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## ARTICLES



## NOTES

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# PRESENT AND FUTURE IMPACTS OF THE COVID-19 PANDEMIC ON EMPLOYMENT LAW IN THE UNITED STATES

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*No one doubts that the COVID-19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease.*[1]

The COVID-19 pandemic has undoubtedly shifted the landscape of employment law in the United States, and it continues to do so. As new COVID-19 variants and challenges arise, so do new questions in the workplace concerning employment policies, government mandates, and compliance. Employers have been forced to constantly adapt to changing legal obligations and keep up with the latest developments.

Beyond the direct threat of the virus, COVID-19 will have a lasting impact on employment law and compliance efforts going forward. This Article addresses the quick evolution of employment law, thus far, during the COVID-19 pandemic with a focus on major congressional legislation and federal agency action impacting employment law. This includes a discussion on the fierce legal battle over COVID-

1. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

19 vaccine mandates and a look at how existing federal agency frameworks were adapted to novel COVID-19 issues. Finally, this Article establishes how key United States Supreme Court determinations and federal agency response on COVID-19 issues may shape the future of employment agency rules and state responses.

## I. THE CONSTANT BATTLE FOR COMPLIANCE: THE EVOLUTION OF EMPLOYMENT LAW DURING THE COVID-19 PANDEMIC

Throughout COVID-19 infection surges and widespread virus variants, the shifting landscape of health and safety precautions led to a dizzying whirlwind of new considerations and obligations for employers. From Congress' authorization of financial relief[2] to local masking ordinances and health directives,[3] to state laws limiting the ability of employers to require vaccination,[4] many responses to the COVID-19 pandemic bled into workplaces across the country and, in many cases, into countless temporary work-from-home set-ups. Beyond federal and local legislation, employers also juggled shifting compliance obligations rising out of executive agency responses. This section explores major congressional COVID-19 legislation impacting workplaces, key federal agency rules, subsequent court decisions, and interpretive guidance relating to COVID-19 employment issues.

### A. Landmark Legislation: Congress's Workplace COVID-19 Relief

The United States Congress passed several expansive bills geared towards providing COVID-19 relief to American families. This Article focuses on two main pieces of legislation that changed employment

2. One such example was the almost $2 billion American Rescue Plan Act of 2021 (authorizing, among other things, financial relief payments to millions of Americans) and the Families First Coronavirus Response Act (requiring certain employers to provide paid sick leave or expanded leave for reasons relating to COVID-19). *See The American Rescue Plan Will Deliver Immediate Economic Relief to Families*, U.S. Dep't of the Treasury, (Mar. 18, 2021) https://home.treasury.gov/news/featured-stories/fact-sheet-the-american-rescue-plan-will-deliver-immediate-economic-relief-to-families (Mar. 18, 2021); *Families First Coronavirus Response Act: Employee Paid Leave Rights*, U.S. Dep't of Lab., https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave (last visited Mar. 27, 2022) [hereinafter *DOL Families* First].

3. Like the temporary mask mandate in Omaha, Nebraska instituted on January 12, 2022 by issue of the City Health Director. *Douglas County Health Department Clarifies Omaha Mask Mandate*, WOWT News (Jan. 12, 2022), https://www.wowt.com/2022/01/12/mask-mandate-effect-omaha/.

4. For example, Tenn. Covid-19 Code §§ 14-1-101-104 and H.B. 702 67th Leg., Reg. Sess. (Mont. 2021), both examples of legislation that prohibit employers from requiring employee vaccination.

obligations: (1) Families First Coronavirus Response Act,[5] a $104 billion package focused on paid sick leave and unemployment benefits, which became known as the "Phase 2" stimulus legislation; and (2) The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"),[6] known as the "Phase 3" stimulus legislation, a massive $2 trillion package focused on cash payments to individuals, increased unemployment benefits, and creation of the Paycheck Protection Program that provided forgivable loans to employers. The CARES Act also established the Federal Pandemic Unemployment Compensation ("FPUC") program, which is the part of the CARES Act discussed in this Article.

*i. The Families First Coronavirus Response Act*

In April 2020, the Families First Coronavirus Response Act ("FFCRA") went into effect. This legislation required certain employers[7] to provide their employees with paid sick leave (Emergency Paid Sick Leave Act)[8] and expanded family and medical leave (Emergency Family and Medical Leave Expansion Act or "Expanded FMLA")[9] for specified reasons related to COVID-19. Under the FFCRA, private sector employers were provided refundable tax credits to reimburse them,

5. 29 U.S.C. 2601 §§ 1101-8001.

6. 15 U.S.C. 116 §§ 9001-9041.

7. The paid sick leave and expanded family and medical leave provisions of the FFCRA applied to certain public employers, and private employers with fewer than 500 employees. *DOL Families First*, *supra* note 2.

8. The Emergency Paid Sick Leave Act entitled workers to up to 80 hours of paid sick time when they were unable to work for certain reasons related to COVID-19. Employees were eligible for up to 80 hours of paid sick leave for their own health needs or to care for others. Qualifying reasons for leave related to COVID-19 included when an employee was unable to work (or telework) because they were:
(1) subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
(2) advised by a health care provider to self-quarantine related to COVID-19;
(3) experiencing COVID-19 symptoms and were seeking a medical diagnosis;
(4) caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
(5) caring for their child whose school or place of care was closed (or child care provider is unavailable) due to COVID-19 related reasons; or
(6) were experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services. *Id.*

9. Under certain conditions, an employer was required to provide up to an additional ten weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay where an employee was unable to work due to need for leave to care for a child whose school or childcare provider is closed or unavailable for reasons related to COVID-19. Apart from this Expanded FMLA, the U.S. Department of Labor released FAQs clarifying that eligible employees could be entitled to FMLA leave under certain circumstances if the employee is sick with or caring for a family member who is sick with COVID-19. *COVID-19 and the Family and Medical Leave Act Questions and Answers*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/fmla/pandemic#3 (last visited Mar. 27, 2022).

"dollar-for-dollar, for the cost of providing paid sick and family leave wages to their employees for leave related to COVID-19."[10]

In March 2021, over a full year into the pandemic, President Biden signed into law the American Rescue Plan Act of 2021,[11] which extended these tax credits available to private employers with fewer than 500 U.S. employees that voluntarily provided EPSLA and EFMLEA to their employees.[12] This was expanded through September 30, 2021 and lapsed on that date.

*ii. The CARES Act's FPUC Program*

Although the FFCRA provided additional flexibility for state unemployment insurance agencies and additional administrative funding to respond to the COVID-19 pandemic, the CARES Act, signed into law on March 27, 2020, significantly expanded states' ability to provide unemployment insurance for many workers impacted by the COVID-19 pandemic, including for workers who were not ordinarily eligible for unemployment benefits, in part through its FPUC program.

Under the FPUC program, all individuals who received regular unemployment insurance benefits through their state were also eligible for an *additional* FPUC payment of $600 per week through July 31, 2020.[13] As the pandemic progressed, the FPUC amounts were adjusted to $300 per week,[14] and several states later began declining

10. *COVID-19-Related Tax Credits for Paid Leave Provided by Small and Midsize Businesses FAQs*, INTERNAL REVENUE SERV. (Feb. 24, 2022), https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-paid-leave-provided-by-small-and-midsize-businesses-faqs.

11. 29 U.S.C. 2601 §§ 1101-8001.

12. *Tax Credits for Paid Leave Under the American Rescue Plan Act of 2021: Overview*, INTERNAL REVENUE SERV. (Mar. 4, 2022), https://www.irs.gov/newsroom/tax-credits-for-paid-leave-under-the-american-rescue-plan-act-of-2021-overview.

13. Press Release, U.S. Dep't of Lab., U.S. Department of Labor Publishes Guidance on Federal Pandemic Unemployment Compensation (Apr. 4, 2020) (https://www.dol.gov/newsroom/releases/eta/eta20200404).

14. After the expiration of the $600 weekly benefit on July 31, 2020, President Trump issued a presidential memorandum on August 8, 2020, creating Lost Wages Assistance (LWA), a grant program that supplemented the weekly benefits of certain eligible UI claimants, with up to $300 weekly in federal funding. All states ended LWA payments by September 5, 2020. The Unemployment Insurance (UI) provisions contained in Division N, Title II, Subtitle A of the Consolidated Appropriations Act, 2021 (P.L. 116-260, enacted December 27, 2020) are titled the Continued Assistance for Unemployed Workers Act of 2020 (Continued Assistance Act). The Continued Assistance Act reauthorized and expanded the enhanced unemployment benefits created under the CARES Act and extended the authorization for additional, temporary unemployment provisions first authorized under the CARES Act and the FFCRA by an additional 11 weeks in 2021. KATELIN P. ISAACS & JULIE M. WHITTAKER, CONG. RSCH. SERV., IF11723, UNEMPLOYMENT INSURANCE PROVISIONS IN THE CONSOLIDATED APPROPRIATIONS ACT, 2021 (DIVISION N, TITLE II, SUBTITLE A, THE CONTINUED ASSISTANCE FOR UNEMPLOYED WORKERS ACT OF 2020) (2021). Shortly thereafter, Congress passed the American Res-

FPUC benefits. This was in response to severe labor shortages in some states.[15] It is believed that the enhanced unemployment benefits were keeping people out of the labor market, and as the pandemic progressed, many employers were struggling to fill available job positions because of it. This illustrates how Congress's actions, through FPUC and FFCRA benefits, has impacted and may continue to shape the workforce. Indeed, these laws likely drove what has become known as "The Great Resignation" of our nation's workforce.

### B. Agency Actions: The Fight Over COVID-19 Vaccine Mandates

For many employers, ensuring workplace compliance becomes a time-consuming and costly headache when standards shift in an on-again, off-again fashion. Nowhere has this been more apparent than with federal agency rules on COVID-19 vaccine mandates. For months, employers were strung along as the legal battle over agency-imposed vaccine mandates continued. This section addresses key federal agency rules regarding COVID-19 standards (namely, COVID-19 vaccination requirements), subsequent court decisions, and employer choice in approaching workplace vaccination requirements.

#### *i. The Big Name in Workplace Safety: Occupational Health and Safety Administration*

The Occupational Health and Safety Administration ("OSHA") is the agency charged with ensuring "safe and healthful working conditions"[16] as dictated under the Occupational Health and Safety Act of 1970 ("OSH Act").[17] Federal OSHA has jurisdiction over most private sector employers and their workers, however, twenty two states or territories comply with OSH Act standards through an OSHA-approved state plan.[18] As COVID-19 posed significant health and safety risks in certain workplaces, OSHA responded by issuing two major emer-

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cue Plan Act of 2021, Pub L. No. 117-2 (Mar. 11, 2021), a $1.9 trillion economic stimulus bill signed into law by President Biden on March 11, 2021. The American Rescue Plan Act extended expanded unemployment benefits with a $300 weekly supplement through September 6, 2021. American Rescue Plan Act of 2021, 29 U.S.C. 2601 §§ 9011-9022.

15. *See Federal Pandemic Unemployment Compensation (FPUC)*, Iowa Workforce Dev., https://www.iowaworkforcedevelopment.gov/fpuc-information (last visited Mar. 27, 2022) (ending FPUC participation in the state to "address the State of Iowa's severe workforce shortage); *and* Press Release, Neb. Dep't of Lab., Nebraska Ending Participation in Federal Pandemic Unemployment Programs (May 24, 2021) (https://dol.nebraska.gov/PressRelease/Details/247).

16. 29 U.S.C. § 651.

17. 29 U.S.C. §§ 651-678.

18. 29 U.S.C. § 667(c)(2).

gency temporary standards ("ETS") in addition to using the OSH Act's General Duty Clause[19] as an enforcement mechanism.

a. What is an Emergency Temporary Standard?

Typically, OSHA (like other administrative agencies) is bound by a formal process for rulemaking under the Administrative Procedure Act,[20] which requires public notice and an opportunity for interested persons to comment on the proposed rule.[21] The OSH Act allows this notice-and-comment rulemaking procedure to be bypassed, however, when circumstances call for immediate action via an emergency rule or ETS.[22] To promulgate an ETS, the Secretary of Labor must determine "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" and that "such emergency standard is necessary to protect employees from such danger."[23] Before the COVID-19 pandemic, OSHA had only issued an ETS nine times—all of which were issued prior to 1984 and six of which were challenged in court.[24]

b. OSHA's Healthcare ETS

The first and least controversial of OSHA's COVID-19 related emergency temporary standards was its June 21, 2021 Healthcare ETS applying to settings where any employees provided healthcare services or healthcare support services.[25] The Healthcare ETS imposed several key requirements on employers, including requirements to: (1) provide paid leave to employees impacted by COVID-19, (2) support COVID-19 vaccination by providing reasonable time and paid leave, and (3) immediately remove from the workplace any employee

19. 29 USC § 654(a)(1).

20. 5 U.S.C. §§ 551-559.

21. *See* 5 U.S.C. § 553(b)-(c).

22. 29 USC § 655(c)(1). Notably, this temporary standard serves as a proposed rule. It is expected that the Secretary "shall promulgate a [permanent] standard . . . no later than six months after publication of the emergency standard." 29 USC § 655(c)(1)(3). *Id.*

23. 29 USC § 655(c)(1)(A)-(B).

24. SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R46288, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA): COVID-19 EMERGENCY TEMPORARY STANDARDS (ETS) ON HEALTH CARE EMPLOYMENT AND VACCINATIONS AND TESTING FOR LARGE EMPLOYERS app. 19-20 (2022). Out of the six ETSs which were challenged in court prior to the COVID-19 pandemic, one ETS was partially vacated and only one ETS fully remained in effect. *Id*.

25. This ETS generally included settings like hospitals, nursing homes, and assisted living facilities. There were certain exceptions, however, including certain hospital ambulatory or out-patient care and home healthcare settings where (1) all employees were fully vaccinated, (2) the employer screened all non-employees for COVID-19 prior to entry, and (3) people with suspected or confirmed COVID-19 were not present. 29 C.F.R. § 1910.502 (2021).

who has COVID-19 or was in close contact with a COVID-19 positive individual in the workplace.[26]

Despite some legal challenges, OSHA's Healthcare ETS remained in effect until December 2021—a far cry from OSHA's Vaccination and Testing ETS (discussed below) which encountered severe and continuous roadblocks. The difference between these two COVID-19 ETSs was the scope of each rule. OSHA's Vaccination and Testing ETS was a broad, sweeping mandate covering all industries. This was distinguishable from the Healthcare ETS, which narrowly focused on certain healthcare settings where there is a heightened risk of encountering people with COVID-19 and where additional precautions were needed to address those potential hazards.[27]

OSHA withdrew much of its Healthcare ETS in December 2021, with the exception of certain record-keeping requirements under 29 CFR 1910.502(q)(2)(ii), (q)(3)(ii)-(iv), and (r).[28] At that time, OSHA announced its intention to soon issue a "final standard that will protect healthcare workers from COVID-19 hazards" in line with the earlier Healthcare ETS requirements.[29]

c. OSHA's Vaccination and Testing ETS

On November 5, 2021, OSHA issued its COVID-19 Vaccination and Testing Emergency Temporary Standard ("Vaccination and Testing ETS").[30] This Vaccination and Testing ETS was a sweeping mandate for employers with 100 or more employees under OSHA's jurisdiction to require their employees to be vaccinated for COVID-19 or to show a negative COVID-19 test on a weekly basis.[31] The Vacci-

26. The Healthcare ETS also included other requirements outlined in 29 C.F.R. § 1910.502.

27. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, 61415 (interim final rule Nov. 5, 2021). "Healthcare settings covered by the Healthcare ETS primarily include settings where people with suspected or confirmed COVID–19 are treated, exacerbating the risk present in most workplaces." *Id*.

28. *Statement on the Status of the OSHA COVID-19 Healthcare ETS*, U.S. DEP'T OF LAB. OCCUPATIONAL SAFETY & HEALTH ADMIN. (Dec. 27, 2021), https://www.osha.gov/coronavirus/ets.

29. *Statement on the Status of the OSHA COVID-19 Healthcare ETS*, U.S. DEP'T OF LAB. OCCUPATIONAL SAFETY & HEALTH ADMIN. (Dec. 27, 2021), https://www.osha.gov/coronavirus/ets. There was significant confusion over whether the Healthcare ETS had a firm expiration date. An ETS does not automatically expire 6 months after being issued; instead, six months is the timeframe contemplated in the OSH Act for the agency to issue a permanent standard on the topic covered by the ETS. 29 U.S.C. § 655(c).

30. Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61555, 61555 (interim final rule Nov. 5, 2021).

31. *Id.* The twenty-two states or territories with OSHA-approved state plans were required to adopt the federal OSHA Vaccination or Testing ETS or a similar standard within thirty days. While states like California took the opportunity to implement stringent COVID-19 protective measures for the workplace, other states like Iowa ex-

nation and Testing ETS covered employers who had a total of at least 100 employees (full-time, part-time, and temporary employees) at any time the ETS was in effect.[32] The key requirements of the Vaccination and Testing ETS required covered employers to either (1) develop, implement, and enforce a mandatory COVID-19 vaccination policy; or (2) establish, implement, and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace.[33]

Almost immediately after OSHA published the Vaccination and Testing ETS, it was met with a flurry of legal challenges. On November 6, 2021, the United States Court of Appeals for the Fifth Circuit[34] stayed the Vaccination and Testing ETS, citing "grave statutory and constitutional issues" for the states within its jurisdiction.[35] As more lawsuits flooded all federal courts of appeal, the United States Judicial Panel on Multidistrict Litigation ("Panel") consolidated all cases into one case in a court randomly selected by the Panel. Through that lottery process, the United States Court of Appeals for the Sixth Circuit was chosen as the court to hear all consolidated cases challenging

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pressly refused to adopt and enforce federal OSHA's Vaccination and Testing ETS. *Compare* CAL. CODE. REGS. tit. 8 § 3205 (2022) (imposing requirements for California employers to establish and adhere to a comprehensive COVID-19 Prevention Plan, while not mandating COVID-19 vaccination), with *Gov. Reynolds Applauds Iowa OSHA Decision Not to Implement Vaccine Mandate for Businesses*, OFF. OF THE GOVERNOR OF IOWA, (Jan. 7, 2022) https://governor.iowa.gov/press-release/gov-reynolds-applauds-iowa-osha-decision-to-not-implement-vaccine-mandate-for (relaying a statement from Iowa Labor Commissioner Rod Roberts saying "Iowa doesn't have a standard requiring the Covid-19 Vaccination and Testing. But after closely reviewing the federal OSHA Vaccine Mandate, Iowa has determined it will not adopt the federal standard. Iowa has concluded that it is not necessary because Iowa's existing standards are at least as effective as the federal standard change.").

32. Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. at 61555. OSHA's Vaccination and Testing ETS contained a number of exceptions in scope. The Vaccination and Testing ETS specifically exempted those workplaces covered under the *Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (*i.e.,* covered federal contractors and subcontractors) or in settings where employees provided healthcare services or healthcare support services when subject to the requirements of OSHA's COVID-19 Healthcare ETS. *Id.* Further, certain workers were exempted from the Vaccination and Testing ETS if they: did not report to a workplace where other individuals such as coworkers or customers were present, to employees while they were working from home, or to employees who worked exclusively outdoors. *Id*.

33. §1910.502(d).

34. The OSH Act provides that "(1) Any person who may be adversely affected by a standard issued under this section may . . . file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard." 29 U.S.C. § 655(f).

35. *BST Holdings, LLC v. OSHA,* No. 21-60845 (5th Cir. Nov. 6, 2021 adhered to *sub nom. BST Holdings, L.L.C. v. Occupational Safety & Health Admin., U.S. Dep't of Lab.,* 17 F.4th 604 (5th Cir. 2021)).

OSHA's Vaccination and Testing ETS. On December 17, 2021, the Sixth Circuit granted the Biden administration's request to dissolve the Fifth Circuit's stay on OSHA's Vaccination and Testing ETS.[36] In effect, this lifted the blocked order and cleared the path for OSHA's Vaccination and Testing ETS to go into effect. The majority opinion specifically noted:

> [T]he costs of delaying implementation of the ETS are comparatively high. Fundamentally, the ETS is an important step in curtailing the transmission of a deadly virus that has killed over 800,000 people in the United States, brought our healthcare system to its knees, forced businesses to shut down for months on end, and cost hundreds of thousands of workers their jobs. In a conservative estimate, OSHA finds that the ETS will 'save over 6,500 worker lives and prevent over 250,000 hospitalizations' in just six months. A stay would risk compromising these numbers, indisputably a significant injury to the public. The harm to the Government and the public interest outweighs any irreparable injury to the individual Petitioners who may be subject to a vaccination policy . . . .[37]

Not surprisingly, the Sixth Circuit's ruling was promptly appealed to the United States Supreme Court. On January 13, 2022, the Supreme Court issued its highly anticipated decision that reimposed a stay on enforcement of OSHA's Vaccination and Testing ETS.[38] The Court blocked the mandate on the basis that OSHA had no "clear authority" from Congress to issue such a widespread, sweeping mandate. In its ruling, the Court stated:

> Although COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.[39]

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36. *In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing, 86 Fed. Reg. 6140x*, Nos. 21-7000, et al. (6th Cir. Dec. 17, 2021).

