived as a mechanism for collaborative governance, but later political conflicts revealed the fragility of intercultural institutions when they conflict with executive power.[15] CODENPE was composed of 34 representatives from Ecuador's Indigenous nationalities, including Awa, Chachi, Épera, Tsáchila, Siona, Secoya, Sápara, Shiwiar, Andoa, Waorani, Shuar, Achuar, and multiple Kichwa peoples alongside state representatives.[16] In 2009, President Rafael Correa moved to close down CODENPE following Indigenous-led protests against his mining legislation, publicly accusing its executive secretary of misusing funds, and subsequently placed other Indigenous institutions like the National Directorate of Intercultural Bilingual Education under direct ministerial control, effectively dismantling their autonomy.[17]

#### *iv. Collective Land Rights*

The constitution protected ancestral territories from privatization, guaranteeing collective ownership and prohibiting land fragmentation.[18] This protection is crucial given the history of land dispossession in the Andes; however, its impact is limited by the constitutional clause reserving subsoil resources for the state, which ultimately allows extractive projects even on protected Indigenous lands.

Yet, even within this progressive framework, contradictions emerged. *Buen Vivir* often functioned as a rhetorical tool rather than a transformative one, coexisting uneasily with extractive economic policies.[19] While the constitution challenged neoliberal logic, the state's dependence on oil exports persisted, undermining the very ecological principles it sought to enshrine.[20]

### *B. Bolivia: Plurinationalism and Indigenous Justice*

Bolivia followed a similar path with its 2009 Constitution, forged under the leadership of former President Evo Morales, the country's first Indigenous head of state. By declaring Bolivia a *Plurinational State*, the constitution redefined sovereignty as shared among 36 recognized Indigenous nations,

8 *República Del Ecuador*, Political Database of the Americas, https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.
9 *Id.*
10 Rachel Sieder, *Demanding Justice and Security: Indigenous Women and Legal Pluralities in Latin America*, Rutgers University Press, 2017, http://www.rachelsieder.com/demanding-justice-and-security-indigenous-women-and-legal-pluralities-in-latin-america/.
11 Donna Lee Van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America*, Pittsburgh University Press, 2000, https://www.jstor.org/stable/jj.11786289.
12 Nancy Postero, *Indigenous State: Race, Politics, and Performance in Plurinational Bolivia*, University of California Press (2017) https://www.researchgate.net/publication/349577084_The_Indigenous_State_Race_Politics_and_Performance_in_Plurinational_Bolivia.
13 Matthew Doyle, *The Case of Piruani: Contested Justice, Legal Pluralism, and Indigeneity in Highland Bolivia*, AnthroSource, July 13, 2021, https://anthrosource.onlinelibrary.wiley.com/doi/10.1111/plar.12424.
14 Catherine Walsh, *Interculturality, Plurinationality and Decoloniality: Political-Epistemic Insurgences to Refound the State*, Universidad Andina Simón Bolívar, Ecuador, https://www.revistatabularasa.org/en/issue-9/interculturality-plurinationality-and-decoloniality-political-epistemic-insurgences-to-refound-the-state/.
15 Willem Assies, *Land Tenure, Land Law and Development: Some Thoughts on Recent Debates*, The Journal of Peasant Studies, July 2009, https://www.researchgate.net/publication/248943635_Land_Tenure_Land_Law_and_Development_Some_Thoughts_on_Recent_Debates.
16 *Recognition of Indigenous Justice in Latin America*, ELLA, https://assets.publishing.service.gov.uk/media/57a08a15ed915d622c000559/130322_GOV_IndEthMinRig_BRIEF3.pdf.
17 Gonzalo Dávila Maceda, *The Bolivian Legal Framework*, NYU Law GlobaLex, Oct. 2022, https://www.nyulawglobal.org/globalex/bolivian_legal_framework1.html.
18 Marc Becker, *Rethinking Latin American Social Movements*, Rowman & Littlefield, 2014, https://files.libcom.org/files/(Latin%20American%20Perspectives%20in%20the%20Classroom)%20Richard%20Stahler-Sholk,%20Harry%20E.%20Vanden,%20Marc%20Becker-Rethinking%20Latin%20American%20Social%20Movements_%20Radical%20Action%20from%20Below-Rowman%20&%20Littlefield%20Publishers.pdf.
19 *República Del Ecuador*, *supra* note 8.
20 Lalander, *supra* note 3.

each with its own languages, territories, and legal systems.[21] It promised the right to territorial self-determination, collective ownership, and political participation through mechanisms such as the *Autonomías Indígena Originario Campesinas*, a form of self-governance for Indigenous peoples, based on their ancestral territories and their self-determination, as established by the 2009 Constitution of Bolivia. This marked a decisive shift away from the colonial "monocultural" state model toward one that recognized multiple epistemologies and legal orders.

The Bolivian constitution also established Indigenous forms of justice as parallel and equal to the ordinary judicial system, reflecting epistemological pluralism rooted in communal ethics rather than disciplinary law, which is the recognition that different cultures have fundamentally different ways of understanding justice. Indigenous systems prioritize restoring social harmony over the punitive, individualist logic of Western law. These systems are based on restorative rather than punitive principles, emphasizing reconciliation, collective deliberation, and the restoration of social harmony over individual punishment. In theory, community authorities are empowered to resolve local disputes, administer sanctions, and interpret customary norms in accordance with their communities' needs and values. The constitution affirms that decisions issued through these Indigenous judicial procedures should carry the same legal weight as rulings issued by state courts, and it mandates coordination between the two systems when jurisdiction overlaps. However, in practice, these forms of justice often face limitations: state institutions sometimes challenge their authority, jurisdictional boundaries remain ambiguous, and Indigenous courts lack adequate resources or political support, undermining the constitutional promise of genuine legal pluralism.

With Ecuador, Bolivia's constitutional promise tempered pragmatic politics. Despite its commitment to Indigenous autonomy, the state retained control over subsoil resources, effectively subordinating self-determination to extractivist development agendas. The result, as Portuguese sociologist Boaventura de Sousa Santos observes, is a paradox of inclusion: Indigenous identities are symbolically celebrated yet materially constrained by centralized authority and economic dependency.[22]

### *C. Global Significance*

Together, the 2008 Ecuadorian and 2009 Bolivian constitutions reshaped global debates about law, environment, and decolonization.[23] Their recognition of Indigenous sovereignty and the rights of nature inspired constitutional reform movements in Chile, Colombia, and beyond.[24] They signaled that constitutions could be tools of epistemic transformation, yet their implementation revealed how difficult it is to translate these ideals into political and economic practice, setting the stage for the structural and institutional challenges examined in the next section.

## II. Structural Barriers

The constitutions of Ecuador (2008) and Bolivia (2009) were significant steps forward in acknowledging Indigenous rights and protecting the environment. However, their ability to bring about real change has been constrained by ongoing structural challenges. Issues like reliance on extractive industries, centralized institutions, strong political motivations, and lingering colonial influences have all played a role in undermining the implementation of these constitutional principles. As a result, despite their radical texts, both countries remain trapped in a paradox of recognition, where Indigenous rights and ecological justice are rhetorically celebrated but practically undermined.

Both Ecuador and Bolivia continue to rely heavily on natural resource extraction as the backbone of their economies.[25] Oil, gas, and mining exports are the main sources of income for both nations, tying them to global markets that require ongoing production and growth.[26] This economic structure directly conflicts with the ecological and communal principles embedded in *Buen Vivir* and plurinationalism.

Irish author Catherine Walsh notes that in Ecuador, the discourse of *Buen Vivir* was quickly absorbed into state-led development policies, in which "living well" became synonymous with national growth rather than with post-extractivist alternatives.[27] In Bolivia, under Morales, the government's dependence on natural gas exports reinforced a resource-focused approach that maintained reliance on extraction. This created a conflict between national growth and Indigenous protections, showing that the country's promises of ecological balance are often controlled by the demands of global capitalism.[28]

Despite constitutional recognition of Indigenous self-determination, both states retain centralized control over natural resources and development planning. Decisions about extractive projects are often made at the national level, with limited consultation or consent from affected Indigenous communities. As Santos observes, this "centralized pluralism" allows the state to nominally include Indigenous voices while maintaining symbolic control over material resources.[29]

Weak state institutions further exacerbate this problem. Environmental ministries and Indigenous justice systems often lack the resources and authority to enforce constitutional protections. These institutions face chronic funding shortages, leaving them without the operational budgets needed to conduct field monitoring, inspect remote extractive sites, or pursue legal action against powerful state-backed companies. They are also understaffed, with too few trained environmental technicians, legal specialists, and community liaison officers to implement constitutional mandates at the scale required. Many regional and local branches lack basic infrastructure, such as transportation, environmental testing laboratory equipment, or digital systems for tracking violations, making it nearly impossible to verify compliance with Indigenous or ecological consultation procedures. Without adequate oversight or independent enforcement mechanisms, rights to consultation and environmental protection

21 Santos, *supra* note 2.
22 *Id.*
23 Postero, *supra* note 12.
24 Rickard Lalander & Magnus Lembke, *The Andean Catch-22: Ethnicity, Class and Resource Governance in Bolivia and Ecuador*, Taylor & Francis, 2018, https://www.tandfonline.com/doi/full/10.1080/14747731.2018.1453189
25 Walsh, *supra* note 1.
26 *Oil and Petroleum Products Explained*, U.S. Energy Information Administration, https://www.eia.gov/energyexplained/oil-and-petroleum-products/prices-and-outlook.php
27 Lalander, *supra* note 3.
28 Liang, *supra* note 5.
29 Santos, *supra* note 2.

exist mainly on paper.[30]

To address these institutional weaknesses, this analysis examines three comparative models that offer pathways for strengthening Indigenous and environmental rights beyond constitutional text. Drawing on legal innovations from the Philippines, New Zealand, and Colombia, these models demonstrate how procedural reforms such as binding consent mechanisms, co-governance structures, and enforceable legal personhood can translate constitutional principles into practice. While not perfectly transferable, these frameworks provide concrete alternatives to the current gap between rights recognition and rights realization in Bolivia and Ecuador.

### *Model 1: Strengthened Free, Prior, and Informed Consent (FPIC) Frameworks*

A possible reform is to strengthen FPIC processes to make them binding and community-led. The Philippines' *Indigenous Peoples' Rights Act* (1997)[31] offers a valuable precedent, requiring companies to obtain the formal consent of Indigenous groups before beginning extractive operations. However, studies reveal significant implementation gaps: Indigenous groups report that FPIC processes are frequently manipulated, the titling process is prohibitively expensive (often exceeding $20,000), and the National Commission on Indigenous Peoples lacks authority to enforce decisions against more powerful government agencies.[32] If Bolivia and Ecuador institutionalized similar frameworks, they could prevent state overreach and ensure that development projects proceed only with local approval.

Political elites and ruling parties have often justified extractivism as essential for poverty reduction and national sovereignty, framing resource extraction as self-determination against foreign interference and a reclamation of resources historically plundered during colonialism.[33] In both countries, leftist governments that championed Indigenous rights simultaneously invoked "resource nationalism" to rationalize extractive projects. This tension reveals what Cuban journalist Camila Acosta calls the "decolonization dilemma": the struggle between advancing Indigenous autonomy and financing state-led development.[34]

These dynamics have entrenched power within dominant political movements in which, while rhetorically decolonial, they often marginalize dissenting Indigenous voices.[35] Social scientist Cristina Espinosa notes in her study of Ecuador's Yasuní-ITT initiative that it is a proposal by the Ecuadorian government to permanently ban oil production in the Ishpingo-Tambococha-Tiputini (ITT) oil field within the Yasuní National Park. This ban is proposed in exchange for a portion of the value of the forgone oil reserves from the international community, highlighting that even progressive environmental policies can become instruments of state control when designed without shared governance.[36]

### *Model 2: Indigenous Co-Governance Institutions*

New Zealand's approach to managing the Whanganui River through co-managed environmental councils shows how sharing authority between the government and Indigenous groups can improve accountability.[37] Creating similar councils in Bolivia and Ecuador could enhance Indigenous rights, allowing them real decision-making power over land and resources. This would shift the balance of power from just consultation to real collaboration.

Deep-seated colonial legacies continue to shape how both states interpret and implement constitutional rights. Despite formal recognition, Indigenous peoples often face racialized stereotypes and systemic exclusion from policymaking. As Bolivian lawyer Paola Villavicencio-Calzadilla argues, "rights of nature" and "Mother Earth laws" in Bolivia risk being co-opted as moral symbols without empowering the communities most connected to them.[38] This cultural disconnect reveals that decolonization requires not only legal reform but also epistemic and institutional transformation.

### *Model 3: Legal Personhood with Enforcement Mechanisms*

Colombia's *Atrato River* 2016 ruling[39] granted the river legal rights and assigned community guardians to protect said rights.[40] If Ecuador and Bolivia adopt similar "rights of nature" laws and create local enforcement groups or Indigenous monitoring teams, they could turn these symbolic rights into real accountability. Such guardianship structures would operationalize ecological rights and bridge the gap between law and lived experience.

The persistence of extractivist economies, centralized power, political entrenchment, and colonial hierarchies reveals that constitutional innovation alone cannot dismantle structural inequality.[41] Without institutional reform and community-led governance, the principles of *Buen Vivir* and plurinationalism will remain aspirational ideals rather than engines of transformation.[42] The following section turns to case studies from Bolivia and Ecuador to illustrate how these tensions manifest in practice through the TIPNIS conflict and the Yasuní-ITT initiative.

## III. Contradictions Between Law and Practice

The contradictions between constitutional ideals and political realities become most visible when examining concrete conflicts in which Indigenous rights, environmental protection, and state development goals collide. While the constitutions of Ecuador and Bolivia promise plurinational governance, collec-

30 *Id.*
31 *Republic Act No. 8371*, Official Gazette, Oct. 29, 1997, https://www.officialgazette.gov.ph/1997/10/29/republic-act-no-8371/
32 Walden Bello, *The Subversion of the Philippines' Indigenous People's Rights Act*, https://focusweb.org/the-subversion-of-the-philippines-indigenous-peoples-rights-act/
33 Paola Villavicencio-Calzadilla, *The Rights of Mother Earth in Bolivia: Progress and Challenges*, Heinrich-Böll-Stiftung Logo, 2025, https://www.boell.de/en/2025/01/29/rights-mother-earth-bolivia-progress-and-challenges
34 Camila Acosta, *'Decolonizing the Nation-State': Indigenous Autonomy, Extractivism, and Consultation in Contemporary Bolivia*, York University, Centre for Research on Latin America and the Caribbean, 2016, https://www.yorku.ca/cerlac/wp-content/uploads/sites/259/2017/03/Michael-Baptista_Camila-Varela-Acosta_Undergrad-Paper_2016.pdf.
35 *Id.*
36 Doyle, *supra* note 13.
37 Espinosa, *supra* note 4.
38 Acosta, *supra* note 34.
39 *Atrato River Decision T-622/16 of November 10, 2016*, Climate Litigation Database, https://www.climatecasechart.com/document/atrato-river-decision-t-622-16-of-november-10-2016_976c
40 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, New Zealand Legislation, Mar. 20, 2017, https://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html.
41 Villavicencio-Calzadilla, *supra* note 33.
42 *Atrato River Decision T-622/16*, Columbia Law School Sabin Center for Climate Change Law, Nov. 10, 2016, https://www.climatecasechart.com/document/atrato-river-decision-t-622-16-of-november-10-2016_976c.

tive territorial rights, and the safety of nature, the implementation of large-scale extraction and infrastructure projects demonstrates how easily these principles can be overridden when they conflict with economic priorities.[43] The TIPNIS conflict in Bolivia and the Yasuní-ITT initiative in Ecuador illustrate how constitutional promises of autonomy and ecological stewardship are undermined by state interests, exposing a persistent gap between rights on paper and the actual experiences of Indigenous communities.[44]

### *A. Bolivia: The TIPNIS Conflict and the Limits of Plurinationalism*

The conflict over the proposed highway through TIPNIS revealed the fragility of Bolivia's plurinational commitments.[45] Although the 2009 Constitution recognizes Indigenous territorial autonomy,[46] the highway project was negotiated and advanced primarily at the national level, without meaningful consultation or consent from the dozens of Indigenous communities living within the protected area. For many Yuracaré, Tsimané, and Mojeño-Trinitario communities, the highway represented an existential threat: a gateway to colonization, land grabs, coca expansion, and accelerated deforestation.[47]

The state's response exposed deeper tensions within Bolivia's plurinational model. Instead of upholding constitutional protections, the government framed resistance as an impediment to national development,[48] portraying Indigenous protesters as manipulated or "anti-progress."[49] Police repression during the 2011 Chaparina crackdown, in which peaceful marchers opposing the TIPNIS conflict were detained and beaten, highlighted the extent to which state power could be mobilized to suppress Indigenous dissent despite constitutional guarantees of autonomy and consultation.[50] While the government later passed a "law of intangibility" temporarily halting the project,[51] subsequent efforts to reopen and renegotiate the highway demonstrated the instability (and political contingency) of Indigenous rights in practice.[52]

The TIPNIS conflict ultimately revealed how plurinationalism can be subordinated to the extractivist and infrastructural priorities of a centralized state.[53] It showed that Indigenous governance structures remain vulnerable when they challenge national development agendas and that legal recognition alone cannot ensure territorial security without institutional and political protection.[54]

### *B. Ecuador: The Yasuní-ITT Initiative and the Contradictions of Buen Vivir*

Ecuador's Yasuní-ITT initiative represents another emblematic case in which constitutional innovation collided with economic pressures. The 2008 Constitution's recognition of the rights of nature and the principle of *Buen Vivir* positioned Ecuador as a global leader in ecological constitutionalism.[55] Yet only a few years later, the state authorized oil drilling in the Ishpingo-Tambococha-Tiputini (ITT) block of Yasuní National Park,[56] one of the most biodiverse regions on Earth and home to Indigenous groups living in voluntary isolation.[57]

Initially, the Yasuní-ITT initiative sought international financial contributions in exchange for leaving the oil underground; a proposal celebrated as a model for climate justice and post-extractive development.[58] When global contributions fell short, however, the government declared the initiative unworkable and approved drilling, arguing that oil revenue was necessary for national development and poverty reduction.[59] This decision directly contradicted the constitution's ecological protections and its promise to respect Indigenous territorial rights.[60]

For Indigenous communities, both contacted and uncontacted, the consequences were profound. Oil extraction brought road construction, increased militarization, and the risk of violent encounters with outsiders.[61] Environmental impacts (including deforestation, habitat fragmentation, and the threat of spills) challenged the constitutional provision recognizing nature's right to restoration and protection.[62] Civil society groups (such as Yasunidos and Acción Ecológica) attempting to mobilize national referendums faced bureaucratic obstacles, surveillance, and political pressure,[63] highlighting the difficulties of enforcing constitutional rights when they conflict with state priorities.

