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ARTICLES

COLUMBIA UNDERGRADUATE LAW REVIEW

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LETTER FROM THE EDITORS-IN-CHIEF

Dear Reader,

The Editors-in-Chief are proud to present the Spring 2021 issue of the *Columbia Undergraduate Law Review*. The five pieces in this issue, encompassing topics from Title VII of the Civil Rights Act to immigration courts in the United States, embody the principles of outstanding undergraduate legal scholarship that our journal values.

In addition to our print articles, the *Columbia Undergraduate Law Review* maintains interjournal collaborations to encompass diverse perspectives from peers across the globe. Our Roundtable Initiative, in partnership with the Cambridge University Law Society's *Per Incuriam*, examines various legal issues through a cross-continental lens. We also jointly hosted a successful event on the legal and socio-economic implications of the recent British exit from the European Union.

In addition to collaborating with the *Penn Undergraduate Law Journal* on our Roundtable Initiative, we also launched our new joint print article, written by authors from both Columbia and the University of Pennsylvania. We look forward to continuing these partnerships in the upcoming academic year and beyond.

The *Columbia Undergraduate Law Review* has continued to thrive in our virtual environment.Our organization has expanded to include over 125 members, and, for the first time, our Print division encompasses five outstanding editing teams. We are immensely grateful for the dedication and remarkable contributions by our members throughout the COVID-19 pandemic.

Without your readership and the incredible work of our Print, Online, and Business teams, this journal would not exist. We hope you enjoy leafing through our Spring 2021 issue, and we look forward to your continued readership of the *Columbia Undergraduate Law Review*.

Sincerely,
Matthew Sidler and Abhishek Hariharan
Editors-in-Chief

LETTER FROM THE EXECUTIVE EDITOR

Dear Reader,

On behalf of the 2021 Editorial Board, I am excited to present the Spring 2021 issue of the *Columbia Undergraduate Law Review*. The articles published offer original insighton pressing legal issues.

In "Unpacking White Revisionist History: Brown v Board of Education" Destiny Harrison-Griffin challenges the narrative that white historical revisionist have cultivated about the impact of *Brown v Board of Education* on the civil rights movement. She focuses on elevating the voices of oppressed minorities within the African diaspora through the use of primary sources.

April Mihalovich in "Sex Crimes and Internet Lies: Who's Responsible for Safety?" investigates the responsibility of the companies behind dating apps in preventing sexual assault. April seeks to find legal preventative measures that parent companies can take to ensure the safety of their user base.

In "A Reimagination of the U.S. Immigration Court System: Lessons Re-learned after Four Years of Deepening Anti-Immigrant Sentiment" Diana Pacheco evaluates the US Immigration Court system and the obstacles it faces as a consequence of being ostensibly controlled by the executive branch. She suggests that immigration courts should be held to the same standard of neutrality as the judicial system.

Michelle Wolk's article "Title VII's Minimum Threshold Has a Maximum Impact on Some Employees" examines Title VII protection for employees who work for smaller businesses. Wolk recommends the expansion of Title VII to prevent discrimination.

In his article "In such Manner as the Legislature Thereof May Direct": The Independent State Legislature Doctrine, Election Contingencies, and Appointing Presidential Electors" Jason Wong discusses the post-election direct appointment of presidential electors by state legislatures. He argues that election contingency statutes do not provide clear support for a state legislature to directly appoint presidential electors in the post-election period.

The *Columbia Undergraduate Law Review* acknowledges how difficult the past year has been. We congratulate our authors for advocating for imperative issues that have been lost among the chaos.

Sincerely,
Kay Barber
Executive Editor of Print

MISSION STATEMENT

The goal of the *Columbia Undergraduate Law Review* is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

SUBMISSIONS

The submissions of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must include a title and author biography (including name, college, year of graduation, and major).

iv) We accept articles on a continuing basis.

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Unpacking White Revisionist History: Brown v Board of Education

Destiny Harrison-Griffin | University of Pittsburgh

Edited by: Sarah Wang, Gabriel Gonzalez, Krishna Menon, Niharika Rao, Emma Schartz, Sonam Jhalani, Caroline Zupan

Abstract

The importance of the 1954 *Brown v Board of Education of Topeka*[1] decision has been debated by white revisionists and their critics alike. One of the most prevalent arguments against the significance of the decision stems from the belief that this decision suspended southern efforts towards racial equality, which would have been implemented quicker if integrationists had not focused on ending segregation within public schools. However, utilizing newspaper articles from historically Black databases such as the Baltimore Afro-American and the Atlanta Daily World demonstrate that both white extremists and moderates were unwilling to relinquish their southern way of life and allow African Americans to acquire rights, much less experience integration at all. Contrary to white revisionist accounts, research data has proven that racial tensions had become suffocating for African Americans in the South, and anti-Black violence as well as legislation was carried out prior to and following the Brown decision. Therefore, the findings of this paper demonstrate that choosing to whitewash history by publishing rhetoric that downplays the true environment of the United States during this time while painting a false picture of the intentions of southern whites is harmful to the Black community and negates the importance of the Brown decision towards Black progression.

I. Introduction and Background

The 1954 landmark case of *Brown v Board of Education of Topeka* was a controversial federal court case that effectively ended segregation between races in public schools and altered the trajectory of race relations during the Jim Crow era. This case was in direct contrast to *Plessy v Ferguson*[2], in which the Supreme Court ruled that racially segregated public facilities were perfectly legal as long as the separate facilities for Blacks and whites were also equal. From this case, we saw a term become popularized that categorized the remainder of the Jim Crow era: "separate, but equal." In his ruling, Justice Brown agreed that differences existed between races and "must always exist so long as white men are distinguished from the other race by color."[3] Through the years, accounts of white revisionist history have attempted to downplay the positive racial progress that the *Brown* decision paved for the Black community, instead accusing the decision of complicating the movement for racial progress. However, further analysis and discussion of this position demonstrate that this a skewed perspective because there was nothing explicitly wrong with the *Brown* ruling. Revisionists only claim that the *Brown* decision stunted racial progress because white extremists and moderates alike were unwilling to dismantle the system of racial hierarchy set in place. Though widespread resistance existed following the ruling, the *Brown* decision was essential for racial progress in the Black community, as it was one of the first opportunities for true integration in the public school system and daily life. Using newspaper articles from two prominent Black news databases, the *Baltimore Afro-American* and the *Atlanta Daily World*, I will demonstrate the lengths that white resistors went to uphold white supremacy and exhibit that the *Brown* transition toward integration would have been smooth, if not for roadblocks set in place by these resistors.

II. Literature Review

Previous arguments regarding the impact, prevalence, and necessity of the *Brown* decision have varied. In his article, "How *Brown* Changed Race Relations: The Backlash Thesis," law professor Michael Klarman established the "Backlash Thesis," which focused on the negative backlash that the *Brown v Board of Education* decision caused in waves throughout the South. Klarman, along with other white revisionists, has insinuated that the *Brown* decision halted Southern efforts towards racial equality and integrationist efforts by catapulting the Civil Rights movement and causing clashes between whites and African Americans. Klarman argues that white southerners supported policies such as desegregation and voting rights for African Americans, but the *Brown* ruling was too extreme for southern whites.[4] My research does not fully align with Klarman's argument, as I do not see validity in misplacing the onus of the *Brown* decision and revising history to paint the *Brown* decision in a negative light.

Conversely, other scholars such as James Cobb have criticized the teachings of white revisionists and directly contradicted Klarman's adoption of the "Backlash Thesis", by instead recognizing the Southern environment that existed leading into the 1950s. Using data pooled together from various newspaper articles, federal court cases, and critiques of the *Brown v Board of Education* decision, Cobb argued that Jim Crow segregation was nowhere near an end prior to the *Brown* decision, although revisionists like to insinuate this message.[5] Similarly, legal historian J. Harvie Wilkinson advocated for the *Brown* ruling, stating that "its greatness lay in the enormity of justice it condemned, in the entrenched sentiment it challenged, in the immensity of law it both created and overthrew."[6]

My research builds upon the arguments of Cobb and additional critics to negate white revisionist history. I instead

demonstrate that the *Brown v Board of Education* case was not detrimental to Black progress. My research uses Cobb's argument to address a more specific question: Would Southern whites have been accepting of Black progress in the South, even without the case of *Brown v Board of Education* pushing the country into integration? Furthermore, did racial tensions reach a climax in the South due to the decision, or were those tensions at a climax to begin with? To address these questions, my study examines the extent of Black oppression in the United States (namely the South) leading up to the *Brown v Board of Education* decision, as well as the resistance from white moderates and extremists after the ruling. Using secondary sources and newspaper articles from the *Baltimore Afro-American* and *Atlanta Daily World* database to juxtapose revisionist arguments, I will demonstrate that white people had no inclination, incentive, or motive to level the playing field for Black people, meaning that the *Brown* decision was essential to Black progress.

III. Discussion and Analysis of Data

In his "Backlash Thesis," Michael Klarman argued that the *Brown v Board of Education* ruling set in motion the following events: increased Southern resistance to racial change which had not existed previously, caused white Southerners to become more politically conservative, and temporarily destroyed Southern racial moderation.[7] This calls into question what was actually meant by Southern racial moderation. Would this have occurred at an acceptable rate of progression? To some Black Americans such as Elmer Carter, racial progression was trudging along at a slow rate as lynchings decreased from seven people in 1936 to two in 1944, and colored nurses and military officers went from being segregated during WWI to integrated during WWII.[8] However, in an excerpt from a town meeting titled "Are We Solving the Race Problem" in 1945, author and activist Richard Wright vehemently disagreed with

Carter's stance. According to Wright, a solution to the race problem will only mean "a nation in which there will exist no residential segregation, no Jim-Crow army, no Jim-Crow navy, no Jim-Crow Red Cross Blood Banks, no colored institutions, no laws prohibiting intermarriage, and no customs assigning colored persons to inferior positions."[9] However, the current state of the nation proved that racial segregation was already a national policy and a large part of the American culture, tradition, and morality.[10] Despite the messages of unification published in documents such as the Declaration of Independence and the Constitution, the American reality allowed white people to be treated more equally than people of color.[11]

Anti-Black Violence: The White Extremist

As Jim Crow lasted from 1877 well into the 1960s, it is difficult to agree with Klarman's position that racial progression was on the horizon. Black people were relegated to second class citizenship, and it was taught by Christian theologians that whites were the "chosen people, blacks were cursed to be servants, and God supported racial segregation."[12] Lynchings were the most extreme forms of Jim Crow anti-Black violence which was essential to upholding the racist institution that suited both white extremists and white moderates. Social economist Gunnar Myrdal outlined the propensity of lynchings in the United States during the Jim Crow era. According to him, resentment among whites against Black people ran deepest in Southern and border states, with "the Southern states accounting for nine-tenths of the lynchings" and "more than two-thirds of the remaining one-tenth occurring in the six states which immediately border the South."[13] A legislative representative of the NAACP, Leslie Perry, explained that the main cause of lynching was due to sociopolitical and economic issues and racial segregation. Perry further claimed, "very few of the lynchings of colored persons resulting from their being accused of serious offenses like murder,

robbery, or criminal assault."[14]

Moreover, white people believed that lynchings were "necessary supplements" to the criminal justice system because African Americans were naturally susceptible to committing crimes, especially raping white women. However, there is no basis for this claim, and more than one-third of suspects were falsely accused.[15] With white Southerners brutalizing African Americans whom they believed were threatening their Southern way of life, the federal courts' intervention through decisions such as *Brown v Board of Education* was crucial to Black progression. Less than a decade before the *Brown* decision, newspaper articles still noted discrimination against racial minorities as the "most extensive and insistent challenge to American civil rights," catapulted by four different occurrences of lynchings that killed seven Black people due to "growing racial tensions born of more determined resistance to their advance."[16]

In Klarman's "Backlash Thesis," he seems to excuse the anti-Black violence that reigned throughout the South following the *Brown* decision since he believes the decision had pushed the boundaries of white Southerners. Although Southerners did react negatively to the *Brown* decision, violence against Black people rooted in racism would have continued with any attempt to level the playing field between races and already existed before 1954. In the years immediately following the *Brown* decision, anti-Black violence significantly increased, and white extremism increased in prevalence. In 1955, sixty members of the white extremist Ku Klux Klan killed an unnamed man in South Carolina without motive.[17] Herbert Johnson, an official from the National Association for the Advancement of Colored People, was brutally beaten, burned, and left to be found by his wife on their farm in Schulenberg, Texas.[18] Two months prior, a news article from the *Baltimore Afro-American* paper described how two police officers were arrested for arson, abduction, and shooting innocent African Americans who had

simply signed a desegregation petition the previous month.[19]

Legislation: The White Moderate

A key takeaway from Klarman's "Backlash Thesis" is that before *Brown*, "Southern whites had proved willing to make small concessions on racial issues that were less important to them than school segregation."[20] Furthermore, Klarman believes that the focus should have been shifted to Black voting, because "there might have been less hostility to a ruling that focused on Black voting than to one that targeted grade school education, the area where white southerners were sure to be most resistant."[21] However, the reactions of white moderates to legislation in the years leading up to the *Brown* decision prove that Klarman's assumption is wholly incorrect. However, the reactions of white moderates to legislation in the years leading up to the *Brown* decision prove that Klarman's assumption is wholly incorrect.

The reactions of white moderates in the South, to one major court case in particular, demonstrate exactly why they would not have been more welcoming to Black progression towards equality in any form: The *Smith v Allwright* case of 1944. In *Smith v Allwright*, the Supreme Court determined that Black voters could no longer be excluded from white Democratic primaries in the South. As a form of protest, some whites sought to make African Americans economically expendable by developing technology such as an advanced mechanical cotton picker. This forced African Americans to leave the South before they could challenge white political supremacy in the primaries or succumb to the Southern way of life and refrain from entering the primaries.[22] In addition, Black voters were blocked from voter registration lists, and threats such as the one made by Governor Eugene Talmadge stating that "wise Negroes will stay away from white folks' ballot boxes in Georgia" were implemented to deter Black voters.[23] Local legislators in the

South mirrored Talmadge's position, even going as far as publicly announcing that "any Black voter would be a dead voter" and standing outside of polls with shotguns as an intimidation tactic.[24] Ultimately, their attempts were successful for the time being, as very few Black voters cast ballots during primary elections that took place in the years immediately following.[25]

Following the *Brown* ruling, white extremists took pride in invoking violence against African Americans in order to enforce the segregationist mindset of the South, while white moderates utilized the courtroom in their favor to uphold the same ideologies in a manner they deemed "more respectable". As stated by legal historian Anders Walker, "Southern moderates articulated a strategic constitutionalism that avoided open defiance of federal authority and, therefore, through evasion, succeeded in preserving racial inequality where massive resistance had failed."[26] For this reason, massive resistance across the legal sector contained a range of policy initiatives advanced at both state and local levels. For example, state legislatures made it a "criminal offense for public officials to assign Black and white students to the same schools."[27] In response to *Brown*, state legislatures enacted legislation prohibiting the use of state funds for desegregated schools and made it a criminal offense for public officials to assign white and black students to the same school.[28] Pupil placement laws were crucial to impeding *Brown*'s progress, because students were still strategically grouped together by race, "confounding blacks who were dissatisfied with their placements in a maze of administrative appeals."[29] Furthermore, a number of states repealed compulsory attendance laws and held referendum constitutions to remove language that required state provision of public education, thereby setting the stage for public school closings as an alternative to desegregation.[30] White Southerners were hoping that Black Americans would become incredibly overwhelmed and exhausted by the court system, and eventually give up on the fight for integration.

White legislators who were advocates of segregation and white supremacy made sure to vocalize their position following the *Brown* decision just as much as civilians did. In an article titled "Segregation Ruling Hits the South," the immediate reaction of Southern legislators to the *Brown* decision was captured by the Georgia Attorney General who stated that "this decision has provoked a social, economic, political, and legal revolution in at least 23 states" and Lieutenant Governor of Georgia, Marvin Griffin, who stated, "the races will not be mixed, come hell or high water."[31] In the years following the *Brown* decision, numerous measures were taken in an attempt to reject the federal court ruling. For example, a news article published in 1956 titled "Resistance to Desegregation is Spreading to Other Areas" outlined how resistance spanned from the Deep South to neighboring states and "more than 43 new pro-segregation measures had been adopted by five state legislatures meeting in early 1956."[32] In addition, a Southern Manifesto known as the "Declaration of Constitutional Principles" was adopted by white moderates and meant to directly contradict the *Brown* decision to prove that the racial integration was unconstitutional.[33] More than thirty years following the *Brown* ruling and the Civil Rights Movement, white moderates were still utilizing backdoor attempts to undermine the federal court decision and reverse the effects of racial integration in schools. In a news article titled "ACLU Calls Court Decision Legally Wrong," Federal District Court Judge, Richard Rodgers, purposefully misinterpreted the *Brown* case and instead ruled that "the *Brown* decision openly required schools in Topeka, Kansas to change from intentionally segregated schools to neighborhood schools" which the American Civil Liberties Union fought against since this was a blatant lie on the judge's behalf.[34]

IV. Preliminary Results

Upon analyzing the responses of white people to racial integration before and after the *Brown v Board* decision, it is safe to assume that the South had already resisted integration efforts and adopted policies to continuously oppress African Americans. Dr. Charles Johnson, president of Fisk University, explicitly stated that desegregation couldn't have been left in the hands of Southerners, because "state governments in the south are dominated by rural legislators whose overall attitude is anti-labor, anti-capital, anti-race, anti-liberal, anti-civil rights, anti-education, anti-intellectual, anti-technology, and anti-federal government."[35] White people would not have been accepting of adequate racial progress for Black people, especially white Southerners. It is true that *Brown* led to the heightening of racial tensions in the United States, with communication lines being cut between the two racial groups.[36] However, research data proves that racial tensions in the South were already suffocating prior to the *Brown* decision, and Black people were intimidated on all fronts.

Due to the effects of revisionist history, there is also a common misconception that white extremists were the only opponents of racial integration. However, data from the analysis section of this research paper demonstrates that massive resistance to *Brown* was enacted by both white extremists and white moderates in the forms of anti-Black violence and legislation. Table 1, adapted from Mark Golub's publication titled "Remembering Massive Resistance to School Desegregation," paints an accurate picture of the different ways that white extremists and white moderates went about circumventing the system to eradicate—and if unsuccessful, prolong—racial integration efforts in the Jim Crow South.[37]

Table 1: Moderates vs. Massive Resistance (after Golub 2013)

Massive Resistance	**Moderates**
Total exclusion	Token integration
Defiance	Gradualism
Rejection of *Brown*'s legitimacy	Evasion of *Brown*'s implementation
Interposition, nullification	Minimum compliance
School closures	School choice, pupil placement plans
Uniform state prohibition	Local experimentation
Rural/Black Belt	Urban/Metropolitan
Old South/"Past"	New South/"Future"
Violence	Fidelity to law

Most explicitly, white extremists relied on defiance, violence, school closures, and an outright rejection of *Brown*'s legitimacy as a means to advocate for the maintenance of their "Old South" ideologies rooted in racism and segregation.[38] On the other hand, white moderates recognized the legitimacy of the *Brown* decision, yet chose to prolong the ultimate integration that would result from the decision through minimum compliance and passing multiple laws that would impede racial progress.[39]

V. Conclusion

Without the landmark case of *Brown v Board of Education*, racial progress throughout the United States would have remained at a standstill, and the oppression of African Americans would have persisted at the same rate. Revising history negates the role of *Brown v Board of Education* as a stepping stone towards racial progress. Instead, it reflects the false sentiment that African

Americans would have eventually been placed on an equal playing field if they had waited for white people to come to terms with integration, which further disenfranchised the African-American community and the entire Black diaspora. It is extremely unfair to require patience from African Americans who are asking for equal treatment and opportunities to fulfill their American dream, when they were already facing other forms of anti-Black violence and intimidation for simply existing. The negative reactions of white Southerners towards legislation that emphasized a push for equality prove that the majority of white Southerners had one main goal in mind: upholding white supremacy and avoiding desegregation — in any form and at all costs.

[1] 347 U.S. 483 (1954).
[2] 163 U.S. 537 (1896)
[3] Ibid.
[4] Michael J. Klarman, "How Brown Changed Race Relations: The Backlash Thesis." *The Journal of American History*, 1994 https://doi.org/10.2307/2080994.
[5] James C. Cobb, *Brown Decision, Jim Crow, and Southern Identity*, University of Georgia Press, 2005.
[6] J Harvie Wilkinson. 1980. "From Brown to Bakke: The Supreme Court and School Integration: 1954-1978." *Michigan Law Review* 78 (5): 801. https://doi.org/10.2307/1288074.
[7] Michael J. Klarman, "How Brown Changed Race Relations: The Backlash Thesis." *The Journal of American History*, 1994 https://doi.org/10.2307/2080994.
[8] Northern Discrimination Linked with Lynching," *The Baltimore Afro-American*, November 23, 1946.
[9] Ibid.
[10] Ibid.
[11] Stetson Kennedy, *Jim Crow Guide to the U.S.A.: The Laws, Customs and Etiquette Governing the Conduct of Nonwhites and Other Minorities as Second-Class Citizens*, Tuscaloosa: University Of Alabama Press, 2011.
[12] David Pilgrim, "What Was Jim Crow," Ferris State University Jim Crow Museum of Racist Memorabilia, Ferris State University, 2000. https://www.ferris.edu/jimcrow/what.htm.
[13] Gunnar Myrdal, *An American Dilemma: the Negro Problem and Modern Democracy* (Pantheon Books 1975), 561.
[14] "Northern Discrimination Linked with Lynching," *The Baltimore Afro-American*, November 23, 1946.
[15] Myrdal, *An American Dilemma*, 561.
[16] "Minority Rights Still Main Issue," *The Baltimore Afro-American*, September 6, 1947.
[17] "NAACP Head Slain, Another Missing: Violence Flares in South," *Los Angeles Sentinel*, December 8, 1955.
[18] Ibid.
[19] "Two Selma Alabama Policemen Held in Connection with Arson, Shooting: Violence Called Reaction to School Desegregation Petition," *Atlanta Daily World*, October 21, 1955.
[20] Cobb, *Brown Decision*
[21] Ibid.
[22] Ibid.
[23] Ibid.

[24] Ibid.
[25] Ibid.
[26] Mark Golub, "Remembering Massive Resistance to School Desegregation," *Law and History Review* 31, no. 3 (August 2013), 494.
[27] Ibid, 505.
[28] Ibid, 504.
[29] Ibid, 507.
[30] Ibid, 505.
[31] "Segregation Ruling Hits South," *The Patriot*, May 18, 1954.
[32] "Resistance to Desegregation Is Spreading to Other Areas," *Atlanta Daily World (1923-2003)*, April 5, 1956.
[33] Ibid.
[34] "ACLU Calls Court Decision Legally Wrong." *The Baltimore Afro-American*, May 2, 1987.
[35] "Can't trust the South with Desegregation." *The Baltimore Afro-American*, October 2, 1956.
[36] Gordon, William, ed. 1956. "'Southern Tension Picture Painted.'" *Atlanta Daily World (1932-2003)*, October 25, 1956.
[37] Golub, Mark, "Remembering Massive Resistance to School Desegregation," *Law and History Review* 31, no. 3 (August 2013), 505.
[38] Ibid, 505.
[39] Ibid, 505.

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Sex Crimes and Internet Lies: Who's Responsible for Safety?