37. *Id*. at 37 (citation omitted).

38. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S.Ct. 661 (2022).

39. *Id*. at 6-7.

The Court recognized the mandate could force employers to incur billions of dollars in unrecoverable compliance costs and would cause hundreds of thousands of employees to leave their jobs. Likewise, the Court recognized the mandate could save over 6,500 lives and prevent hundreds of thousands of hospitalizations.[40] Nevertheless, the Court stated:

> It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category.[41]

Following the Court's decision, OSHA withdrew the Vaccination and Testing ETS on January 26, 2022.[42] While OSHA may have conceded this fight on broad vaccination and testing requirements, the agency has reiterated plans to continue working towards a permanent infectious disease standard for health care workers which would include, but not solely focus on, COVID-19 protective measures.[43]

d. OSHA's Authority Under the General Duty Clause

While OSHA may not have specific COVID-19 rules to enforce, the agency still retains enforcement authority under what is known as the General Duty Clause of the OSH Act. This clause states that employers are obligated to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[44] As COVID-19 is a recognized hazard, which may lead to death or illness, OSHA has the ability to inspect and to issue citations and civil money penalties for what the agency believes it can prove to be COVID-19 hazards that were recognized by the employer

40. *Id*. at 8.

41. *Id*. at 8-9.

42. COVID-19 Vaccination Testing; Emergency Temp. Standard, 87 Fed. Reg. 3928 (Jan. 26, 2022).

43. *Infection Diseases*, OFFICE OF INFO. AND REGUL. AFFAIRS (2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1218-AC46. This will likely lead to overlapping coverage with certain healthcare entities who are subject to the Centers for Medicare & Medicaid Services (CMS) interim final rule requiring COVID-19 vaccination for healthcare staff. *See id.*

44. 29 U.S.C. § 654.

or others in the employers' industry.[45] About eight percent of OSHA's inspections are virus-related, and agency data shows that, since April 2020, "OSHA has conducted 3,587 COVID-19 related inspections and issued citations in about 765 cases," many times relying upon the General Duty Clause as its means of enforcement.[46]

*ii. Surviving Vaccine Mandates (Either Alive and Well, or Near Death)*

On September 9, 2021, President Biden announced his plans for aggressive COVID-19 vaccination requirements spearheaded by two federal agencies—OSHA and the Centers for Medicare & Medicaid Services ("CMS")—and by executive order for certain federal contractors and subcontractors. This sweeping three-pronged vaccination plan drew immediate criticisms, mainly on the issue of proper authority. As previously discussed, the OSHA Vaccination and Testing mandate succumbed to Supreme Court scrutiny in January 2022. But what about the other two prongs of President Biden's announced plan? As discussed below, the CMS mandate is alive and well. The same cannot be said for the federal contractor and subcontractor mandate, which faced a long, drawn-out legal battle and eventual death.

a. Centers for Medicare & Medicaid Services Vaccine Mandate

On November 5, 2021, CMS's interim final rule ("IFR") was published in the Federal Register.[47] The IFR relied on CMS's existing regulatory authority over Medicare and Medicaid certified facilities to require vaccination for such providers and suppliers.[48] Specifically, covered facilities were required to "develop and implement policies and procedures to ensure that all staff are fully vaccinated for COVID-19."[49] Unlike OSHA's Vaccination and Testing ETS, CMS's rule does not provide a weekly testing alternative to COVID-19 vaccination.

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45. *Id.* OSHA has the burden of proving the existence of a cited violation. Under the General Duty Clause, that burden increases due to the need to prove that the employer or its industry recognized something as being a hazard. *Id.*

46. Bruce Rolfsen, *COVID-19 Regulation Still on Agenda, OSHA Chief Doug Parker Says*, BLOOMBERG LAW (Feb. 14, 2022) https://news.bloomberglaw.com/safety/covid-19-regulation-still-on-agenda-osha-chief-doug-parker-says-1.

47. Medicare and Medicaid Programs, 86 Fed. Reg. at 61555.

48. *Id.* Notably, the IFR is made up of separate but nearly identical amendments to conditions of coverage, conditions of participation or other grant funding regulations for the certified providers and suppliers covered by the IFR. *Id.*

49. Medicare and Medicaid Programs, 86 Fed. Reg. at 61555. *See, e.g.*, Conditions for Coverage for End-Stage Renal Disease Facilities, 42 C.F.R. § 494.30(b) (2021) (requiring vaccination of all staff). COVID-19 vaccination is required of all staff, regardless of clinical responsibility or patient contact, who provide any "care, treatment, or other services for the center and/or its patients" which includes employees; licensed practitioners; students, trainees, and volunteers; and individuals who provide care,

Following several challenges to the CMS rule across jurisdictions, CMS's rule found its way to the Supreme Court through two separate challenges from groups of states—one led by Louisiana and one led by Missouri.[50] On January 13, 2022, the Supreme Court lifted the injunction blocking the CMS rule and allowed the rule to go into effect.[51] Unlike OSHA's Vaccination and Testing ETS, the Court concluded that CMS's rule fell within the authority Congress conferred to the agency to "impose conditions on the receipt of Medicaid and Medicare funds that 'the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.'"[52] Thus, a COVID-19 vaccination requirement was considered a necessary part of patient health and safety because the vaccine reduces the likelihood that healthcare workers (covered by CMS's rule) would contract and transmit COVID-19 to their patients.[53] The Court's decision subjected all states to CMS's rule, although enforcement deadlines varied.[54]

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treatment, or other services for the [entity] and/or its patients, under contract or by other arrangement. Some exclusions apply for staff who are not physically present in the facility. Nevertheless, the requirement that "staff" and not just "employees" be vaccinated makes the CMS mandate far-reaching. For example, a photocopying machine technician who regularly visits the facility to repair and maintain office machines falls under the definition of staff. Therefore, to be compliant with the CMS mandate, the facility will need to have on hand proof of the technician's vaccination.

50. On December 13, 2021, the United States Court of Appeals for the Eighth Circuit denied the Biden administration's request to lift a Missouri district court's preliminary injunction that blocked the vaccine mandate in ten states—including Missouri, Nebraska, Arkansas, Kansas, Iowa, Wyoming, Alaska, South Dakota, North Dakota, and New Hampshire. *Missouri v. Biden*, No. 21-2725 (5th Cir. Dec. 13, 2021). Similarly, the Fifth Circuit denied the government's request to lift the stay following a decision out of the Western District of Louisiana imposing a nationwide stay. *Louisiana v. Becerra*, 20 F.4th 260 (5th Cir. 2021). However, the Fifth Circuit limited the injunction to just those 14 states party to the action. *Id.*

51. *Biden v. Missouri*, No. 21A240, 595 U.S. 1 (2022).

52. *Biden v. Missouri,* No. 21A240, 595 U.S. 1, 5 (2022).

53. *Id*. The Court stated, "Vaccination requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella." *Id*. at 7.

54. On December 28, 2021, CMS issued additional guidance regarding the enforcement of the vaccine mandate in the states not subject to the appeal to the Supreme Court. *Guidance for the Interim Final Rule - Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, CENTERS FOR MEDICARE & MEDICAID SERVICES, (Dec. 28, 2021), https://www.cms.gov/files/document/qso-22-07-all.pdf. States not impacted by the injunctions had compliance deadlines set in a phased approach for January 27, 2022 and February 28, 2022. States impacted by the injunctions (including Nebraska and Iowa) were subject to later deadlines on February 14, 2022 and March 15, 2022 in a similar phased deadline approach. *Id*.

b. Executive Order for Federal Contractors and Subcontractors

Unlike the OSHA and CMS vaccine rules, the COVID-19 vaccination requirement for federal contractors and subcontractors has not had its day in front of the Supreme Court and likely never will. On September 9, 2021, President Biden signed Executive Order 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors* ("Order").[55] This order directed executive departments and agencies to contractually require enforcement of certain workplace safety standards (like COVID-19 vaccine requirements) as developed by the Safer Federal Workforce Task Force ("SFWTF"). The SFWTF released guidance on September 24, 2021 that required vaccination of covered contractor employees (unless an employee is legally entitled to an accommodation); required masking and physical distancing while in covered contractor workplaces; and required designation by covered contractors of a person to coordinate COVID-19 workplace safety efforts at covered contractor workplaces. Notably, the SFWTF made clear the Order only applied to contracts or contract-like instruments—meaning that coverage would only extend to those employers entering into a contract or sub-contract with the required contract language.[56]

On December 7, 2021, the United States District Court for the Southern District of Georgia imposed a nationwide preliminary injunction to halt enforcement of the SFWTF guidance for federal contractors and subcontractors.[57] Shortly after, the Office of Management and Budget ("OMB") issued updated guidance relating to its enforcement of the federal contractor vaccine mandate. OMB specifically stated that the federal government will not enforce the contract clause for any existing contracts already containing the new

55. *Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors*, THE WHITE HOUSE (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/.

56. The definition of a covered contractor is defined broadly, however, and can include "a prime contractor or subcontractor at any tier who is party to a covered contract." *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, Safer Federal Workforce, 3 (Nov. 10, 2021), https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf. This "flow down" requirement of the required SFWTF clause to subcontractors at all tiers "except for subcontracts solely for the provision of products." *Id*. at 11.

57. *Georgia v. Biden*, No. 1:21-cv-163 (S.D. Ga. Dec. 7, 2021). This followed an earlier injunction order from the United States District Court for Eastern Kentucky, which halted enforcement of the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee. *Kentucky v. Biden*, No. C:21-cv-00055-GFVT (E.D. Ky. Nov. 30, 2021).

clause, so long as the place of performance in the contract is a "U.S. state or outlying area" subject to a court order.[58]

On August 26, 2022, The U.S Court of Appeals for the Eleventh Circuit upheld the district court's preliminary injunction against the federal contractor vaccine mandate on narrow grounds.[59] While the Eleventh Circuit agreed the plaintiffs were entitled to preliminary injunction, the court held that the district court's nationwide injunction was overboard and limited its decision to only the plaintiffs in the case.[60] On August 31, 2022, however, the SFWTF responded by officially announcing that the federal government would not be taking steps to enforce the federal contractor vaccine mandate nationwide, pending further written notice.[61] While several decisions still await determinations at the circuit court level, the appellate courts appear to be taking their time and did not grant requests for expedited review.[62] For now, enforcement of the federal contractor and subcontractor rules are suspended and parties still wait for court resolution—and no one seems to be in a hurry.

### *iii. A Note on Voluntary Employer Vaccination Policies*

Notably, these court decisions have neither addressed nor placed restrictions on the ability of private employers to implement voluntary COVID-19 health and safety precautions, including employer-specific vaccination mandates. In most states, private employers are free to impose vaccine mandates for employees, if they so choose. While there may be advantages to imposing protective measures against COVID-19 in the workforce, there are also potential costs in doing so—namely

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58. These excluded areas are all fifty States; the District of Columbia; the commonwealths of Puerto Rico and the Northern Mariana Islands; the territories of American Samoa, Guam, and the United States Virgin Islands; and the minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll. *For Federal Contractors*, SAFER FEDERAL WORKFORCE, https://www.saferfederalworkforce.gov/contractors/ (last visited Feb. 17, 2022).

59. *Georgia v. Biden*, No. 21-14269 (11th Cir. 2022).

60. The plaintiffs included Alabama, Georgia, Idaho, Kansas, South Carolina, Utah, and West Virginia, and the construction trade group Associated Builders and Contractors, Inc. *Id*.

61. *Federal Contractors*, SAFER FEDERAL WORKFORCE, https://www.saferfederalworkforce.gov/faq/contractors/ (last accessed Oct. 9, 2022).

62. This includes the Fifth, Sixth, and Eighth Courts of Appeal. *See Louisiana v. Biden*, 1:21-cv-03867-DDD-JPM (W.D. La. Nov. 4, 2021), https://www.bloomberglaw.com/public/desktop/document/LouisianaetalvBidenetalDocketNo121cv03867WDLaNov042021CourtDocket/1?1645193692; *Kentucky v. Biden*, No. 21-6147 (6th Cir. Dec. 6, 2021), https://www.bloomberglaw.com/public/desktop/document/KYetalvJosephBidenetalDocketNo21061476thCirDec062021CourtDocket?1645194832; *Missouri v. Biden*, 4:21-cv-01300-DDN (E.D. Mo. Oct. 20, 2021), https://www.bloomberglaw.com/public/desktop/document/MissourietalvBidenetalDocketNo421cv01300EDMoOct292021CourtDocket?1645194576.

the risks in losing valuable, unvaccinated employees in industries already experiencing labor shortages.

Under some state laws, there may be additional considerations for private employers seeking to impose vaccine mandates. In several states, there are already legislative limitations to required employer vaccination programs, and even more states are considering such limitations during upcoming legislative sessions.[63] States like Montana and Tennessee have passed legislation banning private employer vaccine mandates entirely.[64]

Beyond possible state legislative limitations, private employers with COVID-19 vaccine mandates must also consider state guidance for unemployment benefits when an employee is terminated for refusing vaccine mandate compliance. For example, the Nebraska Department of Labor released guidance for situations where an employee is terminated due to refusal to receive a COVID-19 vaccination. Under the Nebraska state agency's guidance, employees who were already employed at the time an employer's COVID-19 vaccination mandate was implemented may still qualify for unemployment compensation benefits and those benefits will apply against the employer's experience account.[65]

At this point, most employers have already had conversations about and made decisions regarding COVID-19 workplace vaccinations—whether mandated or not. Throughout the legal battles and shifting compliance requirements with COVID-19 vaccination, challengers to these agency actions and employers in general have gathered key takeaways and have learned through the process. How these decisions will affect new federal agency rules and standards moving forward will be increasingly important to watch.

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63. *See, e.g.,* FLA. STAT. § 381.00317 (prohibiting private employers from imposing a COVID-19 vaccination mandate without providing individual exemptions allowing an employee to opt out of vaccination requirements based on one of five identified reasons).

64. *See* Tenn. Covid-19 Code §§ 14-1-101-104 and H.B. 702 67th Leg., Reg. Sess. (Mont. 2021).

65. *Unemployment Benefit Eligibility for Individuals Discharged for Refusing to Receive a Vaccination Against COVID-19*, NE DEP'T OF LAB., https://dol.nebraska.gov/webdocs/Resources/GuidanceDocuments/COVID-19%20Vaccine%20Mandate.pdf. The guidance states that "For all individuals who began work for an employer prior to an employer instituting a COVID-19 vaccine requirement: (1) an individual who is discharged from employment for refusing to receive a vaccination against COVID-19, shall be deemed to have been discharged for reasons other than misconduct and not be disqualified for unemployment benefits on account of such discharge; and (2) impact to an employer's experience account will be determined under Neb. Rev. Stat. §48-652." *Id*.

### C. Agency Guidance Approaches: Old Concepts Applied to a New Paradigm

In many cases, frameworks for employment laws already existed even as new issues arose with the COVID-19 pandemic. But those frameworks did not squarely address the unique employment law issues created by the pandemic. In an attempt to make existing employment laws and regulations better "fit" the new paradigm, administrative agencies moved quickly and frequently to issue updated guidance on COVID-19 issues.

Agency guidance are nonbinding documents that allow administrative agencies to share detailed instructions or best practices without subjecting the agency to a rigorous, binding rulemaking process. While guidance does not bear the weight of regulations, it is a useful tool for employment-focused agencies to communicate expectations to employers. In response to COVID-19 issues, several key agencies turned to existing guidance or introduced updated guidance, including the Occupational Health and Safety Administration ("OSHA"), the Equal Employment Opportunity Commission ("EEOC"), and the United States Labor Department's Wage and Hour Division ("WHD") for remote work situations.

#### *i. OSHA: Work from Home Safety Considerations*

For many workplaces, the COVID-19 pandemic forced the introduction of remote work options or hybrid work models. For certain positions and industries, work from home options quickly became common and those arrangements have persisted as COVID-19 numbers wax and wane. For example, GALLUP reports that forty-five percent of full-time workers were working either partly or fully remote in September 2021, and nine out of ten remote workers want to retain some flexible work arrangements to some degree.[66]

Years before the COVID-19 pandemic, OSHA had issued a directive on home-based worksites in 2000. This guidance stated that OSHA will not: (1) conduct home inspections of employees' home offices;[67] (2) hold employers liable for employees' home offices; and (3) expect employers to inspect an employee's home office.[68] For home-

66. Lydia Saad & Dr. Ben Wigert, *Remote Work Persisting and Trending Permanent*, Gallup (Oct. 13, 2021), https://news.gallup.com/poll/355907/remote-work-persisting-trending-permanent.aspx.

67. Home offices are defined as "The areas of an employee's personal residence where the employee performs work of the employer." *OSHA Directive CPL 02-00-125*, U.S. Dep't of Lab. (Feb. 25, 2000), https://www.osha.gov/enforcement/directives/cpl-02-00-125#definition.

68. *Id*.

based worksites,[69] OSHA notes that employers are responsible for hazards caused by "materials, equipment, or work processes which the employer provides or requires to be used in an employee's home." Notably, OSHA's recordkeeping obligations for employers are not affected by remote work. However, work from home considerations do not end there—as employers have already or are currently contemplating return to office protocol, the question arises of who (if anyone) gets to continue with remote access privileges or work from home arrangements?

ii. EEOC: Work from Home as an Accommodation

The EEOC enforces workplace anti-discrimination laws including the Americans with Disabilities Act[70] ("ADA"), the Rehabilitation Act,[71] the Genetic Information Nondiscrimination Act ("GINA"),[72] and Title VII of the Civil Rights Act ("Title VII").[73] Throughout the COVID-19 pandemic, the EEOC has updated and maintained guidance titled "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws."[74] In a question and answer format, this guidance covers topics such as disability-related inquiries and medical exams, confidentiality of medical information, return to work implications, and—perhaps most significantly—reasonable accommodation requests, vaccinations, and COVID-19 as a disability under the ADA and Rehabilitation Act.

It has been long established that, under the ADA, reasonable accommodations may be requested by an individual with a disability to apply for, perform, or enjoy the benefits and privileges of employment. If a reasonable accommodation is requested, employers must generally provide it unless the accommodation would pose an undue hardship. Most commonly, reasonable accommodation requests increased during the COVID-19 pandemic as related to remote or telework accommodations and COVID-19 vaccine exemptions.

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69. Home-based worksites are defined as "Office work activities in a home-based worksite (e.g., filing, keyboarding, computer research, reading, and writing). Such activities may include the use of office equipment (e.g., telephone, facsimile machine, computer, scanner, copy machine, desk, file cabinet)." *Id*.

70. 42 U.S.C. § 12101.

71. 29 U.S.C. § 701.

72. 42 U.S.C. § 2000.

73. Title VII prohibits discrimination based on race, color, national origin, religion, and sex (including pregnancy). Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e (1964).

74. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last visited Dec. 14, 2021).

The individual assessment of reasonable accommodations is not a new process under the ADA. The EEOC's COVID-19 guidance shed additional light onto remote work options as an accommodation, especially moving forward. For example, telework may not have been a viable pre-pandemic accommodation for certain jobs where "in person" attendance is an essential function of the job. As telework and remote work opportunities become more easily accessible, it may become difficult for an employer to justify in person attendance for certain positions. The EEOC guidance states that "the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely."[75] The key here is the focus on whether telework still permits an employee to perform all the essential functions of their job:

> To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function.[76]

But after extended periods of remote work away from a physical office location, does it become harder for an employer to argue that working in the office is truly an essential job function? This may be an area of increasing ADA litigation in years to come, as employers navigate the transition from COVID-19 remote work arrangements back to in person office arrangements.[77]

### *iii. WHD: Work from Home and Screening Compensation Issues*

Remote work arrangements and COVID-19 workplace safety precautions also prompted questions arising under the Fair Labor Standards Act ("FLSA").[78] Enforced by the WHD, the FLSA establishes minimum wage, overtime pay, recordkeeping, and child labor require-

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75. *Id*. at D.16.

76. *Id*. at D.15. However, employers are still obligated to engage in an individualized determination under the ADA. *Id.* at G.4.

77. Emily Halliday, *ANALYSIS: RTO, Covid Issues to Drive Ramp-Up in ADA Litigation*, BLOOMBERG LAW (Nov. 1, 2021) https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-rto-covid-issues-to-drive-ramp-up-in-ada-litigation (observing that "Before Covid-19, there was some litigation over whether telework is a reasonable accommodation for employees with ADA-covered disabilities. Employers argued that employees' physical presence at the worksite was an essential job function, and courts were pretty receptive. But the coronavirus pandemic has changed how and where many Americans work.").