The Yasuní-ITT case ultimately demonstrated that *Buen Vivir* and rights of nature, while transformative in theory, remain constrained by the structural dependence on oil revenues and the centralized power of the executive branch.[64] It showed how ecological rights can be reinterpreted or deprioritized when framed

43 Eduardo Gudynas, *Buen Vivir: Today's Tomorrow*, Society for International Development, 2011, https://www.gudynas.com/publicaciones/GudynasBuenVivirTomorrowDevelopment11.pdf.
44 Postero, *supra* note 12.
45 John Andrew McNeish, *Resource Extraction and Conflict in Latin America*, ResearchGate, Jan. 2018, https://www.researchgate.net/publication/323156000_Resource_Extraction_and_Conflict_in_Latin_America.
46 *Bolivia (Plurinational State of) 2009*, Constitute, 2009, https://www.constituteproject.org/constitution/Bolivia_2009.
47 McNeish, *supra* note 45.
48 Postero, *supra* note 12.
49 Karla Mundim, *Social Movements as Bulwarks of Democracy: Indigenous Mobilization and Political Inclusion in Ecuador*, Insights from the Social Sciences, Apr. 25, 2023, https://items.ssrc.org/democracy-papers/democratic-anxieties-in-the-americas/social-movements-as-bulwarks-of-democracy/.; Nicole Fabricant, *Mobilizing Bolivia's Displaced*, The University of North Carolina Press, Nov. 12, 2012, https://uncpress.org/9780807872499/mobilizing-bolivias-displaced/.
50 *World Report 2011: Bolivia*, Human Rights Watch, https://www.hrw.org/world-report/2011/country-chapters/bolivia.
51 *Bolivia: Ley Nº 180*, Levivox, Oct. 24, 2011, https://www.lexivox.org/norms/BO-L-N180.html.
52 Fabricant, *supra* note 49.
53 Santos, *supra* note 2.
54 Sieder, *supra* note 10.
55 Jose Antonio Villarán, *Open Pit: A Story about Morococho and Extractivism in the Americas*, University of California Santa Cruz, Sept. 2022, https://escholarship.org/content/qt9680t6f5/qt9680t6f5_noSplash_2b27acdc0973c68001b9be85cd029cdd.pdf.
56 Maria Fernanda Enriquez Szentkiralyi, *Social Movements and Framing Decisions: Ecuador's Campaign for the Rights of Nature*, UConn Library, July 25, 2014, http://digitalcommons.lib.uconn.edu/cgi/viewcontent.cgi?article=6683&context=dissertations.
57 Matt Finer, *Oil and Gas Projects in the Western Amazon: Threats to Wilderness, Biodiversity, and Indigenous Peoples*, PLOS.one, Aug. 13, 2008, https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0002932.
58 Leah Temper (UAB) et al., *Towards a Post-Oil Civilization*, ejolt report, May 2013, http://www.ejolt.org/wordpress/wp-content/uploads/2013/05/130520_EJOLT6_Low2.pdf.
59 Rickard Lalander, Magnus Lembke, & Pablo Ospina Peralta, *Political Economy of State-Indigenous Liaisons: Ecuador in Times of Alianza PAIS*, DOAJ: Open Global Trusted, https://doaj.org/article/d2f13ef68af049df9e9fbf2eac4f4ac5.
60 Walsh, *supra* note 1.
61 Finer, *supra* note 57.
62 *República Del Ecuador*, *supra* note 8.
63 Espinosa, *supra* note 4.
64 Eduardo Gudynas, *The New Extractivism of the 21st Century: Ten Urgent Theses about Extractivism in Relation to Current South American Progressivism*, The Americas Program Report, 2010, https://www.academia.edu/4242379/The_new_extractivism_of_the_21st_century_ten_urgent_theses_about_extractivism_in_relation_to_current_South_American_Progressivism.

against the imperatives of national development.[65]

### C. Lessons from Both Cases

Taken together, TIPNIS and Yasuní-ITT illustrate recurring patterns that define the implementation gap in both countries:

*i.* Consultation is often procedural rather than substantive, used to legitimize predetermined decisions rather than empower communities.[66]
*ii.* Indigenous territorial rights are weakened when they are aligned against national development plans, revealing the limits of plurinationalism and legal pluralism.[67]
*iii.* Environmental protections are overridden by extractivist imperatives, demonstrating that rights of nature remain secondary to state revenue needs.[68]
*iv.* State repression and political delegitimization of Indigenous movements persist, even under governments that claim to champion decolonization.[69]
*v.* Institutional weaknesses (limited budgets, weak enforcement agencies, and centralized control) prevent constitutional guarantees from being fully realized.[70]

These cases show that constitutional innovation, while symbolically powerful, cannot by itself dismantle entrenched political and economic structures. They reveal a tension between transformative legal ideals and the material realities of governance, extractive economies, and state sovereignty. Ultimately, both TIPNIS and Yasuní-ITT underscore the central argument of this paper: that the gap between recognition and implementation is not incidental but structural, embedded in the very economic and political systems the constitutions sought to reform.

## Conclusion

The constitutional reforms undertaken by Ecuador in 2008 and Bolivia in 2009 represent some of the most ambitious efforts in the world to reimagine the relationship between states, Indigenous nations, and the natural environment. By embedding concepts such as *Buen Vivir*, the rights of nature, and plurinationalism into the highest levels of law, both countries challenged entrenched colonial hierarchies and articulated alternative visions of sovereignty grounded in reciprocity, collective stewardship, and intercultural pluralism.[71] These innovations signaled that constitutions could serve as transformative tools; not only regulating state power but redefining the very foundations of political community and ecological responsibility.[72]

Yet, as this paper has demonstrated, the translation of these ideals into practice remains deeply constrained by economic, institutional, and political structures that long predate the new constitutions. Extractivist development models continue to shape state priorities, linking national revenue and political legitimacy to oil, gas, and mining sectors. Centralized decision-making and chronically under-resourced institutions weaken the enforcement of constitutional rights, while entrenched political actors employ the discourse of development to justify incursions into Indigenous territories.[73] These structural dynamics have produced a persistent gap between rights on paper and the lived realities of Indigenous communities; one that becomes especially visible in the high-profile conflicts of TIPNIS in Bolivia and Yasuní-ITT in Ecuador.[74]

Both cases reveal that constitutional recognition alone cannot dismantle the colonial logics embedded in state governance. When confronted with competing objectives: economic growth, geopolitical strategy, or party consolidation, the state has repeatedly prioritized extractive projects over Indigenous autonomy and ecological protection.[75] Consultation processes become tokenistic, Indigenous justice is overshadowed by ordinary courts and ministries, and rights of nature are selectively interpreted to accommodate the demands of national development. As a result, the transformative promises of plurinationalism and ecological constitutionalism risk being co-opted, diluted, or rendered symbolic.[76]

However, the failures of implementation do not invalidate the constitutions' transformative potential. Rather, they highlight the need for a deeper shift in political and economic structures, one that aligns legal innovation with material and institutional change. Strengthened Free, Prior, and Informed Consent (FPIC) mechanisms, Indigenous co-governance institutions, autonomous environmental monitoring, and community-led enforcement of ecological rights represent meaningful pathways toward bringing constitutional ideals closer to practice.[77] These reforms demand not only legal adjustments but long-term commitments to redistributing power, resources, and epistemological authority.[78]

Ultimately, the experiences of Ecuador and Bolivia illustrate both the promise and the limits of constitutionalizing decolonial and ecological principles. They show that while constitutions can open space for new forms of political imagination, their implementation depends on the everyday practices of governance, the allocation of resources, and the willingness of states to share authority with Indigenous nations. Bridging the gap between recognition and reality requires sustained political will, institutional reform, and the empowerment of the very communities whose worldviews inspired these constitutional

65 Pamela L. Martin, *Oil in the Soil: The Politics of Paying to Preserve the Amazon*, MIT Press Direct, Nov. 1, 2012, https://direct.mit.edu/glep/article/12/4/157/14595/Oil-in-the-Soil-The-Politics-of-Paying-to-Preserve.
66 Regine Mader, *Right to Prior Consultation: Challenges and Opportunities for Stakeholders in the Andean Region*, Climate Diplomacy, May 31, 2015, https://climate-diplomacy.org/magazine/environment/right-prior-consultation-challenges-and-opportunities-stakeholders-andean.
67 Sieder, *supra* note 10.
68 Walsh, *supra* note 1.
69 Postero, *supra* note 12.
70 Mader, *supra* note 66.
71 Walsh, *supra* note 1.
72 Boaventura de Sousa Santos, *The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South*, Duke University Press, Sept. 2018, https://www.dukeupress.edu/the-end-of-the-cognitive-empire.
73 Espinosa, *supra* note 4.
74 McNeish, *supra* note 45.
75 Postero, *supra* note 12.
76 Gudynas, *supra* note 64.
77 Laura MacKay, *The United Nations Declaration on the Rights of Indigenous Peoples; a Step Forward or Two Back?*, Public Interest Law Journal of New Zealand, Oct. 21, 2014, https://nzlii.org/nz/journals/NZPubIntLawJl/2014/15.html.
78 Sieder, *supra* note 10.

transformations.[79] Only through such structural changes can plurinationalism and the rights of nature move from symbolic aspiration to lived and enduring forms of justice.[80]

**This piece was written by Priscilla Matthews and edited by Daphne Coplon.**

79 Cott, *supra* note 11.
80 Arturo Escobar, *Designs for the Pluriverse Radical Interdependence, Autonomy, and the Making of Worlds*, Duke University Press, Mar. 2018, https://www.dukeupress.edu/designs-for-the-pluriverse.

# Predictive Policing and the Constitutional Category Error

## Introduction

Predictive policing uses computer systems and algorithms to analyze large datasets, including historical crime data, to inform decisions about where to deploy police and to identify individuals who are more likely to commit or be victims of crime. These tools have been increasingly used in police departments across the United States, yet their usage remains highly contentious. Marketed as objective, efficient, and data-driven tools, these systems often operate under the premise that algorithmic prediction can guide proactive policing and reduce crime. Yet the rise of AI and predictive policing forces a fundamental constitutional question: can statistical probability ever satisfy the Fourth Amendment's requirement of individualized suspicion?

This paper argues that predictive policing represents a constitutional category error. By collapsing the distinction between probabilistic forecasts and individualized suspicion, predictive policing redefines "probable cause" as "predictable cause," thereby undermining the Fourth Amendment's qualitative standard for evidence and for reasoned police judgment. This doctrinal shift directly conflicts with the Supreme Court's Fourth Amendment jurisprudence. In *Terry v. Ohio* (1968), the Court held that reasonable suspicion must be grounded in "specific and articulable facts" tied to the individual.[1] Furthermore, *Illinois v. Gates* (1983) reaffirmed that the "totality of the circumstances" standard is a holistic, qualitative judgment made by officers and courts.[2] Predictive algorithms, by contrast, operate on generalized patterns and correlations, not individualized evidence or officer-observed conduct.

Moreover, predictive policing also delegates core law-enforcement discretion to private, proprietary algorithms, creating an accountability vacuum analogous to the nondelegation problem in administrative law. While proponents claim that predictive algorithms enhance efficiency and objectivity, emerging empirical research shows that these systems often reproduce historical policing biases, lack transparency, and expand state surveillance without the individualized justification the Constitution demands.

This not only undermines the Fourth Amendment's qualitative standard for suspicion but also delegates police authority to unaccountable actors who privately develop algorithms, similar to the nondelegation problem in administrative law. Section I introduces predictive policing and its rise in U.S. law enforcement. Section II defines predictive policing and reviews major case studies, including Los Angeles, New York, and Chicago. Section III outlines arguments in favor, focusing on efficiency and objectivity, while Section IV presents counterarguments on bias, opacity, and constitutional risks. Section V analyzes how predictive policing distorts Fourth Amendment doctrine, referencing *Terry v. Ohio* and *Illinois v. Gates*. Section VI explores algorithmic delegation and accountability gaps. Section VII proposes policy and doctrinal reforms, and Section VIII concludes by calling for renewed judicial clarity on individualized suspicion in the algorithmic era.

## I. Overview of Predictive Policing

Predictive policing has its roots in the rise of data-driven policing techniques such as CompStat, which evolved into algorithmic systems that promise efficiency and precision. It spread quickly in the 2010s, with "more than 150 police departments nationally deploying predictive policing analytics."[3] A Department of Justice (DOJ) report also stated that 70% of agencies planned to implement or increase the use of predictive policing technology within five years.[4]

As Andrew Ferguson notes, predictive policing "rests on the insight that certain aspects of the physical and social environment encourage quite predictable acts of criminal wrongdoing."[5] Police departments frame these systems as modern, objective extensions of traditional hotspot policing. Predictive policing systems generally fall into two categories: place-based models and person-based models. Place-based systems such as PredPol generate "hot spots" using historical enforcement data—not actual crime incidence. Because police disproportionately patrol and arrest in minority and low-income neighborhoods, these systems reproduce and intensify those racialized enforcement patterns.[6] By contrast, person-based systems evaluate individuals directly. Chicago's Strategic Subject List (commonly called the "Heat List") attempted to algorithmically assess the likelihood that specific residents would commit or be victims of gun violence based on social network analysis and prior police interaction.[7] These approaches extend the logic of profiling into data science, shifting suspicion from observable conduct to probabilistic inference. Ferguson explains that predictive policing has evolved through three major stages.[8] Early systems focused on

1 *Terry v. Ohio*, 392 U.S. 1 (1968).
2 *Illinois v. Gates*, 462 U.S. 213 (1983).
3 Ali Winston, *All Tomorrow's Crimes: The Future of Policing Looks a Lot Like Good Branding*, S.F. Weekly (Oct. 30, 2013), http://archives.sfweekly.com/sanfrancisco/all-tomorrows-crimes-the-future-of-policing-looks-a-lot-likegood-branding/Content?oid=2827968&showFullText=true.
4 U.S. Dep't of Justice, Office of Community Oriented Policing Services, *Predictive Policing: The Role of Crime Forecasting in Law Enforcement Operations* (2014), https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-p282-pub.pdf.
5 Andrew Guthrie Ferguson, Policing Predictive Policing, 94, Wash. U. L. Rev. 1109, 1116 (2017), https://openscholarship.wustl.edu/law_lawreview/vol94/iss5/5.
6 Nazgol Ghandnoosh, *One in Five: Disparities in Crime and Policing*, The Sentencing Project (Nov. 2, 2023), https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing/.
7 Jeremy Gorner, *Chicago Police Use 'Heat List' As Strategy to Prevent Violence*, Chi. Trib. (Aug. 21, 2013), https://www.chicagotribune.com/2013/08/21/chicago-police-use-heat-list-as-strategy-to-prevent-violence/.
8 Ferguson, *supra* note 5, at 1115.

predicting locations of property crimes (like burglaries). The next wave expanded to forecasting violent crime in specific areas. The most recent stage attempts to predict which individuals are likely to commit—or be victimized by—crime. This progression reflects a broader trend: predictive tools are becoming increasingly granular and tied to assessments of individual people rather than places.

Case studies in the United States' biggest cities demonstrate mixed results from the implementation of predictive systems. The Los Angeles Police Department (LAPD) has partnered with academics to predict property crime hotspots, deploying officers in areas projected to experience spikes in crime beginning in 2010.[9] In New York City, the New York Police Department (NYPD)'s data-driven policing began with CompStat in the 1990s to "compile information on crimes… and spot emerging crime patterns."[10] In 2016, the NYPD launched Patternizr, a machine-learning tool to detect patterns across robbery and larceny reports. Molly Griffard, a law professor at NYU, describes Patternizr as a tool "returning a report listing ten potentially related crimes … scored between 0-1" for similarity and highlights NYPD's widely publicized case where Patternizr helped "crack the case of the needle-wielding shoplifter."[11] Meanwhile, Chicago's "Heat List" attempted to predict individuals likely to become perpetrators or victims of gun violence, identifying hundreds of residents for targeted interventions. The strategy's framing seemed to mirror "a public health approach … [targeting] both potential shooting victims and offenders."[12]

The core statistical premise is that past crime predicts future crime—not actually "predicting a particular crime but predicting an elevated risk of crime based on pre-determined … factors."[13] Scholars caution, however, that because these systems rely on historical policing data, concerns about bias and feedback effects arise;[14] these issues are explored in Section IV. These systems differ in form, but all share the same constitutional flaw: they substitute probabilistic pattern recognition for individualized suspicion.

## II. Arguments in Favor

Proponents of predictive policing argue that algorithmic forecasting represents a major advancement in the efficiency, accuracy, and objectivity of modern law enforcement, though these claims ultimately fail to address the Fourth Amendment's constitutional demands. Supporters emphasize that predictive policing enables police to "do more with less"[15] by helping departments preposition officers in areas of anticipated criminal activity rather than relying on broad, undirected patrols. Ferguson notes that early implementations in Los Angeles and Santa Cruz were driven by the promise of cost-effective policing during periods of shrinking municipal budgets, with predictive systems advertised as tools that optimize increasingly scarce or limited resources.[16]

Police chiefs promoting predictive policing depict this as a shift from reactive to proactive policing, enabling departments to cover more ground with fewer officers and to intervene before crime escalates. Empirical results from early pilot programs are frequently cited: the Santa Cruz Police Department reported a 4–11% drop in property crime in the first six months after adopting its predictive policing algorithm.[17] Although preliminary, these statistics are regularly invoked by advocates as evidence that predictive models yield measurable real-world benefits. Ferguson describes how Santa Cruz's algorithm flagged micro-locations (500×500 ft) tied to meaningful decreases in burglaries and thefts.[18] These success stories helped fuel a wave of adoption across cities such as Memphis, Chicago, Dallas, and Minneapolis. Griffard likewise notes that the NYPD promoted Patternizr as a "new, effective… recommendation engine" that could assist investigators in linking related crimes more quickly than manual review.[19]

Another key argument is that algorithmic guidance can reduce reliance on individual officer hunches—long criticized for allowing racial bias and arbitrary decision-making. Ferguson frames predictive tools as more "objective" than traditional hot-spotting because they rely on mathematically derived probability models rather than discretionary perceptions of danger.[20] This line of reasoning suggests that when predictive alerts function like standardized "tips" about high-risk locations, they can guide policing in a more even-handed and consistent manner. Similarly, Griffard notes that Patternizr's developers explicitly designed the NYPD's system to minimize subjective inputs, claiming that removing "sensitive suspect attributes" (e.g., race, gender) and coarsening location data helps promote neutrality in pattern detection.[21]

Proponents interpret these design choices as evidence that data-driven policing can be insulated—at least in part—from the biases that affect human decision-makers. Predictive policing is also presented as the logical extension of decades of criminological research on how crimes cluster in space and time. Ferguson points out that predictive models are rooted in theories such as near-repeat theory, routine activity theory, and crime-and-place analysis, all of which show that certain crimes (especially property crimes) tend to recur near prior incidents within predictable time windows.[22]

Supporters also point to the rapid growth of predictive policing vendors—such as PredPol, Palantir, and HunchLab—as evidence of strong institutional confidence in the technology's

9 Mark Puente, *LAPD Pioneered Predicting Crime With Data. Many Police Don't Think It Works,* The L.A. Times, (July 3, 2019). https://www.latimes.com/local/lanow/la-me-lapd-precision-policing-data-20190703-story.html.
10 Molly Griffard, *A Bias-Free Predictive Policing Tool?: An Evaluation of the NYPD's Patternizr,* 47 Fordham Urb. L.J. 43, 47 (2019), https://ir.lawnet.fordham.edu/ulj/vol47/iss1/2.
11 Griffard, *supra* note 10, at 60.
12 Ferguson, *supra* note 5, at 1116.
13 *Id.* at 1137.
14 See: George Mohler et al., *A Penalized Likelihood Method for Balancing Accuracy and Fairness in Predictive Policing,* in 2018 IEEE International Conference on Systems, Man, and Cybernetics (SMC) (2018), https://doi.org/10.1109/SMC.2018.00421; Frank R. Baumgartner et al., *Racial Disparities in Traffic Stop Outcomes,* 9 Duke F. L. & Soc. Change 21 (2017).
15 Charlie Beck & Colleen McCue, *Predictive Policing: What Can We Learn from Wal-Mart and Amazon About Fighting Crime in a Recession?*, Police Chief, (2009), 18. https://www.ojp.gov/ncjrs/virtual-library/abstracts/predictive-policing-what-can-we-learn-wal-mart-and-amazon-about.
16 Andrew G. Ferguson, *Predictive Policing and Reasonable Suspicion,* 62 Emory L. J. 259, 269 (2012), https://scholarlycommons.law.emory.edu/elj/vol62/iss2/1.
17 Josh Koehn, *Algorithmic Crimefighting*, SanJose.com (Feb. 22, 2012), https://www.sanjose.com/2012/02/22/sheriffs_office_fights_property_crimes_with_predictive_policing/.
18 Ferguson, *supra* note 16, at 268.
19 Griffard, *supra* note 10, at 45.
20 Ferguson, *supra* note 16, at 270.
21 *Id.* at 44.
22 Ferguson, *supra* note 16, at 277–284.

potential. What began as a limited academic experiment quickly evolved into a multimillion-dollar enterprise supported by federal grants and national law-enforcement conferences. For proponents, this commercial and governmental investment signals that predictive policing is not a speculative or fringe idea but an innovation that major agencies view as central to the future of public safety.

## III. Arguments Against Predictive Policing

The core statistical premise is that past crime predicts future crime—not actually "predicting a particular crime, but predicting an elevated risk of crime based on pre-determined … factors."[23] However, predictive policing has become one of the most controversial developments in contemporary criminal law, with the most common criticisms being systemic bias and "dirty data"—inaccurate, incomplete, or inconsistent data, particularly within computer systems or databases. Since algorithms are trained on historically biased data, this reproduces racial disparities in policing. Manipulating crime statistics to meet quotas or produce ambitious crime-reduction results can also lead to increased policing in the neighborhoods where those statistics are concentrated. Some critics have labeled predictive policing as a form of "tech-washing," allowing racially biased policing methods to seem acceptable in society due to the appearance of objectivity.[24] Although proponents frame algorithmic systems as neutral, efficient, or data-driven, the empirical and legal evidence reveal a very different reality.

As Lum and Isaac write: "Police records do not measure crime. They measure some complex interaction between criminality, policing strategy, and community–police relations."[25] Their Oakland case study evaluates how biased police data sets are by combining a demographically representative synthetic population of Oakland with population-based drug use estimates to compare underlying drug use with police records. The results show that drug crimes known to police systematically misrepresent the true distribution of drug use in the population. While drug use was "relatively uniform across the city," arrests were concentrated almost exclusively in historically non-white and low-income neighborhoods.[26] When the PredPol algorithm was applied to this data, "Black people would be targeted at roughly twice the rate of whites," despite equivalent estimated drug-use patterns.[27] This demonstrates that predictive systems do not predict crime—they predict police behavior, embedding past enforcement disparities into future action.

Rotaru et al. likewise find that event-level models encode a "signature of enforcement bias."[28] Their event-level crime model revealed that models were susceptible to "perturbations caused by policing intensity rather than actual crime-pattern changes."[29] Across eight major metropolitan areas, the researchers found that predictive models were strongest at forecasting where police would go, not where crime would occur. As a result, these findings undermine any claim that predictive policing increases fairness. Instead, predictive models create feedback loops: the more heavily a neighborhood is policed, the more "crime" appears in the data, the more predictions target it, and the cycle repeats—confirming and amplifying historic racialized over-policing.