April Mihalovich | The George Washington University

Edited by: Jeannie Ren, Jack Walker, Mia Xing, April Wang, Virginia Lo, Kaleigh McCormick, Griffin Jones

Abstract

Physical or sexual assault upon meeting another person from an online dating platform is a reality for many users of these applications. Apps facilitate in-person meetings between two parties, which leads to an increased likelihood of assault compared to those who do not use online dating apps. In some cases, the parent companies of these online dating applications make no claims to authenticate the identity of their users, which, in turn, leaves users vulnerable to misrepresented profiles. Should the law be updated to encapsulate the safety issues that arise from online communication? With the lack of federal and state legislation governing online dating apps' parent companies, users are left unaware of the validity of other profiles and without legal protections to ensure their safety. This review explores the current ineffective legislation on the topic of sexual assault as connected to dating apps. In both criminal and civil cases, there is no argument under which any third party can be held responsible in order to bring restitution to victims of sexual assault. Furthermore, the limited protections that parent companies do have in place still prove to be ineffective. The exclusion of sex offenders from these platforms as a consequence of past crimes does not protect other users from the possibility of sexual assault. Additions to legislative protections and whether such legislation would increase the safety of dating apps are considered as a solution, however the limited impact of state legislation on de facto protections is a limiting factor of such change. Balancing individual rights to privacy with protections for users is important when considering legislation regarding modern technology used for online dating. The shortfalls of legislation and case law in holding parent companies liable is a failure in protecting victims of sexual violence, creating an unsafe atmosphere for all.

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II. Introduction

Online dating membership has grown dramatically over the past few years. In 2020 alone, Match Group—the parent company of popular sites such as Tinder, Hinge, and Plenty of Fish—saw a 12 percent rise in first-time subscribers from the previous year.[1] With more users, the risk of sexual harassment, assault, and rape through online dating apps is also likely to rise through this increased use. There are no studies in the US on sexual assault through online dating. However, a UK study found that, since 2016, assaults linked to the use of online dating services has risen by 450 percent.[2] It is important to conduct research on the experiences of users in the US to encourage user safety but also to examine how current legislation fails users and offers no protection outside the existing channels provided by third-party services through which to report sexual assault.

Harassment on dating apps is already a common experience for many users, and, even worse, many perpetrators of various sex crimes have admitted to using online dating apps to find victims. The aim of this article is to elaborate on the specific ways in which the information collection and user identity verification systems of the parent companies fail to keep users safe in real-life encounters.

Case studies have discovered a lack of response from these companies when a user reports an assault. While users have the option to report a specific profile or message for harassment, it is much more challenging to report an assault that took place with another user. If the user has blocked or "unmatched" the other person, then it is almost impossible for a user to construct a report unless they have extensive information about the perpetrator, such as their full name, social media handles, and more. The difficulty in reporting assault through dating apps ensures that many perpetrators of sexual assault and violence remain on the app and are able to interact with other users even after the app has received a complaint. Without

additional legal protection specifically targeting dating apps, users are left only with the limited reporting resources the apps and their parent companies provide or the option to report sexual assault through local law enforcement.

This review considers in Section III the lack of protections provided to users by online dating apps' parent companies. The gap in US-specific information that exists about survivors of sexual assault through dating apps, as well as the lack of federal legislation incorporating the modern online element of sexual crimes increases the safety risk for all users.

Many of the safety precautions and screening the government could enforce to further protect users invades the privacy of both users and third-party parent companies. The first part of Section III of this article establishes the limitations of governmental protections by reviewing landmark cases in the realm of internet law. The latter part of Section IV considers the avenue of civil lawsuits against the parent companies of dating apps in hopes to instill accountability and demand restitution on behalf of those victimized through these online dating apps. However, the possibility of content restrictions and breach of contract lawsuits are both heavily protected by the Court's narrow interpretation of the term "Internet content provider" under Section 230 of the Communications Decency Act.[3] Therefore, victims are left with few options for restitution under civil lawsuits against dating apps' parent companies.

Another important element of sexual assault this article considers in Section V is the role of registered sex offenders and repeat offenders in the dating app audience. Evaluation of the current registration requirements and protections for users against serial offenders reveals that the current laws for sex offenders do little to prevent sexual assault through dating apps. The failure of online dating apps to screen for serial offenders and the limitations of constitutional laws imposed on registered sex offenders does not offer any further user protection from sexual assault.

In reviewing the limitations of current state and federal law, this article discusses avenues through which future legislation can better serve users of online dating apps and survivors of sexual assault. Section VI evaluates existing state statutes that incorporate elements of online dating or social media use in relation to sex offenders and sexual violence. Particular clauses of current and proposed state and federal law can serve as models for new federal legislature, which would offer greater protections to dating app users.

III. Sexual Assault Via Dating Applications is Underresearched and Underreported

Little is known about the prevalence of sexual assault as it is connected to online dating apps, as the parent companies of these apps do not address the issue of assault. Additionally, current federal and state laws do not provide protections for those victimized through the use of a dating app.

A. Gaps in Information About Sexual Assault and Dating Apps

The imagined exclusivity of online dating and sexual assault leads to a gap in data surrounding online dating users' experiences with sexual assault. A study conducted by Columbia Journalism Investigations in conjunction with ProPublica found that more than a third of the women in their small sample had been assaulted by someone they met over a dating app.[4] This study is the only of its kind regarding both sexual assault and online dating. The small sample size, lack of generalizability, and the lack of further studies in this area creates a small knowledge base around how and how frequently sexual assault occurs through online dating. Additionally, the sensitive nature of sexual assault contributes heavily to low rates of reporting and the small amount of data available to researchers.

Only about 20 to 30 percent of sexual assaults are estimated to be reported to law enforcement.[5] Additionally, many further channels offered to victims such as protections under Title VII and Title IX see few reports of sexual assault. Whether it is a fear of retaliation, perceived lack of evidence, or shame surrounding victimization, the underreporting of sexual harassment, sexual assault, and rape all contribute to the small body of knowledge surrounding the occurrence of sex crimes through dating apps.

Further issues in assessing the prevalence of sexual assault in online dating are the inconsistencies in reporting sexual assault and in the fragmentation of the healthcare system. Each state collects their own data about sexual assault and each state categorizes the crime differently, which leaves no consistent nation-wide information regarding sexual assault.[6] For example, the state of California defines each form of rape and sex crime separately, whereas the state of Florida classifies all sex crimes under the umbrella term of "sexual battery."[7] This inconsistency in the recording and reporting of different types of sex crimes presents a challenge in comparing statistical data about sex crimes across different states.

While collecting statistics about sexual assault and online dating, researchers also encounter the barrier of categorization. Would a person one met and talked with online be considered a friend, acquaintance, or stranger?[8] Beginning a relationship with someone over the internet is a regular occurrence, but there is no way to "filter" sexual assault reports for how exactly an online assailant might be categorized in the victim's life. Even if the option to indicate an online relationship was available when reporting a sex crime, victims may feel embarrassed to reveal their use of online dating apps or services.[9] The lack of mutually exclusive or defined categories in studies of sexual assault contributes to the difficulty in collecting data, which in turn allows for overlooking of sexual assault and online dating as an important issue.

B. Current Legislation Surrounding Sexual Assault via Dating Apps is Non-existent

Given the Court's hesitancy to create original jurisprudence on modern technology and the lack of bi-partisan support for meaningful internet legislation, it comes as no surprise that there is no applicable federal legislation for online dating apps and the issues of harassment and assault that arise from their use. The only federal law that can be applied to dating apps is the Computer Fraud and Abuse Act (CFAA), which at its most impactful still fails in prosecuting and preventing sexual assault.[10] The 2020 DC District Court case *Sandvig v Barr* provided the ruling that terms of use violations made by individual users did not constitute a violation of the CFAA.[11] Additionally, *Van Buren v United States*, which is currently before the Court, will be the Court's first case on the CFAA. If the Court's ruling does narrow the scope of the CFAA, the option for prosecution for terms of use violations under the Act would greatly decrease, if not disappear.

The terms of use clause in online dating apps is the first line of defense in preventing users from being exposed to dangerous people and situations. First, many popular online dating apps stipulate in their terms of use that a user must never have been convicted of a felony, violent crime, or sex crime. By removing the option to prosecute under the CFAA, there is no legal penalty for lying about one's criminal record. Additionally, many online dating apps ask the user to verify that they are over eighteen years old, and that the information they provide in their profile is accurate and truthful. Therefore, there is also no legal penalty for a user who lies about their age, appearance, and name. A user can end up unknowingly committing a sex crime if they have consensual sexual intercourse with a minor who has lied about their age on the app.[12] Lying about appearance, name, and gender creates a dangerous situation where a user can be "catfished," or encounter someone far more physically

intimidating than the person they had expected to meet.

Without the CFAA, users can rely only on state law and stipulations for sex offenders to deter sexual assault through dating apps. As discussed in the forthcoming sections, these legal avenues also fail to offer protection to online dating app users.

C. There is No Industry Response or Prevention of the Issue

In addition to the lack of legislation protecting users, online dating app users encounter no safety support from the apps or their parent companies. A spokesperson from Match Group has even admitted that "there are definitely registered sex offenders on our free products."[13] Despite outlining in their terms of use that sex offenders are not allowed on the online dating applications, the parent companies are fully aware that users are lying about their sex offender registration status and continue to let users who have committed sex crimes interact with other users on their apps. In a February 2020 letter to the president of Match Group, Congress expressed its concern of the continued presence of sex offenders on dating applications.[14] Despite the accessibility to sex offender registries and the ability for screening to be conducted regularly, online dating apps continue to let registered sex offenders use their services.

The 2019 investigation by Columbia Journalism Investigations and ProPublica found that Match Group in particular screens regularly for users of their paid apps and subscriptions, but not for their free apps.[15] The apps that do not get screened regularly for sex offenders include Tinder, Plenty of Fish, and OkCupid, which are all popular apps and websites among users of online dating services. It is clear that the parent companies have the ability to screen for sex offenders, but they have no interest in doing so for users unless they have a paid subscription. Achievable safety from those convicted of sex crimes should not be a privilege that a user should have to pay

for, but they instead should be the industry standard in the realm of online dating. Since there is no way to enforce the removal of sex offenders from these apps and prosecution for terms of use violations under the CFAA is not possible, users of online dating apps are left unprotected and, often, unaware of the danger of misrepresentation on these apps.

IV. The Parent Companies Cannot Be Held Liable for User Safety

Through the avenues of both protection under federal and state law and accountability for users' safety through civil lawsuits, the parent companies of popular online dating applications cannot be prosecuted and held responsible for both the safety of their users and for sex crimes that are committed against users of online dating applications.[16]

A. Federal and State Law Fails Protective Measures

As outlined below, no protections such as mandatory screenings and searches of user data or the creation of governmentally imposed user restrictions can be enacted without either violating the Fourth Amendment right to privacy or containing specific applicability to online dating platforms.

1. Challenges to Protective Government Searches of Data

Through the precedent set forth in *Riley v California*, law enforcement officers are unable to conduct searches on users' online data without a warrant.[17] In this case, the Supreme Court declined to extend *United States v Robinson*'s ruling that warrants are not required in searches incident to arrest to apply to cell phone and cell data. While this ruling is broadly applicable to many parts of internet

law, it is most important in the sense the local, state, and federal law enforcement officers are unable to conduct searches of the parent companies' data on users without specific warrants citing specific incidents. This ruling means that when users violate the terms of use of online dating apps by lying about their age or sex offender registration status, the government is unable to provide searches that will reveal these users without a warrant.

Further elaborating on the collection and screening of user data, a 2014 Kansas District Court case stated that the government in obtaining a warrant for data searches must have "enumerated search protocol" for protecting the privacy rights of the individual to be searched.[18] Riley already limits the government's ability to search data to a specific, case-by-case basis that must already have probable cause for a search warrant against a specific user. The additional restrictions by the Kansas District Court ruling requires the establishment of a detailed outline and framework for minimizing the intrusiveness of a search that already falls within the requirements of the Fourth Amendment. This requirement, if upheld at the federal level, creates a challenge in creating individualized frameworks for each search on a timely basis. Considering the problem of sexual assault through online dating apps is a large-scale issue, there is no de facto way for the safety of online dating app users to be ensured by warranted government data searches.

2. Challenges to Government Screening for Terms of Use Violations

Outside of the collection of user data, allowing the government basic access to a list of subscribers and subscription information is another recourse that could help decrease the presence of sex offenders on various online dating apps. That way, local or federal law enforcement could "screen," for names cross-listed on the sex offender registry without requiring further access to data. However, in order for any government entity to gain access

to subscriber information from a third-party computer service such as online dating apps, the government must obtain a warrant, court order, consent of the subscriber, and a formal written request to law enforcement noting the specific relevant investigation and information for each subscriber involved.[19] One way to implement this is for the online dating apps to require users to consent to having their subscription information available for a cross-check with the sex offender registry, which is a way of verifying the terms of use compliance of users.

While this may be an achievable way for local law enforcement to cross-check specific sex offenders they have probable cause to believe are subscribed to a certain platform, it is unrealistic to implement on a large scale. Similarly to the limitations on governmental data searches, even screening for subscriber information without content requires too much individualized suspicion in order to be implemented effectively and without violating a person's Fourth Amendment rights.

3. Challenges to Creating User Restrictions

Another important aspect of eliminating deceit in online dating accounts is through user restriction. Although these online dating apps have an age requirement of eighteen in their terms of use, many lie about their age in order to use the services. In such a case, two users exchanging sexual material or engaging in consensual sexual intercourse can unknowingly commit a sex crime if one of them is a minor and has lied about their age. An important law for regulating mature content online, such as dating apps that often promote sexual content and relations between its users, is the 2006 Adam Walsh Child Protection and Safety Act. Designed to further protect minors from having access to sexually explicit material or being sexually exploited themselves, this act imposes legal age restrictions to access certain websites that are likely to

contain mature material.

However, the Act is unable to facilitate further user restrictions for two main reasons. First, this Act does not apply to online dating apps and websites due to the fact that the sites are meant for a "mixed audience."[20] Only websites specifically designed for those under thirteen are required to comply with the Act's regulations. Since online dating websites are not designed or marketed for children, they are only required to have a simple age verification, one that does not require the use of government documents, input in order to comply with the Act. Second, online dating websites are not affected by the portions of the Act regulating media due to the fact that the online dating websites themselves are not producing any pornographic material. While users may message or attach explicit material to their profile, the content of the app or website itself does not contain explicit material. Therefore, users are not protected as a result of this Act past an initial age verification, which is often a simple button asking a person's age and does not require government documents to prove their age.

B. Parent Companies Lack Civil Responsibility

In order to receive restitution for damages and aid the prevention of future damage to others, people who have been sexually assaulted through the use of online dating apps may seek a civil lawsuit against the parent company that facilitated the interaction. As explored in this section, past lawsuits in the areas of tort and contract law have shown that the litigation against the parent companies of online dating apps is difficult due to the extensive governmental protections placed on websites and the strict requirements to be considered an "information content provider." Section 230 of the Communications Decency Act was passed with the objective of "allowing them [internet content providers] to perform some editing on user-generated content without thereby

becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete."[21] Since then, the definition of internet content providers and the restrictions put forth on third parties have been expanded through court cases such as *Doe v SexSearch* and *Carafano v Metrosplash.com, Inc*. This section and its implication on civil lawsuits is explored in the forthcoming subsections.

1. Challenges to Negligence Lawsuits

In encouraging the development and use of new technology and new kinds of websites, Congress has given such websites and their parent companies a wide berth in legislation. Examples of these freedoms is that parent companies may continue to develop and put to use their services without constant entanglement in various civil lawsuits.[22] By doing so, the opportunity for civil lawsuits to successfully hold an online dating app or website accountable for the facilitation of interactions or crimes is greatly decreased.

a) Content Restrictions under 47 U.S.C. § 230 Communications Decency Act

The Communications Decency Act of 1996 was one of the first attempts to regulate obscene material across the internet. In doing so, Section 230 of the Act established the definition of an "internet content provider" as any entity responsible for the development of information published through the internet.[23] Computer service providers are protected from being held responsible for the information put forth by their users through an extensive body of case law. As summarized in the case of *Zeran v Am. Online*, Congress in the creation of Section 230 and subsequent internet law, has a greater interest in protecting third-party free speech rights than prosecuting parent companies for tort damage.[24] Consequently, computer service providers are immune from damages resulting from the actions or

speech of their subscribers or employees.[25] Unless they are the sole provider and creator of the information that is transmitted through their website, online dating websites will not be found to act as an "information content provider," and will be immune from tort liability.

The definition of an "information content provider" developed through case precedent has determined under what circumstances are required to deem an online service to be an "internet content provider." In the case of *Doe v SexSearch*, the online dating service SexSearch was found not to have been an "information content provider" due to the fact that the service did not modify the specific user's profile.[26] Although online dating services reserve the right to modify users' profiles, in this case the service could not be held liable for damages due to the fact that the service had no intervention in the profile that provided false information to the Plaintiff in that case.

A case referencing a similar principle, *Carafano v Metrosplash.com, Inc.*, articulated that a service that allows users to interact via their own profiles cannot be considered an "information content provider" due to the fact that no profile contains information, truthful or not, until the user themselves creates that information.[27] The online dating website has no hand in creating and falsifying information and therefore cannot be held liable for damages resulting from that false information.

Through these restrictions, the Communications Decency Act serves as legislation that vastly limits the options for restitution through tort liability. While Congress's role in protecting the First Amendment rights of third-party internet services is important, it must be recognized that, in doing so, the opportunity for victims of crime to receive damages for the wrongdoings committed against them is nearly impossible as seen in recent case law.

b) Breach of Contract for Terms of Use

Another applicable avenue for civil lawsuit in a case of sexual assault arising from the use of an online dating service is the potential for a lawsuit under breach of contract for a company allegedly violating its own terms of use. However, the fact that the terms of use of most, if not every, dating service states that the company assumes no responsibility for verifying the accuracy of information put out by other users. This stipulation counters the possibility for a breach of contract lawsuit due to false information of another user displayed on the website or app. As a result, the company is protected upfront by such a clause in their contract and cannot be sued for breach of contract for another user's false information.[28] On this same principle, the online service is exempt from responsibility for any false display of age, due to the contract clause assuming no responsibility for age verification present in most, if not every, online dating services' terms of use contract. The issues that would most likely arise in a breach of contract civil lawsuit are, in fact, protected from the very signing of the terms of use contract upon download of the app or access of the website.

Finally, the opinion in *Doe II v MySpace Inc.* sums up the lack of civil responsibility that parent companies have in terms of assault arising from the use of their apps or websites. In comparing *Zeran v Am. Online, Inc.*, *Carafano v Metrosplash.com, Inc.*, and *Doe v SexSearch.com*, the Court of Appeals in *Doe II v MySpace Inc.* noted that the harm occurring in all of these cases occurred offline, after the interactions via the app, website, or service had been made.[29] The Plaintiff's sexual assault in *Doe II v MySpace Inc.* occurred offline, so the parent company of the website that had connected Plaintiff with her assailant could not be held liable under tort or contract liability due to the fact that the online service did not directly harm the Plaintiff.

The various limitations related to both tort and contract civil

lawsuits protect the third-party service providers and free speech published over the internet, but at the same time exclude the possibility to hold parent companies liable as an actor in crimes facilitated by the use of their online dating services. As such, survivors of sexual assault cannot count on the liability of the service providers as a source of restitution or a deterrent for the spread of false information over online dating apps and websites.

V. Limiting Access to Online Dating Services for Sex Offenders is Ineffective

Currently, any limitations on registered sex offenders occur because they are imposed by federal law or state law, or by the courts on a case-by-case basis. It is difficult and often ineffective to further impose laws restricting access to the internet, specifically socially-oriented websites that contribute to a large part of day-to-day life. Given the existing legislature defining and controlling registered sex offenders' access to the internet, such restrictions on sex offenders fall short in protecting the safety of other users of online dating apps while also infringing on the rights of sex offenders as citizens.

A. Current Protections Limiting Internet Access Fail to Prevent Sexual Assault

The broadest set of legislation defining the procedure for registered sex offenders is the Jacob Wetterling Act and Megan's Law. In totality, these legislative actions create the requirement for states to maintain a sex offender registry and to notify communities of the presence of registered sex offenders and their basic biographical and geographic information. These laws provide the information of registered sex offenders for the immediate access of both law enforcement and community members.

Additionally, any registered sex offender is required to submit

"his person, and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects to search at any time, with or without a warrant" if there is reasonable suspicion that they have violated terms of their probation.[30] With the inclusion of "electronic communication" and "data storage devices or media," any media or messages between a registered sex offender and another user of an online dating service can be investigated. While this requirement does allow the government access to the electronic communications and materials of individual sex offenders, the review of this information is not sustainable on a larger scale. This method of investigation is reactive rather than preemptive, which must be considered when assessing de facto effectiveness of examining the materials of registered sex offenders nationwide. Additionally, law enforcement only has access to these communications and information with the reasonable suspicion that a registered sex offender has violated conditions of their parole or broken the law in another way. Therefore, such information and safeguards are more helpful in investigating assault than preventing it.

An additional barrier to monitoring the online access of sex offenders is sources of communication that local or state law enforcement may not have the capabilities to access. A highlight for state sex offender registration requirements is that in Virginia, "any instant message, chat or other Internet communication name or identity information that the person uses or intends to use" must be submitted upon registration.[31] While this seems like a more effective way to track the activity of registered sex offenders on dating apps, there exist many additional avenues such as encrypted messages, VPN scrambling software, and "Anonymous" functions that make the de facto regular monitoring of each registered sex offender in the state impossible.[32]

Another factor that limits the protection of dating app users is the presence of sex offenders and predators on dating apps, even

apps as a facilitator of sexual violence. This ease-of-access granted by online dating services provides the opportunity of sexual assault to non-offenders and allows the use of such apps as a facilitator of sexual violence.

Given the difficulty of enforcing the laws surrounding registered sex offenders' use of internet services and the tools that provide users anonymity, it is unreasonable to expect that any of these safeguards adequately protect online dating app users against sex offenders before they are harmed.

B. Further Restrictions Create Unnecessary Collateral Consequences for Sex Offenders

The further restriction of sex offenders' access to the internet and online dating would not have the intended impact on victims' safety due to the gap of predators that are not prosecuted and registered as sex offenders, as well as the use of sex offender information reactively rather than in preventing assault. Further restrictions are not effective in the way they are intended to be, and for the cost of offenders' freedom to use and engage with social media.

It is important to consider the rights of registered sex offenders as citizens. Laws targeted at banning registered sex offenders from using specific social media websites have been struck down recently in North Carolina and New York, with the logic that bans for social media use adds undue imposition on the First Amendment rights of offenders that did not use social media in the commission of their crimes.[35]

Websites and online dating services can be disguised and marketed as innocuous social media and can be used to facilitate violent crime, so it is unlikely that legislation can specifically target the use of online dating applications by registered sex offenders since there is often an overlap between social media and dating

apps. Social media not intended for sexual encounters can also be used to facilitate such conversations through private messaging features. This creates a gray area between the boundaries of online dating platforms and other forms of social media. Even if legislation was passed unchallenged, as the *Jones et al. v Stanford* case in New York articulated, doing so would create an unnecessary punishment for registered sex offenders that is, in some cases, not at all related to the nature of the crime they committed. Despite the commission of a sex crime in person, the requirement to register as a sex offender occurs for all sex crimes of a certain tier and involves the monitoring of online activity of sex offenders, even if their crime was not perpetrated online.

VI. Legislative Reform and Solutions

It is imperative to develop a legislative solution that balances protections for users of online dating apps from sexual assault with minimal invasion of personal privacy rights for all parties. Additionally, in order for a law to be effective in attempting to regulate any online dating services, it must be passed as federal legislation.[36]

While no states have drafted effective legislation to protect victims from violence facilitated by online dating apps, the state laws in New York, California, and Illinois can serve as models for future federal legislation.