78. 29 U.S.C. § 201.

ments.[79] As many workplaces shifted to telework or remote options, the WHD shared frequently asked questions addressing common issues on proper compensation for hours worked from home.[80]

The WHD also addressed certain workplace safety precautions under the FLSA, like temperature checks, health screenings, and COVID-19 testing. For example, employees required to undergo a temperature check before they begin work must be paid under the FLSA when the temperature check is necessary for the job.[81] Any required COVID-19 health screenings or COVID-19 testing throughout the workday may also be compensable because "WHD's regulations require that employees be paid for time spent in waiting for and receiving medical attention required by their employer during the workday."[82]

The FLSA requires employers to pay employees for all hours worked, regardless of where that work is done—whether at the office, at home, or at a location other than the normal workplace. As applied to COVID-19 remote work arrangements, the WHD clarified that employers are obligated to compensate teleworking employees as long as the employer "knows or has reason to believe that work is being performed," even if those hours are not specifically authorized.[83] This has prompted considerations about how employers may monitor an employee's worked hours and work performance from remote locations. Remote work undoubtedly offers more flexibility throughout a work day, which poses other challenges. For example, how can hours be effectively tracked for a teleworking employee who begins work, takes time away to care for children, and then returns to working re-

79. *Wages and the Fair Labor Standards Act,* U.S. DEP'T OF LAB. WAGE AND HOUR DIV., https://www.dol.gov/agencies/whd/flsa (last visited Feb. 28, 2022).

80. *COVID-19 and the Fair Labor Standards Act Questions and Answers*, U.S. DEP'T OF LAB. WAGE AND HOUR DIV., https://www.dol.gov/agencies/whd/flsa/pandemic#1 (last visisted Feb. 28, 2022).

81. WHD specifically notes that:

> . . . under the FLSA, your employer is required to pay you for all hours that you work, including for time before you begin your normal working hours if the task that you are required to perform is necessary for the work you do. For many employees, undergoing a temperature check before they begin work must be paid because it is necessary for their jobs. *Id*.

82. *Id*. In addition, employees who are required to put on and take off certain COVID-19 protective gear (like N95 respirators or face shields) may be entitled to compensation for the time spent "donning" and "doffing" when these tasks are necessary for work. *Id.*

83. *See* 29 C.F.R. § 785.11-13, *and Field Assistance Bulletin No. 2020-5*, U.S. DEP'T OF LAB. WAGE AND HOUR DIV. (Aug. 24, 2020), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf (stating "An employer's obligation to compensate employees for hours worked can therefore be based on actual knowledge or constructive knowledge of that work. For telework and remote work employees, the employer has actual knowledge of the employees' regularly scheduled hours; it may also have actual knowledge of hours worked through employee reports or other notifications.").

motely? WHD advised that "off duty" time, or time where an employee is completely relieved from duty, are not considered hours worked.[84] Absent a prior arrangement, however, tracking flexible work hours can present its own challenge.

The rise of at-home work stations also prompted the question of who pays for additional expenses an employee may incur while working remotely. Examples include costs for internet access, increased use of electricity, computers, or other office equipment. The FLSA states that employers may not require employees to pay for items that are considered business expenses if doing so reduces the employee's earnings below the federal minimum wage or due overtime compensation.[85]

*iv. EEOC: COVID-19 Vaccine Exemptions*

COVID-19 vaccine exemptions have been a key topic of discussion, both as more employers look to mandatory workplace vaccination policies and as CMS's and OSHA's COVID-19 vaccination rules were challenged. Federal equal employment opportunity law does not prevent employers from requiring employees entering a workplace to be vaccinated against COVID-19. However, any such vaccine requirement must be subject to the reasonable accommodation provision of the ADA and Title VII.

The EEOC interprets that the ADA requires employers to provide reasonable accommodations to employees who "because of a disability . . . do not get vaccinated against COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business" or would pose a direct threat to the health and safety of others.[86] When an employee requests a reasonable accommodation related to COVID-19 under the ADA, employers may ask for reasonable documentation about the disability and/or the need for reasonable accommodation. This typically includes information about the individual's diagnosis, any restrictions or limitations, and about the effectiveness of potential alternative accommodations.

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84. *COVID-19 and the Fair Labor Standards Act Questions and Answers*, U.S. DEP'T OF LAB. WAGE AND HOUR DIV., https://www.dol.gov/agencies/whd/flsa/pandemic#1 (last visited Feb. 28, 2022).

85. *Id.* Some states, however, may impose more stringent business expense reimbursement requirements. *See* CAL. LABOR CODE § 2802 (requiring employers to reimburse employees for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties. . .").

86. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, at K.1, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last visited Dec. 14, 2021).

Under Title VII, employers must provide reasonable accommodations or exemptions of a mandatory COVID-19 vaccine policy to employees who "because of a . . . sincerely held religious belief, practice, or observance, do not get vaccinated against COVID-19, unless providing an accommodation would pose an undue hardship[87] on the operation of the employer's business."[88] The EEOC's clarified guidance under religious exemption requests to COVID-19 vaccine policies largely tracked previously-existing guidance for general religious exemptions. Generally, religious accommodation requests are less frequently challenged due to the broad nature of beliefs accepted under the definition of religion. Notably, however, the EEOC stated that Title VII does not protect social, political, or economic views, or personal preferences—meaning objections to COVID-19 vaccination based on social, political, or personal preference, or on non-religious concerns about possible vaccine side effects are not protected "religious beliefs" under Title VII. While an employee's stated beliefs are typically not disputed, the EEOC also listed several factors that—either alone or in combination—might undermine an employee's credibility.[89]

### *v. EEOC: Long-Haul COVID-19 as a Disability*

In its latest update to the "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" guidance, the EEOC addressed protections under the ADA for workers who contract COVID-19.[90] The guidance refers to the Department of Justice's ("DOJ") and Department of Health and Human Services'

87. Undue hardship requires more than a "de minimis," or minimal, cost to employers under Title VII and can include direct monetary costs, the risks of COVID-19 spread, and other burdens on business. *Id.* at L.3. Courts have found undue hardship in Title VII cases where the religious accommodation would impair workplace safety, diminish efficiency in other jobs, or cause coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work. *Id*.

88. *Id*. at K.1.

89. *Compliance Manual on Religious Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (last visited Mar. 30, 2022). Those "factors include: whether the employee has behaved in a manner markedly inconsistent with the professed belief; whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; whether the timing of the request renders it suspect (*e.g.,* it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons." Again, while the basic framework for reasonable accommodations under the ADA and Title VII already existed, COVID-19 is shaping a new application of that analysis in the workplace. *Id.*

90. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, at N, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last visited Dec. 14, 2021).

("DHHS") guidance[91] for "long COVID" as a disability under the ADA when it substantially limits one or more major life activities. Long COVID has been defined as a "range of new or ongoing symptoms that can last weeks or months after they are infected with the virus that causes COVID-19 and that can worsen with physical or mental activity."[92] Based on DOJ's and DHHS's joint guidance, the EEOC identifies four specific examples of when employees with COVID-19 may be entitled to ADA protections for lingering COVID symptoms:

- An individual diagnosed with COVID-19 who experiences ongoing but intermittent . . . headaches, . . . brain fog, and difficulty . . . concentrating, which . . . [is] attribute[ed] to the virus. . .
- An individual diagnosed with COVID-19 who initially received supplemental oxygen for breathing difficulties and continues to experience fatigue or shortness of breath. . .
- An individual with COVID-19 who experiences lasting cardiovascular limitations, which may include heart palpitations, chest pain, and shortness of breath due to the virus.
- An individual diagnosed with "long COVID" who experiences COVID-19 related pain or symptoms that linger for many months.[93]

While the EEOC's updated guidance provides helpful clarification, there are still practical challenges for employers navigating individualized assessments required by the ADA. With legal gray areas remaining, long COVID-19 could be another increasingly litigated issue in the coming years especially as the full extent of long COVID-19 complications remains unclear.

Administrative agency guidance on work from home issues and accommodations are nothing new, but the COVID-19 pandemic forced new considerations under these existing frameworks. While agency guidance can be a helpful tool for employers to gauge how a federal employment agency considers new topics (like long COVID), the nonbinding nature of guidance documents can also complicate obligations

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91. *Guidance on "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557*, DEP'T OF HEALTH AND HUMAN SERVICES, https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html (last visited Feb. 19, 2022).

92. *Id*. This could include (but is not limited to) common symptoms like tiredness or fatigue, difficulty thinking or concentrating ("brain fog"), shortness of breath or difficulty breathing, headache, chest pain, cough, joint or muscle pain, fever, depression or anxiety, and loss of taste or smell. *Id*.

93. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last visited Dec. 14, 2021).

where no clear standard exists. As agency actions may become increasingly scrutinized, the weight afforded to agency guidance may also change moving forward.

## II. A LOOK AHEAD: THE FUTURE IMPACTS TO EMPLOYMENT LAW

If anything, the COVID-19 pandemic has shown the volatility of labor and employment law and exposed challenges to federal agency practices in particular. This section explores how recent United States Supreme Court determinations may signal a new era where the limits of administrative agency authority may become increasingly challenged. This section also considers how state and local governments may be taking matters into their own hands to preserve individual autonomy.

### A. Encroaching Limits to Federal Agency Power

The United States Supreme Court's decisions regarding the Occupational Safety and Health Administration's ("OSHA") COVID-19 Vaccination and Testing Emergency Temporary Standard[94] and the Centers for Medicare & Medicaid Services ("CMS") COVID-19 interim final rule on staff vaccination[95] shone a spotlight on growing criticism regarding federal agency authority. Beyond issues arising from the COVID-19 pandemic, the Court's opinions on OSHA's and CMS's vaccination standards may indicate forthcoming changes to the level of deference provided to federal government agencies—pandemic or not. There are a growing number of challenges to federal agency authority stemming from two significant angles: (1) arguments to weaken or abandon the *Chevron* doctrine, and (2) arguments to strengthen the major questions doctrine.

#### *i. A Possible Decline of the Chevron Doctrine?*

For decades, the *Chevron* doctrine has been a foundation of administrative law. Under the *Chevron* doctrine, federal courts defer to an executive agency's reasonable interpretation of an ambiguous provision of a statute the agency administers.[96] For example, OSHA would be given deference for its interpretation of ambiguities under the Occupational Safety and Health Act ("OSH Act"), which is the statute that OSHA administers. In *Chevron U.S.A., Inc. v. Natural*

94. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S.Ct. 661, 667 (2022).
95. *Biden v. Missouri*, No. 21A240, 595 U.S. 1 (2022).
96. *Chevron U.S.A., Inc. v. Nat. Res. Defense Council*, 467 U.S. 837 (1984).

*Resources Defense Council*,[97] the United States Supreme Court announced:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[98]

Those critical of the *Chevron* doctrine have argued that it extends too much interpretive authority to administrative agencies where "courts uphold an agency's reading of a statute – even if it is not the best reading – so long as the statute is ambiguous and the agency's reading is at least reasonable."[99] Prior to his Supreme Court appointment, Justice Kavanaugh wrote that "[f]rom my more than five years of experience at the White House, I can confidently say that *Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."[100] This notion was echoed, in a sense, by critics of the Biden administration's three-prong COVID-19 vaccine mandate approach (which included the OSHA Vaccination and Testing ETS, CMS's interim final rule on COVID-19 vaccination, and the federal contractor regulation) who believed the administration was working towards a policy goal to vaccinate as many Americans against COVID-19 as possible, rather than addressing threats specific to each administrative agency's authority. During oral arguments on the stay of OSHA's Vaccination and Testing ETS, Chief Justice Roberts speculated the "government is trying to work across the waterfront and it's . . . going agency by agency" to reach a

97. 467 U.S. 837 (1984).
98. *Chevron*, 467 U.S. at 842-43.
99. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (June 10, 2016) (reviewing JUDGING STATUTES 2014)).
100. *Id*.

policy goal COVID-19 vaccinations in "an effort to cover the waterfront."[101]

Notably, the *Chevron* doctrine was not addressed during the Court's limited review of OSHA's Vaccination and Testing ETS stay.[102] Ambiguity of the OSH Act was not a question directly addressed in *National Federation of Independent Business v. Department of Labor*,[103] and the Court's per curiam determination on OSH Act authority was clear. The Court concluded the OSH Act tasks OSHA with "ensuring *occupational* safety."[104] The Court stated that OSH Act empowers OSHA to "set *workplace* safety standards, not broad public health measures."[105] The dissent disagreed and posited that this suggested OSH Act limitation is not so clear.[106] While the *Chevron* doctrine was not considered in *National Federation of Independent Business*, the application—or perhaps the decision to decline application—of the doctrine in similar future cases will undeniably have an impact moving forward where challenges to regulatory rule-making authority may become more commonplace.

In recent years, the Court has been reining in the reach of *Chevron*, and more challenges on are the horizon. In November 2021, the Court heard arguments for *American Hospital Association v. Becerra*[107] on whether *Chevron* deference permits the Department of Health and Human Services to set Medicare reimbursement rates. In 2022, a group of Republican-led states[108] and Grand Old Party

101. Transcript of Oral Argument at 79-80, Nat'l Fed. of Indep. Bus. v. Dep't. of Lab., (Nos. 21A244, 21A247), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21a244_kifl.pdf.

102. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S.Ct. 661, 667 (2022) (Gorsuch, J., concurring). The Supreme Court's decision on the OSHA ETS was limited to whether to lift the injunction (allowing enforcement of OSHA's Vaccination and Testing rule) or to stay the rule. This was not a complete review on the merits; however, the Court did broadly consider whether applicants were likely to succeed on the merits of their claim. *Id.*

103. 142 S.Ct. 661 (2022).

104. *Nat'l Fed'n of Indep. Bus*., 661 S.Ct. at 663.

105. *Id*. ("The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set workplace safety standards, not broad public health measures."). *See* 29 U.S.C. § 655(b) (directing the Secretary to set 'occupational safety and health standards' (emphasis added)); § 655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect "employees" from grave danger in the workplace).

106. *Nat'l Fed'n of Indep. Bus.*, 661 S.Ct. at 673. The dissent argues the majority opinion imposes "a limit found no place in the governing statute." *Id*. (citing *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,* 140 S.Ct. 2367, 2380-81) to state that "When Congress 'enact[s] expansive language offering no indication whatever that the statute limits what [an agency] can' do, the Court cannot 'impos[e] limits on an agency's discretion that are not supported by the text.'").

107. 141 S.Ct. 2883 (2021).

108. Brief of Indiana, Arizona, and Thirteen Other States as *Amici Curiae* in Support of Petitioner, *Buffington v. McDonough*, No. 21-972, (S.Ct. 2022).

("GOP") senators[109] are urging the Court to take the *Buffington v. McDonough*[110] case. In *Buffington*, the plaintiff veteran, Thomas H. Buffington plans to challenge a Department of Veterans Affairs forfeiture rule. Specifically, Buffington is asking the Court to consider resolving the statutory ambiguity in this case by either (1) clarifying that a pro-veteran canon should be applied before the *Chevron* doctrine, or (2) overruling *Chevron*.[111] While the fate of the *Chevron* doctrine remains unclear, challenges to the amount of deference given to administrative agencies are likely to persist. The legal and regulatory landscape of the COVID-19 pandemic seems to have only brought this into sharper focus.

*ii. A Major Surge for the Major Questions Doctrine*

The major questions doctrine became a centerpiece of the analysis behind OSHA's COVID-19 Vaccination and Testing ETS and the CMS COVID-19 interim final rule on staff vaccination. This doctrine states that, under the United States Constitution's separation of powers, Congress must "'speak clearly' if it wishes to assign to an executive agency decisions 'of vast economic and political significance.'"[112] Instead of the usual broad deference given to an administrative agency, the major questions doctrine allows courts to bypass that deference on these major issues.

As a reminder, *National Federation of Independent Business v. Department of Labor*[113] did not fully review OSHA's authority to promulgate the Vaccination and Testing ETS. But in considering the likelihood of success on the merits, the *per curium* opinion and Justice Gorsuch's concurring opinion both stressed the expectation of Congress to "speak clearly" when authorizing agency action of "vast economic and political significance."[114] The Court determined that OSHA's vaccine mandate clearly met this "vast economic and political

109. *Id.* Support for Chevron withdrawal has been seen in the legislative chambers of Congress, as well. Congressional representatives (largely led by GOP members) have been attempting to override Chevron deference through proposed legislation. *See* Separation of Powers Restoration Act of 2021, H.R. 4317, 117th Cong. (2021).

110. Brief of Indiana, Arizona, and Thirteen Other States as *Amici Curiae* in Support of Petitioner, *Buffington v. McDonough*, No. 21-972, (S.Ct. 2022).

111. *Id*. at 2.

112. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S.Ct. 661, 667 (2022) (Gorsuch, J., concurring) (citing *Alabama Ass'n. of Realtors v. Dep't of Health and Human Services,* 141 S.Ct. 2485, 2489 (2021)) (*per curiam*) (slip op., at 6) (internal quotation marks omitted).

113. 142 S.Ct. 661 (2022).

114. *Nat'l Fed'n of Indep. Bus*, 142 S.Ct. at 665, 667. Notably, the *per curium* opinion does not expressly name the majors question doctrine. The Court determined there "can be little doubt that OSHA's mandate qualifies as an exercise" of authority with vast economic and political significance. *Id*. at 665.

significance" standard, but the limits of this standard still leaves plenty of room for interpretation—particularly outside of the COVID-19 pandemic.[115]

Prior to 2018, issues involving the major questions doctrine (at least by name) were rarely heard in federal courts.[116] The doctrine, however, has seen a major surge in filings in 2021 with the trend expected to continue. COVID-19 related litigation has seemed to serve as a catalyst for the major questions doctrine.[117] The Supreme Court has now recently heard several key, highly-publicized arguments that limited agency authority under the major questions doctrine. With this tool in the arsenal, there may be more opportunities to challenge administrative agency action and regulations where Congress has not provided clear authorization.

These trends involving the *Chevron* doctrine and the major questions doctrine are, at the core, centered on the limits of an administrative agency's ability to act when congressional delegation may be ambiguous. Critics of the broad administrative state celebrated the Court's OSHA Vaccination and Testing ETS decision as a victory. It seems likely that challenges to agency rulemaking authority, or at least challenges to the scope of certain agency rules, will only increase in the future—even for regulatory topics that are not nearly as polarizing as vaccine mandates. The effect of increased challenges to agency rules may also increase the potential for court-ordered stays or injunctions. Practically speaking for employers, this could lead to more of the on-again, off-again rule status as was seen with OSHA's vaccine mandate or the headache of navigating different jurisdictional deadlines as seen with CMS's vaccine rule, which imposes different phased deadlines for those states affected by court injunctions. While

115. *Id*. Gorsuch concurrence states: "Far less consequential agency rules have run afoul of the major questions doctrine. *E.g., MCI Telecommunications Corp. v. American Telephone & Telegraph Co.,* 512 U.S. 218, 231 (1994) (eliminating rate filing requirement). It is hard to see how this one does not." *Id*. at 668.

116. Erin Webb, *ANALYSIS: Major Questions Doctrine Filings Are Up in a Major Way*, BLOOMBERG LAW (Feb. 1, 2022), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-major-questions-doctrine-filings-are-up-in-a-major-way.

117. In addition to COVID-19 vaccine mandate issues, the Supreme Court considered the "vast 'economic and political significance'" of the U.S. Centers for Disease Control and Prevention's ("CDC") eviction moratorium in August 2021—a moratorium created as a preventative COVID-19 measure. *Alabama Ass'n. of Realtors v. Dep't of Health and Human Services,* 141 S.Ct. 2485, 2489 (2021) (*per curiam*). Here, the Court vacated the stay on the CDC's eviction moratorium because Congress failed to specifically authorize a federally imposed eviction moratorium. *Id*. at 2486. While the Court did not expressly name the major questions doctrine, it determined the federal eviction moratorium qualified as a decision of "vast economic and political significance" because (1) at least 80% of the country fell within the moratorium, (2) Congress provided nearly $50 billion dollars of emergency rental assistance, and (3) the moratorium intruded on to landlord-tenant legal principles traditionally governed by state law. *Id*. at 2489.

the future remains unclear, the possibility of increased scrutiny to federal agency action and authority is certainly something to keep in mind.

### B. Championing Individual Protections on a State Level

When the federal government (mostly by way of administrative agencies) began its push for broad COVID-19 measures, local governments responded on a state level. The push and pull battle of who has the right to act—whether the state, local, or national government—was seen in many forms throughout the COVID-19 pandemic. When it comes to employment law specifically, however, more states are pursuing legislation to preserve individual autonomy for the employee.

The COVID-19 vaccine mandates have given rise to increased state legislation protecting employee choice. As discussed above, some states have passed laws or proposed legislation to ban employer-mandated vaccine requirements and to allow greater application of certain exemptions to vaccine mandates.[118] For example, the Nebraska legislature approved a bill on February 25, 2022 that would allow employees to claim medical and religious exemptions from workplace COVID-19 vaccine mandates.[119] This reaction on a state level may demonstrate growing local efforts to clamp down on federal agency or employer actions which encroach on employee choice and individual autonomy. While this sentiment is not new, COVID-19 policies and mandates have brought this sharper relief.