Opacity compounds these issues. Predictive policing tools are almost always proprietary, developed by private vendors such as PredPol, Palantir, or IBM. This means the algorithmic logic that directs state coercive power is hidden from courts, defendants, and the public. The Yale Media and Freedom Information Access (MFIA) Clinic emphasizes that information laws have serious shortcomings with respect to algorithmic accountability because companies claim that algorithms are "trade secrets that cannot be disclosed to the public,"[30] despite the algorithms operating as black boxes. This makes it difficult, if not impossible, to assess the accuracy and fairness of their performance. Compare this with administrative procedures to promote the accountability of human decisions, such as freedom of information laws, due process protections, and appeals procedures.

This black-box structure makes it impossible for defendants to challenge algorithmic suspicion. Yet predictive systems still shape encounters that may escalate into stops, searches, or arrests. Griffard's empirical evaluation of the NYPD's Patternizr reinforces this concern. She finds that Patternizr's pattern matching process is opaque and reproducibly inconsistent, with significantly different outputs depending on human analyst decisions and data-selection choices.[31] According to the Brennan Center, after a lengthy legal battle, the NYPD finally disclosed some documentation about its use of algorithms and predictive policing software.[32] However, the NYPD remains reluctant to disclose the source of their data sets. Despite claiming to not use enforcement data (such as arrest data) for predictive policing purposes, the department does not keep audit logs of the creation, access, and storage of the predictions it generates.[33] This makes it difficult for independent auditors or policymakers to evaluate these tools properly. Similarly, in Los Angeles, major details about predictive policing only emerged after years of activism demanding more information from the LAPD about the nature of its operations.[34] This concern reflects a shift in the locus of discretion, with accountability shifting from the police chief to the algorithm designer. This raises a structural constitutional issue, as the state is delegating core policing authority to actors beyond public oversight.

23 Ferguson, *supra* note 5, at 1137.
24 Will Douglas Heaven, *Predictive Policing Algorithms Are Racist. They Need To Be Dismantled.,* MIT Tech. Rev. (July 17, 2020), https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/.
25 Lum, K. and Isaac, W. (2016), To Predict and Serve? Significance, 13: 14-19. https://doi.org/10.1111/j.1740-9713.2016.00960.x.
26 *Id.*
27 *Id.*
28 Victor Rotaru, Yi Huang, Timmy Li, James Evans & Ishanu Chattopadhyay, *Event-Level Prediction of Urban Crime Reveals a Signature of Enforcement Bias in U.S. Cities*, 6 Nat. Hum. Behav. 1056 (2022), https://doi.org/10.1038/s41562-022-01372-.
29 *Id.*
30 Media Freedom & Information Access Clinic, *Algorithmic Accountability: The Need for a New Approach to Transparency and Accountability When Government Functions Are Performed by Algorithms 2* (Jan. 18, 2022), Yale Law School, https://law.yale.edu/sites/default/files/area/center/mfia/document/algorithmic_accountability_report.pdf.
31 Griffard, *supra* note 10.
32 Tim Lau, Predictive Policing Explained (Apr. 1, 2020), Brennan Center for Justice, https://www.brennancenter.org/our-work/research-reports/predictive-policing-explained.
33 *Id.*
34 *Id.*

## IV. Doctrinal Layer

Even if predictive policing were unbiased and transparent—which it is not—it faces a doctrinal problem: the Fourth Amendment requires individualized suspicion, not statistical generalizations. Predictive systems do not produce evidence tied to a specific person or specific act. They produce probabilistic area-based forecasts.

Supreme Court precedent makes clear that this equivalence is impermissible. As seen in *Terry v. Ohio* (1968), reasonable suspicion requires specific, observed facts. In *Terry*, the Court required that reasonable suspicion be based on "specific and articulable facts"[35] about a person's conduct, not on general profiles or inferences drawn from broad trends. The Court emphasized that a stop must be justified by the facts available to the officer at the moment of the seizure, and those facts must "warrant a man of reasonable caution" to suspect that this individual is engaged in crime.[36] Predictive algorithms provide no specific, individualized, or moment-specific facts about any person. They supply only statistical risk scores, which are the exact kind of generalized, unparticularized hunch *Terry* prohibits. Treating a probabilistic risk score as if it were a present-tense fact collapses *Terry*'s objective standard into what the Court expressly forbids: "intrusions… based on nothing more substantial than inarticulate hunches."[37] *Terry* also makes clear that constitutional protections apply most stringently in precisely the contexts where predictive policing is deployed. The Court emphasized that the Fourth Amendment "protects people, not places,"[38] and applies fully to the citizens on the streets. Predictive policing tools overwhelmingly guide officers' actions in public spaces—hotspots, neighborhoods, intersections—yet the individuals encountered there retain full Fourth Amendment protections. When officers rely on algorithmic risk to initiate encounters, they trigger constitutional scrutiny because "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[39] And any resulting frisk is a "serious intrusion upon the sanctity of the person… not to be undertaken lightly."[40] Crucially, *Terry* authorizes such intrusions only when the officer has reason to believe that this individual is "armed and dangerous," grounding suspicion in specific, situational facts.[41] Predictive policing flips this logic entirely: individuals become the focus of police attention not because of their observed conduct but because they fall within a statistically "high-risk" group or geographic area. Area-level or group-level predictions are not—and cannot be—"specific and articulable facts" about an individual's behavior. They are, at best, correlations about spaces, populations, or past enforcement patterns. As scholars like Lum & Isaac and Rotaru et al. show, these correlations often reflect "dirty data"[42] and enforcement bias, meaning risk scores frequently amount to formalized, data-driven hunches. Predictive policing, therefore, violates *Terry* at its core: it replaces individualized, moment-specific observation with statistical generalization, converting the constitutional standard of reasonable suspicion into an algorithmic approximation.

While *Terry* enshrines individualized suspicion at the street level, *Illinois v. Gate*s (1983) illustrates how probable cause requires contextual, qualitative judgment. In *Gates*, the Court rejected rigid or quantitative tests for probable cause, emphasizing that the Fourth Amendment requires a "totality of the circumstances" analysis grounded in the quality, not the quantity, of the evidence. This cuts directly against the logic of predictive policing. Gates rejects "rigid" or "quantitative" tests for probable cause.[43] Instead, it argues that probable cause is a "practical, nontechnical conception" assessed through a "fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[44] Probable cause, the Court explains, does "not deal with hard certainties, but with probabilities… [and] practical considerations of everyday life on which reasonable and prudent men act,"[45] emphasizing that the inquiry is fundamentally human and situational rather than mathematical. The Court emphasizes that probable cause should not be "reduced to a neat set of legal rules,"[46] and explicitly warns that "finely tuned standards" or "numerically precise" thresholds have "no place" in the magistrate's decision.[47] Predictive policing does exactly what *Gates* forbids: it translates probable cause and reasonable suspicion into finely tuned statistical thresholds, operationalized through an algorithm that encodes rigid, pre-set weights and rules. Instead of evaluating a suspect based on "particular factual contexts"[48] and a fact-rich, individualized narrative, officers are invited to rely on abstract risk scores and hotspot outputs that strip away context and replace it with automated correlation. In doctrinal terms, predictive policing inverts the *Gates* standard. Where *Gates* insists on a holistic, circumstance-specific judgment grounded in human reasoning, predictive systems reduce the probable cause inquiry to algorithmic suspicion and substitute a numerical output for the "totality of the circumstances"[49] analysis. Together, Terry and Gates reject the very logic on which predictive policing depends: suspicion can be mechanically derived from generalized probabilities.

## V. Structural and Governance Layer

Beyond doctrinal shortcomings, predictive policing raises a structural constitutional problem: law enforcement discretion is being delegated to private, proprietary algorithm developers. These systems are often created and controlled by entities that are not democratically accountable and operate outside traditional due-process safeguards.

This accountability failure is akin to the logic of the nondelegation doctrine in the U.S. government,[50] which prevents one branch of government from delegating to another entity the power or function it is constitutionally authorized to exercise it-

35 *Terry v. Ohio*, 392 U.S. 1, 21 (1968).
36 *Id.* at 22.
37 *Id.* at 22.
38 *Id.* at 9.
39 *Id.* at 16.
40 *Id.* at 16–17.
41 *Id.* at 27.
42 Madison Blevins, *When Dirty Data Leads to Dirty Policing*, 29 Rich. J.L. & Tech. 166 (2024), https://scholarship.richmond.edu/jolt/vol29/iss2/4.
43 *Illinois v. Gates*, 462 U.S. 213, 237 n.11 (1983).
44 *Id.* at 230–32.
45 *Id.* at 231–32.
46 *Id.* at 232.
47 *Id.* at 235.
48 *Id.* at 232.
49 *Id.* at 272.
50 Cong. Rsch. Serv., *Overview of Nondelegation Doctrine,* Constitution Annotated, https://constitution.congress.gov/browse/essay/artI-S1-5-1/ALDE_00000014/.

self. It is explicit in Article 1, Section 1, of the U.S. Constitution, which states that "all legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[51] Therefore, Congress cannot cede its lawmaking authority to external actors, such as the executive or judicial branches or private parties. By ensuring that decisions affecting rights and obligations are made by more public institutions than opaque or private entities, the doctrine aims to protect democratic legitimacy.

Predictive policing raises a parallel structural concern: police departments increasingly rely on proprietary, privately developed algorithms to exercise core policing discretion, effectively outsourcing the constitutionally significant task of determining suspicion. Just as Congress cannot hand its legislative power to private regulators, law enforcement cannot delegate the constitutional judgment required by the Fourth Amendment to companies like PredPol, Palantir, or ShotSpotter, whose operations are shielded from the Freedom of Information Act (FOIA) by trade secrecy and contractual nondisclosure.

This creates what scholars and policymakers identify as an accountability vacuum, as the public, and sometimes even the agency, doesn't know if "government algorithms are functioning properly or [how] to identify sources of ineffectiveness or bias."[52] For example, police involved in the Chicago Heat List invoked the algorithm to bolster its credibility, despite its inaccurate results. In effect, it was a way for cops to target people. A review by the Inspector General of the Los Angeles Police Department found significant disparities in the administration of the LAPD's predictive policing algorithms, PredPol and LASER, by different departments across the city. As a result, the LAPD stopped using LASER in 2019. This demonstrates how, in such contexts, the use of an algorithm may lend unwarranted legitimacy to discriminatory and baseless practices, ironically failing to constrain human discretion despite being thought to improve accuracy and reduce bias.

Case studies in Connecticut demonstrate that agencies using high-stakes algorithms are unaware of, or do not monitor, what those tools are doing.[53] A child welfare algorithm produced by Mindshare Technology used predictive analytics to estimate the chance that a child faced neglect, danger, or death, though with anomalous results. The Department of Children and Families (DCF) was unable to produce the algorithm's source code and "complete a robust formal evaluation to assess [ERSF's] efficacy."[54] Therefore, nobody evaluated whether the algorithm exhibited bias.

When a FOIA request was submitted to the Department of Education (DOE) requesting information about algorithms in the administration of school lotteries, the DOE withheld "documents detailing coding of the placement system [and] specific data inputs and protocols," invoking trade secret protection.[55] Its description of factors was rudimentary, and the DOE "provided no information about any procedures it has used to assess the performance of the algorithm."[56] Similarly, the Department of Administrative Services (DAS) plans to withhold "anything substantive related to the actual algorithm"[57] used in the hiring process for state employees and state contractors, citing trade secret and exam exemptions.

All three agencies indicated that their respective algorithms were proprietary and not subject to disclosure, suggesting that the state is increasingly deploying high-stakes automated decision-making systems without understanding, monitoring, or evaluating them. Agencies cannot explain how these systems operate, verify that they function, or assess whether they reproduce bias—yet they continue to rely on them in contexts with profound consequences for children, students, and public-sector workers. Constitutional and administrative judgment is effectively transferred to private vendors whose proprietary interests trump transparency. The Connecticut examples thus illustrate the core structural flaw of predictive policing: once the state relies on algorithms it cannot see, test, or challenge, meaningful accountability is impossible.

Unlike the nondelegation doctrine, predictive policing is even more troubling because the delegated function is not regulatory—it is coercive policing power. Individuals subjected to algorithmically informed stops or heightened surveillance cannot meaningfully challenge their classification, both because the algorithm is a black box and because there are no legal protections that compel police to disclose, justify, or scrutinize algorithmic inputs.

This structure also poses serious due process risks. When a person becomes the subject of police attention because of proprietary algorithmic labeling, they face consequences without notice, without the ability to contest, and without access to the underlying evidence. Predictive policing thus inverts basic procedural norms: the state acts first, and the justification is never revealed.

## VI. Policy and Doctrinal Implications

The combined doctrinal and structural flaws of predictive policing reveal the need for a comprehensive governmental response. Courts, legislatures, and administrative agencies all have roles to play in reasserting constitutional limits on algorithmic policing.

Courts should clarify that predictive policing outputs cannot independently establish reasonable suspicion or probable cause. Judicial doctrine must reaffirm that the Fourth Amendment requires individualized, contextualized evidence, and that algorithmic "risk scores" or hotspot predictions do not meet the threshold articulated in *Terry* and *Gates*. Judges can also require full disclosure of algorithmic methodologies when such systems are invoked in criminal proceedings, aligning algorithmic policing with existing rules of evidence and confrontation.

Regarding legislative action, state legislatures and Congress should adopt statutory frameworks requiring:

*i.* Mandatory algorithmic audits assessing disparate impact, data bias, and accuracy.
*ii.* Transparency requirements, including disclosure of vendors, training data, and system logic.

51 U.S. Const. art. I, § 1.
52 MFIA Clinic, Algorithmic Accountability, *supra* note 30, at iii.
53 *Id.* at 17.
54 *Id.* at 20–21.
55 *Id.* at 22.
56 Id at 23.
57 *Id.* at 24.

*iii.* Prohibitions on sole reliance on predictive scores for stops, arrests, or investigative decisions.
*iv.* Clear retention and oversight rules for data used in predictive tools.

Such statutes would align with emerging AI governance standards and directly address the accountability concerns raised by the Yale MFIA Clinic.

Finally, increasing public accountability and democratic oversight is needed as a balancing power. Predictive policing systems must be subject to public scrutiny equivalent to that afforded to other exercises of coercive state power. Agencies should be required to publish contracts with algorithmic vendors, evaluation metrics, accuracy, disparate-impact reports, and community-oversight mechanisms. These reforms reflect a broader shift toward algorithmic governance frameworks that treat predictive systems as public actors rather than private tools. Adopting such measures would help prevent the constitutional erosion that occurs when predictive policing functions unchecked by law.

## Conclusion

Quite paradoxically, predictive policing—far from its premise of being scientific, precise, and impartial—reveals a familiar problem: to what extent can state power be untethered from constitutional constraint? In a digitized world now increasingly surrounded by yet simultaneously concerned with the rise of artificial intelligence permeating every corner of society, the issue of predictive policing is a hotspot that heavily influences how AI and other algorithmic systems are regulated in the future. It sits at the intersection of constitutional doctrine, technological governance, and racialized enforcement—and it fails on all three fronts.

While marketed as an objective, data-driven innovation, predictive policing fundamentally reconfigures the Fourth Amendment by substituting statistical risk for individualized suspicion. As *Terry v. Ohio* and *Illinois v. Gates* make clear, the Constitution requires police to ground intrusions in "specific and articulable facts"[58] and the "totality of the circumstances"[59]—a contextual, qualitative judgment anchored in particularized evidence. Predictive systems, however, generate suspicion from correlations, not conduct; from populations, not persons. Transforming probability into suspicion collapses the doctrinal boundary that the Fourth Amendment was designed to preserve. Furthermore, by outsourcing core policing judgments to proprietary, opaque, and private algorithms, police departments effectively delegate constitutional decision-making to entities beyond democratic or judicial oversight. Agencies often lack access to the source code, cannot evaluate algorithmic effectiveness or bias, and cannot disclose the algorithmic logic due to trade-secret claims. The authority to initiate stops, surveillance, and enforcement against real people without notice, transparency, or recourse remains unchecked and runs rampant throughout the United States. Predictive policing fails because it transforms constitutional judgment into statistical output and places that transformation beyond accountability.

Given these limitations, predictive policing is incompatible with foundational Fourth Amendment principles. Courts should reject attempts to treat algorithmic forecasts as reasonable suspicion or probable cause, and legislatures must adopt accountability frameworks that restore transparency, oversight, and due process. Until policing algorithms can meet constitutional standards—and until the public can meaningfully scrutinize their design, operation, and effects—their deployment threatens not only individual rights but the legitimacy of the criminal legal system itself.

**This piece was written by Elena Li and edited by Clare A'Hearn.**

58 *Terry v. Ohio*, 392 U.S. 1, 21 (1968).
59 *Illinois v. Gates*, 462 U.S. 213, 272 (1983).

# AI Literacy and the Reproduction of Inequality in Education: Reassessing Equity in Emerging Technology Policy

## Introduction

The rapid implementation of artificial intelligence (AI) into social, economic, and political spheres has created a need to determine the best practices to develop comprehensive AI literacy. Schools are actively taking part in technological advancement, and world leaders are considering compulsory education as a solution to AI illiteracy, as younger generations will enter an increasingly algorithmic world. Many educators are most concerned with the curricula and regulatory frameworks that would allow students to develop technical and ethical understanding, both of which are important for students' engagement with emerging technologies. The rapid implementation of AI tools has also led educators to question whether students can interpret and evaluate new information they see online. Amid discussion of AI literacy, it is necessary to also consider the unequal distribution of technological resources within the United States to reimagine how policy implementation can shape the future.

Marginalized communities within the U.S. face various challenges that limit them from succeeding in the educational system, many of which stem from social and cultural factors. Most importantly, marginalized communities often have underfunded schools that don't have the resources to adopt up-to-date technologies as fast as other schools can.[1] Introducing an AI curriculum without understanding structural inequalities would only further exacerbate these issues. Thus, we cannot simply allude to AI literacy policies as the solution to baseline access. The divergence of access not only contributes to the widening of individual economic mobility gaps; it also undermines democratic participation, as AI now mediates access to information, political expression, and economic security. In this context, policymakers should not rely on simplistic solutions or assume that introducing new frameworks alone will resolve existing inequities. Instead, AI literacy policies must be developed in ways that acknowledge the U.S.' deeply rooted structural inadequacies. Only by doing so can we prevent AI literacy from reinforcing historical patterns of exclusion and ensure that it becomes a pathway toward educational and civic empowerment.

This paper argues that, if implemented without structural reform, AI literacy will reproduce the racial and socioeconomic inequities embedded in U.S. educational and legal systems, and therefore requires a federally guided, equity-centered governance framework. This paper proceeds in four parts. Section I situates AI literacy within the historical and structural inequalities of U.S. education policy. Section II analyzes the current legal and policy landscape governing AI, digital learning, and civil rights. Section III diagnoses how existing governance structures risk reproducing inequality when applied to AI literacy. Lastly, Section IV proposes a federal, equity-centered framework for AI literacy that integrates civil rights enforcement, targeted infrastructure investments, procurement reform, and community-based governance.

## I. Historical Context: Educational Inequality and the Digital Divide

The unequal access to education, which is now shaping the decision for AI literacy today, is rooted in the political, legal, and economic decisions that have contributed to the structure of educational opportunity within the U.S. Education disparities did not arise from the simple construct of schooling itself; they were actively reconstructed through public policies that distributed resources unevenly across communities, and these policies reshaped educational opportunity to fit particular political and economic priorities instead of promoting equal access. Federal housing and education policy played a central role in this process, as the use of redlining practices denied mortgages to Black families and other marginalized groups; this placed white families into well-resourced suburbs and confined Black and low-income families to underfunded urban neighborhoods.

Before 1954 and, to some extent, in the following years, we can study history to conceptualize how federal, state, and local governments have contributed to educational segregation through both housing and school finance policies. Federal housing policy decisions in America have restricted Black families from gaining access to homeownership, which has led them to live in underfunded districts. The federal government created the Home Owners' Loan Corporation's redlining system in 1933, which color coded maps that labeled Black neighborhoods as "hazardous" and ineligible for mortgage insurance.[2] The creation of the Federal Housing Administration's discriminatory mortgage insurance program (1934–1960s), another program implemented by the federal government, aimed to subsidize low-interest loans for white families while denying them to Black families.[3] This was an act of suburbanization that laid the foundations for well-funded and underfunded schools, thus deepening educational segregation through federal housing policy. Local governments also put forth zoning laws that prohibited multifamily housing, a policy specifically designed to

1 National Center for Education Statistics, Forum Guide to Digital Equity (2024).

2 Bruce Mitchell & Juan Franco, HOLC "Redlining" Maps: The Persistent Structure of Segregation and Economic Inequality 4 (2018), https://ncrc.org/wp-content/uploads/dlm_uploads/2018/02/NCRC-Research-HOLC-10.pdf.

3 *See* Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 92–130 (2017).

keep Black families out of white neighborhoods.[4] Because they were ultimately preventing people from living in affluent neighborhoods, they were also protecting these communities from sharing valuable resources.