A. Current State Laws as Models for Federal Legislation

Ways in which the three particular state laws attempt to protect users of online dating services are through the mandatory presence of safety warnings displayed on the app or website, and the disclosure about the lack of screening for users. While these laws only partly function to protect online dating app users, it is

important that users are aware of the presence of convicted violent individuals on the online platforms.

In New York, any app or website that is considered an internet dating service must provide "a list and description of safety measures reasonably designed to increase awareness of safer dating practices."[37] This mandated information is often displayed on such apps or websites as a separate page linked at the bottom of the home page or elsewhere on the site.[38] Both Tinder and Hinge have links to their safety tips and messages at the very bottom of their home pages. Grindr, Bumble, and Plenty of Fish, however, do not display anywhere on their home pages a link to their safety tips. Future legislation should consider enforcing the presence of a more prominent warning on the service's app or website. Displaying the risks of online dating and tips to stay safe somewhere on the home page is important in creating informed users and a sense of user safety.

Messages outlining safe dating tips shifts the focus of sexual assault to a victim's issue rather than a deviant crime committed by an offender, which is not the goal of future legislation around this issue. However, requirements for dating apps to display safety tips and links on their home, signup, or masthead pages is a step toward increasing the accountability of these apps to inform users of the risks associated with online dating. This is also an opportunity for further studies on how long users spend reviewing safety tips so that websites can optimize the impressions, or the number of digital views, of their safety tips. By collecting analytical information on the "views" that a safety tips webpage has, these third-party companies can track how long their users spend on the page and how many click the links that brings them to the safety tips webpage.

California's Proposition 65 warnings, widely known as necessary warnings mandated by the California Office of Environmental Health Hazard Assessment, ensure consumers' awareness of specific dangerous chemicals in products and the

potential health conditions that can arise from exposure to those chemicals.[39] The law encompasses in-person sales, internet sales, and sales conducted by mobile phone.

Although this Proposition is not related in content to online dating, it can offer guidance to future federal law that could require online dating services to display a detailed warning to their users, and could enumerate specific content requirements such a warning must include. By giving the parent companies of online dating application requirements for how, how often, and in what ways they must warn users of the dangers of online dating, future legislation can increase the likelihood that users would see and engage with messages, webpages, and graphics that display warnings about sexual assault and sexual predators.

Similarly, an Illinois law governing online dating can provide a guiding example: it requires that if an internet dating service does not conduct criminal background checks on its users, then the service must disclose that information "clearly and conspicuously" to its users.[40] The idea of transparency is a progressive *de jure* way of promoting user safety. However, given the history of inconsistent screening and background checks on users as established in previous sections, it is difficult to tell how successful this law can be enforced.

The elements of the New York and Illinois laws fall short of being effective on their own but can serve as inspiration in the drafting of federal legislation to provide clear warnings and disclosures to users of online dating services. Conducting market research with companies to evaluate how users engage with the apps can help shape federal legislation. Methods such as a quiz about safety at the time of creating an account may encourage users to read and internalize the apps' safety tips. Additionally, giving users the option to customize their experience on the apps would foster more informed dating app users. Drafting legislation that requires giving users the option to request identity verification checks on other users or the option for in app video chat is the next step in enforcing

consistency in safety procedures without infringing on the rights of users.[41]

B. Proposed Federal Laws as Models for Legislation

The most effective avenue in which new legislation can be introduced is in the enforcement of mandatory criminal background screenings as well as additional protections for users of apps such as online dating services, which carry the implication of a future in-person meeting between its users. The expansion of legislation to address not only websites explicitly using sexual language in their services but also websites that promote dating, matchmaking, or other romantic services is a necessary next step in the protection of sexual assault victims.

A federal law passed in 2018 created the amendment of the aforementioned Section 230 of the Communications Decency Act to allow the enforcement of the Act and other federal and state law against online service providers in cases "relating to sexual exploitation of children or sex trafficking."[42] This law created an avenue for the prosecution of websites "knowingly assisting, supporting, or facilitating" the prostitution of another person. Further expansions of protections of this type are unlikely to pass given the broad scope and lack of consideration for the nuances between different types of online service providers.

Since online dating apps such as Hinge are marketed solely for dating and contain no language on their homepage, masthead, or the "About" section referencing sex, legislation targeting sexual assault and explicitly sexual websites would not affect the most popular online dating applications.[43] However, the Allow States and Victims to Fight Online Sex Trafficking Act can be used as a model to craft legislation more broadly applicable to websites that offer dating and romantic services. Pivoting the focus of subsequent bills toward sexual assault outside of prostitution would change the

landscape of sexual assault and other sex crime prosecution under the Communications Decency Act.

VII. Conclusion

It is evident from the aforementioned sections that the current channels of state law, federal law, and civil liability are not successful in their protections for online dating app users. While prosecuting perpetrators of sexual assault is essential to deterrence and restitution for victims, it is necessary to look past individual cases and investigate how technology works within our legal system to facilitate the commission of sex crimes. Creating a body of law that protects the intersection of online dating app users and sexual assault survivors is complex in its drafting and implementation. Not only is it important to consider how both state and federal laws interact with case law and the various jurisdictions at play, it is also necessary to consider what expansions of the law are realistic in their enforcement without infringing on the rights of any party involved.

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[7]Fla. Stat. § 794.011 (2020), California Penal Code Section 243.4, California Penal Code Section 261.
[8] "The Dangers of Dating Apps"
[9] Kasandra Brabaw, "It's 2018, So Why Are People Still Lying About Meeting Online?" *Refinery 29*, (August 16, 2018.)
[10] 18 USCS § 1030 (Current through Public Law 116-246), 1984.
[11] *Sandvig v Barr*, 451 F. Supp. 3d 73 (2020).
[12] *State v Holmes*, 154 N.H. 723 (2007). (State did not have to prove defendant knew that a victim was under age of legal consent for statutory rape conviction). See also *Fleming v State*, 455 S.W.3d 577 2014). (State did not need to prove a defendant had a culpable mental state regarding the defendant's belief that the victim was 17 years old or older).
[13] "Tinder Lets Known Sex Offenders Use the App."
[14] *See* Letter from Congress of The United States to Shar Dubey, President of Match Group (Feb. 20, 2020) (on file with U.S. Representative Ann McLane Kuster) ("The failure to cross-reference all user responses with sex offender registries is deeply concerning")
[15] Keith Cousins and Brian Edwards, Columbia Journalism Investigations, "How to Report a Sexual Assault to a Dating App," *Newstex Blogs Pro Publica*, 2020.
[16] *See, for example* Tinder. "Terms of Use." Tinder Policy Pages. (Arbitration Clause in Tinder Terms of Use). *See also* Bumble. "Terms & Conditions." Bumble. (Arbitration Clause in Bumble Terms of Use). *See also* Grindr. "Terms of Service in Grindr." Grindr. (Arbitration Clause in Grindr Terms of Use). *See also* "Hinge.

Terms." Hinge. (Arbitration Clause in Hinge Terms of Use).
[17] *Riley v California*, 573 U.S. 373 (2014).
[18] *In re Cellular Tels*., 2014 U.S. Dist. LEXIS 182165 (United States District Court for the District of Kansas), 2014, p.25-26.
[19] § 2703. Required disclosure of customer communications or records, 18 USCS § 2703 (1986).
[20] § 2257. Record keeping requirements, 18 USCS § 2257 (1988).
[21] *Fair Hous. Council v Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. Cal. April 3), 2008.
[22] § 230. Protection for private blocking and screening of offensive material, 47 USCS § 230 (Current through Public Law 116-246), 1996.
[23] Ibid.
[24] See *Zeran v Am. Online, Inc*., 129 F.3d 327, 331 (United States Court of Appeals for the Fourth Circuit), 1997. ("Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.").
[25] See *Delfino v Agilent Technologies, Inc*., 145 Cal. App. 4th 790, 802 (Court of Appeal of California, Sixth Appellate District), 2006. (Employer was entitled to immunity under 47 U.S.C. § 230 on tort claims that arose from an employee's use of the employer's computer system because the employer qualified as an interactive computer service provider under § 230).
[26] *Doe v SexSearch*, 502 F. Supp. 2d 719, 725 (United States District Court for the Northern District of Ohio, Western Division), 2007.
[27] *Carafano v Metrosplash.com, Inc*., 339 F.3d 1119, 1124 (United States Court of Appeals for the Ninth Circuit), 2003.
[28] *Doe v SexSearch*, 502 F. Supp. 2d 719, 729 (United States District Court for the Northern District of Ohio, Western Division), 2007.
[29] See *Doe II v MySpace Inc*., 175 Cal. App. 4th 561, 574 (Court of Appeal of California, Second Appellate District, Division Eight), 2009. ("In *Zeran* and *Carafano*, the harm occurred offline when the plaintiffs received harassing or threatening communications through their home telephones and fax machines. Similarly, in *Doe v SexSearch.com*, the harm occurred when the plaintiff was arrested because he had sex with the minor. These incidents all occurred offline, just as the sexual assaults against the Julie Does occurred offline.").
[30] Conditions of probation, 18 USC § 3563(b)(23) (2006).
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[43] See, for example, Hinge. "What We Believe," Hinge; Hinge, "What Is Hinge?," Hinge.

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A Reimagination of the US Immigration Court System

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Abstract

The breadth of inefficiency in our country's immigration system has been exposed as an open wound in our democracy. In its contemporary structural organization, the immigration courts invite executive overreach and partisan interference, resulting in increased backlogging, detention, and constitutional infirmities. This article argues for the reconstruction of the immigration courts away from the direct control of the executive branch and thus from the instability of rotating presidential administrations.

I. Introduction and Background

At present, the immigration courts are Article I courts created by the legislative branch under Article I of the Constitution.[1] Congress placed these courts under the executive branch and delegated its responsibilities to the attorney general. Unlike similar tribunals, such as the US bankruptcy courts and the US tax courts, immigration courts cannot be classified as independent. The immigration courts' historical development suggests that their organization under the executive branch has stemmed from xenophobic and anti-immigrant attitudes. Today, these legislative courts are more restrained by the executive branch than ever before. For example, immigration judges and board members are without term limits and serve at the mercy of the attorney general.[2] The attorney general holds 'power of review' over any Board of Immigration Appeals case, which allows the office to overturn decisions, set precedent, and interpret immigration law.[3] In short, through the attorney general, a president can interfere in immigration adjudication according to their partisan interest. Such gross executive overreach is not possible in other Article I courts.

Part II of this article illustrates the evolution of the immigration courts and analyzes their present-day organization. This section demonstrates that the immigration courts were constructed to assist executive interference in immigration adjudication. Part III presents the failures of the current immigration court system by interpreting the structural vulnerabilities affecting immigration judges and members of the Board of Immigration Appeals (BIA). Policy pushed forward by President Trump's administration that preyed upon the autonomy of immigration adjudicators is criticized and the constitutionally problematic structures arising from the system's organizational deficiencies are evaluated. Part IV introduces how the executive and the legislative branch have undermined judicial authority. This section analyzes the evolution of the federal circuit courts' jurisdiction to review BIA decisions and

illuminates a disturbing trend of institutionalized xenophobia that threatens the immigration courts' constitutionality. Part V follows BIA cases in which attorney generals facilitated executive overreach in immigration adjudication. First, *Matter of E-F-H-L-,* second, *Matter of Castro-Tum* in conjunction with *Matter of L-A-B-R-*, and third, the *Matter of A-B-* together with Matter of *L-E-A-*. Finally, Part VI reveals the parameters within which Congress has the power to reconstruct the immigration courts and recommends a system parallel to that of the US bankruptcy courts with independent trial and appellate divisions, ten year terms for judicial appointments, and rehabilitated judicial review. This article highlights how a transition to independent Article I immigration courts will heal some of the unjust and inefficient practices prevalent within the adjudication system today.

I. The Evolution of US Immigration Courts Reveals That Their Organization Within the Executive Branch Bureaucracy Stems from Anti-Immigrant Sentiments

Throughout the evolution of the immigration courts, the dominance of the executive branch remained consistent. The US immigration courts have never had an opportunity for independence and freedom from partisan interference because they were structured to facilitate intrusion. In an attempt to respond to growing xenophobia in the country, Congress categorized the courts under the Department of Justice, granted great leeway to special inquiry officers, and endowed exhaustive power to the attorney general. Today, the organization of these courts under the executive branch serves as a reminder of this nation's instinct to react to uncertainty with protectionist and anti-immigrant policy.

Due to the economic destabilization that globalization caused, the early 1890s saw the rise of right-wing populist parties that blamed immigrants for the consequences of a rapidly changing

international economic system.[4] Through the Immigration Act of 1891, the legislative branch created the first US immigration court system, charged an executive department with the responsibility of appointing a superintendent, who would later be replaced with the attorney general, and gave inspection officers the sole authority and discretion to assess and deport immigrants.[5] The Immigration Act of 1893 strengthened the authority of inspection officers by creating a process of "special inquiry" where officers had the power to determine naturalization on subjective methods; that is whether the officers found the migrant admissible by their own standards.[6] After a name change, special inquiry officers would become immigration judges.[7] The Immigration and Naturalization Service (INS) was later moved from the Department of the Treasury to that of Commerce and Labor upon the department's creation to address public movements against cheap labor provided by migrants.[8]

In the 1940s, increased concerns about national security led to the transfer of the Immigration and Naturalization Service from the Department of Labor to the Department of Justice (DOJ).[9] Under the DOJ, criminal law and immigration law have become exceedingly intertwined.[10] This is explicitly illustrated by the fact that the attorney general is the nation's chief prosecutor, the head of the Department of Justice, and responsible for immigration adjudication all in one. Once the Board of Review was placed within the DOJ it became the Board of Immigration Appeals (BIA).[11] This restructure was also indicative of the growing association between immigration and crime. Under the Department of Labor, the Board of Immigration Review could make rulings with their own authority; however, under the DOJ, the renamed appellate decides appeals on behalf of the attorney general.[12]

Further, since its creation, the Immigration and Nationality Act (INA) has made special inquiry officers liable to the direction of the attorney general and inherently vulnerable to changing presidential administrations. Finally, in 1983 during the Reagan

administration, the Executive Office for Immigration Review (EOIR) was formed within the Department of Justice and Attorney General William French Smith relocated both the BIA and immigration courts under its purview.[14] The passing of the Immigration Reform and Control Act of 1986 gave the EOIR the power to rule on cases concerning immigration-related hiring issues and the employment of unauthorized individuals.[15] Specifically, this act delegated some of the attorney general's power to the immigration court system, while not depriving the office of their authority over any immigration adjudicating structure. The placement of the immigration courts under the long arm of the executive branch has resulted in structural vulnerabilities that continue to endanger the efficacy of US immigration proceedings. Therefore, they must be recategorized as an independent entity, away from the history that has left them exposed.

III. Under the Executive Branch, US Immigration Courts Suffer Structural Vulnerabilities

Independent Article I courts are essential for the efficient and ethical processing of immigration cases. During the 2020 fiscal year, the number of pending immigration cases surpassed a million.[16] A decade ago, this number had not overtaken 300,000, and in the year 2000, the number of backlogged cases was well below 150,000.[17] The inefficiency of the immigration court system is also partly responsible for the number of pending cases. Immigration judges are unable to carry out independent adjudication and the Board of Immigration Appeals, hindered by the same constraints, cannot hear cases without bias or interference from the executive branch.

A. The Evolution of the US Immigration Court System has Neither Ensured The Independence of Immigration Judges Nor That of the Board of Immigration Appeals

Independent immigration courts are critical to ensuring fair trials. The lack of independence among immigration judges reduces trust in the adjudication process and can increase the number of cases appealed to the Board of Immigration Appeals (BIA).[18] As stated above, immigration judges, previously titled 'special inquiry officers,' are not appointed by Article III of the U.S. Constitution. Instead, immigration judges are attorneys appointed by the attorney general who, per federal regulation, "shall act as the attorney general's delegates in the cases that come before them."[19] Therefore, they are part of the executive branch contrasting traditional federal judges housed under the Judicial branch. Immigration judges are "subject to such supervision and shall perform such duties as the attorney general shall prescribe, but shall not be employed by the Immigration and Naturalization Service."[20] As a result, the executive holds disproportionate power over immigration matters. Within the contemporary system, the immigration judge cannot be independent and consequently, it is impossible for immigrants to secure a fair trial. The policy described in Part C of this section illustrates how presidential administrations have sought to eliminate judicial discretion and perpetuate partisan interests.

Decisions made by immigration judges can be appealed to the Board of Immigration Appeals; however, its members are also under the control of the attorney general. Board of Immigration Appeals (BIA) members are "attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them."[21] The ability to create certifications is a way for attorney generals to maintain review authority and power over the Board. Therefore, published BIA decisions are final "except in those cases reviewed by the Attorney General."[22]

The regulation creates three instances in which the attorney general can review a BIA case on certification; however, one of these categories allows the attorney general to review any case they demand referred to themselves.[23] This certification process endows the attorney general with a great deal of power, often allowing them to upend decades-long precedent as was the case in *Matter of Castro-Tum*[24] and others detailed in section V. Overall, certification is but another avenue through which the executive dominates over immigration adjudication.

Stacking the courts, as is currently within the power of the executive branch, allows an administration to push their political agenda by handpicking judges and Board members whose views align with those of the party in power. The political appointment, removal, and reassignments of immigration judges and BIA members seen in the past four years have made it clear that a President's administration can easily pack the immigration courts. In 2018, Congress members sent then-Attorney General Sessions a letter expressing their disquietude over the Department of Justice consideration of political and ideological factors to illegally "block the hiring of immigration judges and members of the Board of Immigration Appeals (BIA)" and to further inquire on immigration judge hiring and training policies as well as the mishandling of immigration courts.[25] Under the Bush administration, immigration judges and BIA members were dealt reassignments by the executive as a punitive action and political strategy.[26] Because the BIA can set precedent upon which all immigration courts must abide, any shift in its political balance is of interest. In 2015 the number of maximum Board members went up from fifteen to seventeen.[27] In 2018, the Department of Justice increased this number to twenty-one.[28] Then again in 2020, the Board was expanded to twenty-three members at the direction of the serving attorney general.[29]

The Trump administration has also been accused of replacing Board members with restrictionists to forward his political

agenda. For instance, former Attorney General (AG) William P. Barr endorsed candidates such as Philip J. Montante Jr and Kevin W. Riley, each of whom have denied 96.3 percent and 88.1 percent of asylum cases respectively.[30] Other immigration judges handpicked by AG Barr had similar records for granting asylum claims. For instance, immigration Judge Earle Wilson granted only 3 out of 110 claims causing a drop in his record from 3.8 percent to 2.6 percent for FY 2019.[31] Stephanie Gorman's grant rate dropped from 14.7 percent to 3.76 percent for granting 11 out of 281 claims during that same period.[32] The same trend of low grant rates plummeting after appointment by the Trump administration holds for immigration judges Deborah Goodwin and William Cassidy.[33] Keith Hunsucker stands out with a zero percent grant rate for both FY 2018 and FY 2019 and Stuart Couch breaks the trend with an increase from 1.4 percent to five percent; although both rates are disturbingly low.[34] The link between changing political ideologies and the BIA would be severed if the immigration courts were removed from the reach of the attorney general and replaced by independent courts with their own judicial appointment system.

B. Recent Policy Exemplifies How Executive Overreach Continues to Deteriorate Immigration Judge and BIA Discretion and Autonomy

Recent policy demonstrates that the executive can and will take advantage of the current immigration court system. On January 18, 2020, the Executive Office for Immigration Review (EOIR) released a memorandum issuing quotas for immigration judges to meet or otherwise be subject to discipline. The EOIR cites the House Committee on Appropriations direction to "establish a goal that the median length of detained cases be no longer than 60 days and the median length of non-detained cases to be no longer than 365 days."[35] The memorandum further emphasizes the office's right

to create measures for timely and efficient adjudication. A footnote in this memorandum further announced the creation of a "status docket." A "status case" was defined to be

> (I) one in which an immigration judge is required to continue the case pursuant to binding authority in order to await the adjudication of an application or petition by U.S. Citizenship and Immigration Services, (2) one in which the immigration judge is required to reserve a decision rather than completing the case pursuant to law or policy, or (3) one which is subject to a deadline established by a federal court order.[36]

This definition came as ominous foreshadowing for Sessions' upcoming certification in *Matter of Castro-Tum*.[37] Cases that did not fall within this definition, "non-status cases" were to be completed within the designated 365 days. Once set for trial, another quota states that if more than five percent of an immigration judge's cases were delayed they could be disciplined. Instead of keeping a case active, an immigration judge could place it in the status docket for over a year without penalty. A few months later, however, then-Attorney General Sessions would take away the immigration judge's ability to administratively close cases, a powerful docket management tool, through his power of certification. In 2019, after rumors of "secret policy-making" guidance surfaced in a secret email to immigration judges, the Executive Office for Immigration Review released a policy memorandum limiting the type of cases that could be placed on the 'status docket,' further eroding an immigration judge's ability for discretion.[38] The 'status docket' was limited to 'status' cases as defined above.[39] Consequently, most cases could neither be administratively closed nor placed on the status docket. In order to adhere to time restraints and quotas concerning continuances, immigration judges are forced to order removal thus interfering with their right to discretion. This outcome is problematic because it severely limits the amount of time available to process the vast amount of paperwork immigration litigation entails. Time is especially vital

in immigration law because it entails the collaboration of various federal agencies and departments, language barriers, and the lack of professional representation for many migrants.[40] Consequently, respondents can and have been subject to orders for removal for reasons outside of their control, regardless of the merits of their case. These types of quotas make it impossible for immigration judges to comprehensively meet migrants' due process rights.

Moving cases through the courts at such an expedited rate without regard for immigrant rights will impact the pile-up of cases in the Board of Immigration Appeals (BIA). Between 2008 to 2017, that number fluctuated but never surpassed 24,000.[41] However, in 2019, the number of case appeals filed to the BIA increased from 39,160 to 55,924 cases and the Executive Office of Immigration Review (EOIR) asked for a budget increase of $64,839,000.[42] In 2020, the trend continued with a total of 51,266 cases filed, and again, the EOIR asked for an increase of $71,147,000.[43] In 2021, they again requested an increase of $137,028,000.[44] In every one of these cases, the EOIR justified its request by citing the rising number of pending cases facing the BIA since FY 2018.[45] Executive overreach into the immigration courts creates barriers to the efficient and ethical administration of immigration law. As a result, these excess appeals have and will continue to be litigated at the taxpayers' expense.

IV. The Structure of the Current Immigration Court System Has Resulted in Limited Availability for Review by Article III Courts

The opportunity for review by Article III courts is critical to maintaining the constitutionality of Article I courts; however, the lack of independence in the immigration courts has made appeals to the Federal Courts of Appeals unlikely. The Supreme Court in *Northern Pipeline*[46] claimed that the US Bankruptcy Courts'

limitations for review by the federal circuit courts presented a problem for their constitutionality. In 1996, amendments made to the Immigration and Nationality Act (INA) by Congress severely hindered the federal courts' ability to properly review decisions made by the Board of Immigration Appeals (BIA). These amendments, the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration and Reform and Immigrant Responsibility Act (IIRIRA), present a serious challenge to the constitutionality of US immigration courts and endangers the careful balance of powers between the three branches of government.