To say that the COVID-19 pandemic has changed the world is an understatement. Like many things, the field of employment law changed and adapted along with the pandemic and will undoubtedly continue to raise new questions and challenges for employers. Understanding how employment law has evolved with the COVID-19 pandemic—through major congressional legislation, federal agency action, and Supreme Court determinations—provides a better look at how the law may continue to grow and change.

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118. *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, Nat'l Acad. for State Health Pol'y, https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer (last visited Feb. 23, 2022).

119. L.B. 906, 107th Leg., 2nd Sess. (Neb. 2022).

# THE POLITICAL ROOTS OF JUDICIAL ELECTIONS

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*Modern judicial politics, including judicial elections, feels divisive. But there was no idyllic past where judicial elections were free of politics. Judicial battles of the past were in truth much more fiery. This Article examines how early judicial elections were suffused in politics and how political actors openly called for opposing and supporting judges on the basis of their ideology. It was not just fringe activists either. Political parties, newspapers, and politicians got their hands dirty too. Today, many judges engage in doomsaying over the prospect of mild accountability reforms, but the judiciary has already survived a much more tumultuous past.*



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## I. INTRODUCTION

Judicial independence is in grave danger. Or least it is according to judges. Justice Sandra Day O'Connor has said that criticism of the judiciary is the first step towards a dictatorship.[1] Justice Ruth Bader Ginsburg compared an inspector general for the judiciary—something virtually every other appendage of government already has—to the Soviet Union.[2] She continued that "the judiciary is under assault in a way that I haven't seen before."[3] Judges also claim that matters as pedestrian as lack of pay increases[4] or modest increases in accountability[5] are a clear and present danger to the courts. Even sunshine laws for the judiciary are resisted.[6]

It is true that political battles over the judiciary are at a volcanic temperature. At the federal level, we have seen a Supreme Court nominee wait a historically long time without a Senate vote,[7] while another was rushed through in the middle of a pandemic on the eve of an election.[8] Among the lower courts, confirmation of judges slowed to a crawl in the last two years of the Obama Administration,[9] and after he left office, the Senate abandoned its tradition of deferring to home-state senators who objected to judicial nominees.[10]

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1. Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301, 302 (2010).

2. *Id.* at 319.

3. *Id.* at 319.

4. Michael J. Frank, *Judge Not, Lest Yee Be Judged Unworthy Of A Pay Raise: An Examination of the Federal Judicial Salary "Crisis"*, 87 MARQUETTE L. REV. 55, 58 (2003) (quoting from various judges who claimed that insufficient pay increases to judges would lead to everything from judicial corruption to the loss of "human liberty.").

5. *See* Arthur D. Hellman, *An Unfinished Dialogue: Congress, the Judiciary, and the Rules for Federal Judicial Misconduct Proceedings*, 32 GEO. J. L. ETHICS 341, 350 (2019) (quoting a judge criticizing proposals for a stronger judicial disciplinary system for judges); *Nebraska judge apologizes after backlash over tweet*, ASSOCIATED PRESS (July 27, 2018), https://apnews.com/article/ba2101e3066344aeba571508c456ab28 (judge called an effort by law clerks to tackle sexual harassment and abuse in the judiciary a "Spanish Inquisition").

6. Jess Bravin & James V. Grimaldi, *Chief Justice John Roberts Pledges to Bolster Judicial Ethics*, WALL ST. J. (Dec. 31, 2021), https://www.wsj.com/articles/chief-justice-john-roberts-pledges-to-bolster-judicial-ethics-11640991604.

7. Jon Schuppe, *Merrick Garland Now Holds the Record for Longest Supreme Court Wait*, NBC NEWS (July 20, 2016), https://www.nbcnews.com/news/us-news/merrick-garland-now-holds-record-longest-supreme-court-wait-n612541.

8. Tyler Olson, *Barrett fast-track confirmation threatened as GOP senators test positive for COVID-19, Schumer seeks delay*, FOX NEWS (Oct. 5, 2020), https://www.foxnews.com/politics/barrett-fast-track-confirmation-threatened-as-gop-senators-test-positive-for-covid-19-schumer-seeks-delay.

9. Seung Min Kim, *McConnell's historic judge blockade*, POLITICO (July 14, 2016), https://www.politico.com/story/2016/07/mitch-mcconnell-judges-225455.

10. Jordain Carney, *Senate confirms Trump court pick despite missing two 'blue slips'*, THE HILL (Feb. 26, 2019), https://thehill.com/homenews/senate/431717-senate-confirms-trump-court-nominee-despite-missing-two-blue-slips.

At the state level, record-shattering amounts of money are being spent to influence state supreme court elections—much of it dark money.[11] Advertising campaigns have been called "a prerequisite to winning a state supreme court seat."[12] Election ads can be sensational and childish.[13] Ohio legislators mulled impeaching justices who struck down a Chamber of Commerce-backed tort law.[14] In New Hampshire, legislation was introduced to strip the courts from reviewing school funding cases, after the court ruled that the government had failed to provide a constitutionally adequate education to students.[15]

Any of these sorts of actions could be described as risking judicial independence, that is to say, pulling courts into the political swamp. "Judicial independence is the crown jewel" of the judiciary according to Chief Justice William Rehnquist.[16] To this end, judges should maintain a high wall of separation against politics. Attorney Joseph W. Hatchett said judges should not be criticized by members of Congress for decisions they issue to protect this ideal.[17]

But as we will see, the dawn of judicial elections were not utopian contests, free of partisan strife. To the contrary, from the earliest days of judicial elections, tempers flared and politics dominated. There may not have been a 24-hour news cycle or super political action committees flooding races with money, but things were even more chaotic. Parties did not merely criticize judges they disagreed with, they passed resolutions demanding judicial candidates pledge to certain positions, and explicitly called for judges to be ousted or elected based on how they would vote. This Article shows the rough and tumble nature of early judicial elections, and in doing so, demonstrates that modern day handwringing about the collapse of the judiciary due to more accountability is exaggerated.

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11. Alicia Bannon, *Who Pays for Judicial Races? The Politics of Judicial Elections 2015-16*, BRENNAN CENT. FOR JUST. (Dec. 14, 2017), https://www.brennancenter.org/our-work/research-reports/who-pays-judicial-races-politics-judicial-elections-2015-16.

12. Bert Brandenburg, *Judicial Elections: Justice for Sale?*, 39 HUMAN RIGHTS 18, 18 (2010).

13. Martin J. Siegel, *In Defense of Judicial Elections (Sort Of)*, 36 LITIGATION 23, 23 (2010).

14. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 45 (2003); William Glaberson, *Ohio's Top Court Strikes Down Tort Reform Law*, CHI. TRIBUNE (Aug. 17, 1999), https://www.chicagotribune.com/news/ct-xpm-1999-08-17-9908170275-story.html; State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999).

15. Geyh, *supra* note 14, at 45-46; Claremont Sch. Dist. v. Governor, 794 A.2d 744 (N.H. 2002); Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997).

16. JUDICIAL INDEPENDENCE: UNDERSTANDING THE COURTS AND THE CONSTITUTION, FLA. L. RELATED EDUC. ASS'N 5 (2002), https://files.eric.ed.gov/fulltext/ED467466.pdf.

17. *Id.* at 8.

Part I gives an overview of the debates over the adoption of judicial elections. States used to appoint their judges, but New York popularized the idea of judicial elections in 1846. Opponents of judicial elections feared it would politicize the bench, resulting in judges feeling pressured to rule in favor of the majority. Once elections were established, the partisan press wasted no time in throwing fuel on the fire.

Part II looks at the 1847 judicial election of Mississippi. The Magnolia State was the first to move to an entirely elective judiciary, so it should come as no surprise that it has one of the earliest examples of mudslinging in a judicial campaign. The election took place amidst a battle between debtors and banks that sought to collect. Debtors believed that Chief Justice William L. Sharkey had cozied up to the banks and were outraged to see the Mississippi Supreme Court strike down legislation making it harder for banks to collect. They organized a strident effort to unseat Sharkey and defang the banks but ultimately failed on both counts.

Part III is about New York's first judicial election in 1847. A few years before the election, thousands of tenants—trapped in oppressive leaseholds owned by enormously powerful landlords—rose up demanding equitable living conditions. This "Anti-Rent" movement saw the judicial election as a chance to install men as judges who had treated them well in the past. Ultimately, only one of their preferred candidates ended up winning.

Part IV examines the 1887 Illinois judicial elections. Railroads were a dominant force in the state, and the courts had long protected them against government regulation. But farmers who felt exploited by the rail lines wanted to break their power. With a rallying cry of "reverse the Supreme Court," they succeeded in knocking out one of the incumbent justices who had been voting in favor of the railroads, and replacing him with a man who would be known as the "Farming Judge."

Part V offers concluding thoughts. Political actors now offer comparatively mild criticisms of judges who rule against them. This occurs in spite of the fact that judges have much more power today. It goes to show that the judiciary has survived hundreds of years' worth of political jousting, and safely withstand mild accountability reforms today.

## II. A HISTORY OF STATE JUDICIARIES

Over time, the judiciary worked hard to cultivate a nonpolitical image. The idea that judges should be separate and apart from politics is neither new nor exclusively American. Notions of judicial inde-

pendence go back to at least 1215 in the Magna Carta, where the King agreed to "appoint as justices . . . only men that know the law of the realm and are minded to keep it well."[18] Even so, in the 1600s, in the words of one British historian, the "tribunals afforded no protection to the subject against the civil and ecclesiastical tyranny of that period."[19] And the king's judges "were scandalously obsequious."[20] But over the years, judges gained more independence from the Crown through statutes.[21] One scholar pointed to the Glorious Revolution of 1688—where William III of Orange was installed as sovereign—as the year when "the judges became independent, and that independence has been the pride and the boast of the Englishman ever since."[22] In the American system, one of the earliest articulations of the need for judicial independence came from Alexander Hamilton in the Federalist Papers.[23]

To this end, federal judges are appointed, serve for life, and remain in office during good behavior.[24] State courts, along with federal ones, hold themselves out as above the political fray.[25] But federal courts have built-in features to ensure independence, state courts' situation is more complex. State judiciaries used to be appointment-based but now are largely elected.[26] Indeed, no state elected judges at the founding. Judicial officers were typically appointed by the legislature or governor and legislature together, typically with life tenure.[27] In that way, they mimicked the federal system. But a few states dab-

18. Patrick Wilson Dunn, *Judicial Selection in the States: A Critical Study with Proposals for Reform*, 4 HOF. L. REV. 267, 276 (1976).

19. 1 THOMAS BABINGTON MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND, ch. 1 (1848).

20. *Id.*

21. Dunn, *supra* note 18, at 276.

22. OLIVER A. HARKER, EFFORTS TO DIVORCE JUDICIAL ELECTIONS FROM POLITICS IN ILLINOIS *in* TRANSACTIONS OF THE ILLINOIS STATE HISTORICAL SOCIETY FOR THE YEAR 1909, 38 (1909) https://quod.lib.umich.edu/m/moa/0050220.0014.001/5?rgn=full=text;view=image;q1=judicialelections.

23. 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 803 (1853) [hereinafter MASSACHUSETTS CONVENTION OF 1853] (statement of Mr. Choate) https://www.google.com/books/edition/Official_report_of_the_debates_and_proce/iyMIYy-bZo0C?hl=en&gbpv=1&dq=.

24. U.S. CONST. art. III, § 1.

25. *E.g.*, State v. J.L.M., No. 2007-CA-01160-SCT, 2008 Miss. LEXIS 592, at *6 (Dec. 4, 2008); Wayne Cty. Sheriff v. Wayne Cty. Bd. of Comm'rs, 385 N.W.2d 267, 270 (Mich. Ct. App. 1983); Laura Zaccari, *Judicial Elections: Recent Developments, Historical Perspective, and Continued Viability*, 8 RICH. PUB. INT. L. REV. 138, 138-39 (2004).

26. Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 856-60 (2012).

27. Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553, 557 (2013).

bled with electing some of their judges,[28] and in 1832, Mississippi became the first state to make all judges elective, around the same time life tenure for judges was dying out around the country.[29] New York adopted a highly influential state constitution in 1846 that provided for the election of judges.[30] The Empire State set off a stampede in favor of judicial elections. By 1853, twenty states had judicial elections, including thirteen states that switched from appointive to elective systems.[31] Today, ninety percent of state judges face some kind of popular election.[32] Scholars differ on the reason so many states moved to judicial elections, but most agree it was done to make courts accountable to the people.[33]

State judges assert that their role has not changed, even though their mode of selection has. Indiana's Supreme Court said that, unlike other offices, voters elect judges not to pursue certain policies, but to "listen and rule impartially on the issues brought before the bench."[34] Nevada's high court declared "while the role of the executive and legislative branches is to effect the will of the electorate, the role of the judiciary is, ultimately, to uphold and defend by rule of law."[35] The United States Supreme Court has declared "[j]udges are not politicians, even when they come to the bench by way of the ballot."[36] Four justices have also signed onto the opinion that "judges [running for election] are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation."[37]

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28. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 715 (1995) (noting that Vermont, Georgia, and Indiana all elected some lower court judges in the late eighteenth or early nineteenth centuries).

29. Bam, *supra* note 27, at 557-58.

30. 1848 N.Y. CONST. of 1846, art. VI, § 12.

31. MASSACHUSETTS CONVENTION OF 1853, *supra* note 23, at 790.

32. Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349, 1351 (2010).

33. Bam, *supra* note 27, at 560. Some also posit that it was primarily done to make judges more independent of the other branches. *Id.* at 562.

34. In re Bybee, 716 N.E.2d 957, 959-60 (Ind. 1999) (internal citation omitted); *see also* Morial v. Judiciary Com. of La., 565 F.2d 295, 305 (5th Cir. 1977) (stating a judge "cannot, consistent with the proper exercise of his judicial powers, bind himself to decide particular cases in order to achieve a given programmatic result").

35. Ramsey v. City of N. Las Vegas, 392 P.3d 614, 621-22 (Nev. 2017); *see also* In re Callaghan, 796 S.E.2d 604, 620 (W. Va. 2017) ("The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election.").

36. Williams-Yulee v. Fla. Bar, 575 U.S. 433, 437 (2015).

37. Republican Party v. White, 536 U.S. 765, 803-04 (2002); *see also* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 445 (2015) ("We have recognized the vital state interest in safeguarding public confidence in the fairness and integrity of the nation's elected judges.") (cleaned up).

These courts may draw upon the American Bar Association ("ABA") for support. The ABA provides model Canons of Judicial Conduct that includes the comment that a judge running for election "plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case."[38] This comment has been widely adopted by state judicial ethics codes.[39] To further insulate the judiciary from politics, states have tried to regulate how judicial candidates can make their case to the voters or engage in politics generally.[40] Try as they might, however, courts have never fully escaped politics.

### A. States Begin with Appointment Systems, But Politics still a Played Role

On its face, an appointment system may appear less political than elections,[41] but politics has always found its way into the judiciary by some way or another. At least two Supreme Court justices actively

38. Model Code of Judicial Conduct Cannon 4.1, cmt. 1 (Am. Bar Ass'n 2016). The ABA first promulgated rules of Judicial ethics in 1928, which included the provision, "[a] candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power." Canons of Judicial Ethics Canon 30 (Am. Bar Ass'n 1928), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/1924_canons.authcheckdam.pdf. It also advised judges to "avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for public office and participation in party conventions." *Id.* at Canon 28.

39. *E.g.*, Tenn. Code of Judicial Conduct, 4.1, cmt. 1; Pa. Code of Judicial Conduct, 4.1, cmt. 1; Nev. Code of Judicial Conduct, 4.1, cmt. 1; Ky. Code of Judicial Conduct, 4.1, cmt. 1; Ark. Code of Judicial Conduct, 4.1, cmt. 1; Okla. Code of Judicial Conduct, 4.1, cmt. 1; W. Va. Code of Judicial Conduct, 4.1, cmt. 1.

40. *E.g.*, Statement of Charges, Ariz. CJC No. 11-245 (Aug. 24, 2012) (Lester Pearce) (sanctioning judge for gathering petitions for a recall election, commenting on the election, and speaking at a political meeting); Notice of Formal Charges, Fla. JQC No. 06-432 (Oct. 24, 2007) (Terri-Ann Miller) (filing disciplinary charges against a judicial candidate for misleadingly giving voters the impression that she was the incumbent); In re Peter Katic, 549 N.E.2d 1039 (Ind. 1990) (suspending judge for engaging in partisan politics); Wash. CJC No. 96-2173-F-63 (1997) (Justice Richard B. Sanders) (reprimanding justice for speaking at a political rally).

41. Jonathan Abel, *Testing Three Commonsense Intuitions About Judicial Conduct Commissions*, 64 Stan. L. Rev. 1021, 1042 (2012) (quoting an official in a state with an appointed judiciary as saying elected judiciaries are "the Wild Wild West."); David Lyle, *The Politicization of State Courts Threatens Fundamental Rights: The Empirical Case*, Am. Bar Ass'n (June 1, 2017), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-3/the-politicization-of-state-courts-threatens-fundamental-rights-/ (describing appointed judiciaries as "merit selection.").

campaigned for John Adams in the election of 1800.[42] Illinois' first supreme court had four members under the 1818 Constitution.[43] But after the court ruled against the governor, he packed the court by adding five more justices.[44] This happened more than a century before President Franklin Roosevelt's ill-fated plan to expand the United States Supreme Court. At the time of the founding, state legislatures could reopen completed judicial proceedings through private legislation.[45] States allowed litigants to appeal judicial decisions directly to the legislature, and Congress briefly flirted with the idea of reviewing court rulings on military pension cases.[46] Voters perceived judges as part of a landed class that would restrict their rights.[47]

Proponents of judicial election pointed out that the appointment process directly led to politicking. The *Daily Nashville Union* noted that justices of the United States Supreme Court "were indebted for their election to political influences."[48] Great figures such as John Marshall or Joseph Story were selected because they shared a political party with their appointing president.[49]

This was no less true at the state level. At an 1853 Massachusetts Constitutional Convention, Delegate Wilson pointed out that Democrats were rarely appointed to the Supreme Judicial Court over the last half-century in the Whig-heavy state, and said that many appointed judges were not only politicians but "ultra politicians" or "violent politicians."[50] He ventured to say "it will continue to be so, in the future as in the past."[51] Judges would also time their retirement to

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42. Stephanie C. Willis, *Comment: Favoring justice over partisan politics*, COURIER J. (Sept. 29, 2016, 8:05 AM), https://www.courier-journal.com/story/opinion/contributors/2016/09/29/comment-favoring-justice-over-partisan-politics/91109086/.

43. 1818 ILL. CONST. of 1818, art. IV, § 3.

44. *Senator Castle on "Reversing the Supreme Court,"* INTER OCEAN, Mar. 27, 1873, at 3, https://www.newspapers.com/image/38400916/.

45. Fitzpatrick, *supra* note 26, at 867 & n.86.

46. *Id.* at 865 & n.81.

47. Zaccari, *supra* note 25, at 140-41; *cf. New York Correspondence of the Union*, DAILY NASHVILLE UNION, June 1, 1847, at 2, https://www.newspapers.com/image/603926567/ (saying that under New York's appointed judiciary, "[j]udges had fat salaries . . . [and] had but little else to do than 'eat his mutton cold' if he liked it so"). The first edition of United States Reports includes argument from William Findley, an Anti-federalist, who argued against the unfairness of judges and lawyers deciding what the law is, shutting out the people. Respublica v. Oswald, 1 U.S. 319, 329 (1788) (criticized a judgment as wrong and said that anyone who "possessed a competent share of common sense, and understood the rules of grammar, was able to determine [this] on a bare perusal of the bill of rights and constitution").

48. *New York Correspondence of the Union*, *supra* note 47, at 2.

49. *Id.*

50. MASSACHUSETTS CONVENTION OF 1853, *supra* note 23, at 706.

51. *Id.*

ensure a like-minded governor could pick their replacements.[52] In Ohio, one paper groused that the legislature selected judges only if they were known for their "subserviency to the central power" in the capital.[53]

### B. States Move to Elective Judiciaries, Placing Judicial Independence in Tension

Politics can never be completely removed from elections of any sort. Indeed, skeptics of judicial elections predicted that they would inevitably lead the judiciary to fall into the "political cauldron."[54] The *New York Evening Post* complained that judicial elections were destined to "be managed in the same way, be contested in the same way, and decided in the same way," as any other campaign.[55] "At the recurrence of every judicial election day," predicted the *Hartford Courant*, "the heat and passion and prejudice of political strife [will be] enkindled, and suffered to blaze" if judicial elections came to pass.[56] A Chicago lawyer complained that elected judges were "disposed to be unfair to corporate interests and to favor the laboring classes unduly. Political influences have too much control over the character and positions of the judges."[57]

The very adoption of judicial elections may be traced to politics. In New York, Whigs believed that the Democratic-tilt of the state gave Democrats a monopoly on judicial appointments in the state.[58] After all, when New York adopted judicial elections in 1846, it had only ever had one Whig as governor, and five of the last six had been Democrats.[59] By moving to an elective system where the state was split

52. *Id.* In modern times, a fairly large percentage of "elected" state judges first rose to the bench through an appointment by the governor. Jonathan P. Nase, *The Governor's Impact on an Elected Judiciary: The Lessons From Pennsylvania*, 69 Temp. L. Rev. 1137, 1142 (1996). This suggests judges may be timing their retirements so that the governor can name their replacement. *See id.*

53. *To the People of Ohio*, Spirit of Democracy, Mar. 13, 1847, at 2, https://www.newspapers.com/image/171433829/.