At the same time, state and local governments used school boundary drawing, exclusionary zoning, and suburban incorporation to preserve local tax bases, which protected wealthier districts from resource sharing and kept poorer districts segregated and underfunded. State funding formulas rarely corrected these disparities, and many plans favored communities with higher property wealth, which reinforced racial and economic inequalities instead of addressing them. These public policies created an educational landscape in which technological access and school resources flowed toward communities that already held racial and economic privilege, while underserved communities were left without the infrastructure needed to benefit from new forms of learning, now including AI-powered education. These disparities were constructed through public policies that distributed resources unevenly across communities, contributing to racial and economic segregation and granting technological access to already privileged groups while neglecting those in need. Acknowledging this history is vital because any AI literacy initiatives introduced in today's unequal political infrastructure will further contribute to inequity unless policymakers undertake critical work to reverse these societal harms. Due to past policy decisions, AI should be viewed conceptually, with an understanding that addressing its implications in marginalized communities requires a holistic approach that tackles the harmful effects of redlining.

In *Milliken v. Bradley* (1974), the Supreme Court held that federal courts could not require interdistrict (across city–suburb) desegregation plans unless the suburban districts were proven to have intentionally contributed to segregation.[5] Because Detroit's surrounding white suburbs had not been found liable, the Court ruled that they could not participate in metropolitan-wide desegregation.[6] The ruling effectively stopped white suburbs from integrating, even where urban segregation was clearly rooted in state-sanctioned housing discrimination, local zoning laws, and school district boundary manipulation. This political decision contributed to racial inequality and unequal access to public resources. The state consistently relies on property taxes to fund education, which contributes to wealthy districts being able to receive more funding for teachers, technology, and infrastructure than low-income districts. Thus, AI becomes a tool implemented through federal and state funding, which may have significant implications for minority communities, as funding is not always distributed equitably.

Because public schools rely heavily on local property taxes, these housing decisions produced districts with dramatically different funding capacities, which allowed suburban communities to build stronger schools with better teachers and more updated technology, while urban districts faced chronic underinvestment. This largely explains why poor districts and schools are limited in adopting best technological practices such as AI. These policies have further widened the gap in schools' capacity to adopt advanced technology. Those same capacities continue to guide who gains access to AI tools, curriculum, and the necessary training. Technological advancements come after these structural inequalities, but they ultimately contribute to the foundational elements of the digital divide, which started to form in the late twentieth century. Federal policy initiatives such as the 1996 Telecommunications Act expanded internet access by restructuring the nation's telecommunications system and creating federal programs to support school and library connectivity.[7] The Act established the E-Rate program, which subsidized the cost of broadband, telecommunications services, and internal network infrastructure for K–12 schools and public libraries.[8] By requiring telecommunications companies to contribute to a Universal Service Fund, the policy aimed to ensure that even low-income or rural districts could obtain discounted internet services.

In practice, the Act marked the first major federal effort to integrate digital connectivity into public education, laying the foundation for widespread classroom internet access, but it did not eliminate problems related to broadband inclusion, device availability, and technological training. Because of the rise of technological innovation, well-resourced schools started to integrate STEM programs, while underfunded schools struggled to get funding. Both "Education to Innovate" and "Race to the Top" were designed to increase STEM readiness, stimulate technological capacity, and help low-income districts adopt modern instructional tools.[9] But these initiatives were limited in their ability to change the harmful conditions in marginalized communities because they relied on competitive grant models rather than guaranteed federal investment.

Race to the Top required states and districts to demonstrate existing capacity, such as strong data systems, effective teacher pipelines, and modern technological infrastructure, to qualify for funding, but these were the very resources that underfunded districts lacked due to decades of property tax disparities, redlining, and state disinvestment.[10] As a result, the districts

4 *See* Christopher Silver, *The Racial Origins of Zoning in American Cities*, *in* Urban Planning and the African-American Community: In the Shadows .

5 Milliken v. Bradley, 418 U.S. 717 (1974).

6 *Id.*

7 Federal Communications Commission, *E-Rate and Education (A History)*, https://www.fcc.gov/general/e-rate-and-education-history.

8 *Id.*

9 The White House, *Educate to Innovate*, https://obamawhitehouse.archives.gov/issues/education/k-12/educate-innovate; *President Obama Launches "Educate to Innovate" Campaign for Excellence in Science, Technology, Engineering & Math (Stem) Education*, Nov. 23, 2009, https://obamawhitehouse.archives.gov/the-press-office/president-obama-launches-educate-innovate-campaign-excellence-science-technology-en; U.S. Department of Education, Fundamental Change: Innovation in America's Schools Under Race to the Top 2, 6 (2015), https://files.eric.ed.gov/fulltext/ED577009.pdf.

10 *Race to the Top Fund,* 74 Fed. Reg. 59,836, 59,841–42, 59,844–45 (Nov. 18, 2009) (describing selection criteria, including state capacity, data systems, and effective teachers and principals); Legis. Analyst's Off. 7, Overview of Federal Race to the Top Grants (Sept. 29, 2009), https://lao.ca.gov/handouts/education/2009/Overview_of_Federal_Race_to_the_Top_Grants_92909.pdf (listing "data systems that support instruction" and "effective teachers and principals" among reform areas and noting capacity-based criteria); Fundamental Change, *supra* note 9, at 2, 6; Sylvia A. Allegretto, Public Education Funding in the U.S. Needs an Overhaul, Econ. Pol'y Inst. (July 12, 2022), https://www.epi.org/publication/public-education-funding-in-the-us-needs-an-overhaul/ (explaining that school funding relies heavily on state and local resources, particularly property taxes, and remains inequitable); An Analysis of School Funding Equity Across the U.S. and Within Each State, Educ. Tr. 1–2 (Dec. 2022), https://edtrust.org/wp-content/uploads/2014/09/Equal-Is-Not-Good-Enough-December-2022.pdf (finding that districts serving more students from low-income backgrounds and students of color often receive less state and local revenue); Daniel A. Lukes & Dora C. Costa, The Lingering Legacy of Redlining on School Funding, School Segregation, and Gentrification in the U.S., https://files.eric.ed.gov/fulltext/ED616673.pdf (linking historical

most in need of support were often the least able to compete for it. Neither program addressed foundational inequities such as broadband quality, device access, class size, teacher shortages, or the absence of equitable school finance structures. They encouraged innovation without supplying the long-term funding necessary to maintain it, and they assumed a baseline technological readiness that simply did not exist in many high-poverty districts. These programs helped well-resourced districts accelerate innovation while leaving structurally marginalized communities with the same barriers they had before: unequal infrastructure, limited digital capacity, and underfunding. Due to the political implementation of these policies, we have seen, and continue to witness, the consequential nature of those decisions, which have shaped access to housing, school funding, and digital infrastructure. Federal policies like HOLC and FHA lending systematically removed Black families from the wealth-generating opportunities of homeownership, creating tax-poor districts that still struggle to fund modern technologies. State policies that rely on property taxes to finance education reinforced these disparities, ensuring that underfunded districts could not invest in STEM programs or digital learning initiatives at the same pace as wealthier communities.

Local exclusionary zoning and rigid school district boundaries further concentrated poverty and racial segregation, which limited the technological capacity of marginalized communities for decades. Even federal digital policies, such as the 1996 Telecommunications Act and later competitive-grant initiatives like Race to the Top, expanded access unevenly because they assumed existing infrastructure that many under-resourced districts lacked. As a result, today's disparities in AI literacy reflect the cumulative effect of these historical choices: students in affluent districts benefit from early exposure to devices, broadband, STEM courses, and AI-enabled tools, while students in underfunded districts continue to face inadequate connectivity, outdated technology, and limited curricular access. These are not new inequities; they are the modern manifestations of long-standing political decisions that distributed resources along racial and economic lines.

Guan et al. (2025) demonstrate this clearly: students whose parents hold a bachelor's degree scored, on average, 26-30% higher on AI literacy assessments than students whose parents had a high school diploma or less, and students from high-SES families reported nearly double the frequency of hands-on AI tool use compared to low-SES students.[11]

Higher education has been impacted by similar patterns of inequality, as institutions with greater funding can adopt AI tools, develop specialized curricula to address the critical challenges within the world, especially the rise of AI, while students who attend institutions that don't have access to funding face inconsistent or inequitable access. As Shoval (2025) explained, AI integration in universities can widen rather than narrow equity gaps when adoption is not grounded in structural accountability.[12] By rapidly outputting policy that aims to advance technological adoption and innovation, we risk exacerbating the existing inequalities without prioritizing the existing inequitable practices, which correlates to policy failure.

Federal and state educational policies have always been rooted in innovation without recognizing underserved communities and their voices within the framework. Policy decisions such as No Child Left Behind (2001) and the Every Student Succeeds Act (2015) are often framed as major federal interventions designed to improve educational outcomes, but their actual impact reveals how policy can overlook the structural inequalities that shape learning conditions. NCLB attempted to create national accountability through high-stakes standardized testing, requiring schools to demonstrate "adequate yearly progress" or face federal sanctions.[13] While the law positioned itself as a tool for equity, it operated on an assumption that all schools, regardless of race, income, or local tax base, had equal capacity to meet rising performance expectations. In reality, NCLB intensified pressure on already underfunded districts by tying success to test scores without addressing the resource disparities that made meaningful improvement nearly impossible. As a result, schools serving low-income and minority communities were more frequently labeled as "failing," reinforcing stigma rather than supplying the investments needed to close achievement gaps. This is a prime example of what happens when we fail to address the historical problems that have contributed to minority disadvantage; instead, we design new metrics to quantify and explain why underserved communities are not meeting established standards. This could, in fact, also occur with AI if we do not address the root causes of unequal technological access. ESSA, signed in 2015 as NCLB's replacement, promised to correct some of these shortcomings by shifting power back to the states and offering more flexibility in how schools are evaluated. However, ESSA preserved the central logic of accountability without resolving the underlying inequities that shape educational access. Although the law allows federal funding to support effective instructional technology,[14] it does not require states to confront disparities in broadband infrastructure, digital literacy, or access to advanced technology, issues that directly influence whether students can benefit from emerging AI-powered educational tools. ESSA therefore continues a long-standing pattern in federal education policy: prioritizing performance metrics and the rhetoric of innovation while leaving the deepest structural barriers, property-tax-based funding, racial segregation, and unequal technological capacity, largely untouched. Both NCLB and ESSA allow us to understand the limitations of reform efforts that center on assessment rather than equity. They demonstrate how federal policy can demand academic progress from marginalized communities without addressing the political decisions that produced unequal condi-

redlining to present-day disparities in school and district funding).

11 Yurong Guan et al., *AI Literacy Predicts Computational Thinking through Multidimensional Interactions among Chinese High School Students*, 15 Sci. Rep. (2025).

12 Dorit Hadar Shoval, *Artificial Intelligence in Higher Education: Bridging or Widening the Gap for Diverse Student Populations?*, 15 Educ. Sci. 637 (2025).

13 U.S. Department of Education, No Child Left Behind: A Desktop Reference (2002), https://www.ed.gov/media/document/no-child-left-behind-desktop-reference-archived-2002-98652.pdf.

14 Every Student Succeeds Act, Pub. L. No. 114-95, §§ 4108(3), 4109(a), 129 Stat. 1802, 1958–59 (2015) (hereinafter ESSA); *See* U.S. Department of Education, *Overview of Final Regulations: Accountability, Data Reporting, and State Plans*, (2016), https://www.ed.gov/media/document/accountstateplan12816pdf-55349.pdf; U.S. Department of Education, Non-Regulatory Guidance: Student Support and Academic Enrichment Grants (2016), https://www.ed.gov/sites/ed/files/2020/07/essassaegrantguid10212016.pdf.

tions in the first place. Also, the rapid implementation of online learning and digital learning strategies during the COVID-19 pandemic exposed the disparities within underserved communities, which disproportionately affected low-income students and students of color.[15]

The political history and implementation of digital technology are deeply important, as they allow us to understand the legal and political frameworks into which AI literacy must be introduced. As Singh et al. explain, marked disparities in computer and broadband use persist across racial/ethnic and socioeconomic lines in the United States, with access differing sharply not only by income but also by geography and educational attainment.[16] Research consistently shows that gaps in digital access remain profound: for example, only 66.0% of American Indian/Alaska Native adults have broadband access, compared to 89.7% of Asian/Pacific Islander adults and 83.5% of non-Hispanic Whites, while individuals living below the poverty line experience an 18-percentage-point deficit in computer and internet use relative to higher-income groups.[17] 43% of adults in households earning under $30,000 lack home broadband, 41% do not have a desktop or laptop computer, and 27% rely solely on a smartphone for internet connectivity.[18] Furthermore, Americans with lower incomes continue to be less likely than those with higher incomes to have home broadband, a smartphone, or a computer, underscoring that essential forms of digital access remain stratified along economic lines.[19] These disparities make clear that equal access to AI-enhanced learning environments cannot exist when entire communities still lack consistent broadband, adequate devices, or the digital capacity necessary to meaningfully engage with emerging technologies. This suggests that AI literacy frameworks should not focus solely on individual competence or compliance with established standards, but also on the structural policies that shape who can access, and ultimately benefit from, AI education. Educational inequity shapes how people engage in society, as it may relate to their economic mobility, political voice, and democratic participation. As AI becomes deeply embedded in society, it has already begun to influence housing outcomes, employment, resource allocation, social services, and democratic engagement.[20] In the housing sector, for example, AI-powered tenant-screening algorithms have reproduced existing racial and socioeconomic biases by disproportionately flagging Black and low-income applicants as "high-risk," even when controlling for credit history or rental records.[21] Similarly, predictive policing technologies, often used in proximity to housing authorities, have concentrated surveillance in predominantly Black and Latino neighborhoods, reinforcing residential segregation patterns rather than alleviating them.[22] Therefore, equal access is a civil rights concern.

## II. Legal and Policy Landscape for AI Literacy

The regulation of AI literacy is deeply interwoven with education law, civil rights protections, federal and state digital learning policies, and the establishment of rules for educational technology and AI governance frameworks. Many policymakers have been central to the idea of the U.S. being prepared for AI which, in addition to technical familiarity with emerging tools, requires a society capable of navigating the political, economic, and civil rights consequences that accompany algorithmic systems. Preparation, in this sense, means developing the legal, educational, and infrastructural capacity to ensure that AI strengthens democratic participation rather than undermines it. It entails building an equitable technological foundation, broadband access, device availability, curricular integration, and strong civil rights protections, so that communities are not excluded from the benefits of innovation. Most importantly, being prepared for AI requires a historically informed understanding of how past policies have reproduced inequality. Without confronting these structural conditions, policies aimed at "AI readiness" risk functioning as another mechanism that privileges already-advantaged districts while marginalizing those without the resources to engage. In this context, true preparedness is not simply about adopting new technologies; it is about constructing an equitable framework that allows all students to meaningfully participate in an AI-driven society. But within the true political dynamics, the policy landscape itself is deeply fragmented, especially when it comes to addressing the inequities that contribute to unequal access to education in the U.S.

### *A. Education Law and Federal Statutory Frameworks*

15 *See, e.g.*, Allegretto, *supra* note 10; Megan Kuhfeld et al., Understanding the Initial Educational Impacts of COVID-19 on Communities of Color (2021), https://files.eric.ed.gov/fulltext/ED617855.pdf; Amanda Bergson-Shilcock & Roderick Taylor, Closing the Digital Skill Divide: The Payoff for Workers, Business, and the Economy (2023), https://files.eric.ed.gov/fulltext/ED626621.pdf.

16 Gopal K. Singh et al., *Digital Divide: Marked Disparities in Computer and Broadband Internet Use and Associated Health Inequalities in the United States*, 4 Int. J. Transl. Med. Res. Public Health (2020).

17 *Id.*

18 Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, Pew Research Center, Jun. 22, 2021, https://www.pewresearch.org/short-reads/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/.

19 *Id.*

20 *See generally* Organisation for Economic Co-operation and Development, A Broken Social Elevator? How to Promote Social Mobility (2018), https://www.oecd.org/content/dam/oecd/en/publications/reports/2018/06/a-broken-social-elevator-how-to-promote-social-mobility_g1g8e196/9789264301085-en.pdf; Hannah Borhan, *Civic Education as a Pathway to Inclusive Societies: Exploring the Role of Education in Fostering Civic and Social Engagement*, (2025), https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/02/civic-education-as-a-pathway-to-inclusive-societies_6d52238a/3f128be8-en.pdf; Organisation for Economic Co-operation and Development, *AI and Work*, https://www.oecd.org/en/topics/ai-and-work.html; Organisation for Economic Co-operation and Development, *AI and the Future of Social Protection in OECD Countries*, (2025), https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/06/ai-and-the-future-of-social-protection-in-oecd-countries_038f49ed/7b245f7e-en.pdf; Organisation for Economic Co-operation and Development, Governing with Artificial Intelligence: The State of Play and Way Forward in Core Government Functions (2025), https://doi.org/10.1787/795de142-en.

21 *See generally* Bill Pitkin, Katharine Elder & Danielle DeRuiter-Williams, Building a Housing Justice Framework (2022), https://www.urban.org/sites/default/files/2022-08/Building%20a%20Housing%20Justice%20Framework.pdf; Boshart, *How Tenant Screening Services Disproportionately Exclude Renters of Color from Housing*, Housing Matters, Dec. 21, 2022, https://housingmatters.urban.org/articles/how-tenant-screening-services-disproportionately-exclude-renters-color-housing; Brendan Chen et al., *Oversight of Tenant Screening Companies May Change. Here's What Landlords and Renters Should Know to Protect Themselves*, Housing Matters, Apr. 9, 2025, https://www.howhousingmatters.org/articles/oversight-tenant-screening-companies-may-change-heres-what-landlords-and-renters-should; Judah Axelrod et al., Opening the "Black Box" of Tenant Screening: Analyzing Data Matches in Court Data (2025), https://www.urban.org/sites/default/files/2025-03/Opening-the-Black-Box-of-Tenant-Screening.pdf.

22 Dhruv Mehrotra et al., *How We Determined Crime Prediction Software Disproportionately Targeted Low-Income, Black, and Latino Neighborhoods*, The Markup, Dec. 2, 2021, https://themarkup.org/show-your-work/2021/12/02/how-we-determined-crime-prediction-software-disproportionately-targeted-low-income-black-and-latino-neighborhoods.

Federal education law sets the foundational principles for states and districts, but it does not explicitly state what those obligations are when it comes to AI literacy. The Elementary and Secondary Education Act (ESEA) was put into place in 1965 and reauthorized by the Every Student Succeeds Act (ESSA), which denotes that educational accountability is a process that is built on standardized assessments.[23] It neglected the scope of digital or algorithmic competencies, which are highly needed in today's world.[24] Although ESSA did allow for federal funding to support effective instructional technology,[25] it does not truly look into how states' discretion could result in economic and social problems for marginalized groups. This creates variation in terms of the availability of AI-related curriculum and teacher training. The Individuals with Disabilities Education Act (IDEA) also entails AI literacy as it requires schools to provide students with disabilities with the proper technological tools to obtain a public education.[26]

AI tools are becoming deeply embedded in learning systems. IDEA's accessibility mandates will require many school districts to evaluate algorithmic bias and ensure that these tools are meeting the federal disability standards under Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination based on disability in any program or activity receiving federal financial assistance, and requires schools to provide students with equal access to educational opportunities.[27] It establishes that students with disabilities must receive the accommodations, support, and services necessary to participate meaningfully in the learning environment.[28] But there is no federal policy that explains or even details how schools should evaluate AI tools for compliance.

### *B. Civil Rights Protections and Anti-Discrimination Law*

AI literacy policy is built on the core foundational elements of the civil rights statutes. Title VI of the Civil Rights Act of 1964 prohibits discrimination in programs that are funded by the federal government.[29] When it comes to equal access, AI-relevant coursework, broadband connectivity, or algorithmic tools could contribute to discrimination if they are disproportionately harming racial groups.[30] This would also apply to Title IX for gender discrimination[31] and the Equal Educational Opportunities Act (EEOA) for language minorities.[32]

Historically, courts have understood and recognized education inequity as a civil rights concern and problem, even when they don't set standards for what schools would have to do to comply. The Supreme Court's decision in *Milliken v. Bradley* (1974) held that schools could not be required to cross district lines to remedy segregation unless it was proven that multiple districts had deliberately engaged in discriminatory practices. In other words, the Court rejected a metropolitan-wide desegregation plan and ruled that predominantly white suburban districts did not have to participate in remedies for a segregated urban district. This ruling sharply limited the ability to address educational inequity regionally. It effectively cemented district boundaries as barriers, preventing resource-sharing or collaborative remedies across districts even when inequality was the product of broader housing patterns, regional funding structures, and metropolitan-level decisions.[33]

### *C. Federal and State Digital Learning Policies*

Federal digital learning policy is established through the E-Rate Program, part of the Telecommunications Act of 1996, which supports school districts with broadband and telecommunications services.[34] Through the implementation of E-Rate, many schools have connectivity, but the program has not closed gaps in broadband speed, home internet access, quality, or digital training.[35] This is important to note as AI tools become more dependent on bandwidth. Bandwidth becomes the focal point of the issue because it determines whether schools can actually participate in digital or AI-enabled learning in the first place. When a district lacks sufficient bandwidth, it cannot run the tools, platforms, or instructional programs that these initiatives assume are baseline conditions. As a result, the conversation shifts from *how* to implement AI literacy to *whether* implementation is even possible in the first place. Bandwidth exposes the underlying structural divide: districts with strong, reliable internet can adopt new technologies with ease, while districts with weak or inconsistent connectivity are automatically excluded from the modernization initiative envisioned. In this way, bandwidth decides who gets to benefit from digital learning environments and who is left behind, revealing that the core issue is not innovation itself but unequal access to the infrastructure required to support it.