Like the evolution of the immigration court system itself, the erosion of the Article III court's ability to comprehensively review BIA decisions correlates with eras of intensified anti-immigrant sentiment.[47] In 1961, Congress added official provisions that made habeas corpus the sole method for judicial review of exclusion orders.[48] At the time, exclusion and deportation orders were separate processes and, therefore, subjected to differing jurisdictional constraints. With the passing of the AEDPA and the IIRIRA, Congress effectively amended the INA provisions on judicial review in response to the prevailing political climate that emphasized the need to protect the country from "illegal" immigrants and an "out of control" border.[49] These 1996 amendments limited the federal availability for review of crime-related deportation orders and the lion's share of discretionary rulings.[50] Further, they grouped exclusion and deportation rulings under a single title; removal orders which allowed for the further narrowing of judicial review prospects as described in Part C of this section.[51]As was the case in the 1890s, anti-immigrant movements have resulted in the allocation of more power and less oversight for the executive branch concerning immigration adjudication.

A. Migrants' Ability to Appeal Final Removal Orders is Severely Undercut With Time Limits and Restrictions to the Federal Circuit Courts' Fact-Finding Ability

Adequate time to complete the requirements for the appeal process and the federal circuit courts' right to remand for additional fact-finding are critical components of the judicial review process that ensures the system's integrity and fairness for petitioners. In the current organization of the US immigration courts, these essential structures are undermined. The 1996 amendments disposed of these vital structural protections and handed the executive branch more control over immigration adjudication. The IIRIRA barred the courts of appeal from remanding cases to the BIA for further fact-finding and cut the time frame for filing appeals from 90 to 30 days.[52] This leaves little room to file for an appeal. Before these amendments, courts had the option of remanding a case for this purpose and were not constrained by the attorney general's own "findings of fact."[53] This amendment to the INA has forced federal courts to rule only "on the administrative record" providing great hardships for asylum seekers whose conditions can quickly change relative to the pace of their court proceedings along with the many barriers that obstruct petitioners from seeking appeal as stated in Section III, Part C of this review.[54]

The extremely limited time frame creates excess work for the courts and a convoluted system for migrants who must often navigate it without assured legal representation. Moreover, the multi-step process does not guarantee a temporary stay of removal. Thus, Petitioners must file both a motion for appeal and then a separate motion for stay.[55] Under this current organization, the Petitioner runs the risk of being deported while an appeal is in the system. The AEDPA and the IIRIRA put more power into the hands of the executive and subsequently constrained that of the judicial branch. An independent immigration court would put some power back into

the federal courts and create a more viable system for checks and balances in immigration adjudication.

B. The Inability for Federal Circuit Courts to Review Discretionary Decisions Has Facilitated Executive Overreach in Immigration Adjudication

The IIRIRA deems denials for relief following from the attorney general's discretionary powers unreviewable by Article III courts.[56] This provision has made it easier for the executive branch to overstep its boundaries and interfere in immigration adjudication. For instance, the Bush administration hoped to insert its political agenda in the courts by pushing that more rulings be labeled as 'discretionary' and 'unreviewable.'[57] Courts are often challenged to determine whether they hold the right to review a BIA decision due to the complexity of the present appeal process; therefore, instead of streamlining appeals, time and resources are spent in the battle over jurisdiction. Prior to the 1996 amendments, 'discretionary' decisions had been subject to the 'abuse-of-discretion' standard and legal conclusions were able to be reviewed *de novo*.[58] Its elimination has opened the door for executive overreach through the attorney general and further threatened the balance of powers between the three branches of government. Overall, these provisions exacerbate vulnerabilities within the immigration court system.

C. The Elimination of Habeas Review for Most BIA Removal Orders Reduces Vital Insurances for Fair Judicial Hearings

Before the 1996 amendments, final orders for deportation maintained a path for appeal in both the district courts and the courts of appeal; however, these amendments eliminated habeas jurisdiction and thus judicial review in the district courts. The REAL ID Act of 2005 would consolidate the two paths for review by functionally

doing away with the district court's habeas corpus jurisdiction for review of final removal; allegedly to create a more efficient process by limiting appeals to the courts of appeals.[60] Today, the appeal process is only open to "constitutional claims or questions of law" and severely narrows the number of cases that can be appealed in the Federal appeals courts.[61]

Only expedited removal cases can be heard in the district courts via habeas corpus review; otherwise, this form of review has been wiped out.[62] The only recourse that remains for immigrants seeking an appeal for BIA final removal orders is in the courts of appeal. However, this path is riddled with obstacles and restrictions that further threaten the court's constitutionality. Under these amendments, most discretionary decisions outside of constitutional or legal questions have been made unreviewable with the sole exception of asylum cases.[63] As mentioned above, without the ability to remand for further fact-finding cases heard in the federal circuit, courts are incomplete and thus cannot ensure a fair hearing. Further, pre-1996 amendments removal orders had been considered under the 'substantial evidence standard.' This standard questioned the facts of a case on whether they were "supported by reasonable, substantial, and probative evidence."[64] Congress stamped out this standard with these amendments and denied the immigration adjudicating system another critical structural check.

As has been explored in this article, immigration judges and Board members are in a precarious and vulnerable position concerning the attorney general and the executive political agenda.[65] The 1996 amendments to the INA and the REAL ID Act of 2005 have demonstrated how the immigration courts have been easily manipulated to further political agendas and an overall battlefield for immigration policy. The Supreme Court has ruled that similarly strict jurisdictional bars for review by the federal circuit courts are enough to deem Article I courts as unconstitutional.[66] To promote the rule of law, support worthwhile judicial review, and maintain

the vital structural safeguard on executive reach and administrative power, it is critical to restore the federal circuit courts' jurisdiction for review over BIA final orders of removal. Transforming the immigration courts into a system independent of the executive branch and placing it under the district court's purview is the first step in restoring the federal circuit courts' jurisdiction for review of BIA final removal orders.

V. The Attorney General's Power of Certification Has Led to Executive Overreach and the Violation of Individuals' Constitutional Rights

To maintain the American tradition of checks and balances and to safeguard the minimal constitutional rights to which non-citizens are entitled, the creation of independent Article I immigration courts is imperative. As previously discussed, there is an inordinate amount of power over immigration litigation from the attorney general and the presidential administration. It has often led to the violation of the Fifth Amendment. As the Supreme Court of the United States has held, the Fifth Amendment guarantees procedural due process rights for *all persons* in the United States, including non-citizens.[67] However, the growing backlog means rising wait times for immigrants and serious Fifth Amendment infringements, especially for migrants held in detention centers. Further, attorney generals have violated procedural due process rights through certification and compromised the integrity and independence of the U.S. immigration courts.

A. Matter of E-F-H-L Narrowed Procedural Due Process Rights for Immigrants and Sped Up Removal Proceeedings

The lack of judicial autonomy allowed the attorney general to interject into the *Matter of E-F-G-L-* thus illustrating the ease

with which a president's partisan interests can alter immigration adjudication beyond lawmaking. In *Matter of E-F-H-L-,* the court denied the Respondent's application for asylum, withheld removal, and held that the Respondent was not entitled to an evidentiary hearing. The case was appealed to the BIA who remanded the immigration judge's decision and ruled that *E-F-H-L-*[68] was in fact "ordinarily entitled to a full evidentiary hearing." The BIA based its decision on the precedent set by *Matter of Fefe*[69] and federal regulations stating that "applications for asylum and withholding of removal so filed will be decided by the immigration judge...after an evidentiary hearing to resolve issues in dispute." However, at this time the Respondent became eligible for naturalization through family-based application which falls under the jurisdiction of the United States Citizenship and Immigration Services (USCIS) and out of the immigration courts.[70]

Ordinarily, in such cases, E-F-H-L-'s case would be administratively closed until the USCIS' decision was administered, thus temporarily removing the case from the court's docket. Administrative closure delays court removal proceedings by temporarily closing a case so that the USCIS can work on pending green card and visa applications for respondents.[71] Administrative closure is a docket management tool and therefore of vital importance to judicial discretion. However, then-Attorney General Sessions used his review process powers to refer the case to himself to vacate the BIA's decision. Going against decades of precedent and procedural rights, AG Sessions had the matter re-imposed onto the immigration courts' active docket.[72] This was the first step in a long plan to speed up removal proceedings at the expense of immigrant rights.

B. Matter of Castro-Tum and Matter of L-A-B-R- Narrowed Immigration Judges' Discretion and Contradicted Existing Precedent and Federal Regulation

Matter of Castro-Tum and *Matter of L-A-B-R-* further demonstrate the lack of structural provisions in today's immigration court system to prevent executive overreach, partisan intervention, and to protect the integrity of existing immigration law. Attorney General Sessions would again employ his power of review to have these cases referred to himself. In *Matter of Castro-Tum*, AG Sessions held that neither the immigration judge nor Board members are authorized to administratively close cases. This certification was a direct attack on the court's discretion and independence. Again, the office of the Attorney General reversed years of precedent and infringed upon the Respondent's procedural due process rights. Without administrative closure, paperwork and speed are the deciding factors in Respondents' cases, depriving them of fair trials. AG Sessions reasoned that administrative closure was inefficient and its disposal would help chip away at the increasing backlog.[73] Contradicting established federal regulation which empowers immigration judges to "exercise their independent judgment and discretion," AG Sessions held that "immigration judges exercise only the authority provided by statute or delegated by the attorney general."[74] Since neither statute nor an attorney general had authorized its use in the past and Department of Justice regulations only allowed its administration in specific types of cases, it was within his power to limit judicial discretion.[75]

AG Sessions would elaborate that formal continuances would serve as the only tool at the immigration adjudicator's disposal for delaying a case. However, AG Sessions quickly changed his mind when reviewing *Matter of L-A-B-R-*[76] which he, again, had referred to himself. Continuances allow the Respondent to gather evidence, present testimony, receive USCIS decisions, or find a representative.

Simply put, it is another way to administer Respondents their procedural due process rights. Immigration judges have the power to "grant motions for continuance for good cause shown."[77] In *Matter of L-A-B-R* [78], the AG Sessions ruled that all cases concerning continuances should be referred to him for review and narrowed the standard for "good cause." Again, AG Sessions would be able to make decisions in direct contrast to federal regulation. The attorney general's ruling in these two cases funneled every asylum case of this nature to his desk, leaving the process vulnerable to politicized bias and decision making.

These certifications have had callous consequences for the constitutional rights of immigrants. In *Romero v Barr*[79], Jesus Zuniga Romero had appealed his case to the BIA for review but it was dismissed due to the precedent set by *Matter of Castro-Tum*. On original jurisdiction, the immigration courts had been unable to administratively close Romero's removal proceedings.[80] In light of his wife recently becoming naturalized, Romero had an opportunity to gain legal status via a different avenue, but immigration judges had been earlier stripped of their power to put his case on hold. Subsequently, Romero petitioned the BIA's order to the U.S. Court of Appeals for the Fourth Circuit who then rejected the attorney general's holding in Casto-Tum. The Fourth Circuit had jurisdiction over the case and held that the language of the federal regulations exemplifying judicial discretion "unambiguously confers upon [immigration judges] and the BIA the general authority to administratively close cases."[81] In an independent immigration court, Romero would have had a fairer chance for legal-status free of partisan interference. Once again, the attorney general had easily overstepped his boundaries and deeply disrupted the immigration judges' ability to act as independent and effective adjudicators.

C. Matter of A-B- and Matter of L-E-A- Created A Revised Intepretation for the Framework of a "Particular Social Group"

The threat to the country's checks and balances lies in the President's ability to regulate immigration within the courts themselves, albeit indirectly. In *Matter of A-B-* and *Matter of L-E-A-*, the attorney general's office continued its attack on immigration by narrowing the well-established framework of a "particular social group" to limit the number of asylum claims granted in the immigration courts. Under federal law, there exist five protected groups for migrants seeking asylum: race; religion; nationality; membership of a particular group, or political opinion.[82] *In Matter of A-B-*[83], Respondents sought asylum under "membership of a particular social group;" specifically, gender as it relates to domestic violence. The BIA has long defined a "particular social group" as "a group of persons all of whom share a common, immutable characteristic." [84] In this case, the particular group was considered by the court as "El Salvadorian women who are unable to leave their domestic relationships where they have children in common with their partners."[85] The case was appealed to the BIA who found that this particular social group was enough to warrant asylum; however, AG Sessions disagreed.[86] Upon having the case referred to himself he ruled that claims made by non-citizens concerning "domestic violence or grand violence perpetrated by non-government actors will not qualify for asylum."[87] These cases, again exemplify the gross executive overreach possible under the current immigration court system

Concerning the *Matter of A-B-*, the court in *Bringas-Rodriguez*[88] ruled that "[t]he concept of persecution by non-state actors is inherent in...the Refugee Act." Subsequently, *Grace v Barr*[89] found that the new standard and policy for establishing credible fear created in *Matter of A-B-* was "arbitrary and capricious" on multiple counts including the USCIS's "failure to acknowledge and explain

its departure from past practice and the agency's failure to meet the APA's "requirements of reasoned decision making." AG Sessions was able to interfere with legal precedent and distort immigration proceedings for migrants through "arbitrary and capricious" certifications. Failure to abide by immigration law and protect the rights of every individual has and will continue to result in higher numbers of appeals; therefore, worsening the national backlog.

As previously explored, it is extremely difficult for a BIA case to be successfully appealed by Article III courts, and it comes too late for migrants who may have been deported as a result of an unlawful precedent. As a result, the Attorney General's supreme authority over these ruling bodies has put migrants in life-threatening situations. In *Matter of L-E-A-*[90], the Respondent had been deported to Mexico where his father had rebuffed the cartel, La Familia Michoacana, and refused to sell their drugs. The cartel retaliated against the Respondent in four instances; one of them amounting to a kidnapping from which he escaped.[91] The BIA had initially found that the "father's immediate family" constituted a 'particular social group' to qualify for asylum and was supported in these findings by the Department of Homeland Security (DHS).[92] But, then-acting Attorney General Matthew Whitaker, and later Attorney General William Barr, ruled that "most nuclear families are not inherently socially distinct and therefore do not qualify as particular social groups."[93]

It was contested whether Whitaker had the authority to review this case; however, on the precedent set in *Matter of A-B-*,[94] "[n]othing in the INA or the implementing regulations precludes the Attorney General from referring a case for review simply because the Board has remanded the [it] for further proceedings before an immigration judge." Because there was "nothing" stopping him from reviewing a case that had been returned to the immigration courts, AG Whitaker concluded that he could. Once AG Barr replaced Whitaker as attorney general, he claimed that his prior assertions on

asylum and immigration issues did not hinder him from "acting as an unbiased adjudicator" in this case.[95] Citing *Matter of A-B-* AG Barr stated that he has "made no prior statements regarding the facts of the case, and [he] does not have a personal interest in the outcome of the proceedings."[96] However, this is difficult to believe considering the Trump administration's history of packing the immigration courts and their anti-immigrant crusade. Once again, the attorney general's office had overturned decades of precedent and political bias was allowed to enter the nation's courts. There is an inherent conflict of interest in these rulings but the structure of the system allows them to persist. Independence is imperative for these courts to remedy and avert violations of executive overreach.

VI. Proposed Solution

As demonstrated, the structure of the immigration courts under the executive branch empowers and emboldens the attorney general's office to modify the immigration system without needing to officially write laws. There is little doubt that the U.S. Immigration Courts need to gain independence in order to restore its constitutionality and integrity. The Federal Bar Association, the National Association of Immigration Judges, and the American Bar Association favor the reorganization of the immigration court system in a manner that distances the Executive Office for Immigration Review (EOIR) from political influence and results in independence from the Department of Justice (DOJ).[97] This section describes the creation of independent Article I courts akin to the U.S. bankruptcy court structure, with separate trial and appellate decisions.

A. The Legislative Branch has the Enumerated Right to Amend the US Immigration Courts and Precedent Demonstrates that it Has Been Done Before

Congress has the power to reconstruct the immigration courts outside of the executive branch and into independent adjudicating bodies. In *United States v Curtiss-Wright Export Corp*,[98] the Supreme Court held that the president holds an extensive right to control foreign affairs. But Congress too has enumerated rights over immigration and foreign affairs as established in Article I including the power to create legislative courts.[99]

Congress should reconstruct the U.S. Immigration courts parallel to their reconstruction of the U.S. Bankruptcy courts. The legislative branch created Article I bankruptcy courts in 1898.[100] The Bankruptcy Act of 1978 later transformed these courts by inviting them to erect appellate panels (BAP), widening the court's jurisdiction while also limiting the federal courts' ability to review their decisions.[101] The legality of these Article I courts was questioned since customarily legislative courts were territorial, military, or courts that oversaw "public rights disputes."[102] *Murray's Lessee v Hoboken Land & Improvement Co.*[103] set the "public rights exception" that created a significant distinction between Article I courts and Article III courts. However, bankruptcy courts did not fall within this exception because the U.S. is not a party in bankruptcy disputes. As a result, the appellate court, BAP review was made optional to safeguard the bankruptcy courts' constitutionality by Congress.[104] The proposed appellate division of independent Article I immigration courts, however, need not follow the bankruptcy courts' development in this matter. Immigration falls within the "public rights exception" since the U.S. is a party in all immigration proceedings.[105]

B. Congress Should Create Independent Article I Courts With Separate Trial and Appellate Divisions

Like the U.S. Bankruptcy Courts, these new immigration courts should be considered a unit of the district courts that exercise the immigration jurisdiction given to them by law. As stated above, the U.S. Immigration Courts in their current form are inefficient, inconsistent, and constitutionally problematic. Congress has the power to restore the legitimacy of this democratic institution by reorganizing the immigration courts as independent Article I courts with separate trial and appellate level divisions.

An independent trial-level court would free immigration judges from the control of rotating Attorney Generals and changing Presidential administrations; therefore, eliminating the core of executive overreach in immigration adjudication. In its present structure, the trial-level immigration courts are operated by immigration judges subject to the whims of Attorney Generals' hiring and firing policies, arbitrary completion quotas, and capricious precedent that fluctuates and complicates immigration law. A minimum of 10-year terms for immigration judges and Board Members or 14 years, as are bankruptcy judicial officers should be implemented to reduce the impact of political impact in executive appointments. The executive branch would maintain control of other immigrant regulating departments such as the Department of Homeland Security and the United States Citizenship and Immigration Services (USCIS). Further, the distance from political influences will create more trust in the judge's decisions resulting in fewer appeals to the BIA and overall greater efficiency. Accordingly, the BIA will be freed of its politicized constraints and its decisions will be received with ameliorated public trust.

As a unit of the federal courts, the extent to which BIA rulings are reviewable by Federal Appeals Courts would also be expanded and the deferential standard of review lessened to a level more in

tune with the Constitution.[106] The reorganization should include the restoration of the federal court's ability to review all discretionary issues and employ de novo review in such cases. The reinstatement of de novo review is especially important to asylum cases that often sit on the docket for months or even years, upon which the facts of the case and the conditions of the Respondent's country of origin may have changed.[107] In short, reorganizing the immigration courts for greater independence is within Congressional capability and will result in a more just and ethical system.

VII. Conclusion

The country's ineffective immigration court system precedes former President Trump; but for the past four years, the United States has witnessed repeated attacks on immigration. Decades of politicized immigration courts have led to the erosion of judicial independence, the backlogging of cases, and the violation of constitutional rights.

Section II of this article followed the chronological development of the immigration courts and demonstrated that its evolution was trailed with xenophobic intentions. This section found that from their inception, the immigration courts have been sans independence in order to serve the executive branch as a tool for complete jurisdiction over immigration.

Section III exhibited three structural vulnerabilities that have emerged in the current court system as a result of their evolution. First, this section emphasized the lack of autonomy both immigration judges and Board members have as a result of the Attorney General's direct authority over the courts. Second, this section found that the current organization of the immigration courts enables the executive branch to continue violating the autonomy of immigration adjudicators. Finally, Part III found that the extremely limited availability for Article III court review of BIA and Attorney

General decisions has resulted in a constitutional infirmity. It concluded that the current structure of the immigration courts is unguarded and welcoming of executive interference.

Section IV demonstrated the erosion of Federal appeals courts' right to review final BIA removal orders on account of political interference. Part A highlighted how the political environment has allowed for strict restrictions on judicial review of immigration adjudication. Part B found that the 1996 amendments undercut Petitioner's ability to appeal final removal orders with unusually short time limits and restrictions on the courts' fact-finding ability, thus creating a tangled bureaucracy that increases the strain on immigration adjudicating systems. Part C of this section discovered that the erosion of the Federal Circuit court's ability to review discretionary decisions facilitates executive overreach in immigration adjudication. Finally, Part D demonstrated that the eradication of habeas corpus judicial review for most BIA orders reduces important insurances to a fair adjudication. This section found that an independent Article I immigration court must include rehabilitated paths for judicial review by the Federal Circuit courts.

Section V illustrates through Attorney General certifications the extent of executive overreach in immigration adjudication. These cases illuminate how the Attorney General can circumvent federal regulation, narrow practiced immigration law, and overhaul decades-long precedent with ease. This section found that in order to protect the constitutional rights of non-citizens in the United States and ensure the court's integrity, the U.S. Immigration Courts must be divorced from the executive branch and be made independent.

Ultimately, Section VI presents an alternative to the contemporary organizational structure of immigration adjudication parallel to that of the U.S. bankruptcy courts. Whether the Biden administration will also take advantage of the immigration courts' reachability to push partisan interests is unknown; however, this article recommends against it. Instead, it suggests that Congress

recategorize the immigration courts as independent Article I courts with separate trial and appellate divisions. This review concludes that as a unit under the district courts, immigration adjudication would no longer be at the mercy of rotating presidential administrations and fluctuating partisan interference, thus, remedying the judicial maladies examined above. Most importantly, this article calls for the reinstatement of the American ideals of justice, equality, and constitutionality into our immigration courts.