54. Massachusetts Convention of 1853, *supra* note 23, at 763.

55. *The Judicial System*, N.Y. Evening Post, Sept. 18, 1846, at 2, https://www.newspapers.com/image/39631228/.

56. *The Judiciary*, Hartford Courant, Sept. 30, 1846, at 2, https://www.newspapers.com/image/369321095/.

57. Report of the Industrial Commission on the Chicago Labor Disputes of 1900 with special reference to the Disputes in the Building and Machinery Trades, H.R. Rep. No. 57-177, at cix (1901), https://www.google.com/books/edition/Serial_set_no_4001_4500/8-o3AQAAIAAJ?hl=en&gbpv=1&dq=.

58. Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv. L. Rev. 1061, 1083 (2010).

59. *List of New York State Governors*, The US 50, http://www.theus50.com/newyork/governors.php (last visited Dec. 13, 2020). Incidentally, after 1846, the state would not elect another Democratic governor for almost 20 years. *Id.*

into districts, and each district selected a judge for that locale, Whigs could guarantee at least a few judgeships.[60] For this very reason, the Whigs' conservative predecessor party also had supported judicial elections.[61]

Occasionally, those in high places broke from the orthodoxy of judicial independence. One state constitutional convention delegate suggested it was a violation of a judge's oath to strike a law down as unconstitutional after it had been passed by the legislature.[62] Another declared "the idea of 'the independence of the judiciary' is something that does not apply to this country at all. . . . Here, the people are the sovereign, and what do we want to come between them and the government?"[63] A third said, "I want to make the judges independent, but not independent of the people, not independent of that wholesome restraint and moral sense which belongs to public opinion, and ever will belong to it."[64] These kinds of thinkers wanted the elected judiciary to be more sympathetic to the needs of the "common man" and disenfranchised.[65]

But populists were not the only ones trying to influence elections. A Wisconsin paper noted that there was "a deep seated and growing feeling" that corporate interests were working toward the "seating of men favorable to them, upon the benches of our state and Nation."[66] It also noted that "nearly every corporation lawyer in the state and all corporate influences" favored the election of a particular judicial candidate.[67]

The idea that popular passion could sway judicial opinions was feared by opponents of judicial elections.[68] A Massachusetts constitutional convention delegate, opposing elections, said "I do not see that [judges] are not likely to be as much influenced by popular argument,

60. Handelsman Shugerman, *Economic Crisis*, *supra* note 58, at 1083.

61. *Id.* at 1083.

62. MASSACHUSETTS CONVENTION OF 1853, *supra* note 23, at 775.

63. *Id.* at 811.

64. 2 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 465 (1851) https://books.google.com/books?id=CeVuu9AFWIIC&q=..

65. Zaccari, *supra* note 25, at 141. For example, elected judges drove the adoption of populist responses to industrial hazards through strict liability for corporate malfeasance. Handelsman Shugerman, *The Twist of Long Terms*, *supra* note 32, at 1353-54.

66. *Judge Clementson*, REPUBLICAN-J., Feb. 1, 1895, at 5, https://www.newspapers.com/image/678566212/.

67. *Id.*

68. A Kentucky delegate warned that allowing a judge to be voted out by the people would "throw the vessel of state upon a more dark and tempestuous ocean of confusion." REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION OF THE STATE OF KENTUCKY 163 (1849), https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1002&context=KY_cons_conventions.

and popular impulses, as other men."[69] New York's convention also raised the issue of whether a judge could rule against popular passions if they were dependent on popular elections.[70] A Maryland delegate fretted that judges would naturally feel pressure to rule in favor of popular litigants, even if they were not necessarily corrupt.[71] He was skeptical of simply "trusting the people" because people have passions and prejudices.[72]

Sometimes, state constitutional framers would give specific examples of hot-button issues where they feared judges would be strong-armed. In a Massachusetts constitutional convention, Delegate Dana gave the example of the "Maine Law," which referred to an 1851 statewide prohibition on alcohol enacted by Maine that spread to a dozen other jurisdictions in the United States.[73] Dana explained that if judges of the state supreme court were equally divided over the constitutionality of such a law, then the ouster of any individual judge could be decisive for the fate of the law.[74] Voters would then vote based on their opinion about whether the law should be upheld, rather than the qualifications of the candidates, which Dana saw was lamentable.[75] He may have had good reason to be concerned, as a few years later, temperance newspapers were recommending certain judicial candidates based on whether they committed to supporting prohibition.[76]

As a second example, Dana brought up the Fugitive Slave Law, which was a 1793 law that required authorities in free states to turn over slaves who had escaped bondage in the South.[77] Abolitionists fiercely resisted the law; northern juries refused to convict defendants accused of being runaway slaves,[78] northern states passed local laws to resist it, and northern papers decried it.[79] Delegate Dana was concerned voters would call for "[p]rinciples, and not men," prioritizing judges who would reject legal machinations of slavery.[80] This would

69. MASSACHUSETTS CONVENTION OF 1853, *supra* note 23, at 708.

70. Handelsman Shugerman, *Economic Crisis*, *supra* note 58, at 1088 .

71. 2 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 472 (1851), https://books.google.com/books?id=CEVuu9AFWIIC&q..

72. *Id.* at 477.

73. Masaru Okamoto, *The Maine Law of 1851: How the Prohibitionists Made It*, 16 AM. REV. 199, 199 (1982), https://www.jstage.jst.go.jp/article/americanreview1967/1982/16/1982_16_199/_pdf.

74. MASSACHUSETTS CONVENTION OF 1853, *supra* note 23, at 763.

75. *Id.* at 763-64.

76. *The Election of Judges*, BUFFALO COMMERCIAL, Sept. 19, 1855, at 2, https://www.newspapers.com/image/264598462/.

77. MICHAEL STOKES PAULSEN & LUKE PAULSEN, THE CONSTITUTION: AN INTRODUCTION 86 (2015).

78. RITA J. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 7 (1980).

79. STACY PRATT MCDERMOTT, THE JURY IN LINCOLN'S AMERICA 12 (2012).

80. MASSACHUSETTS CONVENTION OF 1853, *supra* note 23, at 764.

mean "the choice of the people will be considered as an expression of the law . . . and that the court must follow the voice of the people."[81] Dana said he disagreed with the Fugitive Slave Law, but said if an appointed judge upheld it against the popular will, he would take "one drop of comfort" from the fact that the decision was made by politically insulated judges.[82]

Delegate French responded to this point. "I would like to have judges elected by the people that they may not be so independent of them," he said, that if a defendant facing extradition under the Fugitive Slave Law came before the court, the judges "will be dependent enough to listen favorably to argument, and be able to give equal protection to all, or better reasons for refusing [relief to the fugitive]."[83] Both of these men treasured judicial independence so deeply that they deemed upholding slavery an acceptable price to pay for it.

Some criticisms of judicial elections have remained consistent over time. It seems to have always been conventional wisdom that the people are not up to the task of picking judges. John Adams said the 1795 French constitution's decision to provide for the election of judges, "will be found an instrument of party, instead of a sanctuary of justice."[84] Thomas Jefferson wrote to a friend in 1816 that it "has been thought that the people are not competent electors of judges learned in the law."[85] James Kent ruminated that the "fittest men would probably have too much reservedness of manners, and severity of morals, to secure an election resting on universal suffrage."[86] Arguing that popular outrage against a pro-corporate ruling was misguided, the *Chicago Tribune* sneered that farmers "are not a people who read and analyze judicial decisions. They seize upon the main facts as they are interpreted from the decisions in public utterances."[87] This mindset has not changed over the centuries.[88]

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81. *Id.* at 764.
82. *Id.* at 766.
83. *Id.* at 786.
84. Letter from John Adams to Abigail Adams Smith (Jan. 1, 1796), NATIONAL ARCHIVES, https://founders.archives.gov/?q=%22elective%20judiciary%22&s=1111311111&sa=&r=1&sr=#ADMS-04-11-02-0055-fn-0002.
85. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), AMERICAN HISTORY, http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl246.php.
86. JAMES KENT, COMMENTARIES ON AMERICAN LAW, lecture 14 (1830).
87. *Judge Lawrence's District*, CHI. TRIBUNE, Apr. 11, 1873, at 4, https://www.newspapers.com/image/349502696/.
88. Bam, *supra* note 27, at 555 ("[T]he voters, ignorant of judicial decisions and misled by deceptive television advertising, are unable to hold judges accountable for erroneous decisions, clear bias, or even unethical conduct."); *Demagogueism*, HARTFORD COURANT, Sept. 22, 1846, at 1, https://www.newspapers.com/image/369320220/ (recounting the criticism, "[l]aw is a science of which THE PEOPLE at the ballot box are not capable of judging, any more than they are of glass cutting, or calico printing");

Interestingly, many argued for switching over to elected judiciaries precisely because it would further judicial independence from the corrupt political branches. In the view of reformers, elective judiciaries would endow judges with "a true and god-like independence, based upon the popular will of the people."[89] Reformers in Pennsylvania believed proponents were certain that "where the magistrate is not elective, it becomes tyrannical."[90] Elections would provide a better way to knock off the rust of incompetent judges, too. From the founding of Massachusetts's constitution in the late eighteenth century to 1853, only one judge had been removed by the governor, and only three judicial officers had been impeached by the legislature.[91] This led to the strange situation where both supporters and opponents of judicial elections argued that their favored model would improve judicial independence.

### C. Media Coverage of Early Judicial Elections

Early judicial elections drew national interest. Papers around the country reported on the results of early judicial elections in other states.[92] And papers around the country seemed to buy into the idea that judges should be elected based on merit, not party.[93] "We do not believe that an election for Judges ought to be ever contested upon strict party grounds," intoned the Wisconsin *Rock River Pilot* in 1848.[94] Although a Vermont paper admitted it was happy with the

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Public Administration and Partisan Politics, Annals of the American Academy of Political and Social Science 186 (1916) https://www.google.com/books/edition/The_Annals_of_the_American_Academy_of_Po/ulA5AAAAMAAJ?hl=EN&gbpv=1&dq= ("Just as the people broadly lack acquaintance with the qualities which make for judicial strength so do they lack precise knowledge of the shortcomings of their servants in a field so involved and technical.").

89. Massachusetts Convention of 1853, *supra* note 23, at 711; *see also* Report of the Proceedings and Debates in the Convention to Revise the Constitution of the State of Michigan 204-05 (1850), https://babel.hathitrust.org/cgi/pt?id=mdp.39015071175213&view=1up&seq=1 (saying an elective judiciary would lead to an "independent supreme court system").

90. Harry L. Witte, *Judicial Selection in the People's Democratic Republic of Pennsylvania: Here the People Rule?*, 68 Temp. L. Rev. 1079, 1083 (1995) (citations omitted).

91. Massachusetts Convention of 1853, *supra* note 23, at 713-14.

92. *E.g.*, *Illinois*, Niles Nat'l Register, Oct. 18, 1848, at 3, https://www.newspapers.com/image/572072660/; *Wisconsin*, Greensboro Patriot, Oct. 21, 1848, at 1, https://www.newspapers.com/image/61983838/.

93. *E.g.*, *The Election of Surrogate and County Judges*, Williamsburgh Gazette & Long-Island Advertiser, at 2 (Apr. 28, 1847), https://www.newspapers.com/image/556665982 (speaking out against political involvement in the courts); *The Judicial Election*, Alton Weekly Telegraph, Sept. 1, 1848, at 2, https://www.newspapers.com/image/612857645/; *Judicial Elections*, Ripley Advertiser, Nov. 15, 1845, at 2, https://www.newspapers.com/image/334859435 ("All agree, that it is improper to mingle party in the choice of Judicial officers.").

94. *The Election on Monday*, Rock River Pilot, Aug. 2, 1848, at 2, https://www.newspapers.com/image/36998846/; *see also Democratic Nomination for the First*

judiciary results, it said "we . . . cannot rejoice that such an election should be made a political matter in any state."[95] The *New York Evening Post* said that a judge's party or base of support did not matter.[96]

Bizarre, given that papers of that era were unabashedly partisan.[97] Were they truly putting aside their political self-interests in service of the public good? Maybe. But there is reason to think much of the pious bleating was itself politically motivated. For one thing, papers could be self-contradictory. Wisconsin's *Sheboygan Mercury*, a Whig paper, wrote on September 14, 1850, that "[i]t is of the utmost importance that men lay aside their political prejudices in this judicial election, and go for the best man independent of all other considerations."[98] But the very next column of the paper attacked the Democratic judicial candidate as a partisan hack and called the Whig candidate a bipartisan unifier.[99] By praising the value of a non-partisan judicial election, papers may simply have been trying to burnish their reputation as fair-minded—a reputation that could then be deployed to assist their preferred candidate.

It may also be that by trying to downplay the importance of partisanship, newspapers thought they could bolster minority political parties that they supported. If voters simply toed the party line in judicial elections, the party with the most adherents would win. But if the race was portrayed as nonpartisan, there would be a chance for a judicial nominee for the minority party to slip in.

This façade was called out expressly on occasion. Writing on New York's judicial election, the *Washington Union* said that Whigs, "with their usual cant of hypocrisy," were arguing that parties should not nominate judges, but this was only because Whigs were a minority of

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*Judicial District*, S. PORT AM., July 21, 1848, at 2, https://www.newspapers.com/image/61450316/ ("We had hoped that the Judicial elections would have been conducted entirely independent of party considerations.").

95. *Untitled*, SPIRIT OF THE AGE, June 17, 1847, at 2, https://www.newspapers.com/image/443485033/.

96. *The Judicial Election on Monday*, N.Y. EVENING POST, June 5, 1847, at 2, https://www.newspapers.com/image/33778272/; *see also Election of Judges for the Districts*, N.Y. EVENING POST, May 21, 1847, at 2, https://www.newspapers.com/image/33778220/ (quoting the *Albany Statesman* as saying, "[a] partisan Judge has ever been held and should ever be held, in the greatest abhorrence. He is as bad, if not worse than a partisan priest").

97. James L. Baughman, *The Fall and Rise of Partisan Journalism*, CEN. FOR JOURNALISM ETHICS (Apr. 20, 2011), https://ethics.journalism.wisc.edu/2011/04/20/the-fall-and-rise-of-partisan-journalism/.

98. *Partizan Judges*, SHEBOYGAN MERCURY, Sept. 14, 1850, at 2, https://www.newspapers.com/image/38648891/.

99. *The Democrat*, SHEBOYGAN MERCURY, Sept. 14, 1850, at 2, https://www.newspapers.com/image/38648891/.

voters and could only hope to win by sowing confusion.[100] The *Detroit Tribune*, a Whig paper, made a plea for Democrats to vote for the "best man" in the 1851 judicial election.[101] In response, the *Detroit Free Press* mocked this "no-partyism" as a thinly-veiled attempt to "divide and distract the Democratic party" because the Whig candidate could not win in a fair fight.[102] "This 'no party' cry," the *Free Press* concluded, "is but a party cry after all."[103]

Little wonder a Whig paper would have incentive to muddy the water in the Great Lakes State. In the prior Michigan gubernatorial election, the Democratic candidate won 54% of the vote—which was about the same as the election before that.[104] It had been over a decade since the Whigs had won the governor's mansion in the state, and even then, they only eked out 51.64% of the vote.[105] Confusing some Democratic voters may have looked to be a solid strategy for Whigs.

For the reverse situation, look at the 1847 New York judicial election. There, the Whig Party would have appeared dominant. In the preceding gubernatorial election, the Whig candidate had prevailed.[106] Without any scientific polling to suggest otherwise, it would have been logical for both parties to assume that in a straight-up partisan fight, Whigs would come out on top. So it would stand to reason that Whigs would want their partisans to come out and vote for judges. Sure enough, a Whig convention held a few weeks before the election defeated a resolution that called for apolitical judicial elections.[107] The unsuccessful resolution stated that political partisans should not seek to "warp public opinion," judges should be selected solely based on "learning, talent and integrity," and "[j]udges should also be as far removed as possible from Political influences." .[108]

Whig papers were happy to make the election a political blood sport. The *Middlebury Galaxy* said "[w]e the Whigs have beat [the Democrats] triumphantly at the last two Elections in the State and

100. *From our New York Correspondent*, WASH. UNION, May 12, 1847, at 3, https://www.newspapers.com/image/319288702.

101. *No Partyism—The Best Man*, DETROIT FREE PRESS, Apr. 3, 1851, at 2, https://www.newspapers.com/image/118766219/.

102. *Id.*

103. *Id.*

104. *MI Governor [1849]*, OUR CAMPAIGNS, https://www.ourcampaigns.com/RaceDetail.html?RaceID=198279 (last visited Nov. 22, 2020).

105. *MI Governor [1839]*, OUR CAMPAIGNS, https://www.ourcampaigns.com/RaceDetail.html?RaceID=198184 (last visited Nov. 22, 2020).

106. *Gov. John Young*, NAT'L GOVERNORS ASS'N, https://www.nga.org/governor/john-young/ (last visited Dec. 12, 2020).

107. N. Bowditch Blunt, *A Card*, N.Y. TRIBUNE, May 31, 1847, at 2, https://www.newspapers.com/image/78619842/.

108. *Id.*

City."[109] The *New York Tribune* intoned that "it has become the severe but unquestionable duty of the Whigs to vote their exclusive party ticket."[110] Any other course of action "would be an acknowledgment, that our opponents had made better selections than we have done: an admission that neither courtesy demands nor truth warrants."[111] The *Poughkeepsie Journal* wrote "[l]et the people then turn out in full force, the whigs especially, and all will be well."[112]

Likely predicting a partisan route, the Democratic paper *New York Daily Herald* told its readers, "[a]bove all things, we beseech them not to allow party differences, or sectarian or narrow views, to influence their judgment or their votes."[113] This high-minded view did not prevent the *Herald* from exclusively endorsing the Democratic candidates, however.[114]

As the next few sections will demonstrate, all of these sorts of partisan tendencies would play out in races around the country. Three case studies will be examined: Mississippi in 1847, New York in 1847, and Illinois in 1873.

## III. MISSISSIPPI'S 1847 JUDICIAL ELECTION

### A. Debts and Banks Roil State Politics

Mississippi was the first state to make all judges elective in 1832.[115] Being a first-mover drew controversy. The policy was framed as a victory for the "whole hogs" over the "aristocrats."[116] Opponents of the judicial election feared that populists on the bench would make property rights "the sport of popular caprice."[117] Henry Clay went so far as to argue to the United States Supreme Court that the decisions by elected judges in Mississippi should not be

109. William Penn, *Judicial Elections*, Middlebury Galaxy, June 8, 1847, at 3, https://www.newspapers.com/image/73553511/.

110. *The Election To-Day*, N.Y. Tribune, June 7, 1847, at 2, https://www.newspapers.com/image/61344073/.

111. *Id.*

112. *The Election at Hand*, Poughkeepsie J., June 5, 1847, at 2, https://www.newspapers.com/image/115221625/; *see also The Coming Judicial Election*, Poughkeepsie J., May 29, 1847, at 2, https://www.newspapers.com/image/115221617 ("[W]e earnestly entreat the whigs of this county to bestir themselves at once to bring out a strong and full vote. A full vote is a whig victory always when a fair issue is made.").

113. *The Judicial Election*, N.Y. Daily Herald, June 7, 1847, at 2, https://www.newspapers.com/image/466574510/.

114. *Id.*

115. Bam, *supra* note 27, at 558. More than a decade after the fact, the state was still bragging about this. Albert G. Brown, *The Inaugural Address*, Vicksburg Whig, Jan. 15, 1844, at 2, https://www.newspapers.com/image/224821494/.

116. Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 Stan. L. Rev. 1373, 1393 (1992).