The Obama administration announced the ConnectEd Initiative, which was designed to modernize digital learning environments by expanding access to up-to-date classroom technologies, improving broadband connectivity, and encouraging schools to integrate digital tools into everyday instruction, but its

23 Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965), *amended by* Pub. L. No. 114-95, 129 Stat. 1802 (2015), https://www.ed.gov/sites/ed/files/documents/essa-act-of-1965.pdf; *Overview of Final Regulations*, *supra* note 14.

24 *See generally* ESSA.

25 *Id.* § 4101.

26 Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482.

27 29 U.S.C. § 794 (2024); U.S. Department of Education, *Section 504*, https://www.ed.gov/laws-and-policy/individuals-disabilities/section-504 (last visited Mar. 16, 2026); U.S. Department of Education, Disability *Discrimination: Equal Access to Opportunities,* https://www.ed.gov/laws-and-policy/civil-rights-laws/disability-discrimination/disability-discrimination-key-issues/disability-discrimination-equal-access-opportunities (last visited Mar. 16, 2026); Miguel A. Cardona, Roberto J. Rodríguez & Kristina Ishmael, Artificial Intelligence and the Future of Teaching and Learning: Insights and Recommendations (2023), https://www.ed.gov/sites/ed/files/documents/ai-report/ai-report.pdf; John Ross, Guidance for Developing Policies to Govern the Adoption and Use of Artificial Intelligence in K-12 Schools, https://files.eric.ed.gov/fulltext/ED655341.pdf.

28 Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794.

29 Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d.

30 Alexander v. Sandoval, 532 U.S. 275 (2001) (limiting private disparate-impact suits but affirming agency enforcement authority).

31 *Education Amendments of 1972*, tit. IX, 20 U.S.C. §§ 1681–1688.

32 *Equal Educational Opportunities Act of 1974,* 20 U.S.C. §§ 1701–1758.

33 *Milliken v. Bradley*, 418 U.S. 717 (1974).

34 *Telecommunications Act of 1996*, Pub. L. No. 104-104, § 254(h), 110 Stat. 56, 91-92 (1996) (hereinafter Telecommunications Act).

35 Federal Communications Commission, *supra* note 7; Federal Communications Commission, *E-Rate - Schools & Libraries USF Program*, https://www.fcc.gov/general/e-rate-schools-libraries-usf-program (last visited Mar. 18, 2026); *Modernizing the E-Rate Program for Schools and Libraries,* 29 FCC Rcd. 8870, 8871–72 (2014) (noting the need for greater high-speed broadband capacity in schools and libraries); *Permitting E-Rate Program Support for Off-Premises Use of Wi-Fi Hotspots and Services,* FCC 24-76, ¶¶ 1–5 (July 29, 2024), https://docs.fcc.gov/public/attachments/FCC-24-76A1.pdf (recognizing that many students still lacked off-premises internet access and remained on the wrong side of the digital divide); Nicol Turner Lee, Bridging Digital Divides between Schools and Communities (2020), https://www.brookings.edu/articles/bridging-digital-divides-between-schools-and-communities/.

impact was uneven because participation was never guaranteed.[36] Today, many states take different approaches to digital literacy and computer science mandates. Most districts understand the importance of implementing or providing resources that pertain to AI literacy, though some districts lack the critical resources needed to help facilitate competencies. There are no detailed standards or approaches for school districts in AI education, which contributes to reinforcing inequities in an increasingly digital world.

### *D. Procurement Rules and Technology Adoption in Schools*

School districts can adopt AI-enabled tools through public procurement rules that are generally cost-effective, require vendor compliance, and are central to data privacy. Procurement practices are governed by federal statutes such as the Family Education Rights and Privacy Act (FERPA), which aims to regulate data collection through digital platforms.[37] States can also add additional requirements. California, for example, enacted the Student Online Personal Information Protection Act (SOPIPA), which aims to limit the way in which ed-tech vendors can use student data.[38] Despite that, procurement practices don't necessarily require equity assessments, algorithmic bias evaluations, or community participation in technology selection. There are various districts that don't have the necessary resources to negotiate equitable contracts or get tools that can critically follow civil rights standards. Due to this limitation, well-resourced school districts can adopt tools to address various concerns, whereas underfunded and under-resourced school districts are limited, thus they are forced to adopt low-quality tools or none at all, which reproduces the digital divide through procurement practices.

### *E. Emerging AI Governance and the Absence of Educational Standards*

At the federal level, there are active measures to shape AI governance by way of executive guidance rather than comprehensive legislation. The Blueprint for an AI Bill of Rights (2022) put forth principles for safe and non-discriminatory algorithmic use, but doesn't detail how this process is supposed to be actually mandated.[39] The National Institute of Standards and Technology (NIST) released an AI Risk Management Framework in 2023, which put forth ways in which risks can be mitigated, but it doesn't pertain to schools specifically.[40] Many states have already started to look at ways in which they can govern AI, but the focus is generally applied to commercial use and employment; it does not address the importance of AI literacy implementation or guidance in K-12 education. If there is no governing statute that details AI literacy standards, data protections, or civil rights obligations in algorithmic education, AI implementation would continue to be fragmented by districts' inconsistent decisions.

### *F. Political Forces Shaping the Landscape*

AI literacy is not only shaped by law but also guided by the rhetoric of competing political pressures. Many technology companies understand the importance of schools as a market, so they allow schools early access to their tools. State governments oversee innovation and workforce preparation, yet this often privileges economic competitiveness over structural equity. Various civil rights organizations have already raised concerns about algorithmic discrimination, digital exclusion, and unequal access to AI. This inequality must be acknowledged as policymakers seek either to define AI literacy as a public good, requiring a universal framework to centralize the resource, or allow it to develop as a market-driven skill that benefits only communities with sufficient infrastructure. Because there is no federal approach, political and economic pressures will continue to shape AI implementation.

## III. Diagnosing Structural Barriers to Equitable AI Literacy

AI policy in the United States is being built on top of an educational system that is legally and socially unequal; the foundational elements of this system ultimately shape who benefits from technological innovation. Most political decisions, generally from the federal and state levels, assume that school districts have the necessary infrastructure, staffing, and curricular flexibility to adopt AI tools, but decades of policy failures have shown that equal access has never existed. Because of these political decisions, the U.S. faces a critical risk, as marginalized students would be excluded from access, and policy decisions would prioritize students in predominantly white districts. One problem stems from resource-dependent educational federalism, which is a structure that is reinforced by the Supreme Court. In *San Antonio Independent School District v. Rodriguez*, the Court ruled that education was not a fundamental right under the Constitution, which allowed states to fund schools through localized property tax systems.[41] This paved the way for wealthier school districts to establish stronger educational infrastructures. This consists of STEM opportunities and broadband access, while marginalized communities face restraints. AI literacy is deeply intertwined with the long-standing battle for educational equality, a policy that neglects the historical domains that infringe upon one's rights could ultimately reproduce the inequities that the court caused in *Rodriguez*.

Additionally, underserved communities are disconnected from the policies that are guiding digital learning. Although the Telecommunications Act of 1996 aimed to expand internet access, it failed to address some critical problems, such as broadband quality, device access, and technology training.[42] AI literacy deeply depends on digital environments, but if there is no detailed approach to access, under-resourced communities will suffer, and the political effects of the act will linger in the new digital domain.

Further, higher education institutions are also reproducing historical inequities. Colleges with higher endowments can address the critical concerns that pertain to AI literacy as they

36 The White House, *ConnectED*, https://obamawhitehouse.archives.gov/issues/education/k-12/connected (last visited Mar. 18, 2026).
37 Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g.
38 *Student Online Personal Information Protection Act,* Cal. Bus. & Prof. Code §§ 22584–22585.
39 *See generally* White House Office of Science and Technology Policy, Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People (2022), https://www.govinfo.gov/content/pkg/GOVPUB-PREX23-PURL-gpo193638/pdf/GOVPUB-PREX23-PURL-gpo193638.pdf.
40 *See generally* National Institute of Standards and Technology, Artificial Intelligence Risk Management Framework (AI RMF 1.0) (2023), https://doi.org/10.6028/NIST.AI.100-1.
41 *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1 (1973).
42 Telecommunications Act.

present themselves, while institutions with lower endowments face critical challenges to even establishing guidelines for their students. Shoval's work is a key contribution to understanding the racialized political economy of emerging AI literacy. She argues that when institutions of higher education attempt to "prepare" students for an AI-driven future, they inadvertently reproduce the same racial and economic hierarchies embedded in technological systems. Thus, rather than closing the gap, AI literacy programs risk expanding it, aligning universities with broader capitalist logics that privilege those already advantaged.

Lastly, AI literacy frameworks are structurally blind. Many models assume that students already have the technical understanding of AI, as they focus on interpretation, data reasoning, and computational thinking.[43] Although technical understanding is highly important, they disregard the fact that some students may not have the same understanding or exposure to technological literacy. Research on the digital divide shows that AI-powered tools deepen inequality when introduced into underfunded schools.[44] The problem is very visible: AI literacy policy, which is currently being constructed, is not a neutral process. It is consistently shaped by legal and political decisions that have historically marginalized communities of educational opportunity and digital access. Policymakers must focus on the structural impact first; if not, AI literacy standards will continue to harm marginalized communities.

## IV. Policy and Legal Reforms for Equity-Centered AI Literacy

In order to properly design an AI literacy framework that accounts for equity, policymakers must address the critical structural inequities that have been formulated through historical and political landscapes. AI literacy must not be centered or governed based on technical competency; it should recognize civil rights, which have been deeply embedded in constitutional, statutory, and administrative obligations. On that note, this section proposes various ways in which we could reform AI literacy policy toward racial, economic, and geographic equity. These reforms are based on research comparing different places, federal civil rights rules, and studies showing how unequal schools and technology access are across different communities.

### *A. Federal Mandate for Equity-Centered AI Literacy Standards*

Congress should create a federal equity mandate requiring states to showcase how AI literacy implementation plans address historic inequities within underserved communities. Looking at federal obligations under the Every Student Succeeds Act (ESSA), this mandate would require states to consider how well AI literacy initiatives are also measuring equity benchmarks rather than solely focusing on innovation goals. It would ensure that AI literacy standards do not contribute to resource disparities, which are often tied to property tax-funding systems that contribute significantly to affluent school districts.

AI literacy research has shown that students who come from a background with higher parental education and socioeconomic status tend to have higher AI competencies.[45] If we don't set federal requirements to stop these disparities from deepening, leaving this problem solely to the states would cause some school districts to be privileged over others that have the required infrastructure. Federal policy implementation thus becomes important to avoid unequal adoption patterns that have been on the rise since digital learning technologies started to become the standard in the late twentieth century.

### *B. Civil Rights Enforcement for Algorithmic and Educational Access*

The Department of Education's Office for Civil Rights should clarify that racially inequitable access to AI literacy may violate Title VI of the Civil Rights Act when students of color are denied equal access to educational resources, technology, and related learning opportunities. Various courts have understood this issue and recognized that resource allocation was tied to the state, which has contributed to civil rights concerns in education. Due to the fact that unequal access to AI tools has the potential to widen achievement gaps, OCR should make sure that AI literacy education is guaranteed to all students, not just the select few who have the resources to obtain literacy. OCR should also require that all school districts publicly disclose and report disparities in access to technological resources. There are already mechanisms in place to address various problems under ESSA, but it is also important to include digital and algorithmic access. Directly reporting inequitable access would force many policymakers to be accountable for disparities.

### *C. Federal Digital Infrastructure Funding Targeted to Underserved Districts*

Federal broadband initiatives do not eliminate the other barriers that are deeply embedded in society. For example, as of 2023, the FCC reports that broadband availability in the U.S. has reached over 90%, yet nearly 28 million households still lack a home internet subscription, primarily due to affordability, device shortages, and limited digital and AI literacy rather than physical access to broadband infrastructure.[46] Moreover, the National Center for Education Statistics finds that students in high-poverty districts are 2-3 times more likely to lack access to a computer at home, even when broadband service is technically available.[47] In order to properly address this gap, it is important for Congress to put forth a funding program that allocates AI-literacy infrastructure grants to districts with high rates of poverty. This funding would address various issues, such as funding for devices, computational learning tools, and culturally responsive AI curricula. Equity is something that can be addressed when resources are provided to communities that have been historically underserved and excluded from technological innovation. If these issues are not addressed, we will accelerate and deepen the digital divide.

### *D. Procurement Standards That Prevent "Inequity by Design"*

State and district procurement rules need to require

43 Davy Tsz Kit Ng et al., *Conceptualizing AI Literacy: An Exploratory Review*, 2 Comput. Educ. Artif. Intell. (2021).

44 Lourdu Vesna et al., *Digital Divide in AI-Powered Education: Challenges and Solutions for Equitable Learning*, 10 J. Inf. Syst. Eng. Manag. 300 (2025).

45 Guan et al., *supra* note 11.

46 National Telecommunications and Information Administration, Federal Broadband Funding Report: Investing in Internet for All (2023), https://www.ntia.gov/sites/default/files/reports/federal_broadband_funding/2023-federal-broadband-funding-report.pdf.

47 *See* Institute of Education Sciences, Use of Educational Technology for Instruction in Public Schools: 2019—20 (2021), https://nces.ed.gov/pubs2021/2021017.pdf.

algorithmic transparency, data protection, and equity audits for all AI-enabled educational tools. Procurement policy has historically led to educational innovations in classrooms, but it doesn't account for the various demographics it impacts. Therefore, I suggest that there be a way to actually account for exploring ways in which standards could be created to prevent inequity by design.

### *E. Community-Centered Co-Design and Governance*

Various studies have also alluded to the fact that AI literacy programs are most effective when they include cultural capital and the lived experiences of underserved communities.[48] In order to properly address this, states should focus on establishing community AI literacy councils; the council could be composed of parents, teachers, students, technologists, and local advocates. These councils would allow for the various people across communities to take part in the creation of standards, evaluation of curricular tools, and oversight of equity outcomes.

### *F. Cross-Disciplinary Integration Beyond STEM*

Lastly, it is important to mandate AI literacy across the curriculum instead of solely focusing on it as STEM instruction. Various models, from history and civics to social work and the arts, allow students to break down AI's impact in society, which can allow them to understand the social, ethical, and political implications of AI.[49] This allows AI to be regarded as a social and legal process instead of relying solely on technical understanding. By including the humanities, we allow for the structural inequities that are documented in K-12 systems to be seen and allow people to address them as they arise.[50] These proposals allow one to build and categorize what it means to address some of the political and legal issues that seem to allow inequities to continue through the development of AI, through legal, civil rights, and governance gaps. By embedding equity into federal mandates, civil rights enforcement, procurement rules, and community governance structures, policymakers can construct an AI literacy framework that expands, rather than restricts, educational and democratic opportunity.

## Conclusion: AI Literacy as a Civil Rights Imperative

Artificial intelligence is a growing field in the United States; therefore, it is positioned with the effects of educational segregation, unequal funding, and uneven technological development. Various policy agendas will be put into place to increase AI literacy, but it is important that they consider the legal and political dynamics that have contributed to educational access. The existing framework within the United States is shaped by the court, federal statutes, and digital learning policies that don't distribute technological infrastructure equally across the nation. These are the conditions in which AI literacy is going to be built from, so these domains are to be taken into account by any policymaker who attempts to implement good policy to enrich and better the lives of others.[51] If policymakers neglect history, they will be contributing to a new formalization of disparities that stems from the rhetoric of innovation, which is usually positioned as solving problems.

AI is not only a technical tool; it has been deeply embedded into our social lives as it contributes to access to employment, information, civic participation, and economic mobility. If we implement policies that neglect how technological innovation only allows communities that are advantaged to take part, we will be infringing upon minorities' informational, economic, and political rights. The inequities that were identified throughout this piece, such as unequal access to AI adoption, further allude to the idea that AI literacy is being built within a system that has already contributed to asymmetrical opportunity. The proposals that were offered within this article would allow us to move from an act of simple policy commitments to real action that is built on the basis of inclusion.

The legal and policy proposals offered in this Article are designed to move beyond rhetorical commitments to inclusion. This would require us to reimagine the actions of federal and state authorities, pushing for policy implementation that aims to redesign procurement and funding structures and build new frameworks that are central to making sure the distribution of resources is equitable. This would require community experts to be at the forefront of issues that are particularly disadvantageous to marginalized groups, as they would also be included in the design, evaluation, and governance of AI-related programs.

If policy implementation does not seek to incorporate the voices of the marginalized into the practical aspects of AI implementation, then AI literacy will only benefit the people who already have access to it, leaving inequality unaddressed as the central issue in the American political context. Ultimately, the future is in the hands of policymakers. If they prioritize innovation and competition over democratic empowerment, society will eventually ask how such inequities could have been prevented. With policies built on equity, participatory governance, and historically informed policymaking, AI literacy could contribute to the rise of America's global infrastructure, as marginalized students would be able to contribute to America's technological innovation and help shape AI leadership.

**This piece was written by Tinarie Dacres and edited by Daphne Coplon.**

48 *See, e.g.*, Huajie Jay Cao et al., *AI Literacy for Underserved Students: Leveraging Cultural Capital from Underserved Communities for AI Education Research*, CHI Conf. Hum. Factors Comput. Syst. (2025).

49 *See, e.g.*, Eunhye Ahn et al., *Artificial Intelligence (AI) Literacy for Social Work: Implications for Core Competencies*, 16 J. Soc. Soc. Work Res. 9 (2025).

50 *See generally* Katarina Sperling et al., *Perspectives on AI Literacy in Middle School Classrooms: An Integrative Review*, Postdigital Sci. Educ. (2025).

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

# From "No Child Left Behind" to "Every Student Succeeds": The Decades-Long Mission of Promoting Equity in Federal Education Policy

## Introduction

Public education policy in the United States has changed considerably over the 20th and 21st centuries. Initially passed in 1965, the Elementary and Secondary Education Act (ESEA) outlined the federal government's involvement in public education, detailing obligations such as allocating funding to public schools and aid to disadvantaged students and areas.[1] The ESEA has been revised multiple times to address issues in, and criticism of, the public K-12 education system. One such policy was the No Child Left Behind Act (NCLB), which passed in 2002 with the intention of reforming federal accountability in public education, primarily by making school funding reliant on across-the-board standardized testing.[2] The other major revision, the Every Student Succeeds Act (ESSA), was passed in 2015 in light of the apparent faults of NCLB, and it granted states more autonomy to determine their method of accountability.[3]

In this paper, I will argue that although NCLB resulted in measurable gains in easily quantifiable skills such as math development, it did not achieve its goal of reducing literacy disparities and achieving general educational equity. The ESSA's broader and more flexible accountability measures represent a conscious shift toward addressing the gaps of its predecessor, yet its inconsistency and sometimes-lacking implementation have limited its effectiveness. In Section I, I will discuss the history of NCLB, defining the lawmakers' goals during implementation and providing an overview of its mechanisms. In Section II, I will dive into both the beneficial and harmful impacts of NCLB, shining light on criticisms of its shortcomings and successes. In Section III, I will transition into the ESSA, discussing the motivations behind its enactment and the key reforms it included due to the drawbacks of NCLB. In Section IV, I will investigate the beneficial and harmful outcomes of the ESSA, outlining criticisms and questions about its future impact. Finally, I will conclude by considering the comparisons between NCLB and the ESSA and detailing which act has been more successful in different fields, how they have mitigated or worsened educational inequality among marginalized groups, and how testing and accountability have evolved.