[1]Immigration Act of 1891, Pub. L. No. 51-551, 26 STAT. 1085 § 13 (1891).
[2] 8 U.S. Code § 1103.1 (a)(1).
[3] 8 U.S. Code §1103.1 (d)(1)(i).
[4] John B. Judis, *The Populist Explosion: How The Great Recession Transformed American and European Politics*, 23 (2016).
[5] 26 STAT. 1085 § 7 (1891), 8 U.S. Code § 1103.1 (a)(1).
[6] Immigration Act of 1893, Pub. L. No. 52-206, 27 Stat. 569 § 5 (1893); *see also* Daniel Buteyn, "The Immigration Judiciary's Need For Independence: Breaking Free From the Shackles of the Attorney General and the Powers of the Executive Branch," 46 *Mitchell Hamline L. Rev*. 958, Section III. B.
[7] 8 Code of Federal Regulations, (1973), § 1.
[8] 15 U.S. Code § 1501; see also Teresa Miller, *Citizenship & Severity*, (2003).
[9] 8 Code of Federal Regulations § 1003.1(a)(1).
[10] Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Pathology* (2003).
[11] 8 Code of Federal Regulations § 1003.1(a)(1).
[12] 8 Code of Federal Regulations § 1003.1(d)(1).
[13] 8 Code of Federal Regulations § 1003.1(a)(6).
[14] 8 Code of Federal Regulations § 1003
[15] 8 Code of Federal Regulations § 1003(g)
[16] Syracuse University, Immigration Court Backlog Tool, TRAC Immigration, (2021 FY) https://trac.syr.edu/phptools/immigration/court_backlog/
[17] Ibid.
[18] AILA Policy Brief: Restoring Integrity and Independence to America's Immigration Courts, AILA, 1-11, (2020).
[19] 8 Code of Federal Regulations § 1003.10
[20] 8 U.S. Code § 1101(b)(4)
[21] 8 Code of Federal Regulations § 1003.1(a)
[22] Ibid § 1003.1(d)(7)
[23] Ibid § 1003.1(d)(7)
[24] *Matter of Castro-Tum*, 27 I. & N. Dec. 271 at 274 (AG May 17, 2018).
[25] Letter from Elijah E. Cummings, Lloyd Doggett, Joaquin Castro, and Donald S. Beyer Jr., Members of Cong., to Jeff Sessions, US Att'y Gen., U.S Dep't of Justice (April 17, 2018).
[26] *Tabaddor v. Holder*, 156 F. Supp. 3d 1076 (CD Cal. 2015) ("The judge sufficiently alleged that the recusal order which adversely affected the judge's ability to engage in teaching for compensation amounted to retaliation for challenging the recusal order").
[27] *Expanding the Size of the Board of Immigration Appeals*, 80 Fed. Reg. 31,461

(June 3, 2015).
[28] Ibid at 8321, 8321; *see also* 8 CFR § 1003.1 (a)(1)(2018).
[29] 85 FR 18105
[30] Syracuse University, *Judge Philip J. Montante, Jr*, TRAC Immigration (2021 FY) https://trac.syr.edu/immigration/reports/judgereports/00023ORL/index.html; see also Syracuse University, *Judge Kevin W. Riley*, TRAC Immigration (2021 FY).
[31] Bryan S. Johnson, *Immigration Judges Asylum Grants & Denials in FY 2018-2019*, Amoachi & Johnson PLLC, (2019). https://amjolaw.com/2019/12/24/immigration-judges-asylum-grants-denials-in-fy-2018-2019/; see also Memorandum from DOJ Senior Counsel for Administrative Law Joseph R. Schaaf on the FOIA request to the EOIR (Dec. 23, 2019).
[32] Bryan S. Johnson, *Immigration Judges Asylum Grants & Denials in FY 2018-2019*, Amoachi & Johnson PLLC, (2019). https://amjolaw.com/2019/12/24/immigration-judges-asylum-grants-denials-in-fy-2018-2019/.
[33] Ibid.
[34] Ibid.
[35] Memorandum from DOJ Dir. McHenry III on Case Priorities and Immigration Court Performance Measures to The Off. of the Chief Immigr. Judge, All Immigr. Judges, All Ct. Adm'[r]s, All Immigr. Ct. Staff. (Jan. 17, 2018).
[36] Ibid, (n) 7.
[37] 27 I. & N. Dec. at 274 (AG May 17, 2018).
[38] Memorandum from DOJ Dir. McHenry III on Use of Status Dockets to All Immigr. Ct. Personnel (Aug. 16, 2019).
[39] Ibid, 1
[40] US Const. Amend. XI, (Non-citizens are not entitled to legal representation provided by the US Government. They may hire their own or appear sans representation).
[41] EOIR, *Executive Office For Immigration Review Adjudication Statistics*, (Jan. 7, 2021), https://www.justice.gov/eoir/page/file/1248501/download; see also Dept. of Justice, *Congressional Budget Submission (FY 2021)*, (Feb. 2020). https://www.justice.gov/doj/page/file/1246381/download.
[42] *Dept. of Justice, Congressional Budget Submission (FY 2021)*, (Feb. 2020). https://www.justice.gov/doj/page/file/1246381/download; see also *Dept. of Justice, Congressional Budget Submission (FY 2019)*, (Feb. 2018). https://www.justice.gov/jmd/page/file/1143986/download
[43] EOIR, *Executive Office For Immigration Review Adjudication Statistics*, (Jan. 7, 2021), https://www.justice.gov/eoir/page/file/1248501/download; see also *Dept. of Justice, Congressional Budget Submission (FY 2021)*, (Feb. 2020).

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[44] Dept. of Justice*, Congressional Budget Submission (FY 2021)*, (Feb. 2020). https://www.justice.gov/doj/page/file/1246381/download

[45] *Dept. of Justice, Congressional Budget Submission (FY 2019)*, (Feb. 2018), https://www.justice.gov/jmd/page/file/1143986/download; see also, *Dept. of Justice, Congressional Budget Submission (FY 2020)*, (Feb. 2019), https://www.justice.gov/jmd/page/file/1143986/download; *Dept. of Justice, Congressional Budget Submission (FY 2021)*, (Feb. 2020). https://www.justice.gov/doj/page/file/1246381/download

[46] *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 US 50, 52 (US June 28, 1982); *B&B Hardware, Inc. v. Hargis Indus.*, 575 US 138, 171 (US March 24, 2015).

[47] Zachary B. Allen et al., "Reforming the Immigration System," 1-1 *ABA*, Parts III-IV, 160-169, (2019) (discussing judicial review by the circuit courts); *see also* US Constitution. Art I, § 9, cl. 2.

[48] 8 USC § 1005a (repealed by § 306(a) of IIRIRA, Pub. L. No. 104-208, § 306(a), 110 Stat. 3009-546, 3009-612 (1996)).

[49] Allen et al., "Reforming the Immigration System," 1-1 *ABA*, Part IV, (2019); *citing* Lenni B. Benson, "Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings," 19 *Conn. L. Rev*. 1411, 1439-40; *see also*, Leisy Abrego et al., "Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IIRIRA Era," *Journal on Migration and Human Security*, Section I, 709-34, (2018).

[50] Antiterrorism and Effective Death Penalty Act, 110 STAT. 1214, Pub. L. No. 104-132 (1996); *see also* Immigrant Responsibility Act, 110 Stat. 3009, Pub. L. 104-208 (1996).

[51] IIRIRA § 306(a) (amending INA § 242(a)(1)).

[52] Ibid at § 306(a)(2) (amending 8 USC § 1252(a)(1) and INA 242(b)(1)).

[53] *Garcia v. Boldin*, 691 F. 2d 1172, 1182 (5th Cir. 1982); 8 USC § 1105(a)(4).

[54] 8 USC § 1252(b)(4)(A) (2017); *Wan Ping Lin v. Mukasey*, 303 Fed. Appx. 465, 468 (9th Cir. 2008).

[55] *Nken v. Holder*, 556 US_, 129 S. Ct. 1749, 1761 (2009).

[56] 8 USC § 1182(h)-(i); *see also* IIRIRA § 309(c)(4)(C) (amending INA § 242(a)(2)(B)).

[57] Allen et al., "Reforming the Immigration System," *ABA*, Part IV, Section III. A. (2019); *citing* Securing America's Borders Act, S. 2454, 109th Cong. §508(a) (2nd Sess. 2006).

[58] *Pablo v. INS*, 72 F. 3d 110, 113 (9th Cir. 1995); *Soroa-Gonzales v. Civiletti*, 515 F. Supp. 1049, 1057 (N.D. Ga.) (1981); *Paredes-Urrestarazu v. INS*, 36 F. 3d 801(9th Cir. 1994).
[59] 28 USC §§ 2341-2351 (2006); see also 8 USC § 1105a(a)(10) (1994). This section would later be made moot by IIRIRA, Pub. L. No. 104-208, § 306(b), 110 Stat. 3009-546, 3009-607 (1996).
[60] REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 § 106(a)(1)(B) (2005) (amending INA § 242(a)(5)).
[61] Ibid at §106(a)(1)(A)(iii) (amending INA § 242(a)(2)(D)).
[62] Allen et al., "Reforming the Immigration System," *ABA*, Part IV, Section III. A. (2019).
[63] 8 USC § 1252(a)(2)(B)(ii).
[64] Ibid at § 1105(a)(4); *see also* 36 F. 3d 801, 807 (9th Cir. 1994).
[65] *Wang v. Attorney General*, 423 F. 3d 260, 268 (3d Cir. 2005); *Lopez-Umanzor v. Gonzales*, 405 F. 3d 1049, 1054 (9th Cir. 2005) ("The IJ's assessment of Petitioner's credibility was skewed by prejudgment, personal speculation, bias, and conjecture").
[66] 458 US 50, 52 (US June 28, 1982); 575 US 138, 171 (US March 24, 2015).
[67] *Zadvydas v. Davis*, 533 US 678, 693 (2001); *Reno v. Flores*, 507 US 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings").
[68] *Matter of E-F-H-L-,* 26 I. & N. Dec. 319. (BIA 2014).
[69] *Matter of Fefe*, 20 I. & N. Dec. 116, 117-18 (AG 1989); see also 8 CFR § 1240.11(c)(3) (2019).
[70] *Matter of E-F-H-L-,* 27 I. & N. Dec. 226. (AG 2018).
[71] *Matter of Bavakan AVETISYAN*, 25 I. & N. Dec. 688, 692 (BIA 2012).
[72] 26 I. & N. Dec. 319. (BIA 2014).
[73] 27 I. & N. Dec. 271, 281 (AG 2018).
[74] Ibid. at 274; *see also* 8 CFR § 1003.10(b) (2019).
[75] 27 I. & N. Dec. 271, 281 (AG 2018).
[76] *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (AG 2018).
[77] 8 CFR § 1003.29 (2019).
[78] 27 I. & N. Dec. 405, 419 (AG 2018).
[79] *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019).
[80] Ibid, at 286
[81] Ibid
[82] 8 USC § 1158(a)(2)(A) (2019).
[83] *Matter of A-B-*, 27 I. & N. Dec. 316, 321 (AG 2018).
[84] *Grace v. Barr*, 965 F.3d 883, 888 (DC Cir. July 17, 2020); citing *Matter of*

Acosta, 19 I. & N. Dec. 211; S.*E.R.L. v. Attorney General*, 894 F. 3d 535, 545-49 (3 Cir. 2018).
[85] 27 I. & N. Dec. 316, 321 (AG 2018).
[86] Ibid.
[87] Ibid at 320
[88] 965 F.3d 883, 889 (DC Cir. July 17, 2020); citing Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1060 (9th Cir. 2017).
[89] 965 F.3d 883, 900-908 (DC Cir. July 17, 2020).
[90] *Matter of L-E-A-*, 27 I. & N Dec. 581, 583 (AG 2019).
[91] Ibid.
[92] *Matter of L-E-A-*, 27 I&N Dec. 40, 42, 43 (BIA 2017); *see also* DHS Supplemental Brief at 20 ("In this case, the Department stipulates that the immediate family unit of the respondent's father qualifies as a cognizable particular social group.").
[93] 27 I. & N Dec. 581, 583 (AG 2019).
[94] 27 I. & N Dec. 316, 323–24 (AG 2018).
[95] Ibid 323–24.
[96] Ibid at 325 quoting *Strivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995); see also *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1168 (DC Cir. 1979) (finding that policymakers do not have to retreat from "interchange and discussion about important issues").
[97] Kip T. Bolin and Elizabeth Stevens, "Subcommittee Hearing of November 1, 2017: Oversight of the Executive Office for Immigration Review," *Federal Bar Ass'n*., (2017); Dana Leigh Marks, "Blueprint for Immigration Court Reform," *NAIJ*, (2013); Zachary B. Allen et al., "Reforming the Immigration System," *ABA*, Part IV, (2010).
[98] *United States v. Curtiss-Wright Export Corp*., 299 US 304, 319-20 (1936); citing US Const. Art. II, § 2, cl. 1.
[99] US Const Art. I, § 8, cl 1, cl 4, cl 11; § 9 cl1; cl 9.
[100] Bankruptcy Act of 1898, Pub. L. No. 55-541, 30 Stat. 544 (1898).
[101] The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).
[102] *Thomas v. Union Carbide Agric. Prods. Co.*, 473 US 568, 105 S. Ct. 3325 (1985).
[103] *Den Ex Dem. Murray v. Hoboken Land & Improv. Co.*, 59 US 272, 274 (US February 19, 1856); see also *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1367 (US April 24, 2018).
[104] 458 US 50, 52 (US June 28, 1982); 575 US 138, 171 (US March 24, 2015).
[105] *Crowell v. Benson*, 285 US 22, 51 (1932).
[106] 458 US 50, 85 (US June 28, 1982).
[107] 36 F.3d 801, 807 (9th Cir. 1994).

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Title VII's Minimum Threshold Has a Maximum Impact on Some Employees

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Abstract

Title VII of the Civil Rights Act of 1964 is the hallmark law against employment discrimination in the United States, yet it leaves many employees without federal protection. The law's minimum threshold constrains Title VII to apply only to companies with fifteen or more employees, leaving millions without access to federal justice if they are discriminated against based on their race, color, religion, sex, or national origin. This article addresses the disparities Title VII creates regarding access to justice. First, an examination of the history of the congressional minimum threshold debate provides illuminating context and offers challenges to establishing a lower or nonexistent minimum threshold. Second, more expansive state laws with low or nonexistent minimum thresholds are analyzed to show how they could serve as models for federal legislation, while demonstrating that the less expansive laws negatively impact employees. As state law claims are often already interpreted in light of federal precedents despite varying minimum thresholds, it is clear that a change to the federal threshold would not require courts to adopt a different standard for these cases. Ultimately, this article (1) analyzes successful state strategies that could be used in more states, (2) calls for a federal legislative change to the minimum threshold, and (3) considers and responds to potential challenges of lowering the minimum threshold, such as the burden that employer liability could impose on small firms.

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I. Introduction

Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), the hallmark law against employment discrimination in the United States, outlawed discrimination against any individual "because of such individual's race, color, religion, sex, or national origin."[1] Title VII was groundbreaking, and it is important to understand how expansive its protections truly are. For the purposes of this article, a law's expansivity refers to how many people it protects. In the case of Title VII, an employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[2] As such, Title VII is not a very expansive law as it only applies to companies with fifteen or more employees, creating what is known as the minimum threshold or the small-firm exemption. When Title VII was first introduced, Congress debated the minimum threshold and ultimately decided that setting it at fifteen employees would protect a majority of workers without placing an undue burden on smaller "mom and pop" shops. The congressional debate over the threshold will be further analyzed in Section II(a). As a result of the small-firm exemption, anyone employed at companies with fewer than fifteen employees is not entitled to compensatory and punitive damages should they be discriminated against on the basis of one of the Title VII-protected categories.[3] Unfortunately, a large percentage of employees fall into the small business category of labor.

While there are no exact data providing the number of employees without federal recourse, a 2015 report by the U.S. Department of Commerce found that very small enterprises—employers with fewer than twenty employees—employed 20.4 million people in 2012, or 17.6 percent of all employees.[4] Although this statistic is an approximation of the number of employees left unprotected by Title VII, it indicates that many employees work

for small employers, many of whom likely have fewer than fifteen employees. As such, there are millions of employees without access to federal justice should they be discriminated against based on their race, color, religion, sex, or national origin. To address this disparity in access to judicial recourse, more expansive state laws that have minimum thresholds lower than fifteen employees should serve as a potential model for federal legislation.

Previous scholarship examining the minimum threshold has focused on the definition of "employer," along with calls to eliminate the minimum threshold at the federal level or incentivize states to do so on their own.[5] However, those who advocate for a low or nonexistent minimum threshold tend to leave its challenges, such as the burden of employer liability or enforcement, unsolved. Furthermore, those who have made the argument regarding state incentivization often fail to realize that some states, in particular, are significantly less likely to respond to such incentives. A more recent article by lawyer Anna B. Roberson in the *Texas Law Review*[6] identified those states and the reasons why they would be less likely to eliminate or reduce the minimum threshold, regardless of the incentive. Roberson argues that the minimum threshold of Title VII needs to be eliminated or reduced but does not consider how states with lower thresholds could inform the expansion of Title VII and serve as a model for such a change.[7] This article aims to fill these gaps in the field by considering state law as a model for eliminating or lowering the minimum threshold of Title VII and, in doing so, responds to and mitigates the challenges associated with such a change.

Part II of this article provides background on Title VII, including a history of the congressional minimum threshold debate. Part III discusses various state laws, providing examples of laws that are both more and less expansive than Title VII. It illustrates how more expansive laws with lower thresholds could serve as a model for federal legislation whereas less expansive laws with

higher thresholds negatively impact employees. Examining states with more expansive minimum thresholds shows that state law claims are already interpreted in light of federal precedent, despite varying thresholds, and demonstrates that changing the minimum threshold would not require courts to adopt a different standard. Then, Part IV discusses solutions and the potential challenges associated with implementing those solutions. It (1) analyzes successful state strategies that could be utilized in more states while awaiting a federal change, (2) calls for a federal legislative change to the minimum threshold, and (3) considers and responds to potential challenges of lowering the minimum threshold, such as the burden that employer liability could impose on small firms. Lastly, Part V concludes the article by summarizing the need for a lower or nonexistent minimum threshold and advocating for a change in strategy and legislation.

II. A Legislative History of the Small-Firm Exemption

When the Civil Rights Act of 1964 initially introduced Title VII, the minimum threshold was twenty-five employees or more in an attempt to protect a majority of American employees without placing an undue burden on small businesses. Later, the Equal Employment Opportunity Act of 1972 lowered the threshold to fifteen employees or more. The intent of establishing the minimum threshold was to avoid placing too great of a burden on smaller employers, the "mom and pop" businesses, which employ a significant percentage of workers.[8] A deeper analysis of the legislative history of both the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972 provides the context necessary for a thorough understanding of the minimum threshold problem and its potential solutions.

A. The Establishment of Title VII and the Small-Firm Exemption

The Civil Rights Act of 1964 is arguably the United States' keystone piece of civil rights legislation, and it continues to protect the rights of all Americans today. However, Title VII, one of the Act's components, was nearly left out of the Act and prompted countless hours of debate among members of Congress.[9] One source of contention was the small-firm exemption. Congress wanted to afford Title VII protections to as many employees as possible without overwhelming small businesses critical to the economic success of the country.[10] Congress's debate on the small-firm exemption generated many considerations still relevant to the modern debate concerning changing or eliminating the threshold.

A key amendment regarding the minimum threshold was the Cotton Amendment of 1964, which proposed Title VII only apply to companies with one hundred or more employees.[11] The rationale for the Cotton Amendment was multifaceted, including problems of enforcement. Considering the large number of businesses that employed fewer than one hundred employees, Senator Norris Cotton (R-NH) argued that it would be impossible to ensure fair, impartial, and uniform Title VII enforcement, believing that there would not be enough resources to address the high volume of expected cases.[12] Cotton's question of enforcement is later discussed when considering the challenges of expanding Title VII.

Cotton also feared that a minimum threshold as low as twenty-five employees would result in the harassment of small business owners, as their hiring criteria might have had to change to accommodate the law.[13] He argued that a federal minimum threshold lower than one hundred employees was unnecessary because a majority of state employment discrimination laws had thresholds lower than twenty-five employees. As such, he believed state law would protect these employees in cases where federal laws failed to do so.[14] Nevertheless, as previous literature has shown, relying on state

law was inadequate because several states had anti-discrimination laws less expansive than the federal law, meaning their minimum thresholds were even higher than the federal threshold. This is still the case today with some states having thresholds above the federal fifteen employee minimum.[15] At the time, senators opposing the Cotton Amendment similarly argued that relying on state law was not foolproof.[16]

Other arguments in opposition to the Cotton Amendment included that raising the minimum threshold would "emasculate the bill" and be a "patent inequality."[17] Ultimately, the senators advancing these arguments felt that raising the minimum threshold to one hundred employees would leave too many employees unprotected and essentially render the law inadequate. Additionally, Senator Hubert Humphrey (DFL-MN) claimed that Cotton's argument regarding hiring on the basis of personal relationships was moot because Title VII does not dictate hiring quotas or indicate who an employer must hire, but rather seeks to ensure that existing hiring practices are nondiscriminatory.[18] Ultimately, after much debate, the Cotton Amendment was rejected, with thirty-four senators in favor, sixty-three against, and three not voting, leaving the minimum threshold at twenty-five employees instead of raising it to one hundred.[19]

B. After the Small-Firm Exemption: Additional Legislative Changes

Quickly after the passing of Title VII, new initiatives followed in hope of altering the minimum threshold. Similar to Cotton's arguments, criticism of such efforts ensued, with claims that lowering the threshold would so greatly increase the number of cases that it would heavily burden the Equal Employment Opportunity Commission (EEOC) to enforce the law in every case.[20] Despite such criticism, the minimum threshold was eventually

lowered from twenty-five employees to fifteen employees to protect more individuals through the Equal Employment Opportunity Act of 1972.[21] Changing the minimum threshold to fifteen employees was essentially a compromise between members of Congress who wanted the minimum threshold to remain at twenty-five employees and those who wanted it to be lowered to eight employees. By compromising and lowering the minimum threshold to fifteen employees, Congress was able to protect more individuals while still avoiding unduly burdening small businesses.[22] The threshold has remained at fifteen employees for forty-eight years, and as a result, millions of Americans working for small businesses still lack access to the protections afforded by Title VII. The impact that lowering the threshold further would have on small businesses is discussed in later sections.

The stagnancy of Title VII's minimum threshold is even more significant when considering that Cotton even acknowledged the minimum threshold "can be extended [by Congress in the future], but at least for the time being, let us not reach the small underdog."[23] His argument here suggests that it would be prudent to first establish enforcement mechanisms to ensure that Title VII was executable and would not cripple the economy or result in the closure of large firms, before imposing Title VII requirements on smaller businesses.[24] As such, even Cotton, one of the staunchest opponents of a low minimum threshold, recognized that the law may need to change in the future. Since enforcement mechanisms have been established and Title VII has not had a detrimental effect on larger businesses, there seems to be no reason as to why the minimum threshold debate should not be revisited.

III. State Law Could be Used as A Model for Federal Employment Discrimination Law

There are thirty-five states with employment-related

discrimination statutes that are more expansive than Title VII. The remaining fifteen states have statutes that are either similar to Title VII or less expansive. State laws range from thresholds of one or more employees to twenty or more employees, revealing a low or essentially nonexistent federal minimum threshold to be possible.[25] This section considers how state law could serve as a model for federal employment discrimination law.

A. State Law Claims are Already Interpreted in Light of Federal Precedent

It is possible to use state law as a model for federal employment discrimination law because courts already interpret state prohibitions on discrimination in light of federal Title VII precedent. For example, Ohio's state law defines an employer as, "the state, any political subdivision of the state, any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer."[26] The quoted language clearly indicates that Ohio has a significantly lower minimum threshold than Title VII. Yet, Ohio courts have repeatedly held that federal law precedent interpreting Title VII applies to cases involving violations of Ohio state law, demonstrating that state claims and federal claims are already held to the same standards despite varying minimum thresholds.

The Supreme Court of Ohio established this precedent in 1981 in deciding that evidence brought pursuant to Ohio state law is sufficient to support a finding of discrimination under Title VII.[27] The precedent was affirmed in 1999 by the United States Court of Appeals for the Sixth Circuit, which held that claims of sexual harassment and gender discrimination under Ohio state law should be treated like Title VII claims in *Dorricott v Fairhill Ctr. for Aging*.[28] Therefore, to demonstrate a violation of Ohio state law or a violation of Title VII based on a claim of a hostile work

environment, the plaintiff must show the same five criteria in either case:

> (1) she is a member of a protected class; (2) she was subject to unwelcomed sexual harassment; (3) the harassment was based on her sex; (4) the harassment unreasonably interfered with her work performance and created a hostile work environment; and (5) [the defendant] knew or reasonably should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action.[29]

The fifth criterion, showing that smaller businesses are accustomed to employer liability, will be especially important in the later review of arguments against lowering the minimum threshold at the federal level. By applying the same criteria to both state claims and Title VII claims, courts in Ohio have shown that even small employers should be subject to the same employment standards. Ohio courts have disproven Senator Cotton and other critics of a low minimum threshold, showing both that they are able to ensure fair, impartial, and uniform enforcement and that they have the resources to address each case. Further, the *Doricott* precedent continues to be as useful today as it was when it was first created twenty years ago. As recently as August 2020, the Court of Appeals of Ohio declared, "Ohio courts look to federal anti-discrimination case law when examining employment discrimination cases made under state law."[30]

In addition, other states including California, Massachusetts, and Michigan have also held that state law claims are to be interpreted in light of Title VII precedent. In California, the United States District Court for the Eastern District of California held that "[The California Fair Employment and Housing Act] applies the standards for retaliation claims under Title VII of the Civil Rights Act of 1964."[31] In Michigan, state courts look to federal Title VII precedents for guidance.[32] Similarly, the "Courts in the District of Massachusetts often use a single analysis for discrimination claims

brought under state and federal law. Further, the Massachusetts Supreme Judicial Court has stated that it is their practice to apply federal case law construing the federal anti-discrimination statutes in interpreting [Massachusetts state law]."[33] Significantly, the minimum threshold in California is five employees or more,[34] while the Massachusetts minimum threshold is six employees[35] or more, and it is only one employee or more in Michigan.[36]

The fact that many states have precedents parallel to *Doricott* shows that the process for evaluating federal claims of discrimination is applicable to state claims regardless of the difference in minimum thresholds. As such, it becomes clear that state law can serve as an effective model for federal anti-discrimination legislation by eliminating the concern that courts might have to adopt a different standard to account for the lower threshold.