117. *Id.* at 1392.

respected.[118] Additionally, the *Vicksburg Whig* worried that voters would become all-consumed with judicial elections, neglecting their civic duties with other offices.[119] "Like the rod of Aaron," it said, judicial elections "would swallow up all the rest and reduce the elections of members of the Legislature and Governors to matters of secondary concern."[120]

Though judicial elections may not have "swallowed up" other elections, they did become mired in politics. One might not know this glancing at the newspapers. It was fashionable to declare that judicial elections were above political considerations.[121] But this did not last. Once the judicial election heated up, the papers would revert to their partisan instincts. One Democratic paper wrote an article about the need to elect judges based on ability, not politics, but said its preferred candidate was the only one who "stood up for the doctrine of State Rights and the true principles of the constitutional compact, at a perilous juncture in the destiny of the Union."[122] Another paper mocked how the *Southron* (a Whig standby) relentlessly attacked the political opinions of a candidate for judge, while at the same time decrying the politicization of judicial elections.[123]

In the 1847 election, the big issues were banks and debts. Banks had long been divisive in Mississippi politics, driven by debt. By the mid-nineteenth century, the several states collectively owed $200 million to European creditors, and the country was swept up in a wave of financial speculation.[124] As future United States Supreme Court Jus-

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118. *Id.* at 1394. At Iowa's constitutional convention, a delegate condemned Mississippi as "an instance of badly-administered laws, connected with popularly elected Judges." Handelsman Shugerman, *Economic Crisis*, *supra* note 58, at 1092. The view that elected judges are somehow less qualified to render decisions still lives on. *E.g.*, Fitzpatrick, *supra* note 26, at 840 ("Federal judges have the requisite independence to perform this task [regulating majorities]; state judges, largely dependent on elections to win and keep their jobs, do not.").

119. *The Judiciary No. X*, VICKSBURG WHIG, Oct. 14, 1831, at 3, https://www.newspapers.com/image/225030570/.

120. *Id.*

121. *E.g.*, Anderson Hutchinson, *Untitled*, SO. SUN, Oct. 1, 1839, at 2, https://www.newspapers.com/image/224113783 ("[W]e have distinctly declared that judicial elections should NOT be governed by party considerations . . . ."); *Orders of the Day*, SOUTHRON, Jan. 21, 1846, at 1, https://www.newspapers.com/image/224599872/ (writing about the need to "keep the judiciary free from the filthy, muddy and corrupting slime of partisan strife"); *Untitled*, VICKSBURG WEEKLY SENTINEL, Mar. 17, 1846, at 2, https://www.newspapers.com/image/224365928/ (claiming it refused to run a piece that would "array *political* feelings in a *judicial* election").

122. *The Election of Chancellor*, ST. RIGHTS & DEMOCRATIC UNION, Oct. 23, 1839, at 3, https://www.newspapers.com/image/465135869.

123. *Jackson Southron*, VICKSBURG TRI-WEEKLY SENTINEL, July 11, 1845, at 3, https://www.newspapers.com/image/224347840/.

124. BENJAMIN ROBBINS CURTIS, AN ARTICLE ON THE DEBTS OF THE STATES: FROM THE CHRISTIAN REVIEW FOR MARCH, 1844, 4 (Boston, W.S. Damrell 1844), https://babel.hathitrust.org/cgi/pt?id=mdp.39015077865437&view=1up&seq=7.

tice Benjamin Curtis described, "[t]he ordinary and old fashioned method of getting rich," by creating things of value, "was abandoned as obsolete."[125] In its place, ambitious men would borrow, buy up anything they could, wait until bidding drove up prices, sell, and then borrow some more.[126] This was highly profitable for men with money or access to credit—such as lawyers, doctors, or judges—but disastrous for those without.[127] For "the pressure fell rather heavily upon poor men," who watched the speculators drive up prices until they "were obliged to pay three times its value for a barrel of flour or a leg of bacon."[128]

Of course, this bubble had to burst eventually. In the 1840s, a number of states and territories defaulted on their debts.[129] Most of the states reconciled with their creditors and passed constitutional restrictions on indebtedness.[130] But Mississippi repudiated millions of dollars' worth of public debt it owed to banks.[131] Jacksonian Democrats cheered on the idea of repudiation, believing that taxpayers should be privileged over lenders, but Whigs believed repudiation was bad for the economy and undermined property rights.[132] The Democratic view carried the day, as a new legislature was sworn in and passed a resolution endorsing the repudiation of the debt.[133] Meanwhile, the executive and legislative branches "engaged in a war against the state's banks," in the words of one commentator.[134]

### B. Courts Wade into the Banking Controversy

In 1840, the legislature passed a law that forbade banks from transferring debts between one another.[135] This law was ultimately upheld by the courts.[136] A separate law empowered district attorneys,

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125. *Id.*
126. *Id.*
127. *Id.* at 5.
128. *Id.*
129. Clifford Thies, *Repudiation in Antebellum Misssissippi*, 19 Independent Rev. 191, 191 (2014), https://www.independent.org/pdf/tir/tir_19_02_02_thies.pdf.
130. *Id.*
131. *Id.* This came on the heels of the financial panic of 1837, where Mississippi repudiated more debt (mostly lent by foreign investors) than all other defaulting states combined. Sarah Ludington, Mitu Gulati & Alfred L. Brophy, *Applied Legal History: Demystifying the Doctrine of Odious Debts*, 11 Theoretical Inq. L. 247, 269-70 (2010). It got so bad that John Quincy Adams proposed that the United States should deny protection to Mississippi if international creditors attacked. Thies, *supra* note 129, at 192.
132. Ludington, Gulati & Brophy, *supra* note 131, at 270.
133. Thies, *supra* note 129, at 192.
134. *Id.*
135. Payne, Green & Wood v. Baldwin, Vail & Hufty, 11 Miss. 661, 674 (1844).
136. *Id.* at 682. A few years later, it was struck down by the United States Supreme Court. Planters' Bank of Miss. v. Sharp, 47 U.S. (6 How.) 301 (1848).

if they had reason to believe that a bank was violating its charter (known as forfeiture), to enjoin the bank from collecting any debt until the alleged violation is adjudicated.[137] It too was upheld.[138] A third law decreed that upon a judgment of forfeiture against a bank, it would be up to court-appointed trustees to collect the outstanding debts of the erstwhile bank.[139] However, in *Nevitt v. Bank of Port Gibson*,[140] one debtor argued that when a bank forfeited its charter, the debt he owed to it should be discharged completely, rather than merely passed to a trustee to collect.[141] The Mississippi Supreme Court, however, refused to go this far, holding that the trustee was empowered to collect the debt.[142]

When the court upheld this provision, debtors denounced the judiciary and the judges themselves, calling for not only legislation but also for the election of pro-debtor judges.[143] They wanted a candidate "whose opinion[s] [were] known" as unfavorable to the idea that trustees could collect debts.[144]

After *Nevitt*, the legislature quickly passed a new law to prevent trustees from collecting on behalf of defunct banks.[145] Banks brought the issue to court in *Commercial Bank of Natchez v. Chambers*.[146] The court, through Chief Justice William L. Sharkey, held that a trustee appointed before 1846 could not be disempowered retroactively by the new law.[147] The effect of the *Chambers* decision was to compel certain bank debtors, who had hoped to escape liability when the bank dissolved, to pay their debts to a trustee.[148]

Chief Justice Sharkey further antagonized the anti-bankers with his dissent in *Commercial Bank of Rodney v. State*.[149] The majority held that the government could enjoin banks from collecting debts if there was an action to dissolve the bank's charter, but Chief Justice Sharkey wrote separately arguing an injunction should not have been

137. Commercial Bank of Rodney v. State, 12 Miss. 439, 482-83 (1845).
138. *Id.* at 490.
139. Nevitt v. Bank of Port Gibson, 14 Miss. 513, 521 (1846).
140. 14 Miss. 513 (1846).
141. *Nevitt*, 14 Miss. at 521.
142. *Id.* at 573.
143. DUDLEY S. JENNINGS, NINE YEARS OF DEMOCRATIC RULE IN MISSISSIPPI: BEING NOTES UPON THE POLITICAL HISTORY OF THE STATE, FROM THE BEGINNING OF THE YEAR 1838, TO THE PRESENT TIME 280 (1847).
144. *Id.* at 281.
145. *The Banks and the High Court*, WEEKLY MISS., Mar. 26, 1847, at 2, https://www.newspapers.com/image/214389162/.
146. Commercial Bank of Natchez v. Chambers, 16 Miss. 9 (1847).
147. *Id.* at 61.
148. Jennings, *supra* note 143, at 277.
149. Commercial Bank of Rodney v. State, 12 Miss. 439 (1845). *The Banks and the High Court*, *supra* note 145, at 2 (noting that the legislature passed a law to refute this ruling in *Bank of Rodney*).

allowed.[150] He also voted with the majority in the case that upheld the right of trustees to collect debts in *Nevitt*,[151] and again in a decision that individuals could not get out of a debt contract by showing that the bank violated its charter by charging excessive interest rates.[152]

### C. The Judicial Election Heats Up

The pro-bank rulings "created very general and intense interest, throughout the State. It has had the effect of producing a strong opposition to some of the judges now on the bench."[153] And after *Chambers*, there were calls for the Democratic governor to "stand by the people" and run for the state supreme court to reverse the decision.[154] One Democratic paper deemed *Chambers* a "crisis in our judicial history."[155] The Hinds County Democratic convention required its candidates to "vote against Sharkey."[156] In his place, the anti-bankers wanted "a judge who will be slow to declare the solemn acts of the Legislature unconstitutional; and who will long hesitate before he will venture to disturb the settled law and policy of the country."[157] At one Democratic Convention, delegates introduced and passed a motion that called upon the convention to nominate a judicial candidate "irrespective of party, and who does not believe that the broken bank charters are omnipotent."

The Whigs responded in force. The Whig paper *Southron* said banks "should be strengthened" as a "measure of State Rights," and accused the anti-bankers of trying to use judges to wipe out their own debts.[158] It bemoaned the idea that a judge might "go on the bench

150. *Bank of Rodney*, 12 Miss. at 518-19.

151. Nevitt v. Bank of Port Gibson, 14 Miss. 513, 531 (1846) ("The act in effect declares the assets of the bank to be a trust fund for the payment of debts, and makes it the duty of the trustees to collect them. This is a trust which would be enforced in a court of equity, without any further legislation.").

152. Grand Gulf Bank v. Archer, 16 Miss. 151, 173 (1847) ("Forfeiture or violation of charter cannot be enforced, or set up in defence by any third person, either directly or collaterally, to avoid compliance with the contract." (internal citations omitted)). It probably did not do Justice Sharkey any favors that he was a director of a bank. Arthur v. President, Dirs. & Co. of Commercial & R. Bank, 17 Miss. 394 (1848) (noting in the Lexis page that Chief Justice Sharkey recused himself because he was a director in the bank).

153. *Judicial Elections*, Miss. Free Trader, May 8, 1847, at 2, https://www.newspapers.com/image/235271742/.

154. Jennings, *supra* note 143, at 286.

155. *Id.* at 278.

156. *Id.* at 288.

157. *Mississippi Politics*, Daily Nashville Union, Apr. 23, 1847, at 2, https://www.newspapers.com/image/603923391.

158. *The Suppressed Resolution*, Southron, May 28, 1847, at 2 (italics omitted), https://www.newspapers.com/image/224606848/.

*pledged* by his '*ascertained*' views to decide them out of debt . . . for a judge must hear the case, see the evidence, and apply the law, before his views can be *ascertained*."[159] The Democratic campaigns were called part of a "war upon the judiciary" by one commentator.[160] A Whig paper condemned that some people have been claiming the "monstrous ideas . . . that candidates for the office of Judge should be pledged as to the decisions they will give upon questions that may come up before them if elected."[161] One paper said that judges who upheld the anti-bank laws "violate their official oath, and deserve to be confined in the penitentiary."[162] Anyone voting for the Democratic judicial candidate, according to the Whigs, did so solely as a means to clear out their debts.[163]

But the populists probably would not have viewed their own actions as radical. When anti-bank legislation had first been passed, they believed that "the Bankers, Money-Changers, and [the] Pocket-Politicians" instantly attacked the law, shelling out large fees to hire the "leading whig lawyers" to undo legislation through the courts.[164] It was the bankers who were engaging in a "crusade" against regulation, and who used their power to "harass the people, fill the courts with never-ending litigation, and to tax the country with enormous expense."[165] All this for no other reason than to "enrich a few Trustees, who cling like vultures to the miserable remains of the defunct Banks."[166] Electing new justices was "the only remedy, since the action of both the co-ordinate branches of the government—the legislative and executive—have been disregarded."[167]

Democratic papers also claimed that *they* were the true beacons of judicial independence. Justice Sharkey's views, after all, were well known through the opinions he published,[168] and he was reportedly campaigning by defending his opinions.[169] This made Justice

159. *Id.* (italics in original).
160. Jennings, *supra* note 143, at 289.
161. *General Remarks on the Constitution and the Judicial*, VICKSBURG DAILY WHIG, June 5, 1847, at 2, https://www.newspapers.com/image/228896824/.
162. *The Judiciary Again*, SOUTHRON, Aug. 2, 1847, at 2, https://www.newspapers.com/image/224608013/.
163. *Squirming of the Supporters of a Political Party Judiciary*, SOUTHRON, Sept. 17, 1847, at 2, https://www.newspapers.com/image/224608317/.
164. *The Banks and the High Court*, WEEKLY MISS., Mar. 26, 1847, at 2 (italics removed), https://www.newspapers.com/image/214389162/.
165. *Id.*
166. *Id.*
167. *Mississippi Politics*, DAILY NASHVILLE UNION, Apr. 23, 1847, at 2, https://www.newspapers.com/image/603923391.
168. *Untitled*, WEEKLY MISSISSIPPIAN, Aug. 27, 1847, at 2, https://www.newspapers.com/image/214399478/.
169. *The Judicial Election*, WEEKLY MISSISSIPPIAN, Sept. 10, 1847, at 2, https://www.newspapers.com/image/214400497/.

Sharkey, the Democratic papers claimed, the "pledged candidate," meaning the one who had pre-judged the issue.[170] Judge Wilkinson, the Democratic candidate, was portrayed as the one who "will go upon the bench prepared to listen to arguments" before making his decision.[171] Whigs were making the opposite argument.[172]

In the end, Justice Sharkey won reelection, and there was much rejoicing among Whig papers.[173] A couple of years later, at the next judicial election, little had changed.[174] The *Vicksburg Whig* published a "dialogue between three voters" where they disparaged a candidate for a judgeship, including attacking a specific decision he made. A Democratic paper attacked the Whig candidate for having worked as a bank attorney in the past, and said he was "committed for the Banks and against the people, on all the great questions which will come up for decision."[175]

## IV. NEW YORK'S 1847 JUDICIAL ELECTION

### A. Manor Lords and the Anti-Rent Movement

When its colonial government was young, New York bequeathed vast parcels of land to about thirty families, some two million acres of land in all.[176] A few of these land grants were broken up early, and many were passed down, father to son, for generations.[177] These landlords ended up with vast estates that could be anywhere from 3,000 to 750,000 acres,[178] more than three quarters the size of Rhode Island. Political and economic power resided in this landed gentry,

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170. *Id.*

171. *Id.*; *see also Judicial Election*, Weekly Mississippian, Sept. 24, 1847, at 2, https://www.newspapers.com/image/214401441/.

172. *Squirming of the Supporters of a Political Party Judiciary*, Southron, Sept. 17, 1847, at 2, https://www.newspapers.com/image/224608317/. Whigs also claimed that Judge Wilkinson—depending on where he was campaigning—argued either that it was necessary to vote for Democratic judges to interpret the law, or that politics had no place in the justice system. *E.C. Wilkinson*, Vicksburg Daily Whig, Oct. 16, 1847, at 2, https://www.newspapers.com/image/228891700.

173. *Eureka! The State and the Constitution safe! Judge Sharkey re-elected beyond all question! All hail, the independent and conservative Democracy!*, Southron, Nov. 5, 1847, at 2, https://www.newspapers.com/image/224608550/.

174. Sharkey continued serving on the court until 1851, after which point he was appointed to a variety of other high governmental posts. *Gov. William Lewis Sharkey*, Nat'l Gov. Ass'n, https://www.nga.org/governor/william-lewis-sharkey/ (last visited Dec. 28, 2021).

175. Philo Publicus, *Signal—Extra*, Miss. Free Trader & Natchez Gazette, Sept. 19, 1849, at 2, https://www.newspapers.com/image/263857976.

176. Sung Bok Kim, Land and Tenant in Colonial New York; Manorial Society, 1664-1775, at vii (1978).

177. *Id.*; People v. Van Rensselaer, 9 N.Y. 291 (1853) (case involving a parcel of land that was passed down from father to son for 150 years).

178. Reeve Huston, *The Parties and "The People": The New York Anti-Rent Wars and The Contours of Jacksonian Politics*, 20 J. Early Republic 241, 241 (2000).

and it was also the social strata from which appointed judges were drawn.[179] Judges of this stock could be counted on to rule in favor of landlords.[180] But these lands would not till themselves. For that, the manor lords would need agricultural tenants, and they attracted thousands to New York, more than any other colony.[181]

By the middle of the nineteenth century, one-twelfth of New Yorkers lived on farms, town lots, and mill sites that were rented from these landlords on long-term or perpetual leases,[182] which demanded payment "so long as grass grows and water runs."[183] The leases were incredibly lucrative for the landlords. Perpetual leases meant perpetual rent, and perpetual rent meant that no matter how much money a tenant sunk into the land, he could never hope to own it.[184] Until 1846, profits from rents were not taxed at all.[185] The tenant had to bear any maintenance cost and pay any tax on the land, but the landlord was entitled to a quarter of any proceeds the tenant made by selling their lease—even if the price of the lease was inflated by improvements to the land that the tenant had financed.[186] Pinching tenants further, the Erie Canal and other internal improvements meant that western farmers could ship goods out east to compete, and many New York farmers had exhausted the soil, inhibiting their ability to grow crops.[187]

Casting embers on this tinder pile was the 1839 death of Stephen Van Rensselaer III, manor lord for the largest estate in New York, which stretched over five counties.[188] Though Rensselaer was a major-general, he had a soft heart when it came to debt collection.[189] Over the years, his manifold tenants had accrued $400,000 in unpaid rent.[190] His son was not as benevolent. Stephen Van Rensselaer IV

179. Patrick Wilson Dunn, *Judicial Selection in the States: A Critical Study with Proposals for Reform*, 4 HOF. L. REV. 267, 278 (1976).

180. *Id.*

181. Bok Kim, *supra* note 176, at vii.

182. Huston, *supra* note 178, at 241.

183. HENRY WYSHAM LANIER, A CENTURY OF BANKING IN NEW YORK, 1822–1922, at 305 (1922), https://quod.lib.umich.edu/m/moa/1118871.0001.001?view=toc;q1=anti-rent.

184. Eric Kades, *The End of the Hudson Valley's Peculiar Institution: The Anti-Rent Movement's Politics, Social Relations, and Economics*, 27 LAW & SOC. INQUIRY 941, 942 (2002) (reviewing HUTSON REEVE, LAND AND FREEDOM: RURAL SOCIETY, POPULAR PROTEST, AND PARTY POLITICS IN ANTEBELLUM, NEW YORK (2000), and CHARLES MCCURDY, THE ANTI-RENT ERA IN NEW YORK POLITICS (2001)).

185. Buffalo v. Le Couteulx, 15 N.Y. 451, 452 (1857).

186. Kades, *supra* note 184, at 943-44.

187. *Id.* at 944.

188. JAMES SULLIVAN, 4 HISTORY OF NEW YORK STATE, 1523–1927, at 1689 (1927), https://quod.lib.umich.edu/m/moa/1262471.0004.001?view=toc;q1=anti-rent.

189. *Id.*; GEORGE E. BAKER, THE LIFE OF WILLIAM H. SEWARD WITH SELECTIONS FROM HIS WORKS 60 (George E. Baker ed., 1855), https://quod.lib.umich.edu/m/moa/abj4572.0001.001?view=toc;q1=anti-rent.