## I. History and Goals of NCLB

NCLB was signed into law in 2002 with broad bipartisan support and represented the most sweeping federal intervention into public education policy since the passage of the ESEA in 1965.[4] The Act was created based on the belief that achievement gaps in education, especially those along racial and socioeconomic lines, could be reduced if schools were held equally accountable for their students' outcomes.[5] To address this, NCLB established federal academic standards in reading and math, which were enforced through nationwide standardized testing.[6] Schools not meeting the average standardized testing benchmark scores faced consequences, such as forcing them to allow students to transfer to better-scoring schools, forcing them to offer free tutoring, and, in severe scenarios, forced restructuring or shutdowns.[7] Through these tests and methods of enforcing accountability, NCLB created uniform standards that public schools nationwide had to abide by, with the intention of decreasing the wide gaps in education nationwide, especially among disadvantaged groups.[8]

These uniform standards involved schools meeting the requirements of the Adequate Yearly Progress (AYP) system, which consisted of evaluating standardized test scores, graduation rates (if applicable), and other hard performance metrics such as attendance.[9] These school metrics were evaluated both as a whole and across specific subgroups, such as "ethnic or racial background, economic status, familiarity with the English language, disability," and more.[10] Until 2014, NCLB required schools to reach these increasing AYP objectives each year with the end goal of reaching "proficiency."[11]

## II. Impacts and Criticisms of NCLB

NCLB was, and continues to be, subject to heavy criticism. This is, in a large part, due to its apparent overreliance on standardized testing and the uneven effects that such testing can generate across different student populations. An analysis of the effects of NCLB on student learning showed that methods of accountability, such as standardized tests, led teachers and curricula as a whole to "teach to the test," essentially narrowing educational topics covered in class to focus on the content of standardized tests.[12] NCLB's methods of enforcing such account-

1 Alyson Klein, *No Child Left Behind: An Overview*, Education Week (Apr. 10, 2015), https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04.
2 *Id.*
3 Alexandra Walsh, Mary Moynihan & Elizabeth Yin, *Has the "Every Student Succeeds Act" Left Children Behind?*, The Regulatory Review (Aug. 6, 2022), https://www.theregreview.org/2022/08/06/saturday-seminar-has-the-every-student-succeeds-act-left-children-behind
4 Klein, *supra* note 1
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 Mark Dziak, *Adequate Yearly Progress (AYP)*, EBSCO Research (2025), https://www.ebsco.com/research-starters/education/adequate-yearly-progress-ayp
10 *Id.*
11 *Id.*
12 Jennifer L. Jennings & Douglas L. Lauen, *Accountability, Inequality, and Achievement: The Effects of the No Child Left Behind Act on Multiple Measures of Student Learning*, 2 RSF: Russell Sage Found. J. Soc. Sci. at 233

ability measures involved tying a school or district's funding, in part, to the success of their students on these tests.[13] Thus, in the interest of self-preservation of their jobs and schools, these teachers and administrators were left with few other options than to abandon their goals of holistic educational development of their students in the service of preparing them for these exams.[14] This narrowing of instruction highlights a common tension between accountability and equity in NCLB-era schooling, since schools serving vulnerable students had the incentive to prioritize test performance over other educational objectives, which hampered work toward the very equity goals that NCLB purported to promote.

However, the aforementioned study also noted that, depending on the subject matter, teaching to the test was not always detrimental. In the case of a more quantitative subject like math, NCLB actually produced measurable gains, particularly among students who were otherwise low-performing.[15] This suggests that strict accountability methods can be effective, especially for struggling students, but the accountability method must fully encompass the subject it is evaluating. While NCLB-era standardized tests may have successfully reduced education disparities in easily measurable subject areas like math, it left much to be desired in less quantitative disciplines, like reading and writing, where observed gains were minimal.[16]

Beyond specific subject-level outcomes, the effectiveness of NCLB in reducing educational inequality across economic and racial lines remains contested. In a comprehensive analysis of NCLB's effects on these issues, one study found that the Act did not meaningfully or definitively narrow racial or socioeconomic disparities that were previously seen in academic performance.[17] Although increases were seen in math test scores, the proportional gap between Black and white students, and high- and low-income students, persisted at almost an identical level as before the law was passed.[18] Researchers attributed this phenomenon in part to resource disparities, where higher-performing and wealthier districts were often more equipped to meet accountability standards than under-resourced schools were, creating a cycle of lower scores leading to sanctions against schools that were already lacking the fundamental support they needed to help their students improve.[19] The persistence of these gaps suggests that NCLB's framework of accountability, while improving already weakly-supported performance metrics among all students, did so without catering to or providing extra support for disadvantaged students, essentially preventing progress toward meeting its equity goals.

Overall, these findings suggest that NCLB's design, while intended to reduce educational disparities, failed to do so. Furthermore, it may have reinforced educational inequalities due to its punitive accountability measures. Schools that served disadvantaged populations were already a few steps behind and thus struggled to meet the newly introduced proficiency benchmarks, resulting in less funding that, in turn, increased teacher turnover and staff shortages. Together, these effects hindered true educational improvement.[20] Punishing schools for failing to meet accountability standards assumes that both the schools and their teachers have the capacity to perform better if they simply choose to do so. Although this may have been true in some cases, the remaining instances can be largely attributed to chronic underfunding and enduring societal and economic disadvantages, all of which are beyond the control of teachers and administrators.[21] By punishing schools that simply cannot meet federal educational benchmarks rather than providing more support and funding, NCLB could have left schools vulnerable to a deeper state of disarray than they were in before its implementation.

In retrospect, all of the data surrounding NCLB educational outcomes illustrate the paradox it created: producing quantifiable success in certain areas, like math, yet failing to fulfill its broader intention of promoting educational success. NCLB's focus on standardized testing prevented academic progress in less quantifiable areas like reading and writing, and its punitive measures generated a culture of teaching to the test rather than teaching to learn. In light of these considerations, it is reasonable to assert that many students who this Act intended to help, especially the most vulnerable and disadvantaged, were still left behind.

## III. Key Reforms in the ESSA

NCLB was unpopular from its outset. Teachers, parents, school administrators, and many others had qualms about the changes it implemented.[22] In response to the widespread criticisms of NCLB, Congress enacted the ESSA in 2015 with broad bipartisan support.[23] In doing so, this Act completely restructured the federal government's approach to, and involvement in, public education. The ESSA, while maintaining NCLB's core objectives and, for the most part, framework, takes a completely different approach: returning the previously nationwide requirements and testing back to the states. As argued by Christian Sundquist, this shift is more of a deliberate move toward "positive education federalism," or "dynamic federalism," where states regain the lost discretion of their own accountability, rather than having to conform to one-size-fits-all federal mandates.[24] This decentralization was aimed to give states greater flexibility while still maintaining some level of accountability at a more individualized level.[25] This allows each state to adapt educational policy to its specific local needs, while decreasing federal oversight and educational data reporting mandates.[26] Through this shift toward state discretion, we can see a sharp departure from the rigidity of NCLB. However, it is important to recognize the new risks and trade-offs when attempting to maintain and promote equity

(2016), https://www.rsfjournal.org/content/rsfjss/2/5/220.full.pdf.
13 *Id.* at 238-239.
14 *Id.* at 238-39.
15 *Id.* at 228-230.
16 *Id.* at 228-30.
17 Sean F. Reardon et al., *Left Behind? The Effect of No Child Left Behind on Academic Achievement Gaps*, Stanford Center for Education Policy Analysis at 32-33 (Aug. 2013), https://cepa.stanford.edu/sites/default/files/reardon%20et%20al%20nclb%20gaps%20paper%2012aug2013.pdf.
18 *Id.* at 4.
19 *Id.* at 4.
20 *Id.* at 4.
21 *Id.* at 25-26.
22 Christian Sundquist, *Positive Education Federalism: The Promise of Equality after the Every Student Succeeds Act*, 68 Mercer L. Rev. 351, at 352-53 (2017), https://digitalcommons.law.mercer.edu/cgi/viewcontent.cgi?article=2310&context=jour_mlr.
23 *Id.* at 352.
24 *Id.* at 356-57.
25 *Id.* at 351-53.
26 *Id.*

nationwide.

The ESSA's central structural change, alongside returning some level of autonomy to the states, was broadening the set of options to measure education levels beyond increasingly controversial standardized tests. Scholars at Brookings note that the ESSA not only allows, but explicitly encourages, multiple measures of school quality and educational success.[27] These include the availability of advanced coursework and student engagement alongside academic tests, thus moving away from a test-only culture of accountability. It would allow for the increase in weight of growth-based factors, measuring student improvement over time rather than static scores.[28] This broader approach allows for states to identify and address their individual issues and areas in need of development while using more holistic evidence. Specifically, the growth-based measures, in theory, should allow schools that serve underachieving students more leeway, testing for their improvement and not simply comparing their average test scores to those of their peers attending schools in more affluent areas.[29] Whether or not these expanded options of measures would translate into more equitable outcomes ultimately depends on how seriously a state wants to increase equity and support its struggling schools.

## IV. Outcomes and Criticisms of the ESSA

Despite these many remedies to the rigid and unsuccessful guidelines of NCLB enacted in the ESSA, many argue that its decentralization and deference to states' judgment creates its own set of problems. One such problem is that this discretion given to the states, while intended to help them individualize and specify their accountability methods, can result in wider disparities in education between states.[30] Alexandra Walsh, Mary Moynihan, and Elizabeth Yin point out several key critiques. Analysts worry that returning accountability to the states could weaken NCLB's uniform protections for disadvantaged students and widen the variation in how, or if, equity is addressed, particularly in states with more relaxed standards.[31] They emphasize that the ESSA's flexibility creates opportunities that cut both ways, allowing for constructive state innovation but also allowing for states to exacerbate educational inequality through the "bare minimum" teaching certification it allows, as "low-income schools are twice as likely to be assigned novice or underqualified teachers."[32] In this, we see that the intended state education equality enforced through NCLB can get lost in the process of allowing the states more freedom in their education systems, emphasizing the tradeoffs that must be considered when promoting educational equity.

These concerns are reinforced by research from Jennifer Ayscue, Lance Fusarelli, and Elizabeth Uzzell, who found that the ESSA's built-in flexibility produces wide differences in how states pursue educational accountability and equity.[33] Some states used this discretion to adopt multiple measures of progress and success, and invest in support for struggling groups, while others set weak measures that did little to either identify or remedy equity disparities between groups.[34] Such uneven implementation suggests that the heavily coveted equity sought out through the ESSA is not guaranteed: it is contingent on state capacity and willingness

The problems raised by these authors highlight the larger issue with the ESSA: although it authorizes experimentation in holistic alternatives to standardized testing on a state-by-state basis, some states have been slow to adopt these new options. Catherine Gewertz reports that while ESSA allows for states to propose new competency-based assessments or other approaches, many states have continued to use standardized tests.[35] This underscores an important point about the reforms introduced through the ESSA: while allowing increased flexibility for states to better measure educational progress in their schools, it is up to state governments to act and create these measures.[36] And, as we have seen, some simply do not prioritize this new avenue, essentially leaving their states behind while others pursue educational equity.

Another concern with the ESSA is with its attempts to allow for better measures in reading and other non-quantitative subjects. While the ESSA was intended to widen the narrow confines that standardized tests place on humanities subjects, recent National Assessment of Educational Progress (NAEP) long-term trend data on math and reading reinforce concerns about growing inequities. The data show that the average reading and math scores for thirteen-year-olds between 2012 (pre-ESSA) and 2020 (post-ESSA) slightly dropped.[37] More specifically, however, averages declined the most in the bottom 10th and 25th percentiles of students.[38] These widening gaps should be a cause for concern, as they show that, while many other factors may be in play, the ESSA is not doing its intended job of decreasing educational gaps.

However, it is difficult to say that this data is completely accurate or pertinent to the success of the ESSA, because it is collected through standardized testing which, as we have already seen, may not fully capture students' full literacy or comprehension skills. Additionally, the dips seen during the ESSA years could be considered a success in that many teachers are no longer teaching for a test, as they no longer rely on such scores for funding. The NAEP uses independent tests on different samples of children to create its reports, and while NCLB's standardized test could have reflected similar subjects and formats that the NAEP used, it was not the same thing. So, the NAEP's data, after the implementation of the ESSA, could simply reflect the changing priorities within the classroom, and should be kept in mind when interpreting such data.

27 Brookings Institution, *Lessons for Broadening School Accountability Under the Every Student Succeeds Act*, Brookings (Oct. 2016), https://www.brookings.edu/articles/lessons-for-broadening-school-accountability-under-the-every-student-succeeds-act/.
28 *Id.*
29 *Id.*
30 Walsh et al., *supra* note 3.
31 *Id.*
32 *Id.*
33 Jennifer B. Ayscue, Lance D. Fusarelli & Elizabeth M. Uzzell, *Equity and Early Implementation of the Every Student Succeeds Act in State-Designed Plans During COVID,* 2022, PubMed Central, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9643106/.
34 *Id.*
35 Catherine Gewertz, *ESSA Offers Testing Flexibility. So Why Aren't States Using It?*, Education Week (Apr. 3, 2018), https://www.edweek.org/policy-politics/essa-offers-testing-flexibility-so-why-arent-states-using-it/2018/04.
36 *Id.*
37 Nat'l Ctr. for Educ. Statistics, *The Nation's Report Card: Long-Term Trend Reading and Mathematics Assessment Highlighted Results* (2023), https://nces.ed.gov/use-work/resource-library/report/statistical-analysis-report/2023-long-term-trend-reading-and-mathematics-assessment-highlighted-results-age-13-nation.
38 *Id.*

## Conclusion

Federal accountability policy surrounding educational standards has shifted immensely over the past twenty-five years. However, it remains largely debated whether or not these changes have genuinely improved educational quality and equity. We can see this tension in the trajectory from NCLB to the ESSA. With NCLB, measurable gains, as seen in standardized tests, were evident in math, most likely due to its objectivity and ease of testing, making the concept of "teaching to the test" synonymous with simply teaching the subject.[39] Yet, despite these successes, achievement gaps persisted, especially in reading categories, highlighting NCLB's narrow focus and the limitations of relying on a single form of assessment that may not apply to the subject matter. Additionally, its methods of accountability resembled punitive sanctions toward schools and teachers, misdiagnosing a school's failure to meet standards as a lack of effort rather than a more nuanced issue that often involved a lack of resources and training.

The ESSA, in contrast, shifted accountability away from this singular, constricting, and uniform federal standard and toward state-led plans, with far more leniency surrounding non-test-based measures of achievement. While this theoretically allows for more state-specific interventions, in reality, its implementation has varied across states, exacerbating inequities and misalignment across the country.[40] Some states have created thoughtful accountability systems intended to broaden the scope of achievement beyond test scores, but others have adopted only minimal changes, relying on the systems that were in place previously rather than working to create the best system for their students. This inconsistency can be seen in areas like reading, where the freedom to use different measures of literacy did little to fix the gaps seen in the years of NCLB.[41] As a result, the ESSA's promise of holistic accountability depended on a state's capacity and political will, oftentimes reinforcing the already wide educational disparities between states with robust educational achievement and those with priorities that lay elsewhere.

Thus, in both of these cases, it is evident that there are trade-offs, with no clear winner. While NCLB is narrow-sighted in its testing standards and misguided in its punishment of struggling schools, the ESSA is equally dangerous. Its over-leniency allows states to essentially neglect their struggling student populations, pushing them through school even if they are not ready or learning. While it was smart and well-intentioned to allow these states more leeway in their educational accountability, it was a fundamental flaw to assume that all fifty would make the best of this opportunity, rather than allow their struggling students to fall even further behind.

Viewed together, these policies reveal a trade-off between the rigidity of NCLB and the discretion of the ESSA, with neither extreme adequately promoting educational success and equity. In this light, there is a simple policy solution: combine NCLB and the ESSA. Within reason, states should have the freedom to determine their methods for testing and enforcing educational standards in their public schools. However, federal policy should articulate clear and positively enforceable standards for academic progress, monitoring each state based on its performance both on average and in its bottom quartiles. And, just like in NCLB, the federal government should require struggling states to offer free tutoring and resource enhancements for educator training and increased class support. And, if all else fails, the federal government would step in at these public schools in the struggling state, in order to bring the averages up and reduce disparities. This hybrid model would allow schools to progress and receive support without fearing school-level punishments when understaffing and undertraining are out of their hands.

Looking forward, federal educational accountability needs to move beyond the swing between extremes. By committing to a model that is both firm and supportive, rather than punitive, the U.S. can raise educational levels and reduce disparities, potentially even along often-overlooked lines like socioeconomic class. In doing so, the federal government will be able to learn from its past failures and move toward a system of true educational equity.

**This piece was written by Max Goodman and edited by Clare A'Hearn.**

39 Jennings & Lauen, *supra* note 12
40 Walsh et al., *supra* note 3.
41 *Id.*

# Untraceable Weapons in a Traceable Legal System: Regulating Privately Made Firearms After *Bruen* and *VanDerStok*

## Introduction

American firearms law is built on a system of traceability. Serial numbers, licensed dealers, background checks, and transaction records form a regulatory framework designed to ensure accountability in the circulation of deadly weapons. Yet privately made firearms (PMFs), commonly known as "ghost guns," exist almost entirely outside this structure. Manufactured at home or assembled from unfinished components, these weapons lack serial numbers, evade background checks, and impede law-enforcement tracing efforts. Their rapid proliferation has exposed a fundamental contradiction within modern gun regulation: a legal system designed to monitor firearms now confronts weapons that are intentionally untraceable.

Ghost guns present an unprecedented challenge that pits personal liberties against public safety, raising the question of what should take priority: an individual's ability to build firearms at home, or society's responsibility to prevent gun violence facilitated by untraceable weapons? The "text, history, and tradition" (THT) test, often used by courts to evaluate gun laws, is virtually inapplicable in the case of ghost guns.[1] PMFs are a novel issue; the problem of them being used violently did not become well known until 2013, when one was linked to the murder of five people near Santa Monica College in California.[2] This novelty means that the "history" and "tradition" components of the THT test cannot be applied as they traditionally would be. As the National Rifle Association (NRA's) Joseph Greenlee explains this problem, "there were no restrictions on the manufacture of arms for personal use in America during the seventeenth, eighteenth, or nineteenth centuries. All such restrictions have been enacted within the last decade."[3] Because PMFs have gained popularity just within the last decade, there is no "history" of ghost gun regulations or "tradition" to follow. In this paper, I will attempt to close that gap by using existing legal and judicial frameworks to suggest new regulations for PMFs in order to slow their proliferation.

This paper proceeds as follows: Section I identifies the necessary legal and judicial frameworks within which to understand regulations of PMFs. Section II identifies the scope of the problem by outlining statistics and anecdotal evidence that provide insight into the gravity of their proliferation. Section III presents common arguments against regulation, while Section IV refutes those points and presents arguments in support of stricter regulations. Finally, Section V proposes specific policies to implement in order to ensure the safe manufacturing and use of PMFs.

## I. Legal Background

In order to develop effective policy solutions to the proliferation of privately made firearms, it is first necessary to examine the statutory and judicial landscape shaping modern regulations. The foundational piece of modern gun control legislation is the Gun Control Act (GCA) of 1968, which establishes licensing requirements for individuals and entities "engaged in the business" of manufacturing, importing, or dealing in firearms.[4] The GCA regulates interstate commerce of firearms and mandates that licensed dealers maintain transaction records.[5] However, the Act does not explicitly address firearms manufactured for personal use.[6] It is clear that, because the GCA regulates commercial firearm sales rather than private ones, it offers limited applicability to the regulation of ghost guns. This statutory gap created a legal gray area wherein individuals could assemble functional guns without serial numbers or background checks so long as they were not "engaged in the business" of selling them.[7]

Judicial developments have further complicated regulatory authority. In *New York State Rifle and Pistol Association v. Bruen* (2022), the Supreme Court struck down New York's "special need" permitting system and adopted a new test for Second Amendment regulations focused on history and tradition.[8] Under *Bruen*, courts must determine whether a challenged regulation is consistent with the "history and tradition"[9] of firearm regulations at the time of founding, solidifying the THT test into law. As Wyatt Lutenbacher explains, "At bottom, *Bruen* requires courts to ask if the current law imposes a 'burden on the right of armed self-defense' that is comparable to a historical tradition of regulation."[10] *Bruen* thus complicates regulatory frameworks for ghost guns since mass-produced firearms kits and 3D-printed weapons have no clear historical analogue.

In response to the legal ambiguity surrounding ghost guns, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) instituted a rule in 2022 that redefined key terms related to PMF regulation. The rule expanded the definition of "frame

1 Jacob Charles, *Ghost Guns, History, and the Second Amendment*, Second Thoughts, https://firearmslaw.duke.edu/2022/04/ghost-guns-history-and-the-second-amendment.
2 Annie Karni & Chris Cameron, *'Ghost Guns': What They Are and Why There Has Been a Fight Over Them*, The New York Times, Mar. 26, 2025, https://www.nytimes.com/2025/03/26/us/politics/what-are-ghost-guns.html.
3 Joseph G.S Greenlee, *The American Tradition of Self-Made Arms*, 54 St Marys Law J. 35 (2023).
4 Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.
5 *Id.*
6 *Id.*
7 *Id.*
8 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).
9 *Id.* at 12.
10 Wyatt Lutenbacher, *Busting Ghosts: How Regulatory Gaps Fail to Address Ghost Guns, and What Can Be Done Post-Bruen*, 43 Minn. J. Law Inequal. 253, 259 (2025).

or receiver" to encompass unfinished or "80%" components that can be readily converted into working firearms.[11] It also amended the definition of "firearm" to clarify that kits containing the necessary components to assemble a functioning weapon qualify as firearms under federal law.[12] Finally, the rule formally defined "privately made firearms" and required that such weapons be marked with serial numbers if transferred or sold.[13] Earlier this year, in *Bondi v. VanDerStok* (2025), the Supreme Court upheld the ATF's authority to issue this rule.[14] This ruling represents a significant step in closing the regulatory loophole that allowed PMFs to proliferate so drastically; however, there is still work to be done. Law enforcement agencies must be able to identify *all* parts of ghost guns, not just those in ready-to-build kits. Under the status quo, individuals can still purchase all the unserialized parts necessary to build a ghost gun, so long as they are not combined in a kit. This legal loophole proves the need for further regulations on PMFs.