B. The Issues With Relying on State Law: Some States Have Anti-Discrimination Laws Less Expansive Than Title VII and Potential Problematic Intersections with Federal Law

While expansive state laws can and should serve as models for future federal legislation, it is important to note that some states have anti-discrimination laws that are parallel to Title VII or less protective. While the previous section highlights some of the thirty-five states with laws more expansive than Title VII, this section considers the fifteen states with anti-discrimination laws equally as protective or less protective than Title VII. In these latter cases, the equal or higher state minimum threshold can leave individuals discriminated against on the basis of one of the Title VII protected categories without access to restitution if their employer does not meet the threshold.

There have been many cases in which victims of workplace discrimination are denied restitution because their state does not have more expansive laws. In Louisiana, for example, the

minimum threshold is twenty employees except for cases of pregnancy, childbirth, and other related medical conditions wherein the minimum threshold is then raised to twenty-five employees.[37] Because pregnancy is a condition that impacts women exclusively, discriminating against an individual because of pregnancy could be considered discriminating against an individual because of their sex, a protected category under Title VII. Furthermore, at the federal level, Title VII of the Civil Rights Act of 1964 was amended in 1978 to prohibit sex discrimination based on pregnancy.[38] The higher minimum threshold for pregnancy cases thus is a potential violation of Title VII, showing why relying on state legislation is not sufficient to ensure all employees have access to justice in cases of discrimination on the basis of categories included in Title VII.

Furthermore, in a Louisiana court case, a plaintiff was denied any form of restitution because the Court ruled the employer did not meet the lower fifteen employee standard under Title VII. Therefore, the plaintiffs' state law claims automatically failed as well due to the higher minimum threshold of twenty employees under Louisiana state law.[39] Even though Lisa McCarty, the plaintiff, lost her job after enduring months of employment in a sexually hostile work environment, she was denied restitution, again showing that it is not sufficient to rely on state law.[40]

Despite the existence of many cases similar to the Louisiana one, the Supreme Court of the United States has repeatedly relied on state laws even when federal laws prove insufficient. The Court argues that if federal laws cannot provide restitution, individuals can still file a claim under state law, a measure the Court routinely recognizes as sufficient. In one case, the Court held that the claim in question was a far cry from recognizing federal liability, but that, "the student will have state-law remedies available to her. The student will often have recourse against the offending student (or his parents) under state tort law."[41] However, forcing individuals to rely on state laws because their claims fail to meet the criteria

of federal laws means individuals have disparate access to justice depending on their state, leaving many employees with no way of seeking restitution.

Regardless of the fact that state laws do not always provide sufficient protection, the Supreme Court reaffirmed its *Davis* precedent when it held,

> We note, too, that…federal courts may exercise 'supplemental' jurisdiction over state-law claims linked to a claim based on federal law. Plaintiffs suing under Title VII may avail themselves of the opportunity [the law] provides to pursue complete relief in a federal-court lawsuit. Arbaugh did so in the instant case by adding to her federal complaint pendent claims arising under state law that would not independently qualify for federal-court adjudication.[42]

The Court's argument here is that while it recognizes Title VII may not provide complete relief, it does not see this as a problem because the individual can file a claim under both state and federal law to seek complete relief. Therefore, the fact that federal laws may not always provide full protection is a non-issue because the federal court overseeing the case has jurisdiction over both the federal and state claims. Thus, according to the Supreme Court, filing a claim under both state and federal law is sufficient. In reality, filing both claims does not provide access to complete relief for many individuals, a fact which has repeatedly been shown—even in cases in which the state law is more expansive.

As the Supreme Court identified, a federal court can preempt a state claim because of the simultaneous federal claim. However, if the employer is found not to meet the Title VII minimum threshold, the federal claim is dismissed. If the federal claim is dismissed, the federal court loses jurisdiction over the state claim, forcing the individual to refile their claim in a state court if they still want restitution.[43] Not only does refiling cost the victim of the discrimination more money, but it also delays their access to

justice. Neither of those repercussions seems equitable, but because the federal government relies on state laws to provide complete restitution, many victims of discrimination are left without access to restitution. These examples show that while state law can, in some cases, serve as a model for future legislation, it alone is insufficient, and as such, some form of federal legislative change is necessary.

IV. Using State Law to Create a More Equitable Federal Law: Immediate Solutions, Long-Term Solutions, and Mitigating Challenges

Although the previous section shows that state law fails to provide equal access to justice to all citizens of the United States, it also proves that state law provides an effective model for future federal legislation that lowers or eliminates the Title VII minimum threshold. This section analyzes immediate solutions that states could implement prior to federal legislation and discusses potential challenges of lowering or eliminating the minimum threshold. Solutions to these challenges are accessible, making modeling federal legislation on state law a viable strategy to lowering or eliminating the minimum threshold.

A. Some States May be Able to Implement Immediate Solutions Prior to Federal Change

Denying justice to victims of workplace discrimination because their employers fail to meet a minimum threshold violates the ideals established by Title VII. Some states have recognized this issue and sought to establish mechanisms allowing victims to seek restitution regardless of whether their employers meet all elements of the state law. For example, in the state of Washington, the minimum threshold is eight employees.[44] Nonetheless, in a case of gender discrimination in which the employer had fewer than eight

employees, the Washington court held,

> In summary, we think that the Washington people, legislature and Supreme Court have together established a clear and unmistakable public policy against gender discrimination; that the common law 'recognize[s] a cause of action in tort for wrongful discharge if the discharge of the employee contravenes a clear mandate of public policy;' and thus that Roberts has pleaded a cause of action in this case. We make no determination on whether Roberts has sufficient evidence to warrant a trial; all we determine is that she is not without recourse under state law solely because her employer happened to have fewer than eight employees.[45]

The decision by the Second Division of the Court of Appeals of Washington was then affirmed by the Supreme Court of Washington, which held,

> Although the Law Against Discrimination was not directly applicable, we nevertheless found that it could form a basis for public policy…The Law Against Discrimination provides a strong public policy basis for the plaintiff's claim of wrongful discharge, and it certainly does not operate to bar her recovery. We do not construe the statute to discover a statutory remedy—clearly there is not one; rather we read the statute to understand its purpose in policy.[46]

The *Roberts* series of decisions by the Washington courts shows that employers can be held liable for gender discrimination even if they do not meet the minimum threshold. While the court later clarified that this rule does not apply to every workplace discrimination case, but only to those involving wrongful discharge,[47] its decision is still an important step toward achieving justice for victims of discrimination on the basis of one of the categories protected by Title VII. The public policy exception used by Washington courts is notably used in other states as well. For example, the Supreme Court of Hawaii also held that public policy can be used to hold

employers liable even if they do not meet the minimum threshold or another element of Title VII. The Court writes, "In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme."[48] Ultimately, the court is suggesting that the purpose of the law matters most in determining public policy. If an employer's actions violate Title VII's purpose, the employer can be held liable for monetary damages.

Hawaii courts have repeatedly used the precedent established by *Parnar v Americana Hotels*. In 2018, the Intermediate Court of Appeals of Hawaii affirmed *Parnar* by holding, "there is a public policy exception to an employer's generally unlimited right to discharge an at-will employee, and that an employer may be held liable in tort."[49] By arguing that these public policy exceptions exist, the Hawaii and Washington state courts affirmed the right for people to seek recourse under the law for claims of discrimination, even if their employer does not meet the minimum threshold. The previously discussed case of Lisa McCarty, who alleged that she was constructively discharged[50] (a modified form of wrongful termination[51]), reaffirms the significance of these exceptions. McCarty would have had access to restitution if she worked in Washington or Hawaii. However, because she worked in Louisiana instead, her case failed since her employer did not meet the federal or state minimum threshold. Lisa McCarty's case emphasizes the harmful lack of equal access to justice across the United States. Relying on inconsistent state laws is not sufficient; American employees require federal legislative change.

In the interim, more states should seek to implement a public policy exception to provide restitution to those wrongfully terminated as a result of discrimination on the basis of one of the protected categories of Title VII. Still, it is important to note that in other cases of discrimination not involving wrongful termination,

state courts have been hesitant to apply the public policy exception. Thus, while establishing public policy exceptions in more states is a legal strategy with significant potential, it is not a perfectly comprehensive solution. It is unlikely that every state would establish such an exception, and as a result, a change at the federal level is still the best option, even if it comes with challenges.

B. Employer Liability and the Potential Burden on Small Firms are Mitigable Challenges

A more complete solution would involve lowering or eliminating the Title VII minimum threshold. However, opponents of lowering or eliminating the threshold argue that doing so would create too large of a burden on small businesses. The concern about burdening small businesses stems in part from the Faragher-Ellerth defense, established by the Supreme Court in 1998[52] and reaffirmed several times since.[53] The defense maintains that an employer can avoid liability for cworker harassment if it can be demonstrated "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[54] Since the formulation of the Faragher-Ellerth defense over twenty years ago, large companies have successfully taken advantage of it countless times to avoid liability. Companies can meet the first prong of the defense simply by having a reporting system or a Human Resources department in place. These kinds of systems and departments are standard in larger companies. As such, larger companies tend to circumvent workplace discrimination laws.[55] Critics of a low minimum threshold worry that because smaller companies tend to not have these systems and departments, they will more often be held liable for discrimination than larger companies, resulting in too great of a burden on these "mom and

pop" shops.

Be that as it may, courts already hold many small businesses to the same standards as larger businesses, thus showing that the Faragher-Ellerth defense is unlikely to cripple them. Courts tend to treat state claims of discrimination in the same manner that they analyze federal claims of discrimination under Title VII. Even when the company does not meet the minimum threshold established by Title VII, courts have a history of utilizing the same review process for state claims as they do federal claims. The Ohio court even acknowledged that for a state claim to succeed, the plaintiff must prove that "[the defendant] knew or reasonably should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action."[56] While the Ohio requirement differs slightly from the requirements of the Faragher-Ellerth defense, it shows that employer liability is not a completely foreign concept to small businesses. By law, small businesses must implement corrective action in cases of workplace discrimination, in line with the first prong of the Faragher-Ellerth defense. For years, courts have applied the same standards to cases of state claims as to federal claims, and such standards have not crippled small businesses. In fact, "based on statistical tests, there is no evidence that anti-discrimination remedies negatively affect growth in small businesses nationwide."[57] Furthermore, small businesses represent a higher percentage of all businesses in states with stronger anti-discrimination laws than in those with less-stringent laws.[58] Thus, the problem employer liability may pose to small businesses is not enough of a challenge to warrant maintaining the minimum threshold.

C. Solutions to Other Challenges Raised by the Minimum Threshold Debate in the 1960s and 1970s are Also Accessible

Opponents of the minimum threshold will continue to find

reasons besides the threat of employer liability to argue that new legislation should not lower or eliminate the threshold. Challengers in decades prior have used many of the arguments from the original debates about the minimum threshold. The main arguments are (1) lowering the threshold would raise the number of cases, placing an extreme burden upon the EEOC and making enforcement in every case impossible and (2) forcing small businesses to comply with Title VII would strip small business owners of their ability to hire individuals based on personal relationships.[59] Nevertheless, each of these claims can be refuted.

The first argument correctly recognizes that raising the number of cases complicates enforcement. However, the use of this argument also implies an awareness that some people facing discrimination are not protected by federal law. Even if it complicates the enforcement process, the law must address this inequity. To combat these challenges, the government should allocate more funding toward the EEOC for enforcement of Title VII protections. In the 1960s, opponents of Title VII thought it would be impossible to enforce every case if the law applied to companies with less than one hundred employees.[60] Yet enforcement has not proven to be a major challenge in the decades since, showing that with the proper resources, implementing a lower minimum threshold is possible.

As for the second argument, Senator Humphrey's initial response still rings true today. He asserted that Title VII does not dictate hiring quotas or indicate who an employer must hire, meaning that an employer is still permitted to hire friends, family members, or people they identify with on the basis of race, gender, religion, or sex. Rather, Title VII seeks to ensure that the employer does not engage in discriminatory practices.[61] Thus, to refute such misconceptions, the government should produce and widely disseminate clear materials about what will actually be required of small businesses if Title VII were to apply to them. Such materials could help garner support for a necessary legislative change.

V. Conclusion

Millions of employees in the United States lack equal access to justice because their employers are not bound by the requirements of Title VII. American employees are instead forced to rely on inadequate state law to offer them restitution in cases of workplace discrimination. As shown through the examination of the legislative history of the small-firm exemption, opponents to a low or nonexistent minimum threshold have utilized arguments that either have not come to fruition or have easily accessible solutions. Although lowering or eliminating the threshold would beget some challenges, it is a feasible solution that would be best achieved by using more expansive state laws as a model. In the meantime, an immediate solution could involve expanding the number of states which utilize the public policy exception. Furthermore, increased advocacy of lowering or eliminating the minimum threshold and the allocation of more resources to the EEOC are necessary steps toward achieving greater justice for employees facing workplace discrimination in the United States.

[1] Civil Rights Act of 1964., 88 P.L. 352, 78 Stat. 241 (July 2, 1964).

[2] Ibid.

[3] "Remedies For Employment Discrimination," U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/remedies-employment-discrimination.

[4]Anthony Caruso, *Statistics of U.S. Businesses Employment and Payroll Summary: 2012*, United States Census Bureau, 1-2 (February 2015), https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf.

[5] Pam Jenoff, "As Equal as Others? Rethinking Access to Discrimination Law," 81 *U. Cin. L. Rev.* (2013).

[6] Anna B. Roberson, "The Migrant Farmworkers' Case for Eliminating Small-Firm Exemptions in Anti-discrimination Law," 98 *Tex. L. Rev*. (November 2019).

[7] Ibid, 185.

[8] Thomas J. Crane, "Less than 15 (or 20) Employees Can = Freedom to Discriminate," *San Antonio Employment Law Blog* (May 26, 2011), https://www.sanantonioemploymentlawblog.com/2011/05/articles/discrimination/less-than-15-or-20-employees-can-freedom-to-discriminate/.

[9] Herbert Hill, "The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law," 2 *Indus. Rel. L.J.* 1, 1-2 (1977).

[10] 10 *Cong. Rec*. 13093 (1964).

[11] Ibid, 13085.

[12] Ibid.

[13] Ibid.

[14] Ibid, 13086.

[15] Anna B. Roberson at 204.

[16] 110 *Cong. Rec.* 13087 (1964).

[17] Ibid.

[18] Ibid, 13088.

[19] Ibid, 13093.

[20] *Equal Employment Opportunity Enforcement Procedures: Hearings on H.R. 1746 Before the Gen. Subcomm. on Labor of the Comm. on Educ. and Labor*, 92d Cong. 422 (1971).

[21] Equal Employment Opportunity Act of 1972., 92 P.L. 261, 86 Stat. 103 (March

24, 1972).

[22] H.R. Rep. No. 92-238, at 20-84 (1971).

[23] 10 *Cong. Rec.* 13087 (1964).

[24] Ibid.

[25] "State Employment-Related Discrimination Statutes," National Conference of State Legislatures (July 2015), https://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf.

[26] § 4112.01 Definitions; pregnancy, childbirth, related medical conditions; Abortion, ORC Ann. 4112.01 (2019).

[27] *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Com.*, 66 Ohio St. 2d 192, 196 (Ohio May 20, 1981).

[28] *Dorricott v. Fairhill Ctr. for Aging,* 1999 U.S. App. LEXIS 17985, 6 (6th Cir. Ohio July 27, 1999).

[29] Ibid.

[30] *McGuire v. City of Newark*, 2020-Ohio-4226, P54 (Ohio Ct. App., Licking County August 26, 2020).

[31] *Davis v. California Dep't of Corrections*, 1996 U.S. Dist. LEXIS 21305, *1 (E.D. Cal. February 23, 1996).

[32] *Marquis v. Tecumseh Prods. Co.*, 206 F.R.D. 132, 173 (E.D. Mich. March 20, 2002).

[33] *Thirkield v. Neary & Hunter OB/GYN, LLC*, 76 F. Supp. 3d 339, 342 (D. Mass. January 2, 2015).

[34] § 12926. Definitions regarding unlawful practices, Cal Gov Code § 12926.

[35] § 1. Definitions., ALM GL ch. 151B, § 1.

[36] § 37.2201. Definitions., MCLS § 37.2201.

[37] § 23:302. Definitions., La. R.S. § 23:302;§ 23:341. Application., La. R.S. § 23:341.

[38] Pregnancy sex discrimination, prohibition., 95 P.L. 555, 92 Stat. 2076 (October 31, 1978).

[39] *McCarty v. Southland Builders & Assocs.*, 2007 U.S. Dist. LEXIS 22379, *31-32 (W.D. La. March 28, 2007).

[40] Ibid, 2.

[41] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 683-684 (U.S. May 24,

1999).

[42] *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (U.S. February 22, 2006).

[43] See, e.g. *Cintron-Alonso v. GSA Caribbean Corp.*, 638 F. Supp. 2d 230; See, e.g. *Clark v. Jeter*, 2009 U.S. Dist. LEXIS 152289.

[44] 49.60.040. Definitions., Rev. Code Wash. (ARCW) § 49.60.040.

[45] *Roberts v. Dudley*, 92 Wn. App. 652 (Wash. Ct. App. September 18, 1998).

[46] *Roberts v. Dudley*, 140 Wn. 2d 58, 71-73 (Wash. February 17, 2000).

[47] *Rice v. Sisters of Providence in Wash., Inc.*, 2000 Wash. App. LEXIS 1745, *24-25 (Wash. Ct. App. September 8, 2000).

[48] *Parnar v. Americana Hotels*, 65 Haw. 370, 380 (Haw. October 28, 1982).

[49] *Woodruff v. Haw. Pac. Health*, 2014 Haw. App. LEXIS 26, *42 (Haw. Ct. App. January 14, 2014).

[50] *McCarty*, 2007 U.S. Dist. LEXIS 22379 at 3.

[51] "Wrongful Constructive Discharge, Cornell Law School Legal Information Institute," https://www.law.cornell.edu/wex/wrongful_constructive_discharge.

[52] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (U.S. June 26, 1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (U.S. June 26, 1998).

[53] See e.g. *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (U.S. June 24, 2013).

[54] *Faragher*, 524 U.S. at 807.

[55] Elizabeth C. Potter, "When Women's Silence Is Reasonable: Reforming the Faragher/Ellerth Defense in the #METOO Era," 85 *Brooklyn L. Rev*. 603, 605.

[56] *Dorricott*, 1999 U.S. App. at 6.

[57] Kristen Jefferson and Sarah Freeman, *Anti-Discrimination Remedies Do Not Harm Small Business Growth*, The Bell Policy Center (August 4, 2015). https://www.bellpolicy.org/wp-content/uploads/2017/10/Anti-Discrimination-Remedies-Do-Not-Harm-Small-Business-Growth-August-4-2015.pdf.

[58] Ibid, 3.

[59] 110 *Cong. Rec.* 13085 (1964).

[60] Ibid.

[61] Ibid, 13088.

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"In such Manner as the Legislature Thereof May Direct": The Independent State Legislature Doctrine, Election Contingencies, and Appointing Presidential Electors

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Abstract

There are two main sources of justification for the post-election direct appointment of presidential electors by state legislatures. The first is in Article II, Section 1 of the US Constitution. The other is a federal statute, 3 USC § 2, according to which if an election in a state "has failed to make a choice," the state legislature may direct how the state will appoint electors. After summarizing the scholarship on the independent state legislature doctrine, I survey the history of 3 USC § 2 and the statute's relationship with other federal election contingency statutes. I argue that 3 USC § 2 and other election contingency statutes do not provide clear support for stronger versions of the independent state legislature doctrine, under which a state legislature may directly appoint presidential electors in the post-election period.

In 2000, the Florida legislature almost became the first in over a century to bypass the popular vote of the state's electorate and directly appoint a slate of presidential electors.[1] As the date on which the Electoral College was to cast votes for president neared, it was still unclear whether George W. Bush or Al Gore won the popular vote in Florida. The state legislature prepared to appoint electors for Bush as the state's official electoral slate, but the US Supreme Court's ruling in *Bush v Gore* (2000)[2] and Gore's subsequent concession rendered the matter moot.[3] The legal disputes associated with the election motivated scholars to question the role of state legislatures in appointing electors. Under what circumstances may a state legislature negate the popular vote of the state's electorate and directly appoint a slate of electors? To what extent may a state legislature depart from ordinary law-making procedures in the post-election period? Twenty years later, there has been renewed interest in these questions. Several weeks before the presidential election in 2020, Barton Gellman reported in *The Atlantic* that President Donald Trump's reelection campaign was discussing plans to pressure legislators to "bypass election results and appoint loyal electors in battleground states where Republicans hold the legislative majority."[4]

Although these plans failed, the Trump campaign and its supporters drew attention to two sources of justification for the post-election direct appointment of presidential electors by state legislatures.[5] The first is in Article II, Section 1 of the US Constitution:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.[6]

The other is a federal statute, 3 USC § 2, according to which if an election in a state "has failed to make a choice," the state legislature may direct how the state will appoint electors.[7] The Trump campaign's claims of rampant voter fraud and its attempts to delay certification

a pretext for sympathetic state legislatures to declare a "failed" election in their respective states.[8]

Scholars and jurists have focused primarily on Article II in debating the ability of a state legislature to direct the appointment of electors during the post-election period. They have paid insufficient attention to 3 USC § 2. As a result, scholars have identified the main legal obstacles a state legislature would face if it were to appeal directly to Article II, but it is far from clear whether a state legislature would face the same legal obstacles if it were to appeal to 3 USC § 2. This article explores the extent to which 3 USC § 2 justifies the direct appointment of presidential electors by a state legislature in the post-election period. I begin with a summary of the debate over the independent state legislature doctrine, according to which state legislatures are not subject to certain constraints on their power to determine how electors are appointed. I then survey the history of 3 USC § 2 and the statute's relationship with other federal election contingency provisions. Finally, I argue that 3 USC § 2 and other election contingency laws do not lend clear support for stronger versions of the independent state legislature doctrine.

I. The Independent State Legislature Doctrine

Scholars have examined the independent state legislature doctrine in the contexts of regulating congressional elections (Article I, Section 4, Clause 1 of the US Constitution), choosing presidential electors (Article II, Section 1, Clause 2), and ratifying constitutional amendments (Article V). This article focuses on the doctrine in the context of choosing presidential electors and, thus, uses "independent state legislature doctrine" and "Article II independent state legislature doctrine" interchangeably.