190. Sullivan, *supra* note 188, at 1689.

started suing to collect back rent from delinquent tenants almost at once.[191] Tenants reacted by rising up destroy the wealthy estates and distribute the land to the farmers who lived on it.[192] By 1845, tens of thousands of farmers had joined the movement, known as the Anti-Rent Wars.[193] They lobbied the government, organized rent strikes, funded litigation, willfully resisted legal process for rent collection, and, occasionally, resorted to violence.[194] These populists claimed that "laws which give some men a thousand times as much land as they can use and thus deprive millions of any at all, are invalid, being contrary to the fundamental principles of our Government."[195]

Eighteen-forty-five is also the year when the Anti-Rent Wars spilled into the courtroom. In December 1844, a mob of 2,000 blocked a sheriff from serving a debt collection notice on a tenant, holding up the constable at gunpoint and burning the notice.[196] Governor Silas Wright called in the state militia to restore order and the leader of the protesters—Dr. Smith "Big Thunder" Boughton—was arrested, jailed, and tried for robbery in March 1845.[197] Judge Amasa J. Parker presided, New York Attorney General John Van Buren (and son of President Martin Van Buren) prosecuted, and Ambrose L. Jordan defended the accused.[198] Seven weeks of trial, two judges, one mistrial, and one fist-fight between attorneys later, Dr. Boughton was sentenced to life in prison.[199]

The trial created a national stir, and public sympathies for the Anti-Renters were strong enough to replace Governor Wright with John Young, who promptly pardoned the Anti-Renters, and replaced Attorney General Van Buren with Ambrose Jordan.[200] But the Anti-Rent movement was not done. It contributed to amending the New York Constitution in 1846 to allow for the election of judges.[201] The Anti-Rent delegates supported judicial elections, hoping they could install like-minded judges.[202] Radical leader and delegate Michael Hoff-

191. Kades, *supra* note 184, at 945.
192. Huston, *supra* note 178, at 241.
193. *Id.*
194. Kades, *supra* note 184, at 945-46.
195. Huston, *supra* note 178, at 242.
196. *The Anti-Rent War Prosecution of Dr. Smith Boughton (1845)*, HIST. SOC'Y N.Y. CTS., https://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-04/history-new-york-legal-eras-people-boughton.html (last visited Dec. 10, 2020).
197. *Id.*
198. *Id.*
199. *Id.* As a result of the fight, prosecutor Van Buren and the defense attorney were both sentenced to 24 hours in solitary confinement. *Id.*
200. Sullivan, *supra* note 188, at 1689–1690.
201. Wilson Dunn, *supra* note 18, at 279.
202. Handelsman Shugerman, *Economic Crisis*, *supra* note 58, at 1092. Indeed, several of the strongest advocates for judicial election were affiliated with Anti-Rentism, including Ambrose Jordan. *Id.* at 1111-12.

man wanted courts to use "Judicial Legislation" to "reverse 'unjust' rules and laws."[203] The *New York Evening Post* opposed judicial elections in part because they feared Anti-Renters would nominate Big Thunder, rather than a professional judge.[204]

### B. New York's First Judicial Election

The constitution went into effect on January 1, 1847, and the first judicial elections were set for that spring.[205] Writing on the upcoming elections, the *Buffalo Pilot* detected "a very general desire among men of all parties" that the contest would be non-political and "hope[d] that neither party will make nominations for the office."[206]

So much for that. An anti-bank wing of the Democratic Party, known derisively as "Loco Focos," held conventions around the state to nominate judicial candidates, and Whigs moved to follow suit.[207] Some Democrats met at Tammany Hall to nominate judges.[208] Anti-Renters and an Independent Lawyers' Ticket would also go on to nominate judges,[209] with an Anti-Rent convention being held.[210] When Whig candidates were nominated, Whig papers dutifully blazoned their names on their pages and extolled their qualifications.[211] By the week of the election, an out-of-state paper summed up how "[t]he judicial election in New York is to be conducted on strict party grounds."[212] There was some discussion of a unity ticket between the Whigs and Democrats, but this fell apart.[213]

The Anti-Renters naturally wanted judges who would look out for their interests. But rather than trying to nominate a unique slate of candidates, Anti-Renters instead endorsed and nominated candidates who were put forth by other parties. One of their high court nominees

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203. *Id.* at 1090.

204. *Demagogueism*, Hartford Courant, Sept. 22, 1846, at 1, https://www.newspapers.com/image/369320220/

205. *First Election Under the New Constitution*, N.Y. Evening Post, Nov. 12, 1846, at 2, https://www.newspapers.com/image/39632066/.

206. *Id.*

207. *Loco Foco Movements*, Poughkeepsie J., May 1, 1847, at 2, https://www.newspapers.com/image/115240260/.

208. *An Adjourned Meeting* N.Y. Evening Post, May 20, 1847, at 3, https://www.newspapers.com/image/33778217/.

209. *Judicial Nominations*, N.Y. Daily Herald, May 21, 1847, at 2, https://www.newspapers.com/image/466573535.

210. *Anti-Rent Nominations*, Evening Post, May 8, 1847, at 1, https://www.newspapers.com/image/33778179/.

211. *E.g.*, *Judicial Election*, Poughkeepsie J., May 15, 1847, at 2, https://www.newspapers.com/image/115221603/.

212. *Untitled*, Miss. Free Trader, June 3, 1847, at 2, https://www.newspapers.com/image/235271786/.

213. William Penn, *Judicial Elections*, Middlebury Galaxy, June 8, 1847, at 3, https://www.newspapers.com/image/73553511/.

was Ambrose Jordan, who had defended the Anti-Renter leader, and another was John Young, the governor who pardoned Anti-Renters.[214] Both were Whigs.[215] A third Anti-Rent candidate was Addison Gardiner,[216] a man that the Anti-Renters had previously nominated for lieutenant governor.[217] Gardiner was labeled both a Democrat[218] and a Whig,[219] depending on the source.

The *Buffalo Commercial* said about the Anti-Rent nominees, "[t]he presumption is that they know the men thus nominated, and have reason to believe them favorable to their views. An imputation, therefore, of the gravest character, rests upon these nominees."[220] The *Utica Gazette* claimed the Anti-Renters' goal was "to make Courts which will construe the laws so as to put the landlords out and the tenants in possession of the coveted property, which will give judgment in favor of debtors, and acquit the mobbers and murderers of Sheriffs."[221] With news of an Anti-Rent convention, the *New York Daily Herald* said the "tenantry" would propose a settlement with the Van Rensselaer family, the exact amount of which to be determined by judges they hoped to elect.[222]

Some had a kneejerk reaction opposing the Anti-Rent candidates. The *Rochester Democrat* described Anti-Rentism as "disorganizing and jacobinical."[223] The *Evening Post* claimed that unnamed sources were saying "it is our duty to show the Anti Renters that nobody whom they support can be elected to any office."[224] After Jordan received the Anti-Rent endorsement, the *Brooklyn Evening Star* wrote

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214. *The Tribune and the Whig Party*, BUFFALO COMMERCIAL, Aug. 5, 1847, at 2, https://www.newspapers.com/image/264294242/.

215. *Anti-Rent Nominations*, EVENING POST, May 22, 1847, at 2, https://www.newspapers.com/image/33778224/.

216. *Judicial Election To-Day, June 7*, N.Y. TRIBUNE, June 7, 1847, at 2, https://www.newspapers.com/image/61344073/.

217. Eldridge H. Pendleton, Silas Wright and the Anti-Rent War, 1844–1846 114 (Jan. 1968) (M.A. thesis, North Texas State University), https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.881.5075&rep=rep1&type=pdf. Anti-Renters even wrote a campaign song urging support for Young and Gardiner when they were running for governor and lieutenant governor, respectively. *Id.* at 128.

218. *Our Appeal Judges*, N.Y. TRIBUNE, May 31, 1847, at 2, https://www.newspapers.com/image/78619842/.

219. *Anti-Rent Nominations*, EVENING POST, May 22, 1847, at 2, https://www.newspapers.com/image/33778224/.

220. *Party–Journals and Judges*, N.Y. TRIBUNE, May 29, 1847, at 2, https://www.newspapers.com/image/78619796.

221. *Id.*

222. *Anti-Renterism and the Judiciary*, N.Y. DAILY HERALD, May 28, 1847, at 4, https://www.newspapers.com/image/466574010/.

223. *Our Appeal Judges*, N.Y. TRIBUNE, May 31, 1847, at 2, https://www.newspapers.com/image/78619842/.

224. *The Judicial Election on Monday*, EVENING POST, June 5, 1847, at 2, https://www.newspapers.com/image/33778272.

that every person should "treat all such nominations with contempt."[225] There were reports that both members of the Whig and Democratic parties were telling their voters to out their own partisan nominees because that nominee was supported by the Anti-Renters, though it is not clear this was a widespread view.[226] One paper worried that in "an anti-rent district," judicial candidates will be selected "according as he is known to favor or disapprove of the peculiar doctrines of the anti-rent school."[227]

All sides hyped up the maiden judicial election.[228] The *Poughkeepsie Journal* termed it "the most important election which [people] have ever been called to engage in."[229] According to the *New York Daily Herald*, "our judicial elections will be more important to the welfare of the State and the county than any others."[230]

Results were anticlimactic, given the buildup. Only 25,000 votes were cast, less than half of the number who participated in the last presidential election.[231] A local paper said the "most striking feature of the election just closed, is the small number of votes cast either way."[232] Michigan's *Ypsilanti Sentinel* remarked that the New York election "passed off with but little interest . . . . The vote was every where light."[233]

Low turnout notwithstanding, the outcome was clear: the "entire Whig county and city ticket [was] defeated."[234] Democrats ended up carrying the day.[235] Because the Anti-Renters had hitched their wagons to the Whigs, they too were dragged down. Two New York Court

225. *Another Declination*, BROOKLYN EVENING STAR, May 26, 1847, at 2, https://www.newspapers.com/image/117457839/.

226. *Our Appeal Judges*, N.Y. TRIBUNE, May 31, 1847, at 2, https://www.newspapers.com/image/78619842/.

227. *The Judiciary*, HARTFORD COURANT, Sept. 30, 1846, at 2, https://www.newspapers.com/image/369321095/.

228. *Most Important Election Nigh at Hand*, BROOKLYN DAILY EAGLE, Apr. 24, 1847, at 2, https://www.newspapers.com/image/50247539/.

229. *The Election at Hand*, POUGHKEEPSIE J., June 5, 1847, at 2, https://www.newspapers.com/image/115221625/.

230. *The Judicial Election*, N.Y. DAILY HERALD, June 9, 1847, at 2, https://www.newspapers.com/image/466574593.

231. *New-York City Judiciary Election*, BROOKLYN EVENING STAR, at 2, June 9, 1847, at 2, https://www.newspapers.com/image/117459255.

232. *The Judicial Election*, N.Y. DAILY HERALD, June 9, 1847, at 2, https://www.newspapers.com/image/466574593/.

233. *Judicial Elections*, YPSILANTI SENTINEL, June 16, 1847, at 2, https://www.newspapers.com/image/171984316. This was not unique. Wisconsin's first judicial election the following year saw low turnout, too. *Judicial Election*, S. PORT AM., Aug. 11, 1848, at 2, https://www.newspapers.com/image/61450363.

234. *The Election*, BUFFALO COMMERCIAL, June 9, 1847, at 2, https://www.newspapers.com/image/264285966.

235. *Judicial Election in Dutchess*, POUGHKEEPSIE J., June 12, 1847, at 2, https://www.newspapers.com/image/115221632/.

of Appeals candidates, Frederic Whittlesey and Ambrose L. Jordan, the candidates endorsed by Anti-Renters, were defeated despite receiving several thousand Anti-Rent votes.[236] Obituaries for the Anti-Rent movement were quickly drawn up.[237] Whigs started calling the newly sworn-in Democratic judges corrupt and inept,[238] grumbled that the judicial election was "not a fair test of political strength,"[239] and blamed their misfortune on their association with Anti-Renters.[240] Addison Gardiner, at least, was elected, and earned a reputation as a "true progressive."[241]

For decades, courts were hostile toward tenants. In 1848, one judge said, "[w]e cannot yield to an abhorrence of what is called the anti rent movement, marked as it has been by violence, arson and bloodshed."[242] The New York Court of Appeals—the state's highest tribunal—affirmed a slew of pro-landlord rulings,[243] and reversed anti-landlord rulings.[244] The intermediate appellate court upheld a life estate for a lease even though the constitution forbade any leases for a period of twelve years.[245] Life never got easy for tenants in New York. In the early twentieth century, New Yorkers were again engaged in what was called, "The Great Rent Wars."[246]

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236. *The Tribune and the Whig Party*, BUFFALO COMMERCIAL, Aug. 5, 1847, at 2, https://www.newspapers.com/image/264294242/.

237. *Anti-Rent*, BUFFALO COMMERCIAL, Oct. 20, 1847, at 2, https://www.newspapers.com/image/264269719/ (pronouncing the Anti-Rent movement "dead and buried").

238. *New Movement*, POUGHKEEPSIE J., Oct. 23, 1847, at 2, https://www.newspapers.com/image/115222413/; *Judicial Election in Dutchess*, POUGHKEEPSIE J., June 12, 1847, at 2, https://www.newspapers.com/image/115221632/.

239. *Untitled*, DAILY NASHVILLE UNION, June 29, 1847, at 2, https://www.newspapers.com/image/603928781/.

240. *N.Y. Judicial Election*, MIDDLEBURY GALAXY, June 29, 1847, at 2, https://www.newspapers.com/image/73579401/.

241. *Addison Gardiner*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/biography/addison-gardiner/ (last visited Dec. 12, 2020).

242. Lord v. Brown & Bouck, 5 Denio 345, 351 (N.Y. Sup. Ct. 1848).

243. Van Rensselaer v. Ball, 19 N.Y. 100, 102-08 (1859) (affirming an ejection action for a property where the tenant had not been paying rent since his father died 12 or 14 years ago); Van Rensselaer v. Hays, 19 N.Y. 68 (1859) (affirming that sub-lease tenants owed rent to the landlord); Van Rensselaer v. Snyder, 13 N.Y. 299 (1855) (the Court of Appeals affirmed lower court ruling allowing an eviction); Van Rensselaer v. Read, 26 N.Y. 558 (1863) (affirming back rent collection by Van Rensselaer family); Van Rensselaer v. Dennison, 35 N.Y. 393 (1866) (affirming landlord's seizure of land from a tenant).

244. People v. Van Rensselaer, 9 N.Y. 291 (1853) (holding that the government could not invalidate a patent for a tract of land passed down through the Van Rensselaer family).

245. Parish v. Rogers, 20 A.D. 279, 280, 286 (N.Y. App. Div. 1897).

246. Hana R. Alberts, *Tracing The Earliest Roots Of New York's Rent Control Laws*, CURBED (Nov. 21, 2013), https://ny.curbed.com/2013/11/21/10172116/tracing-the-earliest-roots-of-new-yorks-rent-control-laws.

## V. ILLINOIS' 1871 JUDICIAL ELECTION

### A. Big Railroads and Small Farmers

Illinois has always struggled with its government. Corruption got so bad in the state that legislators had to take an oath of office affirming they had not received any bribes.[247] The judiciary was no different. Illinois' first constitution provided that judges would be selected by the general assembly in a vote overseen by the governor.[248] It was said that of the inaugural four justices selected, one was unlearned in law and "absented himself from the court and never considered a case. . . . The only service performed by him was to draw one year's salary and resign."[249] All four were politicians.[250] By 1840, Whigs dominated the state supreme court, but the Democratic legislature reorganized the judiciary, giving themselves a 6-3 advantage on the court.[251] Eventually, the people got fed up, and the state switched over to an elective judiciary in 1848.[252]

But this would not drive politics out of the courts. The system had to deal with the fallout from decisions concerning train lines. Illinois had something of a love-hate relationship with railroads. In the middle of the nineteenth century, all levels of government promoted railroad development. The state and federal government gave away land to railroads—often more than they needed for their tracks—while cities and counties offered tax breaks and subsidies to induce railroads to build.[253]

Although governments were eager to support railroads, they were rather late to the game in terms of regulating them. So farmers were left to suffer the worst abuses of the new industry. Rural farmers resented how monopolistic railroads could jack up prices on transportation of their goods to market, prices the farmers had no choice but to pay.[254] And when farmers had a bumper year for corps, railroads would raise prices, often far above the value of the crop. In December 1872, the price of a bushel of corn in Central Illinois was seventeen

247. Ill. Const. of 1870, art. IV, § 5.
248. Ill. Const. of 1818, art. IV, § 4.
249. Oliver A. Harker, Efforts to Divorce Judicial Elections from Politics in Illinois *in* Transactions of the Illinois State Historical Society for the Year 1909 40 (1909), https://quod.lib.umich.edu/m/moa/0050220.0014.001/5?rgn=fulltext;view=image;q1=judicialelections.
250. *Id.*
251. *Id.* at 41-42.
252. Ill. Const. of 1848, art. V, § 3.
253. Mark T. Kanazawa & Roger G. Noll, The Origins of State Railroad Regulation: The Illinois Constitution of 1870 13 *in* The Regulated Economy: A Historical Approach To Political Economy (1994), https://www.nber.org/system/files/chapters/c6571/c6571.pdf.
254. *Id.* at 19.

cents. But the price to ship the same bushel to New York was thirty-five cents.[255] Farmers felt so squeezed by railroads that they accused the companies of trying to "steal" their farms, leaving the farmer with "nothing but a pair of brogans."[256] From the perspective of the farmer, the railroads were only profitable because of the toil of those who worked the land, yet when the crop was bad, the railroads bore none of the pain.[257]

### B. Courts Fuel the Growth of Railroads

Part of this corporate dominance was due to courts. In 1819, the United States Supreme Court in the *Dartmouth College*[258] case held that a corporate charter was a contract between a state and a corporation, and as a result, the government could not alter that charter.[259] This decision hardly ended the debate, however. One of the chief motivating factors for state constitutional conventions before the Civil War was whether to insert a "reservation clause" that would allow the state to alter or revoke corporate laws.[260] Supporters of regulation bristled that a precedent about a small, charitable school could be compared to "the vast system of railway corporations with which we are attempting to deal."[261]

Papers criticized both corporate litigants and individual trial judges for rulings on cases involving railroad companies. After two judges issued rulings excluding a witness from a suit against the Erie Railway Company, newspapers said the rulings could only be explained if the judges sought to "protect bad men from exposure and punishment . . . . We trust that proper measures will be taken to test these questions at once," up to and including impeachment by the legislature.[262] The *New York Times* called the judges' actions in the case

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255. Joseph Hinckley Gordon, Illinois Railway Legislation and Commission Control Since 1870 243 (1904), https://www.google.com/books/edition/Illinois_Railway_Legislation_and_Commiss/kr4nAAAAYAAJ?hl.

256. *The Farmers' Fight*, Chi. Tribune, Mar. 25, 1873, at 4, https://www.newspapers.com/image/466243995/.

257. *Id.*

258. 17 U.S. (4 Wheat.) 518 (1819).

259. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 643-44, 654 (1819). It was not until 1876 that the Supreme Court upheld an economic regulation. Munn v. Illinois, 94 U.S. 113, 135 (1876). A few years later, though, the Court said Illinois could not regulate prices for interstate shipments because that interfered with interstate commerce. Wabash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557, 577 (1886).

260. Kanazawa & Noll, *supra* note 253, at 17.

261. *Mr. Shaw of Railways*, Inter Ocean, Apr. 16, 1873, at 2, https://www.newspapers.com/image/38401607/.

262. Ezra C. Seaman, The American System of Government 170 (1870), https://quod.lib.umich.edu/m/moa/AEW4780.0001.001?rgn=fulltext;view=toc;q1=elective+judiciary.

"a public calamity in every respect" and "a dangerous example."[263] It predicted that if this conduct continued, "the regular forms of judicial administration will not be much longer observed, nor the orders of the Courts obeyed."[264] The *Brooklyn Union* explained one of the judges' conduct in the case by saying "there are dishonest men upon the bench who may thwart justice in its course."[265]

One of the most widely discussed legal dramas of the day was known as the McLean County Case.[266] An 1871 Illinois law barred railroad companies from charging higher rates to customers who lived farther away from market, but the Chicago and Alton Railroad Company broke this law, causing the state railroad commission to sue.[267] At the trial level, Judge Thomas Tipton ruled in favor of the government.[268] For this act, a Farmers' Convention at Kewanee, Illinois in October 1872 passed a resolution "approving the decision of Judge Tipton in the McLean County case," and heard remarks from the government attorney in the case.[269]

But on appeal to the state supreme court, the tables turned. Chief Justice Charles Lawrence said that the mere fact that the company was charging higher rates based on distance was not conclusive evidence of *unjust* price discrimination.[270] Thus, the government would need to prove at trial that the company's actions were unjust, not merely show disparate treatment.[271]

The McClean County Case was reported as the first appellate decision in the country to rule upon the question of the power of the legislature to prohibit discrimination in the price of freight.[272] It was not a resounding victory for railroad companies. The determination of what was "unjust" would be made by a jury, and "in the present state of the public mind, [a jury would] not lean to the side of the rail-

263. *Erie and the Judges*, N.Y. TIMES, Nov. 26, 1869, at 4, https://www.newspapers.com/image/20339684.

264. *Id.*

265. *The Last Blow at Fisk, Gould & Co.*, BROOKLYN UNION, Nov. 26, 1869, at 2, https://www.newspapers.com/image/541731452/.

266. Chi. & A. R. Co. v. People, 67 Ill. 11 (1873).

267. *Id.* at 14.

268. *Id.* Judge Tipton, listed as the trial judge on the Lexis page for the case, noted, "a judgment of ouster was pronounced against the company, and its franchise was declared forfeited" by the trial court. *Id.*

269. *The Farmers' Movement*, CHI. TRIBUNE, Mar. 28, 1873, at 2, https://www.newspapers.com/image/466244145/.

270. Chi. & A. R. Co. v. People, 67 Ill. 11, 26 (1873) (noting that a company should have the right to explain why it was charging a different rate, and a jury should decide whether its explanation was just or not).

271. *Id.* at 27.

272. *The Alton Railway Decision*, ST. JOSEPH GAZETTE, Feb. 28, 1873, at 2, https://www.newspapers.com/image/558870973/.

roads."[273] Still, there was lingering "distrust on the part of the people as to whether" courts would nitpick every regulation and "whether it is possible to enact any regulations of railways which" the state courts "would deem constitutional and without flaw."[274] So even though the court decision was not a boon for railroads, farmers were still furious.