## II. Identifying the Scope of PMF Proliferation

In order to understand *why* we should care about PMF proliferation right now, it is necessary to examine quantitative data on their use in violent crimes. The number of ghost guns has increased dramatically over the past several years. Between 2017 and 2021, the number of suspected PMFs recovered in crimes in the United States and traced by the ATF increased by 1,083%, from 1,629 to 19,273.[15] ATF spokeswoman Carolyn Gwathmey further noted that between January 2016 and December 2020, law enforcement agencies reported approximately 23,906 suspected PMFs recovered in criminal investigations, including those connected to 325 homicides or attempted homicides.[16] These data illustrate that ghost guns are not merely a fringe subset of firearms; they now represent a significant share of the weapons used in violent crime.

Ghost guns have also enabled individuals who would otherwise be prohibited from purchasing firearms to nonetheless obtain operational guns. This trend has manifested itself in the form of underage gun use.[17] Furthermore, privately made firearms have empowered those with a criminal record to legally obtain guns by allowing them to bypass all safeguards intended to prevent access to firearms by individuals deemed legally dangerous.[18] PMFs create a weapons market that is detached from the background checks, serial numbers, and documentation that make the federal firearms market safer.

These statistical trends demonstrate that ghost guns are a rapidly expanding public safety issue. Their appeal lies precisely in their ability to evade the safeguards that govern traditional gun sales. The proliferation of PMFs presents a direct challenge to law enforcement agencies, and further regulations are necessary to ensure citizen safety.

## III. Arguments Against Regulation

In order to propose effective policies to regulate privately made firearms, it is essential to first understand the most common arguments raised against regulating them.

### *A. Additional Regulations are Unnecessary*

Opponents of regulating privately made firearms frequently argue that new restrictions are not needed because existing criminal penalties already apply to firearm possession. According to NRA Executive Director John Commerford, "A felon found in possession of a commercial firearm faces up to 15-years imprisonment; a felon found in possession of a firearm he made in his basement faces up to 15-years imprisonment."[19] Commerford's argument reflects a fundamental misunderstanding of the need for regulations on ghost guns. By focusing solely on penalties after the acquisition of ghost guns, it ignores the preventative role of regulations like serialization and background checks. The true danger of ghost guns is not the fact that criminals currently possess them; rather, it is the ease with which a person can obtain an untraceable firearm in the first place. Privately made firearms allow individuals legally barred from purchasing guns to circumvent the lawful system entirely.

Further, gun advocates see increased regulations on ghost guns as an impediment to their constitutionally guaranteed Second Amendment rights. As Cody Wilson of Defense Distributed argues, "I actually want there to be some law before this administration is over, that the Second Amendment includes the right to build arms and not just keep them."[20] Staunch defenders of the Second Amendment see no unique problem with ghost guns; they simply see their right to build guns as an extension of their right to bear them. However, the right to bear arms must be constitutionally protected under certain restrictions that regulate the firearms market in order to guarantee safe use.

### *B. Concerns About Expanding Government Power*

A similar objection is the claim that regulating ghost guns represents an undue expansion of government authority into private life. The gun lobby often likens the at-home assembly of ghost guns to other hobbies, such as building a car, and argues that regulations on privately made firearms are breaching into people's personal lives.[21] This analogy rests on a fundamental

11 *Id.* at 260.
12 *Id.* at 261.
13 *Id.* at 260.
14 *The Supreme Court Upholds Life-Saving Ghost Gun Rule in Bondi v. VanDerStok. Here's What You Need to Know*, Everytown for Gun Safety, Mar. 26, 2025, https://www.everytown.org/vanderstok-supreme-court-ghost-guns-case-decision/.
15 Crime Guns Recovered and Traced Within the United States and Its Territories (2024), https://www.atf.gov/media/15426/download?ref=readtangle.com.
16 Ivan Pereira, *"Ghost Guns" Showing up in School Shootings, Experts Fear Trend Will Get Worse*, ABC News, Mar. 17, 2022, https://abcnews.com/US/ghost-guns-showing-school-shootings-experts-fear-trend/story?id=83346844&.
17 *See, e.g.*, *id.* ("On Nov. 29, a 15-year-old student allegedly shot and wounded a 16-year-old classmate with a 'ghost gun' at Cesar Chavez High School in Phoenix, according to the Phoenix Police Department.").
18 *See, e.g.*, *Sacramento Church Mass Shooting Follows Disturbing Trend of Domestic Violence, Mass Shooting Connection; Rise of Ghost Guns*, Everytown for Gun Safety, Mar. 7, 2022, https://www.everytown.org/press/sacramento-church-mass-shooting-follows-disturbing-trend-of-domestic-violence-mass-shooting-connection-rise-of-ghost-guns%ef%bf%bc/.; Everytown for Gun Safety Support Fund, *Ghost Guns Recoveries and Shootings*, (2023), https://everytownresearch.org/report/ghost-guns-recoveries-and-shootings/ ("Man with an extensive criminal history in three states shot two kindergartners at their school with ghost gun sold to him by a man with his own criminal history").
19 John Commerford, *The Truth About So-Called "Ghost Guns,"* America's First Freedom, Feb. 18, 2025, https://www.americas1stfreedom.org/content/the-truth-about-so-called-ghost-guns/.
20 Martin Kaste, *Ghost Guns May Make a Comeback, despite a Supreme Court Ruling*, NPR, Jul. 3, 2025, https://www.npr.org/2025/07/03/g-s1-75792/ghost-guns-may-make-a-comeback-despite-a-supreme-court-ruling.
21 *See, e.g.*, Katie Zezima, *Despite Ruling on 3-D-Printed Guns, It Remains Legal to Make Your Own Gun at Home*, The Washington Post, Aug. 1, 2018, https://www.washingtonpost.com/national/despite-ruling-on-3-d-printed-guns-it-remains-legal-to-make-your-own-gun-at-home/2018/08/01/581ca5a6-

misunderstanding. Unlike other hobbies, privately made firearms enable individuals to produce fully functional, lethal weapons in their homes with little to no oversight. Equating gun-building with ordinary hobbies grossly downplays the public safety risks posed by PMFs. Untraceable firearms carry consequences far more serious than any other do-it-yourself project.

Additionally, many gun advocates actually wish for there to be no gun regulations at all, and they see a lack of regulations for ghost guns as the first step toward their extremist plan. David Pucino, legal director and deputy chief counsel of the Giffords Law Center to Prevent Gun Violence, explains, "There are folks out there who want there to be no gun laws at all, and they see this as being the avenue to do it."[22] Further, ghost gun manufacturers are invested in a lack of regulations: for example, "Polymer80, one of the largest manufacturers of ghost gun parts, has joined in calls to abolish the ATF" altogether.[23] It is undeniably clear that gun advocates and lobby groups are actively using their advocacy against ghost gun regulations as a pathway to their end goal: a complete lack of gun regulations. However, far from representing unchecked government growth, PMF regulation addresses a genuine gap in firearms policy necessary to preserve public safety.

## IV. Arguments for Regulation

While debates over firearm regulation often center on constitutional theory, the case for regulating privately made firearms should be grounded in concrete public safety concerns that have grown increasingly urgent. The proliferation of PMFs exposes critical weaknesses in existing safeguards, undermines law enforcement capabilities, and runs counter to the preferences of the American public. This section outlines the principal arguments for enacting stronger federal and state oversight.

### *A. Circumvention of Traditional Firearm Safety Measures*

PMFs bypass the regulatory architecture that has governed the commercial gun market for decades. Because PMFs can be produced at home or assembled from parts sold without serial numbers, individuals who seek to acquire them are not required to undergo background checks, comply with waiting periods, or interact with licensed dealers. This renders inoperative the layers of screening intended to prevent individuals with felony convictions, histories of domestic violence, or mental health issues from obtaining deadly weapons.

In practice, the ability to acquire a weapon anonymously and without any regulatory oversight creates a parallel market for firearms that is particularly attractive to individuals who cannot lawfully purchase guns. As recent incidents demonstrate, PMFs have been used in acts of violence in part because they provide what the commercial market does not: unregulated, untraceable access. The ease with which a person can circumvent traditional safeguards illustrates the need for targeted regulatory intervention. Without reforms, the rapid spread of do-it-yourself manufacturing technologies threatens to erode the effectiveness of the broader firearm safety regime.

### *B. Enabling Law Enforcement Tracking*

Serialization is central to how law enforcement agencies investigate and prevent gun crime. When a firearm is recovered at a crime scene, its serial number enables investigators to trace its origin, identify the first retail purchaser, and uncover trafficking patterns.[24] PMFs intentionally lack this identifying information, making it impossible to determine who made, sold, or transferred the weapon. This absence of traceability significantly impedes investigations, and in many cases, prevents law enforcement from holding perpetrators and suppliers accountable.

The dramatic rise in the recovery of unserialized weapons has already strained investigative resources. Unserialized firearms are incredibly difficult to trace. In fact, "over the past five-year period, ATF reports that it was only able to successfully trace to an individual purchaser 0.98% of the suspected 'ghost guns' submitted by law enforcement around the country."[25] For law enforcement, the inability to trace a gun is not just a gap in evidence: it is a systemic blind spot that conceals illegal actors from accountability and enables trafficking networks to function unchecked. Requiring serial numbers for PMFs, and ensuring that core components fall within the statute's definition of a firearm, would establish a critical tool in combating gun violence.

### *C. Overwhelming Public Support*

Finally, the American public strongly favors the regulation of PMFs. A 2021 survey conducted by Data for Progress found that 73% of likely voters support policies requiring that ghost guns comply with the same basic safety measures as commercial firearms.[26] Support extends across political lines and reflects widespread concern about the dangers posed by untraceable weapons.[27] In an era in which firearm policy is frequently polarized, PMF regulation stands out as an issue on which broad consensus exists. This overwhelming public backing strengthens the democratic legitimacy of regulatory action and signals that voters view PMFs not as an abstract constitutional question, but rather as an immediate public safety threat.

## V. Policy Proposals

While the ATF's 2022 rule and the Supreme Court's subsequent affirmation in *Bondi v. VanDerStok* represent meaningful progress toward regulating PMFs, these measures alone cannot address the full scope of the problem. The rise in untraceable firearms requires more comprehensive regulations that close remaining loopholes, strengthen investigatory capacity, and equip law enforcement agencies with the technical expertise needed to respond effectively. This section outlines several policy proposals designed to supplement existing federal rules and provide a more durable regulatory framework.

95c9-11e8-a679-b09212fb69c2_story.html.

22 Kaste, *supra* note 20.

23 Paranoia and Profit: Armed Extremism and the Gun Industry's Role in Fostering It (2024), https://everytownresearch.org/report/armed-extremism-paranoia-profit-gun-industry/.

24 Brian Mann, *Do-It-Yourself "Ghost Guns" Bypass Background Checks And Firearm Registration*, NPR, Nov. 21, 2017, https://www.npr.org/2017/11/21/565686173/do-it-yourself-ghost-guns-bypass-background-checks-firearm-registration.

25 FACT SHEET: Privately Made Firearms (PMFs), Aka "Ghost Guns," "Buy-Build-Shoot" Kits, and the "Frame or Receiver" Final Rule (2022), https://www.justice.gov/archives/opa/press-release/file/1493431/dl.

26 Erin Thomas, Despite a Partisan Split on Gun Violence Prevention, Regulation of Ghost Guns Is Unequivocally Popular (2021), https://www.dataforprogress.org/blog/2021/12/2/survey-of-political-attitudes-on-gun-control.

27 *Id.*

### *A. Serialization of All Gun Parts*

One of the most significant challenges posed by ghost guns is their lack of serialization, a feature that effectively erases the trail that law enforcement relies on to solve gun crimes. As the National Policing Institute notes, law enforcement agencies "consistently reported the challenge created by the lack of serial numbers on ghost guns," emphasizing that the absence of identifying marks prevents officers from reconstructing a firearm's chain of custody.[28] The ATF regulations upheld by the Supreme Court in 2025 require manufacturers of kits to imprint serial numbers on any part that can be "readily be converted" into a functional weapon.[29] While this regulation illustrates major progress toward the serialization of all gun parts, a gap still remains. The ATF's rule fails to require serialization of core gun components if they are sold separately. Mandating serialization for all core components would place PMFs under a regulatory umbrella that mirrors the commercial firearm market while still allowing for lawful home manufacture. It would also give investigators a meaningful tool: the ability to trace weapons used in violent crimes. This approach strikes a balance between preserving personal freedom to engage in firearm craftsmanship and ensuring that these weapons cannot circulate anonymously in criminal networks.

### *B. Criminalization of Manufacturing*

Although federal law permits individuals to manufacture firearms for personal use, the open availability of unfinished receivers, 3D-printing files, and conversion kits has created a thriving shadow market in which unserialized guns are produced for distribution rather than private ownership. To address this practice, federal and state governments should criminalize the manufacture of unserialized firearms when undertaken with the intent to transfer, distribute, or sell. This policy would not affect personal gun-building, but it would sharply curtail the ability of private actors to function as unregulated gun manufacturers.

Criminalization would also facilitate earlier intervention by law enforcement. Currently, officers often cannot act until an unserialized gun is recovered at a crime scene. Establishing clear statutory prohibitions would allow agencies to interrupt distribution networks before weapons are used in violent crimes. Moreover, such a policy would align PMF regulation with existing laws governing other forms of weapons trafficking, reinforcing the broader regulatory scheme rather than creating a siloed approach.

### *C. Increased Officer Training*

Even when ghost guns are recovered, many law enforcement agencies lack the specialized training needed to identify, document, and trace them effectively. Historically, as researchers at RTI International have noted, "part of the challenge in tracking ghost guns has been a lack of officer training in ghost gun recognition and reporting methods."[30] Training programs currently vary widely across jurisdictions, with no standardized curriculum or consistent protocols for reporting PMFs. According to the National Policing Institute, "training materials are developed by each agency and there is no consistency on methods of delivering the training," leaving many officers without the tools necessary to manage these increasingly common weapons.[31]

A national training initiative, supported by federal grant funding, would remedy this problem. In-service training should include modules on recognizing 3D-printed receivers, distinguishing between fully manufactured and partially completed components, and properly documenting PMFs for federal tracing. Forensic units should receive specialized instruction on safely handling polymer-based components, extracting identifying tool marks, and integrating ghost gun data into national gun crime databases. Such measures would not only improve investigative outcomes but also help standardize national reporting practices, an essential step toward increasing safety measures surrounding PMFs.

## Conclusion

The rapid proliferation of PMFs exposes a fundamental breakdown in the U.S. firearms regulatory system, one that existing law, even after recent judicial intervention, has failed to fully repair. Although the Supreme Court's decision in *Bondi v. VanDerStok* represented a meaningful step toward closing the most obvious loopholes in PMF regulation, it left a far more consequential problem unresolved: the continued circulation of unserialized firearm components. By limiting serialization requirements to ready-to-build kits, current law permits a vast market in which individuals can lawfully acquire all necessary parts separately and assemble fully functional, untraceable weapons within hours. As long as this market remains untouched, the core mechanisms of firearm accountability—background checks, transfer records, and tracing—will remain ineffective.

The consequences of this regulatory gap are no longer hypothetical. As this paper has shown, ghost guns have allowed individuals, including criminals, to bypass existing safeguards. These incidents are not anomalies but predictable outcomes of a system that allows lethal weapons to be manufactured entirely outside the regulated commercial market. Unserialized components complicate law enforcement investigations and undermine the enforceability of firearm law itself by creating a category of weapons designed to evade oversight.

The central takeaway of this analysis is clear: regulating PMFs is not a departure from the U.S.' gun rights protections, but rather a necessary extension of it. Extending serialization requirements to all firearm components that can be readily converted into operable weapons would restore traceability without infringing on lawful gun ownership or the tradition of personal firearm manufacture. When paired with targeted criminal prohibitions on unlicensed manufacturing for distribution and standardized law enforcement training, such reforms would re-establish accountability in a market that currently operates without it.

Technological advances have dramatically lowered the barriers to firearm production, allowing regulation to be outpaced by innovation. The costs of legislative inaction are felt not

28 Travis Taniguchi et al., The Proliferation of Ghost Guns: Regulation Gaps and Challenges for Law Enforcement (2021), https://www.policinginstitute.org/wp-content/uploads/2021/08/NPF_The-Proliferation-of-Ghost-Guns_Final_2021.pdf.

29 *Id.* at 28.

30 Josie Caves Sivaraman et al., *Uncovering Ghost Guns: Informing Policy and Law Enforcement Solutions*, Insights (Jan. 7, 2025), https://www.rti.org/insights/ghost-guns-law-policy-research.

31 Taniguchi et al., *supra* note 28.

only by law enforcement agencies struggling to investigate gun crimes, but also by communities increasingly exposed to untraceable violence. Federal and state lawmakers therefore face a critical choice: allow the continued erosion of firearm accountability or modernize the regulatory framework to meet the realities of contemporary gun manufacturing. Meaningful reform is essential to preserving both public safety and the integrity of the nation's firearms laws in an era when guns can be built as easily as they can be bought.

**This piece was written by Marcela Strombeck and edited by Ashley Son.**

# Exemption to the Jones Act: Opening the Door to Sustainable Offshore Wind Energy Construction in the U.S.

## Introduction

In December 2021, President Joseph R. Biden issued an "Executive Order on Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability," putting forward the federal government's intent to "achieve a carbon pollution-free electricity sector by 2035 and net-zero emissions economy-wide by no later than 2050."[1] In 2022, the "electric power industry accounted for about 33% of total U.S. energy-related $CO_2$ emissions," with coal and gas making up an overwhelming amount of electric power emissions.[2] A sizable part of greenhouse gases within the U.S. come from energy generation, with fossil fuels composing an overwhelming amount. With the ever-increasing threat of climate change, the pressure to decarbonize the electric grid is a daunting task with economic possibility to expand into new manufacturing realms. The U.S. currently lags behind China and other Western countries with sustainable energy infrastructure, posing a serious economic and national security threat.[3]

The U.S. has the opportunity to decarbonize the electrical grid by moving into renewable sources that bolster energy independence and do not worsen its carbon footprint. Offshore wind presents an opportunity for the U.S. to invest further in renewable energy and to revitalize its shipping industry and Merchant Marine. Amid rising demand for electricity, offshore wind serves as an important avenue for the U.S. and other countries to take advantage of national waterways to construct renewable energy infrastructure to support onshore networks. Windfarms have greater consistency than other renewable energy sources, like solar.[4] Specifically, offshore wind is able to produce more electricity because of the "higher speed of winds … and lack of physical interference that land or human-made objects can present" which may obstruct onshore farms.[5] Offshore farms can also be located closer to large coastal cities, making it easier to transmit electricity to consumers.[6] Offshore windfarms also have the advantage of providing sustainable energy without taking up valuable property space onshore. The Build Back Better Act (2021) and the Inflation Reduction Act (2022) each contained provisions for establishing leasing criteria through the Department of Interior and added incentives for offshore wind construction.[7]

Although offshore wind could be a promising part of the U.S.' effort to transition the electric grid away from fossil fuels, its promise is challenged by an antiquated provision deep in the U.S. legal code. Other than the permitting process and occasional presidential administration pushbacks,[8] section 27 of the Merchant Marine Act of 1920, also known as the Jones Act, has greatly prevented the ease of construction of offshore wind farms in the U.S. until now.[9] The Jones Act prohibits the transportation of merchandise between two U.S. coastwise points by non-coastwise-qualified vessels.[10] Instead of port, the term point is used in the Jones Act to expand its scope to include "domestic transportation of merchandise regardless of whether or not the loading or discharge of the cargo takes place within a conventional port facility."[11] A point refers to areas "located in internal waters, landward of the territorial sea baseline, including navigable waters."[12] Included in this definition are areas in the Outer Continental Shelf (OCS) as governed by the Outer Continental Shelf Lands Act. Customs and Border Protection (CBP), the implementer of the Jones Act, specifies that offshore wind facilities are points as they involve "devices attached to the seabed of the OCS."[13] For a vessel to be considered "coastwise" it must be certified as built in the U.S., operated by a U.S. corporation, and mainly manned by U.S. citizens or permanent residents.[14] At first glance, this protectionism seems like a productive way to encourage the shipping industry in the U.S. and protect national

1 Joseph R. Biden, Executive order on catalyzing clean energy industries and jobs through federal sustainability: The White House Perma.cc (2021), https://perma.cc/B66E-2VZX (last visited Nov 2025).
2 How much of U.S. carbon dioxide emissions are associated with electricity generation?, Frequently Asked Questions (FAQs) - U.S. Energy Information Administration (EIA) (2023), https://www.eia.gov/tools/faqs/faq.php?id=77&t=11 (last visited Nov 2025).
3 Paige Hawksworth, Nautical nightmare: How boat regulations pose challenges to U.S. offshore wind development, Center for Global Sustainability (2022), https://cgs.umd.edu/news/nautical-nightmare-how-boat-regulations-pose-challenges-us-offshore-wind-development (last visited Nov 2025).
4 *Id.*
5 Onshore vs offshore wind energy: What's the difference?, National Grid (2024), https://www.nationalgrid.com/stories/energy-explained/onshore-vs-offshore-wind-energy (last visited Jan 2026).
6 *Id.*
7 H. Rept. 117-130, Book 1 - BUILD BACK BETTER ACT, H.Rept.117-130, Book1, 117th Cong. (2026), https://www.congress.gov/committee-report/117th-congress/house-report/130/1.; H.R.5376 - 117th Congress (2021-2022): An act to provide for reconciliation pursuant to title II of S. Con. Res. 14, H.R.5376, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/5376.
8 Presidential Memorandum of Jan. 20, 2025, 90 Fed. Reg. 8363 (Jan. 20, 2025); *Secretarial Order 3415: Temporary Suspension of Delegated Authority*, U.S. Dep't of the Interior (Jan. 20, 2025), https://www.doi.gov/document-library/secretary-order/3415-temporary-suspension-delegated-authority; Jennifer McDermott & Michael Casey, Judge rules Massachusetts offshore wind project halted by Trump administration can continue AP News (2026), https://apnews.com/article/trump-offshore-wind-energy-climate-law-suits-511612fb4a9f8a1f90a6c8b76599cf1b (last visited Jan 2026).
9 Merchant Marine Act, 1920 & Wesley Jones, Merchant Marine Act, 1920 (1920).
10 What Every Member of the Trade Community Should Know About: The Jones Act (2024), https://www.cbp.gov/document/guidance/jones-act (last visited Nov 2025).
11 The Essential Guide to the Jones Act | Second Edition 2023, Essential_Guide_to_the_Jones_Act.pdf (2024), https://files.klgates.com/webfiles/Essential_Guide_to_the_Jones_Act.pdf (last visited Nov 2025).
12 What Every Member of the Trade Community Should Know About: The Jones Act (2024), https://www.cbp.gov/document/guidance/jones-act (last visited Nov 2025).
13 *Id.*
14 *Id.*

security. However, in the face of climate change, the U.S. has been struck by the stark reality that it lacks the ships necessary to meet the challenges and opportunities of the present era. Currently, many offshore wind projects have been stalled, despite obtaining necessary permits, because construction costs and timelines have increased due to the lack of Jones Act compliant ships. To overcome these time-sensitive obstacles, a qualified exemption should be added to the Jones Act to allow companies to build offshore wind and incentivize growth in shipbuilding capacity.