According to the independent state legislature doctrine (ISL), state legislatures are free from certain constraints on their power to direct how presidential electors are chosen. One argument

in favor of ISL comes from *Leser v Garnett* (1922)[9], in which the US Supreme Court held that "the function of a state legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution, and it transcends any limitations sought to be imposed by the people of a state."[10] The analogous argument for ISL is that a state legislature performs a "federal function" when it directs the manner of appointing presidential electors. According to this argument, since directing the manner of appointment is a federal function derived from Article II, neither state law nor the state's constitution can completely constrain the legislature.[11]

However, Lawrence Lessig and Jason Harrow argue that the pro-ISL argument derived from *Leser* would fail in light of the Supreme Court's ruling in *Chiafalo v Baca* (2020).[12] In *Chiafalo*, the Supreme Court unanimously held that a state may enforce an elector's pledge to support the elector's party's nominee and the state's voters' choice for president, thereby rejecting the argument that presidential electors are unconstrained by state law.[13] Lessig and Harrow argue that the Framers expressly rejected a system that would give state legislatures the power to choose the next president.[14] This is the system that would prevail if electors were bound to obey state legislatures that could ignore the results of a presidential election. Finding this outcome untenable, Lessig and Harrow conclude that if the Constitution does not grant discretion to electors, then "legislatures have no special powers to deviate from the choice of the people. If 'the people' constrain the electors, so too must 'the people' constrain the legislatures."[15] To put the implications of *Chiafalo* in very broad terms, electors must obey state laws, and the legislatures that make those laws must obey the will of the citizens of their respective states.

Although *Leser* is important in the ISL debate, proponents of ISL seem to favor a different, older case. They nearly always cite

McPherson v Blacker (1892)[16], in which the Supreme Court explicitly affirmed the great latitude state legislatures enjoy in exercising their powers under Article II. For the election of 1892, the Michigan state legislature switched from a statewide winner-take-all system to a district system of appointing presidential electors.[17] Those challenging the new system argued that dividing the state's electoral votes by district was unconstitutional because Article II requires each state *as a whole* to appoint electors.[18] The Supreme Court upheld the new system, ruling that the Constitution "leaves it to the legislature exclusively to define the method" of appointing electors.[19] Thus, the Michigan legislature had authority under the Constitution to choose a method other than a statewide general election.

The holding in *McPherson* does not say anything about the extent to which a state legislature's power to determine the method of appointing electors is constrained by state law or state constitutional provisions.[20] However, two passages of *dicta* suggest that state legislatures are free from certain constraints.[21] Writing for a unanimous Court, Chief Justice Melville Fuller states,

> What is forbidden or required to be done by a State is forbidden or required of the legislative power under state constitutions as they exist…[T]he insertion of [the words "in such manner as the legislature thereof may direct"], while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.[22]

In other words, the language of Article II limits any attempt by a state (the state supreme court, the governor, etc.) to circumscribe the power of its legislature to determine how electors are chosen. Article II does not limit the legislative power itself. However, this passage from McPherson does not clarify the extent to which a state constitution can circumscribe the legislative power. For example, some skeptics of ISL have construed the first sentence of the passage as suggesting that state constitutions may place procedural

constraints on a state legislature.[23]

The second passage of *dicta* offers clearer support for ISL. Chief Justice Fuller begins by quoting a Senate Report from 1874 to support its holding that state legislatures may choose any manner of appointing electors. According to the report,

> The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts…[or by] the governor, or the Supreme Court of the State, or any other agent of its will… This power is conferred upon the legislatures of the states by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.[24]

The Supreme Court then concludes that "from the formation of the government until now the practical construction of [US Const Art II, § 1, cl 2] has conceded plenary power to the state legislatures in the matter of the appointment of electors."[25] I will return to these passages of *dicta* in *McPherson* in Part III. At present, it is worth noting that proponents of ISL tend to cite these two passages, and scholars have typically discussed these passages in the context of Article II considerations.

McPherson infamously reared its head in the heated legal disputes pertaining to the 2000 election. The Florida Supreme Court ruled that state law, in light of the Florida Constitution's suffrage guarantees, required election officials to include the results of manual recounts in four counties in their official vote counts, as scholars to requested by Al Gore.[26] Challenging the Florida Supreme

Court's ruling, petitioners in *Bush v Palm Beach County Canvassing Board* (2000)[27] questioned whether the Florida Constitution could constrain the Florida legislature's regulation of the appointment of electors. The US Supreme Court, quoting *McPherson*, noted that the Florida Supreme Court may have "construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.'"[28] However, the Supreme Court declined to review the Article II question until the Florida Supreme Court clarified the extent to which its opinion was consistent with Article II. The Supreme Court vacated the Florida Supreme Court's decision and remanded the case.[29]

McPherson was even more prominent in *Bush v Gore*. Citing *McPherson*, the Supreme Court stated that "the state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself…."[30] Chief Justice William Rehnquist went further. In his concurring opinion, writing on behalf of Justice Antonin Scalia, Justice Clarence Thomas, and himself, Chief Justice Rehnquist used *McPherson* to articulate a super-strong version of ISL in which Article II denies state courts a role in regulating the appointment of electors.[31] On this view, Article II frees a state legislature of virtually all constraints on its power to determine the manner in which presidential electors are appointed.[32] In his dissent, Justice John Paul Stevens rejected the Chief Justice's interpretation of Article II and argued that state constitutions can constrain state legislatures. Quoting the first passage of *dicta* (see above), Justice Stevens argued that Article II "does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions."[33]

In the context of ISL, *Bush v Palm Beach County Canvassing Board* and *Bush v Gore* are significant for two reasons. First, they highlight the importance of the *McPherson* passages of dicta for both sides of the debate over ISL. Second, scholarship on ISL

was relatively scarce before 2000.[34] The two cases motivated legal scholars to examine ISL more closely. Two trends in ISL scholarship emerged soon after the 2000 election. First, because of the centrality of Article II considerations in *Bush v Palm Beach County Canvassing Board* and *Bush v Gore*, most research since 2000 has explored the extent to which Article II supports ISL. For example, both Richard Friedman and Hayward Smith wrote shortly after the 2000 election that the Supreme Court's remarks in *Bush v Palm Beach County Canvassing Board* roughly outline how Article II could justify a state legislature operating with some amount of independence from its state constitution in the context of directing the manner of appointing electors.[35] However, the Supreme Court's decision in this case left open the question of just how much independence a state legislature could have.

Thus, a second trend in ISL research has consisted of scholars and jurists arguing for or against different versions of ISL. In his article examining the history of ISL, Smith identifies three categories of ISL: super-strong, strong, and weak. First, according to a super-strong version of ISL, a state legislature is constrained neither by state law nor the state constitution. A state legislature directing the manner of appointment pursuant to Article II would be independent of both procedural and substantive state constitutional constraints. Even if a state constitution were to require that the state legislature present a presidential election bill to the governor for a possible veto, the state legislature would not need to comply. Similarly, if the state constitution were to contain "right to vote" guarantees, the state legislature would nonetheless be able to direct that an independent commission appoint the state's presidential electors. Unconstrained by state law or by the state constitution, the legislature may determine the manner of appointing electors wholly independent from state courts, since state courts would have no basis for adjudication.[36]

In other words, a super-strong version of ISL would free state legislatures of all constraints—the legislature could ignore the results of a popular vote and directly appoint a slate of presidential electors without interference from the state governor or the state courts. This is the version of ISL suggested by Chief Justice Rehnquist in his concurring opinion in *Bush v Gore*. More recently, Justices Brett Kavanaugh, Neil Gorsuch, and Samuel Alito have echoed Chief Justice Rehnquist in their remarks in 2020 election cases, implying their support for a super-strong version of ISL.[37] Characterizing state court interventions as judicial overreach or legislating from the bench, the justices argue in favor of severe limitations on the ability of state courts to regulate federal elections.[38]

Second, according to a strong version of ISL, a state legislature is unconstrained by the state constitution, but its actions may be subject to review by state courts.[39] For instance, a state legislature might be constrained only by limits it previously imposed on itself. Suppose that a legislature passed a law that required a three-fourths majority of each house to pass future changes to the system by which the state appoints electors. If the legislature tries to pass a change the following year with only a simple majority, a state court could intervene on the grounds that the legislature is violating state law. Smith observes that this is the version of ISL suggested by *Bush v Palm Beach County Canvassing Board*, in which the Supreme Court implied that suffrage guarantees in the Florida Constitution might impose improper constraints on the state legislature's power to direct the manner of appointment.[40] In 2020, some lower federal courts also indicated support for a strong version of ISL, as in *Carson v Simon* (2020),[41] where an Eighth Circuit court argued that "a legislature's power in this area is such that it 'cannot be taken from them or modified' even through 'their state constitutions.'"[42] In short, super-strong and strong versions of ISL hold that state legislatures may, to some extent, depart from ordinary law-making procedures such as strict adherence to the state

constitution.

Third, under a weak version of ISL, a state constitution may place some constraints on a state legislature.[43] Smith provides the following example of a weak version: a state constitution could permissibly "impose suffrage requirements on the popular election of electors, so long as popular election is the mode of appointment chosen by the state legislature."[44] On this view, more demanding state constitutional provisions, such as those which require that electors be appointed by winner-take-all popular election, would violate Article II. Michael Morley advocates for a different weak version of ISL, citing nineteenth-century case law and congressional records.[45] Morley argues that while state constitutions can place procedural constraints on state legislatures, Article II immunizes statutes concerning presidential electors from substantive state constitutional constraints so long as those statutes are procedurally proper.[46] According to Morley, a state constitution can, for example, require that the legislature present a presidential election bill to the governor for a possible veto. However, a state court cannot use the state constitution's "right to vote" provisions to modify or strike down the law once it is enacted.

Finally, Smith argues that it is possible to deny that any ISL exists.[47] He explains that on such a view, "Article II would prohibit only those restraints which are completely incompatible with its text."[48] For instance, a state constitution that assigned the role of determining how the state appoints electors to the governor would directly violate Article II.

Several scholars have expressed skepticism about stronger versions of ISL based on two legal obstacles. First, the Supreme Court determined in *Smiley v Holm* (1932)[49] and *Arizona State Legislature v Arizona Independent Redistricting Commission* (2015)[50] that the term "legislature" as it appears in the Constitution refers to a state's law-making process as a whole rather than a mere body of legislators.[51] This implies that Article II does not give license

to a legislative body to ignore the regular law-making process as established by its state constitution. Each state enacted its method of appointing presidential electors through regular law-making procedures, including presenting bills to the governor for possible veto. Many scholars argue that if a state appoints electors pursuant to the state statutes, a legislative body that intends to change the method of appointment must first repeal those statutes through regular law-making procedures.[52]

The Supreme Court has offered additional support for this argument. For example, the Supreme Court remarked in *Williams v Rhodes* (1968)[53] that "[t]here of course can be no question but that [US Const Art II, § 1] does grant extensive power to the States to pass laws regulating the selection of electors."[54] Additionally, in U.S. Term Limits, Inc. v Thornton (1995),[55] the Supreme Court concluded that "[t]he Framers understood the Elections Clause [US Const Art I, § 4, cl 1] as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[56] To "issue procedural regulations" pursuant to Article I, Section 4, state legislatures must engage in the law-making process. This conclusion applies to Article II, since the Supreme Court has described the duties state legislatures have under Article I, Section 4 as "parallel" to those they have under Article II, Section 1.[57] According to the Court, the parallelism arises because both of "[t]hese Clauses are express delegations of power to the States to act with respect to federal elections."[58]

The second set of legal obstacles consists of due process and equal protection concerns. In *Bush v Gore*, the Supreme Court remarked that "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental."[59] Although a state legislature "can take back the power to appoint electors," the right to vote for presidential electors is protected to some extent by federal constitutional

guarantees of due process and equal protection, insofar as that right is "fundamental."[60] Reinforcing and clarifying this point, in *Chiafalo*, the Supreme Court noted that while "Article II, § 1's appointment power gives States far-reaching authority over presidential electors, absent some other constitutional constraint," the appointment power may be subject to constraints that "can theoretically come from anywhere in the Constitution."[61] Put succinctly, a state cannot appoint electors in a manner that violates the Due Process Clause or the Equal Protections Clause.[62]

To avoid violating due process or equal protection, Edward Foley and Richard Pildes argue that a state legislature can change the method of appointment only *before* the election.[63] Foley writes that a legislature "cannot—at least not without violating the due process clause of the Constitution—undo an appointment of electors already made."[64] He argues that if "voters have reasonably come to rely on the availability of a particular type of voting procedure, and if the government removes its availability without a legitimately nonpartisan reason for doing so, then this removal is a form of inappropriate partisanship in violation of fair play and due process."[65] Due process protects against improper unsettling of "vested rights or other reasonable reliance interests that persons may have in existing legal arrangements."[66] Therefore, according to Foley and Pildes, state legislatures may have broad powers to direct the method of appointment of electors, but they can only exercise those powers *before* the election.

While it is difficult to determine how much power state legislatures have under Article II, it is clear that super-strong and strong versions of ISL face much higher hurdles than weaker versions.[67] The most feasible positions require a state legislature to enact a law through regular law-making procedures in order to change the method by which the state appoints presidential electors. Furthermore, it seems that the state legislature must enact such a law before Election Day to avoid violating due process.

II. 3 USC § 2, the Presidential Election Day Act, and Federal Election Contingencies

Due process concerns suggest an additional source of justification for ISL that is not covered much in the literature. What if the result of the popular election cannot be determined in accordance with state law? Can the state legislature directly appoint electors to prevent the state from losing the opportunity to participate in the presidential election altogether? Pildes and Friedman point out that, in such a situation, 3 USC § 2 may authorize the state legislature to forgo ordinary law-making procedures and appoint a slate of electors.[68] The statute reads,

> Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.[69]

However, it is not clear whether the legal obstacles that would arise under normal circumstances would also arise in the case of a "failed" election. For example, if a bug in the programming of a state's voting machines leads to flawed vote counts, and if the state does not have sufficient resources or time to conduct another election, then the direct appointment of electors may not raise serious due process concerns.[70]

The ambiguity stems from two interpretive problems. First, it is woefully unclear what the statute means when it refers to an election that "has failed to make a choice," and neither Congress nor the courts have provided clarification.[71] The dearth of scholarship on this statute is somewhat surprising given that its language is strikingly similar to that found in Article II:

> Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State

may be entitled in the Congress.[72]

It appears that Morley is the only author who has examined the history of the statute in depth, tracing its origins to the Presidential Election Day Act of 1845.[73] Morley argues that the statute allowed a state to postpone elections if, for example, a natural disaster makes it impossible for a significant portion of the state's electorate to vote on Election Day. Unfortunately, his analysis does not offer much insight into how an election that is too close to call could trigger the statute.

The second interpretive problem is that it is unclear whether "direct" means a legislature can depart from ordinary law-making procedures, that is, whether it can directly appoint electors without gubernatorial or judicial interference. Interestingly, the current language of the statute differs from the language of the 1845 Act. The Act specified that, in the case of a "failed" election, "the electors may be appointed on a subsequent day in such manner as the State shall *by law* provide."[74] The current statute does not specify that the manner of appointment must be determined *by law*. It is unclear whether Congress changed the language with the intent of giving state legislatures plenary, unconstrained power to appoint electors in the case of "failed" elections. If the changes were substantive, then there may be more support for stronger versions of ISL. Conversely, if the changes were not substantive, then there may be less support for stronger versions of ISL. Discovering whether the changes in the language were substantive may help scholars determine the extent to which a state legislature may depart from the ordinary law-making process in the post-election period, and it is thus necessary to examine the history of 3 USC § 2.

Turning to the first interpretive problem, it seems obvious *prima facie* that 3 USC § 2 cannot be triggered whenever the result of an election is unclear at the end of Election Day. That state election officials have not yet determined the choice of the electorate does not mean that the electorate has "failed to make a choice." Rather,

it means that the electorate has made a choice on Election Day, and it will take time to determine the result. Extending this logic, it is dangerous to regard an election that is "too close to call" as a "failed" election. If a state legislature were to appoint a slate of electors whenever the result of an election was difficult to determine, they would risk violating the rights of the electorate, since the winner of an election might have been determined if officials had more time.[75]

The history of the statute does not support the "too close to call" contingency as constituting a "failed" election. The election of 1840 saw rampant fraud as voters took advantage of the fact that different states held presidential elections on different days: voters could vote in one state on one day and in a different state the next.[76] To address this issue, Representative Alexander Duncan, a Democrat from Ohio, introduced a bill to establish a uniform election day.[77] Representative Lucius Elmer, a Democrat from New Jersey, proposed an amendment to this bill that would allow legislatures to supply electors if an election failed or if there were vacancies in the Electoral College.[78] In support of Elmer's amendment, another representative noted that Duncan's bill did not account for states like New Hampshire, which had majority-winner requirements for appointing electors and which required runoff elections if no candidate won a majority.[79] A third representative, in a similar vein, noted past cases of Virginia's legislature extending elections when severe weather made it impossible for people to reach the polls.[80] Duncan proposed a substitute version of the bill that accommodated the concerns of his colleagues.[81] The substitute required states to appoint presidential electors on the first Tuesday after the first Monday of November and authorized states to fill any vacancies in the Electoral College. The House of Representatives passed Duncan's substitute, and eventually, the measure became law on January 23, 1845.[82]

The congressional record indicates that the original purpose of the Presidential Election Day Act of 1845 was to set a single day

for appointing presidential electors and to allow for the determination of electors after that date in case of emergencies.[83] No one during the legislative debate suggested that state legislatures ought to directly appoint electors if the results of an election were not immediately clear. Thus, it does not appear that the members of Congress who voted for the Act intended it to authorize a legislature to directly appoint electors if the election was "too close to call." Rather, the evidence suggests that they considered an election to have "failed" primarily in cases where the results required a runoff election or where substantial numbers of voters could not vote due to severe weather or some other emergency. Allowing for runoff elections or extended elections gives states time to determine the will of the electorate after Election Day. The 1845 Act did not authorize state legislatures to bypass the results of an election whenever the results are "too close to call." Neither did the Act expressly forbid a state legislature from passing a law that authorizes the legislature to directly appoint an electoral slate in cases where the results of an election remain sufficiently unclear past a certain date. If a state legislature were to pass such a law in the post-election period, though, due process protections would prohibit the law from taking effect until the next election.

The legislative debate over the Presidential Election Day Act also sheds light on the second interpretive problem, that is, the question of whether members of Congress intended for state legislatures to exercise their power under Article II unconstrained by ordinary law-making procedures. Consider the Presidential Election Day Act, in full:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the electors of President and Vice President shall be appointed in each State on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed: Provided, That each State may by law

> provide for the filling of any vacancy or vacancies which may occur in its college of electors when such college meets to give its electoral vote: And provided, also, when any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide.[84]

The Act repeated the phrase "by law" twice, and had members of Congress understood Article II as authorizing state legislatures to forgo ordinary law-making procedures in appointing electors, they would have seen the qualification inherent in the phrase "by law" as unconstitutional. Yet no one objected to the inclusion of the phrase, suggesting that members of Congress in the 1840s did not seem to support a strong or super-strong version of ISL.[85]

The language of the 1845 Act is significant. 3 USC § 2 stems from the 1845 Act but, unlike the Act, does not specify that a state legislature "shall *by law* provide" the manner of appointing electors. The difference raises the question of whether Congress, after 1845, intended to broaden the power of state legislatures so that legislatures could forgo ordinary law-making procedures. It appears that the change in the language occurred when Congress codified the federal statutes in the 1870s. The revised text included numerous errors and ambiguities.[86] However, there appears to be no clear evidence that the change was substantive. Instead, it is quite possible that the change was inadvertent.

In 1866, Congress authorized a three-person commission to "revise, simplify, arrange, and consolidate all statutes of the United States" in operation at the time.[87] Congress rejected the commission's revisions for making excessive changes to the statutes and subsequently authorized a joint committee to appoint another party to manage the revision process.[88] The committee hired Thomas Jefferson Durant, a lawyer from Washington, D.C., to finalize the revision process and correct the excessive substantive changes of

the previous revision. Congress accepted Durant's revision as the *Revised Statutes of 1874*, despite numerous errors in the revision.[89] To avoid redundancy or conflict between the revision and the original statutes, Section 5596 of the Revised Statutes repealed all prior federal statutes passed before December 1, 1873, including the Presidential Election Day Act of 1845, which thus became inoperative.[90] The clauses of the 1845 Act comprised Sections 131, 133, and 134 of the *Revised Statutes*[91]. The second clause of the 1845 Act appeared almost verbatim in Section 133:

> Each State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.[92]

The third clause of the 1845 Act appeared in Section 134 without the "by law" qualification:

> Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day *in such a manner as the legislature of such State may direct*.[93]

Congress made no changes to either section when the *Revised Statutes* were recodified as the United States Code, indicating that the changes in the language of the "failed" election provision (Section 134) likely occurred between 1866 and 1874.[94]

There is a significant reason to doubt that the changes in the language were substantive. Note that the removal of the "by law" qualification only affected the "failed" election provision, whereas the vacancies provision (Section 133) retained the qualification. Had Congress or those in charge of the revisions process believed that state legislatures ought to be unconstrained by ordinary law-making procedures in appointing electors, why would they have made the change in one instance but not the other? From the perspective of strong or super-strong versions of ISL, it makes little sense to grant the state legislature plenary power to directly appoint electors in

the case of a failed election but not in the case of a vacancy in the electoral college.

If the changes in the language of the "failed" election provision were not substantive, then there are two immediate implications. First, in 1845 and in the 1870s, members of Congress did not distinguish between allowing a state legislature to determine the manner of appointing electors "by law," and allowing the legislature to "direct" the manner of appointing electors. Second, members of Congress held that both the former and the latter are consistent with Article II, as indicated by the absence of modification to the vacancies provision.

Another election contingency statute provides additional support for these implications. The Electoral Count Act of 1887, codified as 3 USC § 5, states,

> If any State shall have provided, *by laws enacted prior to the day fixed for the appointment of the electors*, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, *by judicial or other methods or procedures*, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive….[95]

The statute clarifies that for a state to take advantage of the "safe harbor" provision, two conditions must be met. First, the electors must be chosen according to laws enacted prior to Election Day. Second, the electors must be chosen at least six days before the Electoral College meets to cast votes for president. The first condition indicates that even forty-two years after Congress passed the Presidential Election Day Act, members of Congress did not intend to authorize state legislatures to forgo ordinary law-making procedures in appointing electors. Finally, 3 USC § 5 specifically

directs that controversies be resolved "by judicial or other methods or procedures." 3 USC § 5 leaves room for state courts to intervene in disputes regarding the appointment of presidential electors, insofar as those interventions are consistent with ordinary law-making procedures.

The upshot of this discussion is that the federal laws that address presidential election contingencies do not clearly support the super-strong or strong versions of Article II ISL. The Presidential Election Day Act of 1845 (and the codification of its provisions), the Electoral Count Act of 1887, and the corresponding legislative debates provide little evidence that members of Congress supported the idea of state legislatures ignoring ordinary law-making procedures, even in election emergencies. Put differently, the lack of support in federal election contingency laws for stronger versions of ISL means that even election emergencies may not justify a state legislature taking extraordinary measures, including the negation of the popular vote and the direct appointment of an electoral slate by a state legislature. If a state legislature does not have plenary power in extraordinary circumstances, then it is difficult to see how a state legislature could have plenary power in ordinary circumstances.