## I. About the Jones Act

The Jones Act, or, more specifically, section 27 of the Merchant Marine Act of 1920, was passed by the 66th Congress and signed into law on June 5, 1920, by President Woodrow Wilson. The bill focused on improvements to U.S. shipping. Coming out of World War I, Congress decided it needed to protect domestic ship manufacturing and encourage the development of a merchant marine after threats made during the recent war.[15] From Congress' perspective, the best way to ensure a proper navy is deployed in times of war is to maintain a strong shipping industry in times of peace.[16] Mariners, Congress noted, already have the required and desired skills of a navy without the U.S. military supporting these personnel during peacetime.[17] This was a prominent view at the time and a major reasoning for the Act's passage in regards to national security.[18]

The Jones Act is the cabotage section of the cornerstone shipping law in the U.S. It added onto federal law surrounding shipping in the Passenger Vessel Services Act of 1886, which established no foreign vessels can transport passengers between U.S. ports, and the British Navigation Acts, the foundation of protectionist shipping legislation in the American colonies.[19] Cabotage refers to the types of laws that regulate the ability of foreign flagged ships to transport goods and people between domestic locations.[20] In the modern world, this includes transportation between ports and between airports. While the U.S. has employed the Jones Act for shipping for over a hundred years, there are no cabotage laws relating to air travel. General arguments in favor of cabotage laws relate to national security, public safety, and economic protectionism.[21]

Over time, there have been cases of the Jones Act being waived. The Secretary of Homeland Security can grant waivers, either on the basis of national defense or at the express request of the Secretary of Defense.[22] Waivers are done on a case-by-case basis and are granted in increments of no more than ten days, and cannot exceed a total of 45 days.[23] Waivers, so far, have solely been for natural disasters. According to Brady and Vernacchio (2023), "[t]hese waivers make it easier – and cheaper – to get supplies where they are needed in response to an emergency."[24] For example, after Hurricane Maria in 2017, a waiver was granted so that emergency goods could be brought to Puerto Rico to aid recovery.[25] In times of natural disasters, humanitarian aid is given greater weight than national security, especially as waivers are time sensitive and short term. There are some restrictions still at play in the case of waivers, such as the limitation on how long they can be granted for, and which ships the waiver applies to. Additionally, "[w]aivers may not be granted for vessels already laden with the merchandise that would be delivered to the location at issue."[26] While waivers are a built-in mechanism to the Jones Act, they are specific and only used for short time frames under special circumstances, typically relating to disaster relief. The necessity of these waivers, however, highlights the general weakness in the Jones Act compliant fleet: a lack of ships, even in times of emergency.

Currently, CBP is the main implementer of the Jones Act and is responsible for its enforcement. With the responsibility for implementation coupled with the century-old law, CBP issued official guidance to direct how it interprets the law for implementation, as "[s]imple on their face, the Jones Act and the related coastwise laws are often not simple in practice. Like many laws, the statute itself sets out broad parameters, and a body of regulations, court decisions, interpretations, and policy decisions fill out the details. Even today, more than a century after enactment, new interpretive issues arise on a regular basis."[27] To address these issues, this report, first published in January 2009 and last revised in December 2024, defines the Jones Act from the perspective of the CBP and highlights its application in the modern world.[28]

## II. About U.S. Shipping Manufacturing

Cabotage laws like the Jones Act have existed since before the founding of the U.S. to protect the domestic shipping industry. As a colony, the U.S. was subjected to protectionist shipping policy under the British Navigation Acts which date back to the 1600s.[29] The first U.S. Congress passed its cabotage law in 1789 and followed with similar acts in 1790 and 1817, which were mainly focused on limiting foreign flagged ships on

15 Colin Grabow, Inu Manak & Daniel J Ikenson, The Jones Act: A Burden America Can No Longer Bear Policy Analysis Cato Institute (2018), https://www.cato.org/publications/policy-analysis/jones-act-burden-america-can-no-longer-bear#introduction (last visited Nov 2025).
16 Jones Act | Issues & Advocacy, The American Waterways Operators (2025), https://www.americanwaterways.com/issues/jones-act (last visited Nov 2025).
17 *Id.*
18 Colin Grabow, Inu Manak & Daniel J Ikenson, The Jones Act: A Burden America Can No Longer Bear Policy Analysis Cato Institute (2018), https://www.cato.org/publications/policy-analysis/jones-act-burden-america-can-no-longer-bear#introduction (last visited Nov 2025).
19 Dennis Bryant, History and overview of U.S. cabotage laws MarineLink (2020), https://www.marinelink.com/news/history-overview-us-cabotage-laws-482078 (last visited Nov 2025).
20 Colin Grabow, Inu Manak & Daniel J Ikenson, The Jones Act: A Burden America Can No Longer Bear Policy Analysis Cato Institute (2018), https://www.cato.org/publications/policy-analysis/jones-act-burden-america-can-no-longer-bear#introduction (last visited Nov 2025).
21 *Id.*
22 Shipping Under the Jones Act: Legislative and Regulatory Background (2019), https://www.congress.gov/crs-product/R45725.
23 *Id.*
24 Demian Brady & Atticus Vernacchio, The jones act paradox: Why is a law that is deemed "essential" so frequently waived? National Taxpayers Union (2023), https://www.ntu.org/foundation/detail/the-jones-act-paradox-why-is-a-law-that-is-deemed-essential-so-frequently-waived (last visited Nov 2025).
25 Shipping Under the Jones Act: Legislative and Regulatory Background (2019), https://www.congress.gov/crs-product/R45725.
26 What Every Member of the Trade Community Should Know About: The Jones Act (2024), https://www.cbp.gov/sites/default/files/2024-12/Jones%20Act%20ICP_Complete_04DEC24.pdf.
27 The Essential Guide to the Jones Act | Second Edition 2023, Essential_Guide_to_the_Jones_Act.pdf (2024), https://files.klgates.com/webfiles/Essential_Guide_to_the_Jones_Act.pdf (last visited Nov 2025).
28 What Every Member of the Trade Community Should Know About: The Jones Act (2024), https://www.cbp.gov/document/guidance/jones-act (last visited Nov 2025).
29 Dennis Bryant, History and overview of U.S. cabotage laws MarineLink (2020), https://www.marinelink.com/news/history-overview-us-cabotage-laws-482078 (last visited Nov 2025).

the Atlantic coast as a response to similar policies by England and France for their merchant fleets.[30] The U.S. suspended these cabotage laws leading up to and during World War I. With the conclusion of World War I, Congress put in place the Jones Act to restate and create a broader cabotage law as a national security measure and as a form of protectionism for the U.S. shipping industry. The Jones Act has remained on the books since 1920 and has been amended minorly since its initial passage.

There is debate on whether or not the Jones Act has helped the U.S. shipping industry. According to a working paper from Olney at the University of Hawaii, "[s]ince the passage of the Jones Act a century ago, American shipbuilding has become increasingly uncompetitive. With the exogenous rise of Asian shipbuilding, the number of American shipyards capable of building large commercial ships declined and the number of American built [Jones Act] eligible ships decreased too."[31] This decrease may have resulted in higher manufacturing costs for ships built domestically, as domestically built ships in 1922 cost 20% more than those built abroad.[32] This trend has continued, as by the 1930s, domestic ships had increased by 50%, and by 2019, ships built in the U.S. cost "about four times the global price."[33] The U.S. shipbuilding industry is also isolated, with about 91% of vessels built in U.S. shipyards between 2007 and 2017 sold domestically.[34] Isolation from the global market also leads to noncompetitive prices. As a result, fewer people buy U.S. built ships, leading to less construction. With fewer Jones Act compliant ships, employment opportunities decreased domestically in shipyards, further increasing construction costs. U.S. sailors also are paid higher wages than some overseas, increasing the costs of manning a vessel as well.

Furthermore, questions have been raised around the impact of the Jones Act on trade, particularly as it concerns the non-contiguous U.S. Transporting goods to Hawaii, Alaska, and the U.S. territories like Guam and Puerto Rico, is more costly.[35] Due to restrictions on which ships can go between points, goods, raw materials, and equipment have all become more expensive. Fewer ships have resulted in bigger monopolies in these areas, further raising prices.[36] Some also worry that "[t]he Jones Act discourages domestic water transportation, which may place an added burden on the congested highway and rail systems and shift domestic trade towards more polluting means of transportation (i.e. truck and air)[,]… caus[ing] states to import goods from abroad rather than acquire the same products from other U.S. states."[37] The Jones Act has a complicated past in terms of economic protectionism for the shipping industry and higher costs for transportation in a shrinking shipping industry.

30 *Id.*
31 William W Olney, Cabotage Sabotage? The Curious Case of the Jones Act (2020), https://www.economics.hawaii.edu/research/workingpapers/WP_20-14.pdf (last visited Nov 2025).
32 Shipping Under the Jones Act, *supra* note 25.
33 *Id.*
34 *Id.*
35 Joshua Polk, The Jones Act: A disastrous legacy for the U.S. economy and security (2025), https://pacificlegal.org/the-jones-act-a-disastrous-legacy-for-the-u-s-economy-and-security/ (last visited Nov 2025).
36 *Id.*
37 William W Olney, Cabotage Sabotage? The Curious Case of the Jones Act Working Paper: Cabotage Sabotage? The Curious Case of the Jones Act (2020), https://www.economics.hawaii.edu/research/workingpapers/WP_20-14.pdf (last visited Nov 2025).

## III. Offshore Wind in the U.S.

Upon considering the structure of the Jones Act and the state of the U.S. shipping industry, it is time to consider the implications of the law on offshore development. The Jones Act has prevented offshore wind farms from being built because of the large costs associated with transporting parts from Europe or Canada. This prohibition would be more sensible if it was actively encouraging manufacturing of offshore wind parts in the U.S., but currently it is not.[38] This is worsened by the fact that there are no ships large enough to transport offshore wind parts that meet coastwise qualified standards established in the Jones Act.[39]

Additionally, to get around the Jones Act, few installed offshore wind farms along the northeast coast by Massachusetts and Rhode Island have done so using risky techniques. Wind Turbine Installation Vessels (WTIVs) are needed to construct offshore wind farms.[40] However, there are few in the world, none of which are Jones Act compliant. As a result, WTIVs "featuring a giant crane" and "transport[ing] turbine components such as the tower, blades, and nacelles from a port to the installation site" are required to move them to Jones Act compliant feeder vessels before those vessels then install the wind turbines.[41] Elsewhere, WTIVs are able to directly install wind turbines offshore, but the Jones Act requirements mean feeder vessels must be involved, making the operation more costly as it "add[s] complexity and risk to projects."[42] Without the right equipment, it is much harder and more costly to construct offshore wind farms. The Jones Act makes this process difficult with the necessity to only use U.S.-built, owned, and manned ships that are already limited by a sluggish and expensive domestic shipping industry. WTIVs are complex ships that come at a high cost and have been met with multiple year delays.[43] Foreign WTIVs push back installation and further complicate the multi-year permitting process. Offshore wind is an opportunity for the U.S. to decarbonize the electric grid and meet increasing energy demand. The Jones Act places unneeded impediments, preventing offshore wind from reaching its potential.

## IV. Exemption Needed

A simple, time-sensitive remedy to the Jones Act is needed for offshore wind infrastructure to be built. An exemption from the Jones Act would allow offshore wind farms to be built using foreign ships until a time when the U.S. shipping industry has sufficiently caught up on the production of these large ships. This hypothetical exemption would allow the U.S. to quickly address the need to build offshore wind farms in a time-sensitive manner while allowing this provision to have a supply based sunset clause. Under the exemption, the U.S. secretary of transportation would be granted the ability to decide when the U.S. fleet has sufficient Jones Act compliant ships able to meet the needs of construction and maintenance for offshore wind farms.

This type of exemption from the Jones Act is not un-

38 Colin Grabow, Recent Articles Highlight Jones Act Contributions to Offshore Wind Difficulties Cato.org (2024), https://www.cato.org/blog/jones-act-contributes-offshore-wind-growing-pains (last visited Nov 2025).
39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*

heard of. In fact, a similar exemption was already made. In 2006, an exemption regarding the Yukon River, which flows through Canada's Yukon territory in British Columbia into Alaska, was passed as an amendment to the Jones Act.[44] This allowed for the transportation of goods via the river until sufficient infrastructure was built and "the Secretary of Transportation determine[d] that facilities are available for transportation by U.S. citizens to properly handle the traffic."[45] The Yukon River exemption shows the possibility for specific exemptions to the Jones Act about the unique circumstances. Unlike waivers, this exemption is flexible in terms of timing, as a sunset provision that remains flexible enough to meet the needs of the situation. As a result, an exemption was better able to address the situation and benefit all those involved. The Yukon River exemption also allowed for broader applications compared to waivers. In this case, all transportation along the Yukon River was exempted from the Jones Act. Using waivers alone, each ship would need its own waiver for specific voyages to move without penalty. There are a few other similar exemptions in the Jones Act made by amendments since its passage. These show that there is flexibility within the Jones Act and establish a precedent for further exemptions to the law.

An exemption to the Jones Act to allow offshore wind farms to be built should be modeled after the Yukon River exemption. It could easily allow for the use of non-Jones-Act-compliant ships to build offshore wind farms in the U.S. Outer Continental Shelf, as regulated through the Department of Interior's permitting process, up until the secretary of transportation determines that the U.S.'s Jones Act-compliant fleet is large enough to build and maintain offshore wind farms. This would remove uncertainty, inflated costs, and safety risks in construction. Additionally, this has the potential to stimulate U.S. manufacturing for offshore wind parts—providing jobs domestically—and signal to U.S. ship manufacturers that the market is worth investing resources into. Because of the current lack in Jones Act-complaint ships that are large and specialized enough to build offshore wind farms and the delayed timing in the permitting process, domestic companies have no real incentive to invest in the ships or parts to make offshore wind farms a reality. By allowing foreign ships into the market for this specific project, the competition could stimulate domestic ship building. Even if domestic ship building does not increase, offshore wind farms may still be built, as seen by the drive of foreign companies, mainly from Europe, to build them. This construction would still help the U.S. decarbonize its electric grid—generating greater energy independence and helping to reduce carbon emissions.

## V. Feasibility of an Exemption

Despite a clear model for an exemption, the chance of passing such an exemption through the 119th Congress is low. In addition to increasingly normalized Washington gridlock and entrenched partisan battles, both the Congress and President Trump's second administration are opposed to changes in the Jones Act. In 2022, California Representative John Garamendi introduced H.R.9548, entitled "Close Agency Loopholes to the Jones Act."[46] Even though this bill did not make it out of committee, it signifies a push to enhance the Jones Act, rather than opening the door to any type of exemption. Additionally, the SHIPS for America Act of 2025 showcases a bipartisan bill that would also strengthen the Jones Act.[47] Introduced by Arizona Senator Mark Kelly along with initial co-sponsors Indiana Senator Todd Young, Alaska Senator Lisa Murkowski, Wisconsin Senator Tammy Baldwin, Florida Senator Rick Scott, and Pennsylvania Senator John Fetterman, this bipartisan bill, despite also not having made it out of committee, further indicates Congress' desire to enhance rather than grant an exemption to the Jones Act.[48] The priority of offshore wind has been further pushed aside by the Trump administration, which has gone so far as to pause permitting of future offshore wind projects and attempting to shut down construction on current projects.[49] While not all of the Trump administration's actions have been successful at curtailing offshore wind construction, they do not lend themselves to an endorsement or aiding in the passage of any sort of Jones Act exemption.[50] It is currently unlikely that an exemption to the Jones Act allowing offshore wind facilities to use non-Jones-Act-compliant ships comes to pass. Changes in executive leadership that are more favorable to offshore wind and stronger Congressional support for the technology are needed before such an exemption can be realistically considered.

## Conclusion

The U.S. is at a vital turning point in its domestic energy policy. As climate change continues to generate greater risks of natural disasters plaguing people throughout the country, the U.S. has committed itself in the past to a complete transition of the electrical grid away from fossil fuels.[51] Yet, this transition has been slow going and continues to face many obstacles. For offshore wind, a key impediment is the Jones Act of 1920. Through limitations placed on ships between coastwise points to be domestically built, owned, and manned, the Jones Act has made it harder to manufacture ships in the U.S., particularly those large enough to transport and construct wind turbines. However, by adding an exemption to the Jones Act, the U.S. can temporarily allow foreign ships to transport needed parts from U.S. manufactures to offshore wind farms to construct and maintain them in a safe, cost-effective manner, allowing for more sustainable energy production. An exemption, such as the Yukon River exemption

44 Merchant Marine Act, 1920 & Wesley Jones, Merchant Marine Act, 1920 (1920); What Every Member of the Trade Community Should Know About: The Jones Act (2024), https://www.cbp.gov/document/guidance/jones-act (last visited Nov 2025).

45 What Every Member of the Trade Community Should Know About, *supra* note 26.

46 H.R.9548 - 117th Congress (2021-2022): Close Agency Loopholes to the Jones Act, H.R.9548, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/9548.

47 Text - S.1541 - 119th Congress (2025-2026): SHIPS for America Act of 2025, S.1541, 119th Cong. (2025), https://www.congress.gov/bill/119th-congress/senate-bill/1541/text.

48 *Id.*

49 Presidential Memorandum of Jan. 20, 2025, 90 Fed. Reg. 8363 (Jan. 20, 2025); *Secretarial Order 3415: Temporary Suspension of Delegated Authority*, U.S. Dep't of the Interior (Jan. 20, 2025), https://www.doi.gov/document-library/secretary-order/3415-temporary-suspension-delegated-authority.

50 Jennifer McDermott & Michael Casey, Judge rules Massachusetts offshore wind project halted by Trump administration can continue AP News (2026), https://apnews.com/article/trump-offshore-wind-energy-climate-lawsuits-511612fb4a9f8a1f90a6c8b76599cf1b (last visited Jan 2026).

51 Jonathan D. Haskett, U.S. Withdrawal from the Paris Agreement: Process and potential effects, Library of Congress (2025), https://www.congress.gov/crs-product/R48504 (last visited Jan 2026); Shelia Hu & Melissa Denchak, Paris Climate Agreement: Everything You Need To Know (2025), https://www.nrdc.org/stories/paris-climate-agreement-everything-you-need-know (last visited Jan 2026).

added in 2006, would allow foreign ships to help construct these offshore wind farms until the U.S. has built enough domestic Jones Act-compliant shipping capacity to do so. While currently politically infeasible, shifts in attitudes around wind energy could allow for the passing of such an exemption to help generate electricity sustainably and stimulate the shipbuilding industry in the U.S. as competition increases. Ultimately, offshore wind farms have the potential to help the U.S. decarbonize the electric grid, and an exemption to the Jones Act of 1920 would allow for offshore wind infrastructure to be built sustainably in the U.S.

**This piece was written by Sarah Ziff and edited by Alec Kong.**



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