III. Revisiting McPherson: Less Support for Strong ISL

If Morley's historical analysis and the conclusions drawn from the discussion above on the legislative history of federal election laws are correct, then only weaker versions of Article II ISL are supported by nineteenth-century laws, legislative debates, or court cases.[96] Proponents of ISL nonetheless cite the passages of *dicta* from *McPherson* to justify interpreting Article II as giving plenary power to legislatures over appointing presidential electors. The discussion above may yield some insight into how much influence *McPherson* should have in interpreting Article II.

Recall that in *McPherson*, the Supreme Court quoted a

Senate committee report from 1874. That report pertained to a failed proposed constitutional amendment that would have mandated popular votes for presidential electors.[97] The Supreme Court cited this report to conclude a historical overview of the flexibility states enjoy in appointing electors.[98] Proponents of stronger versions of ISL often point to the strong language of the report cited by the Court:

> [The power to determine how to appoint electors] cannot be taken from [state legislatures] or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.[99]

Smith argues that the report casts doubt on its own strength as justification for ISL and that the views of the report's author, Senator Oliver Morton, may not be representative of Congress's views.[100] In the same vein, my analysis suggests that members of Congress did not seem to endorse any version of ISL that would allow a state legislature to ignore ordinary law-making procedures in appointing electors. The Presidential Election Day Act of 1845, the Electoral Count Act of 1887, and the corresponding legislative debates make the Senate report an outlier in its support for stronger versions of ISL. Therefore, proponents of stronger versions of ISL stand on somewhat shaky ground when they cite the passages of dicta in *McPherson*, insofar as those passages rely on the Senate report for justification.

IV. Conclusion

Most scholarship on ISL has focused on Article II. I have taken a different approach by specifically examining federal

statutes that address election contingencies, and this approach has yielded several insights. First, although it is still unclear what counts as a "failed" election for the purposes of 3 USC § 2, the legislative history of the statutory provision suggests that members of Congress likely did not regard an election that was "too close to call" as a "failed" election. The original purpose of the Presidential Election Day Act of 1845 was to allow states to hold runoff elections or extend elections in the event of severe weather or some other emergency. Second, in the legislative debates surrounding the Presidential Election Day Act, no one raised any objections to the statute directing state legislatures to provide the manner of appointing electors by law. Therefore, one can infer that members of Congress did not think that restricting state legislatures to ordinary law-making procedures violated Article II. Third, the difference in language between 3 USC § 2 and the "failed" election clause of the Presidential Election Day Act may not be substantive. There were no modifications to the language of the vacancies provision of the statute, so it is unlikely that members of Congress believed that directing state legislatures or states to appoint electors by law was unconstitutional. Fourth, congressional records indicate that in 1845 and in the 1870s, members of Congress did not seem to distinguish between allowing a state legislature to determine the manner of appointing electors "by law" and allowing the legislature to "direct" the manner of appointing electors. Members of Congress held that both the former and the latter are consistent with Article II. Fifth, statutes and congressional records from the nineteenth century indicate that members of Congress did not intend to authorize state legislatures to operate beyond ordinary law-making procedures in directing the appointment of electors. Therefore, the Senate report that grounds the dicta in McPherson is an outlier and consequently provides limited justification for stronger versions of ISL.

There are two caveats to these arguments. First, it is possible that there are other sources of justification for interpreting Article

II as authorizing state legislatures to determine how to appoint presidential electors unconstrained by ordinary law-making procedures, as those procedures are formulated in state constitutions. Identifying these other sources and examining how they may justify stronger versions of ISL fall outside the scope of this article. In all likelihood, though, these other sources do not include federal election contingency statutes. Second, there may exist other evidence that the change in the language of the "failed" election provision was substantive, including memos or notes produced by those who oversaw the revisions. Such evidence might be in archives that I could not access.

In spite of these caveats, 3 USC § 2 and other election contingency statutes do not provide clear justification for state legislatures to ignore ordinary law-making procedures even in electoral emergencies. Even if an election has "failed," a state constitution may impose limits on how a state legislature may direct the appointment of electors in the post-election period. If state legislatures cannot operate beyond ordinary law-making procedures even in extraordinary circumstances like electoral emergencies, then proponents of stronger versions of ISL face significant difficulties, regardless of whether they appeal to Article II or to federal election contingency statutes.

[1] Colorado was the last state whose legislature directly appointed presidential electors. In 1876, the newly admitted state of Colorado did not have enough time or money to carry out a general election for president. Instead, the state legislature appointed three electors for Rutherford B. Hayes. See Austin Sarat, "Could a Few State Legislatures Choose the Next President?" (*The Conversation*, October 1, 2020), online at https://theconversation.com/could-a-few-state-legislatures-choose-the-next-president-146950 (visited October 5, 2020); and N.R. Kleinfield, "President Tilden? No, but Almost, in Another Vote That Dragged On," *The New York Times*, November 12, 2000, online at https://www.nytimes.com/2000/11/12/us/counting-vote-history-president-tilden-no-but-almost-another-vote-that-dragged.html (visited November 14, 2020).

[2] *Bush v Gore*, 531 US 98 (2000).

[3] Charles L. Zelden, "Legislatures Picking Electors to the Electoral College: It Could Not Only Happen, It Almost Did." *News-Press*, September 28, 2020, online at https://www.news-press.com/story/opinion/2020/09/28/electoral-college-presidential-election-2020-trump-biden-charles-zelden/3537063001 (visited November 28, 2020).

[4] Barton Gellman, "The Election That Could Break America," *The Atlantic*, September 23, 2020, online at https://www.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424 (visited October 14, 2020). See also David H. Gans, "The Trump Plan for Legislatures to Appoint Electors Would Be a Blatant Attack on Democracy," *Slate*, October 29, 2020, online at https://slate.com/news-and-politics/2020/10/trump-plan-legislature-appoint-electors-end-democracy.html (visited November 14, 2020).

[5] Trip Gabriel and Stephanie Saul, "Could State Legislatures Pick Electors to Vote for Trump? Not Likely," *The New York Times*, November 13, 2020, online at https://www.nytimes.com/article/electors-vote.html (visited December 5, 2020); and Shane Goldmacher and Adam Nagourney, "4 Takeaways from Biden's Electoral College Victory," *The New York Times*, December 14, 2020, online at https://www.nytimes.com/2020/12/14/us/politics/biden-trump-electoral-college-vote.html (visited December 15, 2020).

[6] US Const Art II, § 1, cl 2.

[7] 3 USC § 2. As this article notes, this statute originated in the Presidential Election Day Act of 1845, but the language of the statute was revised by the mid-1870s.

[8] Gabriel and Saul, "Could State Legislatures Pick Electors to Vote for Trump? Not Likely;" Rebecca Ballhaus and Rebecca Davis O'Brien, "What Is Trump's Legal Strategy? Try to Block Certification of Biden Victory in States," *The Wall Street Journal*, November 11, 2020, online at https://www.wsj.com/articles/what-is-trumps-legal-strategy-try-to-block-certification-of-biden-victory-in-

states-11605138852 (visited December 5, 2020); and Colleen Long, et al., "Trump, Allies Make Frantic Steps to Overturn Biden Victory," *Associated Press*, November 19, 2020, online at https://apnews.com/article/trump-allies-try-overturn-biden-victory-29da6aac9cc41e47f3095855e7af7031 (visited December 5, 2020).

[9] *Leser v Garnett*, 258 US 130 (1922).

[10] *Leser v Garnett*, 258 US 130, 137 (1922). See also *Hawke v Smith*, No 1, 253 US 221 (1920); and *Hawke v Smith*, No 2, 253 US 231 (1920).

[11] Lawrence Lessig and Jason Harrow, "State Legislatures Can't Ignore the Popular Vote in Appointing Electors" (*Lawfare*, November 6, 2020), online at https://www.lawfareblog.com/state-legislatures-cant-ignore-popular-vote-appointing-electors (visited November 14, 2020).

[12] *Chiafalo v Washington*, 591 US ___ (2020), online at https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf (visited November 14, 2020); and Lessig and Harrow, *State Legislatures Can't Ignore the Popular Vote in Appointing Electors*.

[13] *Chiafalo v Washington*, 591 US ___ (2020).

[14] Lessig and Harrow, "State Legislatures Can't Ignore the Popular Vote in Appointing Electors."

[15] Lessig and Harrow, "State Legislatures Can't Ignore the Popular Vote in Appointing Electors."

[16] *McPherson v Blacker*, 146 US 1 (1892).

[17] *McPherson v Blacker*, 146 US 1, 4-5 (1892).

[18] *McPherson v Blacker*, 146 US 1, 24-25 (1892).

[19] *McPherson v Blacker*, 146 US 1, 27, 36 (1892).

[20] Hayward H. Smith, "History of the Article II Independent State Legislature Doctrine," 29 *Florida State University Law Review* 731, 776 (2001).

[21] *Dicta* refers to expressions in a court's opinion concerning some rule of law, legal principle, or application of law not necessarily involved nor essential to the determination of the case. *Dicta* are not binding. See *Black's Law Dictionary*, 5th ed. (St. Paul: West Publishing Company, 1979), s.v. "dicta." See also entries for "dictum" and "obiter dictum."

[22] *McPherson v Blacker*, 146 US 1, 25 (1892).

[23] For example, see *Bush v Gore*, 531 US 98, 123-24 (2000).

[24] *McPherson v Blacker*, 146 US 1, 34-35 (1892), quoting S Rep No 43-395, at 9 (1874).

[25] *McPherson v Blacker*, 146 US 1, 35 (1892).

[26] *Palm Beach County Canvassing Board v Harris*, 772 So 2d 1220 (Fla 2000), *vacated sub nom. Bush v Palm Beach County Canvassing Board*, 531 US 70

(2000).
[27] *Bush v Palm Beach County Canvassing Board*, 531 US 70 (2000).
[28] *Bush v Palm Beach County Canvassing Board*, 531 US 70, 77 (2000).
[29] *Bush v Palm Beach County Canvassing Board*, 531 US 70, 77-78 (2000).
[30] *Bush v Gore*, 531 US 98, 104 (2000).
[31] *Bush v Gore*, 531 US 98, 111-22 (2000).
[32] Smith, "History of the Article II Independent State Legislature Doctrine," 764.
[33] *Bush v Gore*, 531 US 98, 123-24 (2000), quoting *McPherson v Blacker*, 146 US 1, 25 (1892).
[34] The most notable work from before 2000 to explore the limits of state legislative power over presidential elections is James Kirby, Jr, "Limitations on the Power of State Legislatures Over Presidential Elections," 27 *Law and Contemporary Problems* 495 (1962).
[35] Richard D. Friedman, "Trying to Make Peace with *Bush v. Gore*," 29 *Florida State University Law Review* 811, 833-41 (2001); and Smith, "History of the Article II Independent State Legislature Doctrine," 734-35.
[36] Smith, "History of the Article II Independent State Legislature Doctrine," 736-37, 740-41.
[37] *Democratic National Committee v Wisconsin State Legislature*, 592 US ___ , *2-*5, *14 (2020), online at https://www.supremecourt.gov/opinions/20pdf/20a66_new_m6io.pdf (visited November 30, 2020); and *Republican Party of Pennsylvania v Boockvar*, 592 US ___, *2-*3 (2020), online at https://www.supremecourt.gov/
[38] See also Michael W. McConnell, "Two-and-a-Half Cheers for *Bush v. Gore*," 68 *University of Chicago Law Review* 657, 663 (2001); and Richard A. Posner, "Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation," 2000 *Supreme Court Review* 1, 30 (2000).
[39] Smith, "History of the Article II Independent State Legislature Doctrine," 734.
[40] Smith, "History of the Article II Independent State Legislature Doctrine," 734; and Michael T. Morley, "The Independent State Legislature Doctrine, Federal Elections, and State Constitutions," 55 *Georgia Law Review* 1, 80-82, 86 (2020), online at https://www.georgialawreview.org/article/18632 (visited January 5, 2021). See *Bush v Palm Beach County Canvassing Board*, 531 US 70, 77 (2000).
[41] *Carson v Simon*, ___ F3d ___ (8th Cir 2020), online at https://ecf.ca8.uscourts.gov/opndir/20/10/203139P.pdf (visited November 15, 2020).
[42] *Carson v Simon*, ___ F3d ___, *12 (8th Cir 2020) (citations omitted).
[43] Smith, "History of the Article II Independent State Legislature Doctrine," 734-35.
[44] Smith, "History of the Article II Independent State Legislature Doctrine," 734-35.

[45] Michael T. Morley, "The Intratextual Independent 'Legislature' and the Elections Clause," 109 *Northwestern University Law Review* 847, 866-68 (2015); and Morley, "The Independent State Legislature Doctrine, Federal Elections, and State Constitutions," 16-21, 24-27, 69, 92-93. See also Kirby, "Limitations on the Power of State Legislatures Over Presidential Elections," 503-04; and Friedman, "Trying to Make Peace with *Bush v. Gore*," 833-41.
[46] Morley, "The Intratextual Independent 'Legislature' and the Elections Clause," 16-17, 30-33, 52, 69.
[47] Smith, "History of the Article II Independent State Legislature Doctrine," 735. See also Vikram D. Amar, "Federal Court Review of State Court Interpretations of State Laws that Regulate Federal Elections: Debunking the 'Independent State Legislature' Notion Once and for All, and Keeping Federal Judges to Their Important but Limited Lanes," (University of Illinois College of Law Legal Studies Research Paper No 21-02, 2020), online at https://ssrn.com/abstract=3731755 (visited December 12, 2020); Richard H. Pildes, "Judging 'New Law' in Election Disputes," 29 *Florida State University Law Review* 691, 727-28 (2001); and Robert A. Schapiro, "Conceptions and Misconceptions of State Constitutional Law in *Bush v. Gore*," 29 *Florida State University Law Review* 661, 672 (2001).
[48] Smith, "History of the Article II Independent State Legislature Doctrine," 735.
[49] *Smiley v Holm*, 285 US 355 (1932).
[50] *Arizona State Legislature v Arizona Independent Redistricting Commission*, 576 US 787 (2015).
[51] *Smiley v Holm*, 285 US 355 (1932); and Arizona State Legislature v Arizona Independent Redistricting Commission, 576 US 787, 807-08, 816-18 (2015).
[52] Vikram Amar, "The (Unwanted) Return of Bush v. Gore and Ruth Bader Ginsburg's Underappreciated Impact on the 2020 Election," (*Justia*, October 29, 2020), online at https://verdict.justia.com/2020/10/29/the-unwanted-return-of-bush-v-gore-and-ruth-bader-ginsburgs-underappreciated-impact-on-the-2020-election (visited November 28, 2020); Amar, "Federal Court Review of State Court Interpretations of State Laws"; Grace Brosofsky, Michael C. Dorf, and Laurence H. Tribe, "State Legislatures Cannot Act Alone in Assigning Electors," (*Dorf on Law*, September 25, 2020), online at http://www.dorfonlaw.org/2020/09/state-legislatures-cannot-act-alone-in.html (visited November 28, 2020); Neil H. Buchanan, "The Supreme Court Limbers Up to Aid and Abet Trump's Coup," (*Justia*, October 30, 2020), online at https://verdict.justia.com/2020/10/30/the-supreme-court-limbers-up-to-aid-and-abet-trumps-coup (visited November 28, 2020); Michael C. Dorf, "What's Wrong with the Argument That State Legislatures Have Exclusive Authority for Everything Election-Related," (*Dorf on Law*, November 2, 2020), online at http://www.dorfonlaw.org/2020/11/whats-

wrong-with-argument-that-state.html#more (visited November 28, 2020); Edward B. Foley, "Preparing for a Disputed Presidential Election," 51 Loyola *University Chicago Law Journal* 309, 319; Richard L. Hasen, "When 'Legislature' May Mean More than 'Legislature,'" 35 *Hastings Constitutional Law Quarterly* 599 (2008); and Laurence H. Tribe and Steven V. Maize, "Conservative Supreme Court Justices Are Threatening a Post-Election Coup," *The Boston Globe*, November 1, 2020, online at https://www.bostonglobe.com/2020/11/01/opinion/conservative-supreme-court-justices-are-threatening-post-election-coup (visited November 28, 2020).

[53] *Williams v Rhodes*, 393 US 23 (1968).

[54] *Williams v Rhodes*, 393 US 23, 29 (1968) (emphasis added).

[55] *U.S. Term Limits, Inc. v Thornton*, 514 US 779 (1995).

[56] *U.S. Term Limits, Inc. v Thornton*, 514 US 779, 833-34 (1995).

[57] *U.S. Term Limits, Inc. v Thornton*, 514 US 779, 805 (1995).

[58] *U.S. Term Limits, Inc. v Thornton*, 514 US 779, 805 (1995).

[59] *Bush v Gore*, 531 US 98, 104 (2000).

[60] *Bush v Gore*, 531 US 98, 104 (2000); *Taylor and Marshall v Beckham*, 178 US 548, 608 (1900); *Griffin v Burns*, 570 F2d 1065, 1077-78 (1st Cir 1978); and *Roe v Alabama*, 43 F3d 574, 580-81 (11th Cir 1995), quoting *Yick Wo v Hopkins*, 118 US 356, 370 (1886), and Curry v Baker, 802 F2d 1302, 1315 (11th Cir 1986). Regulations that limit fundamental rights may be subject to strict scrutiny. See, for example, *Roe v Wade*, 410 US 113, 155 (1973).

[61] *Chiafalo v Washington*, 591 US ___, *9 (2020).

[62] *Chiafalo v Washington*, 591 US ___, *9 (2020). See also Morley, "The Independent State Legislature Doctrine, Federal Elections, and State Constitutions," 16-21. Morley disagrees with the Supreme Court's ruling in Arizona Independent Redistricting Commission, but, echoing *Chiafalo*, he argues that "[e]ven under the independent state legislature doctrine, however, legislatures' authority to regulate federal elections would remain subject to numerous important constraints."

[63] Foley, "Preparing for a Disputed Presidential Election," 319; Pildes, "Judging 'New Law' in Election Disputes," 707-14; and Lessig and Harrow, "State Legislatures Can't Ignore the Popular Vote in Appointing Electors."

[64] Edward B. Foley, "Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws," 84 *University of Chicago Law Review* 655, 692-93, 730-31 (2017); and Foley, "Preparing for a Disputed Presidential Election," 319.

[65] Foley, "Due Process, Fair Play, and Excessive Partisanship," 730.

[66] Foley, "Due Process, Fair Play, and Excessive Partisanship," 731. See also Friedman, "Trying to Make Peace with *Bush v. Gore*," 833-41; Pildes, "Judging

'New Law' in Election Disputes," 707-14; and National Task Force on Election Crises, *A State Legislature Cannot Appoint Its Preferred Slate of Electors to Override the Will of the People After the Election*, 3-4, online at http://electiontaskforce.org/s/State_Legislature_Paper.pdf (visited November 25, 2020).

[67] Edward B. Foley, "How to Draw the Line on a State Legislature's Electoral Power?" (*Election Law Blog*, November 1, 2020), online at https://electionlawblog.org/?p=117943 (visited November 8, 2020).

[68] Friedman, "Trying to Make Peace with *Bush v. Gore*," 815-17; and Richard Pildes, "Why There's So Much Uncertainty about Resolving a Disputed Presidential Election," (*The Conversation*, October 30, 2020), online at https://theconversation.com/why-theres-so-much-legal-uncertainty-about-resolving-a-disputed-presidential-election-146960 (visited November 13, 2020).

[69] 3 USC § 2.

[70] Foley, "Preparing for a Disputed Presidential Election," 320-21.

[71] Sarat, "Could a Few State Legislatures Choose the Next President?."

[72] US Const Art II, § 1, cl 2 (emphasis added).

[73] Michael T. Morley, "Postponing Federal Elections Due to Election Emergencies," 77 *Washington and Lee Law Review Online* 179 (2020), online at https://lawreview.wlulaw.wlu.edu/postponing-federal-elections-due-to-election-emergencies (visited November 28, 2020). See Act of January 23, 1845, ch 1, 5 Stat 721 (1845).

[74] Act of January 23, 1845, ch 1, 5 Stat 721 (1845) (emphasis added).

[75] Friedman, "Trying to Make Peace with," 816. Friedman notes that one should not construe the "safe harbor" provision in 3 USC § 5 as setting a time after which 3 USC § 2 authorizes the legislature to choose electors. He explains that 3 USC § 5 was not enacted until forty-two years after the Presidential Election Day Act, in the Electoral Count Act of February 3, 1887, 24 Stat 373 (1887). See also National Task Force on Election Crises, *A State Legislature Cannot Appoint Its Preferred Slate of Electors to Override the Will of the People After the Election*, 3-4.

[76] Morley, "Postponing Federal Elections Due to Election Emergencies," 183-85.

[77] Cong Globe, 28th Cong, 1st Sess 167 (1844); and Cong Globe, 28th Cong, 2nd Sess 10 (1844).

[78] Cong Globe, 28th Cong, 2nd Sess 10, 14 (1844) (statements of Rep Elmer).

[79] Cong Globe, 28th Cong, 2nd Sess 14-15 (1844) (statement of Rep Hale).

[80] Cong Globe, 28th Cong, 2nd Sess 15 (1844) (statement of Rep Chilton).

[81] Cong Globe, 28th Cong, 2nd Sess 21 (1844) (statement of Rep Duncan).

[82] Act of January 23, 1845, ch 1, 5 Stat 721 (1845).

[83] Friedman, "Trying to Make Peace with *Bush v. Gore*," 815-17; and Morley, "Postponing Federal Elections Due to Election Emergencies," 181-82. As further

evidence of the purpose of the 1845 Act, see Cong Globe, 28th Cong, 2nd Sess 28, 30 (1844) (statements by Rep Dromgoole, Rep Elmer, Rep Bidlack, and Rep Rhett).

[84] Act of January 23, 1845, ch 1, 5 Stat 721.

[85] Cong Globe, 28th Cong, 2nd Sess 10, 14 (1844) (statements of Rep Elmer); and Cong Globe, 28th Cong, 2nd Sess 28 (1844) (statement of Rep Dromgoole).

[86] Andrew Winston, "The Revised Statutes of the United States: Predecessor to the U.S. Code" (Law Library of Congress, July 2, 2015), online at https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code (visited November 25, 2020).

[87] Act of June 27, 1866, ch 140, 14 Stat 74 (1866).

[88] Winston, "The Revised Statutes of the United States."

[89] Act of June 20, 1874, ch 333, 18 Stat 113 (1874); and Winston, "The Revised Statutes of the United States."

[90] Rev Stat § 5596.

[91] Rev Stat §§ 131, 133, 134.

[92] Rev Stat § 133.

[93] Rev Stat § 134 (changes emphasized).

[94] Rev Stat § 133 was classified to 3 USC § 4, and Rev Stat § 134 was classified to 3 USC § 2.

[95] 3 USC § 5 (emphasis added); and Electoral Count Act of February 3, 1887, 24 Stat 373, § 2 (1887).

[96] Morley, "The Independent State Legislature Doctrine, Federal Elections, and State Constitutions."

[97] *McPherson v Blacker*, 146 US 1, 34-35 (1892), quoting S Rep No 43-395, at 9 (1874).

[98] *McPherson v Blacker*, 146 US 1, 28-35 (1892).

[99] *McPherson v Blacker*, 146 US 1, 34-35 (1892), quoting S Rep No 43-395, at 9 (1874).

[100] Smith, "History of the Article II Independent State Legislature Doctrine," 775-79. Smith argues that the author, Sen. Oliver Morton, a Republican from Indiana, was faced with the formidable task of persuading his colleagues that popular elections for presidential elections were problematic.

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