### C. "Reverse the Supreme Court"

Chief Justice Lawrence became "the target for the indiscriminate abuse and denunciation."[275] He was seen as "contemptuous . . . about the power of the people."[276] A delegate at a farmers' convention said Justice Lawrence had insulted the farmers and they must now "repudiate [him], first, last, and all the time" because he "had decided against the people in the case of the railroads, holding their charters to be in the nature of contracts, and would do so again."[277] Chatter grew about the farmers running "a class-candidate for Judge of the Supreme Court" against Lawrence.[278]

S.M. Smith, a supporter of the farmers, did not shy away from his position. He wrote that "reverse the Supreme Court" meant "put men in the place who, instead of forever looking to past ages for precedents, would be . . . brave enough *to establish a precedent for the future* in so just and righteous a cause."[279] The farmers wanted "a Judge who thinks with them" on the bench.[280] Some admitted that would "establish[ ] a bad precedent, but it would seem to be the only protection the farmers have."[281] Another anti-railroader advocated for reversing the United States Supreme Court if it should strike down any railroad fare regulations since he believed the Court was stacked in favor of big business.[282] A supportive paper said reversal was necessary to "preserve the government and keep in accord with the progression of the

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273. *The Farmers' Fight*, Chi. Tribune, Mar. 25, 1873, at 4, https://www.newspapers.com/image/466243995/.

274. *Senator Castle on "Reversing the Supreme Court"*, Inter Ocean, Mar. 27, 1873, at 3, https://www.newspapers.com/image/38400916/.

275. *Judge Lawrence's District*, *Chi. Tribune*, Apr. 11, 1873, at 4, https://www.newspapers.com/image/349502696/.

276. Jonathan Periam, The Groundswell: A History of the Origin, Aims, and Progress of the Farmers' Movement 313 (1874), https://quod.lib.umich.edu/m/moa/aft8857.0001.001/5?page=root;size=100;view=image;q1=judicialllections.

277. *Chief Justice Lawrence's Successor*, Rock Island Argus, May 3, 1873, at 3, https://www.newspapers.com/image/348609717/.

278. *Judge Lawrence's District*, *supra* note 274, at 4.

279. S.M. Smith, *The Judicial Election*, Chi. Tribune, May 2, 1873, at 3 (italics in original), https://www.newspapers.com/image/349506545.

280. *The Farmers of Illinois and the Railroads*, Weekly Star, May 16, 1873, at 1, https://www.newspapers.com/image/55409544/.

281. *Id.*

282. *Mr. Peters' "Short Cut" for Farmers*, Chi. Tribune, Mar. 29, 1873, at 4, https://www.newspapers.com/image/371331325/.

age."[283] Even a state senator said that the "people might have to continue the fight until they *'reversed' the Supreme Court*."[284]

Not all looked fondly on this indignation. The legal community opposed the populist uprising.[285] Chief Justice Lawrence characterized the movement as something that that would "utterly destroy our judicial system, and with it all security for civil rights."[286] A Chicago lawyer wrote that the farmers' movement sought to "'reverse' the [state] Supreme Court, and substitute for its present learned lawyers illiterate shysters . . . . This is the kind of reversal contemplated by the creatures who are waging this unholy war against the Supreme Court."[287]

The Eastern press characterized the farmers' movement as an attempt to pack the court in favor of the lower classes, claimed the judges were pledged to a position and would decide cases regardless of the law, and said the whole thing was an attempt to punish the incumbent for his ruling.[288] So too was the *Chicago Tribune* critical, saying farmers "are not a people who read and analyze judicial decisions. They seize upon the main facts as they are interpreted from the decisions in public utterances."[289] The paper separately wrote that reversing the court would be a "subversion of law, and would lead to anarchy in society" and "chaos in government."[290]

The June 1873 judicial election was the perfect opportunity for the farmers' movement to flex their political muscle. After all, by the middle of the nineteenth century, farmers outnumbered the learned professions 56-to-1.[291] Farmers gathered for what would be known as the Princeton Convention, named for the county it was held in.[292] The convention unanimously passed a resolution calling railroad regulations constitutional, and declared that this legislation "be sustained and enforced by the judiciary of this State."[293] Though it garnered less attention than the McClean County Case, the convention was also angry at Justice Lawrence for his opinion in the Chicago Evening Journal case, where the court held newspapermen in contempt of

283. *"Reversing the Supreme Court"*, *supra* note 273, at 3.
284. *Id.*
285. Periam, *supra* note 275, at 315.
286. *Judge Lawrence's District*, *supra* note 274, at 4.
287. *The Supreme Bench*, CHI. TRIBUNE, Apr. 7, 1873, at 8, https://www.newspapers.com/image/349502157/.
288. Periam, *supra* note 275, at 315.
289. *Judge Lawrence's District*, *supra* note 274, at 4.
290. *"Reversing the Supreme Court"*, *supra* note 273, at 3.
291. Periam, *supra* note 275, at 377.
292. *Id.* at 313.
293. *Id.* at 313-14.

court for publishing an article excoriating the judiciary.[294] The contempt ruling was seen as a "violation of the principle of free government and establishes an odious tyranny to which no free people will submit."[295]

It further called for "the anti-monopolists of this State to nominate such candidates for Supreme and Circuit Judges as are pledged to sustain the Constitution and laws of this State in accordance therewith."[296] Making good on its word, the body nominated its own candidate for the supreme court, and farmers' conventions throughout the state fielded judicial nominees.[297]

The supreme court nominee who came out of the Princeton Convention was Judge Alfred Craig.[298] Judge Craig was a county judge and member of the 1870 state constitutional convention.[299] Delegate W.W. Gilman moved for the nomination, saying Judge Craig's "sympathies were with the farmers, and he would support their views so far as the provisions of the law admitted. They would obtain justice from him." The Princeton Convention looked favorably on the fact that as a member of the constitutional convention, Craig supported provisions regulating railroads.[300] Judge Craig said he would neither seek nor accept any nomination, but he got over that quickly when selected.[301]

Opinions about Judge Craig varied wildly. The *Rock Island Argus* bragged that he had graduated near the top of his class in college and called him "the ablest jury lawyer in his district," with a well-established "character for industry and shrewd intelligence."[302] It went further by saying "[n]o word of suspicion was ever uttered with respect to his character, and either, as man or as an attorney, he is above reproach."[303]

Not quite. For the *Chicago Tribune* said "[t]here is not, perhaps, another man in Illinois who has ever held public place who has made

294. People v. Wilson, 64 Ill. 195, 208-10, 217 (1872). The article in the case alleged the courts were controlled by "corrupt and mercenary shysters,—the jackals of the legal profession,—who feast and fatten on human blood spilled by the hands of other men." *Id.* at 210.

295. *Chief Justice Lawrence's Successor*, ROCK ISLAND ARGUS, May 3, 1873, at 2, https://www.newspapers.com/image/348609717/.

296. Periam, *supra* note 275, at 314.

297. *Id.*

298. *Chief Justice Lawrence's Successor*, *supra* note 276, at 2.

299. *Fifth District—Term Ends 1872*, CHI. TRIBUNE, May 28, 1873, at 4, https://www.newspapers.com/image/349511709.

300. *Chief Justice Lawrence's Successor*, *supra* note 276, at 2.

301. *Untitled*, WIS. ST. J., May 8, 1873, at 1, https://www.newspapers.com/image/396621862.

302. *The Farmers' Candidate*, ROCK ISLAND ARGUS, May 10, 1873, at 2, https://www.newspapers.com/image/348609993/.

303. *Id.*

such a barren and empty record."[304] It also attacked his "poverty-stricken character, [which] shows an utter want of ability, of ordinary comprehension of business, of common intelligence, and respectable industry."[305] The *Albany Law Journal* moaned about Judge Craig's candidacy, saying "[i]t seems incredible that any lawyer, with any self-respect, would accept a nomination on such a platform, striking as it does, most unmistakably at the very foundation of a free and independent judiciary."[306]

Judge Craig ended up winning by over 3,200 votes.[307] He caused a stir on his very first day in office. When sworn into office, Judge Craig gave an oath of office that he wrote himself—a seemingly benign act that was reported on from coast-to-coast.[308] He pledged to "administer justice without respect to persons, and do equal right to the poor and to the rich," and for this, he was labeled a "demagogue."[309] The *Chicago Tribune* wondered aloud whether Craig had violated the constitution by writing his own oath and half-joked that he would not be fair to corporations.[310]

Justice Craig was not dissuaded. He became known as the "Farming Judge" and was known as protective of the rights of the farmers who had raised him up.[311] He upheld a penalty against a railroad company for failure to stop for a sufficient time at a station, stating that the company "accepted its charter upon the implied condition that its franchises would be exercised subject to the power of the State to impose such reasonable regulations as the comfort, safety or welfare of society might require."[312] In *Harvey v. Aurora & Geneva Railway Company*, he struck down a rail line's attempted use of emi-

304. *Mr. A.M. Craig's Record*, CHI. TRIBUNE, May 26, 1873, at 4, https://www.newspapers.com/image/349511491/.

305. *Id.*

306. *Untitled*, OTTAWA FREE TRADER, May 31, 1873, at 4, https://www.newspapers.com/image/164497113/.

307. *Craig, Alfred M.*, NW. L. SCH., https://florencekelley.northwestern.edu/legal/judges/craig/ (last visited Dec. 5, 2020).

308. *Untitled*, MORNING OREGONIAN, July 15, 1873, at 2, https://www.newspapers.com/image/24424096/; *Untitled*, BANGOR DAILY WHIG & COURIER, July 22, 1873, at 2, https://www.newspapers.com/image/663172933. Compare with the constitutionally prescribed oath. ILL. CONST. of 1870, art. V, § 25 ("I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of—according to the best of my ability.").

309. *Untitled*, MORNING OREGONIAN, July 15, 1873, at 2, https://www.newspapers.com/image/24424096/.

310. *Mr. Craig's Oath*, CHI. TRIBUNE, July 1, 1873, at 2, https://www.newspapers.com/image/466250361/.

311. *Craig, Alfred M.*, *supra* note 306.

312. Chi. & A. R. Co. v. People, 105 Ill. 657, 660 (1883).

nent domain to seize private lands.[313] He also affirmed judgments for personal injury plaintiffs who sued railroads.[314] This is not to say he slavishly ruled against railroads. In a tax dispute between a railroad company and the government, for instance, he sided with the company.[315] On the whole, however, it looked as if the farmers' movement succeeded in its effort to get a voice on the high court.

## VI. CONCLUSION

These are only a few examples of judicial elections turning into political slugfests, but they are not the only ones. In Wisconsin's 1850 judicial election, there was deep mistrust on both sides. A Democratic paper steeled itself for a fight, saying "[t]he whigs will resort to every means to defeat our candidates."[316] The Democratic candidate, in turn, was called corrupt by Whigs.[317] Over in Kansas, a Radical Republican Convention was held that announced its intention to "place the Supreme Court in harmony with the political opinions of the majority of the people."[318] What is clear is that for however long judges have been around, politics has been involved.

The professional norms of judges, and those who select them, has become less political over time. It was once perfectly common to see judges give up their robes to run for other political offices.[319] In New York's first judicial elections, all four high court justices brought political experience with them to the bench.[320] The reverse was also true:

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313. Harvey v. Aurora & G. R. Co., 174 Ill. 295, 309 (1898) ("It thus appears that the managers of the street railroad company abandoned the highway and undertook to construct their line of road over private property . . . . This they had no right to do.").

314. Chi. & E. R. Co. v. Flexman, 103 Ill. 546, 549, 552 (1882) (plaintiff sued after railroad employee struck him with a lantern); Toledo, W. & W. R. Co. v. Ingraham, 77 Ill. 309, 311, 315 (1875) (plaintiff was a railroad employee who was crippled by following an order from his boss).

315. Chi. & A. R. Co. v. People, 98 Ill. 350, 360-61 (1881) (holding that local tax assessors lacked the power to tax a certain tract of land).

316. *Our Nominees*, FOND DU LAC J., Sept. 5, 1850, at 2, https://www.newspapers.com/image/37168879/.

317. *See The Green Bay Advocate*, SHEBOYGAN MERCURY, Sept. 21, 1850, at 2, https://www.newspapers.com/image/38648895/.

318. *The Fall Elections*, WYANDOTTE DEMOCRAT, Sept. 6, 1867, at 4, https://www.newspapers.com/image/489354486.

319. *E.g.*, *Freemen, Arouse: For the day of battle is at hand*, VT. COURIER, May 3, 1833, at 2, https://www.newspapers.com/image/366038515; *Cuban Annexation*, BALT. SUN, Oct. 12, 1850, at 2, https://www.newspapers.com/image/365283439; *Independent Indeed*, WYANDOT PIONEER, Sept. 22, 1853, at 2, https://www.newspapers.com/image/465260459/; *Communication*, DAILY NASHVILLE UNION, July 3, 1851, at 2, https://www.newspapers.com/image/603795769; *Untitled*, CADIZ SENTINEL, Aug. 6, 1851, at 2, https://www.newspapers.com/image/351378508.

320. *Charles Herman Ruggles*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/biography/charles-herman-ruggles/ (last visited Dec. 12, 2020) (previously served as a state and federal legislator); *Freeborn Garrettson Jewett*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/biography/freeborn-garrettson-jewett/

former judges used to seek other political offices. Before challenging Abraham Lincoln in the presidential election of 1860, Stephen Douglas was a state supreme court justice.[321] The Democratic Party in New York attempted to get a former high court judge to run for governor.[322] New York's current crop of high court judges have no prior elected experience, aside from lower court positions.[323] Sandra Day O'Connor was the last United States Supreme Court Justice to chase votes in a regular election, and she was nominated in 1981.[324]

Modern disputes over the judiciary are civil by comparison. In modern times, political actors are much more restrained, at least in their public communications. Democratic President Joseph R. Biden must deal with a 6-3 majority Republican Supreme Court that has been none too kind to his administration.[325] In response, the White House commissioned a report on reform proposals for the Court. Far from brandishing pitchforks and torches, the report offered little more than timid solutions like an "advisory code of conduct" while "tak[ing] no position" on the most confrontational ideas.[326] It does not appear that there is any congressional appetite for retribution either. Judges

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(last visited Dec. 12, 2020) (previously served as a state legislator and mayor); *Greene Carrier Bronson*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/biography/greene-carrier-bronson/ (last visited Dec. 12, 2020) (previously served as a state legislator and attorney general); *Addison Gardiner*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/biography/addison-gardiner/ (last visited Dec. 12, 2020) (previously served as lieutenant governor).

321. *Stephen Arnold Douglas*, ILL. SUP. CT., http://www.illinoiscourts.gov/SupremeCourt/ (last visited Nov. 20, 2020).

322. *Addison Gardiner*, *supra* note 319. In Mississippi, there was a proposal for a state supreme court justice to run for governor as well. Philo Publicus, *Signal—Extra*, MISS. FREE TRADER & NATCHEZ GAZETTE, Sept. 19, 1849, at 2, https://www.newspapers.com/image/263857976.

323. *Chief Judge Janet DiFiore*, N.Y. CT. APP., http://www.nycourts.gov/ctapps/jdifiore.htm (last visited Dec. 12, 2020); *Honorable Paul G. Feinman*, N.Y. CT. APP., http://www.nycourts.gov/ctapps/jfeinman.htm; *Honorable Michael J. Garcia*, N.Y. CT. APP., http://www.nycourts.gov/ctapps/jgarcia.htm (last visited Dec. 12, 2020); *Honorable Leslie E. Stein*, N.Y. CT. APP., http://www.nycourts.gov/ctapps/jstein.htm (last visited Dec. 12, 2020); *Honorable Jenny Rivera*, N.Y. CT. APP., http://www.nycourts.gov/ctapps/jrivera.htm (last visited Dec. 12, 2020); *Honorable Eugene M. Fahey*, N.Y. CT. APP., http://www.nycourts.gov/ctapps/jfahey.htm (last visited Dec. 12, 2020); *Honorable Rowan D. Wilson*, N.Y. CT. APP., http://www.nycourts.gov/ctapps/jwilson.htm (last visited Dec. 12, 2020).

324. *Sandra Day O'Connor*, HISTORY.COM (Aug. 21, 2018), https://www.history.com/topics/us-government/sandra-day-oconnor.

325. *E.g.*, Steven D. Schwinn, *The Court's Partisan Rules on Executive Power*, JUSTIA (Aug. 31, 2021), https://verdict.justia.com/2021/08/31/the-courts-partisan-rules-on-executive-power.

326. PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES 7-10 (2021) https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

helped defeat a mild ethics reform proposal in 2018—stopping it from even getting an up-or-down vote.[327]

The increase in civility has occurred despite the fact the courts have vastly more power today. In the nineteenth century, a paper could confidently state "The Justices of the courts of this state will not be called upon to decide upon the merits of" tariffs, the distribution of public lands, an ongoing war, or other public policy questions.[328] Even if a judge was political in that era, the smaller role of courts in society meant they would have less of an impact. Today, however, it seems that the courts have an ever-expanding portfolio of policy matters they decide. Immigration,[329] public sector unions,[330] and regulating carbon pollution[331] are but a few of the issues that the Supreme Court has decided on in recent years.

Our present judiciary may feel politicized, but the past shows us that this is not a new concern. The grass is always greener on the other side of history. This is not to excuse or minimize any actions in the present, but it does contextualize them. Selection of judges has always been accused of being political, and judicial politics has been hyper-charged since the start.

327. James V. Grimaldi, Joe Palazzolo, & Coulter Jones, *Judges Held Off Congress's Efforts to Impose Ethics Rules—Until Now*, WALL ST. J. (Dec. 23, 2021), https://www.wsj.com/articles/judges-held-off-congresss-efforts-to-impose-ethics-rulesuntil-now-11640275421?mod=article_inline.

328. *Election of Judges for the Districts*, EVENING POST, May 21, 1847, at 2, https://www.newspapers.com/image/33778220/.

329. *E.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

330. Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).

331. Massachusetts v. EPA, 549 U.S. 497 (2007).

# DIY ARTIFICIAL INSEMINATION: THE NOT-SO-GREAT GATSBY

JEFFREY A. PARNESS†



## I. INTRODUCTION

Increasingly, intended parentage by female couples, married and unmarried, and by single women is pursued via do-it-yourself ("DIY") artificial insemination ("AI") that utilizes sperm donors (who may be unknown). The clear intentions of would-be parents, and the best interests of later-born children, are often thwarted by incomplete statutes which only address parentage from AI births utilizing medical personnel. Statutory gaps remain unfilled by the courts through common law precedents, often because the statutes are deemed "controlling." Constitutional procreational interests and equality mandates

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often are not considered when parentage in DIY AI births is disputed. Disputes could be, but often are not, guided by general parentage norms, like presumed spousal parent, residency/hold out parent, and/or de facto parent laws.

A recent ruling illustrates the difficulties arising from incomplete AI statutes. In *Gatsby v. Gatsby*[1] in 2021, the Idaho Supreme Court determined legal parentage for a child born via AI to a married female couple who later divorced.[2] In a 4-1 ruling, the court found that the Idaho Artificial Insemination Act (AIA) was the controlling law, and that the couple's AI agreement did not comply with the AIA.[3] The majority did not decide if the nonbirth spouse could have completed a "voluntary acknowledgement of paternity" to become a parent or had standing to seek a childcare order as a nonparent.[4] It did rule out the common law presumption of spousal parentage.[5] On the facts, the nonbirth spouse was found to have no custodial rights as it "would not be in the child's best interest."[6]

The couple in *Gatsby* did not consult with an attorney and did not use a physician.[7] The nonbirth spouse was foreclosed from parenthood because the agreement, "found online," suffered from "severe inadequacies."[8] Specifically, the court found the women "did not use a licensed physician . . . nor did they file the required consent"[9] as required by the AIA. In opining that the majority "exalts form over substance" and "turns a blind eye to Idaho's policy favoring legitimacy," the dissenter concluded that the "unintended consequences" of the decision "are hard to quantify, but . . . they will be myriad."[10]

The *Gatsby* ruling is troublesome on several fronts. Its problems highlight the difficulties facing intended childcare parents employing AI in the United States,[11] especially for those without significant fi-

1. 495 P.3d 996 (Idaho 2021).
2. Gatsby v. Gatsby, 495 P.3d 996, 1004 (Idaho 2021).
3. *Gatsby*, 495 P.3d at 1010.
4. *Id*. at 1007.
5. *Id.* at 1000
6. *Id.* at 1009.
7. *Id.* at 999.
8. *Id.* at 999, 1003.
9. Gatsby, 495 P.3d at 1016.
10. Gatsby, 495 P.3d at 999.
11. Childcare parents here are those with interests in child custody, child visitation, or parental allocation responsibilities. Parentage may operate similarly or differently in other contexts, like child support, tort, and probate. *See, e.g.*, UNIF. PROB. CODE § 1-201(32) (2019) (noting a parent is "an individual who has established a parent-child relationship" under the Uniform Parentage Act). Compare *In re* Scarlett Z.D., 28 N.E.3d 776, 792 (Ill. 2015) ("[T]he doctrine of equitable adoption . . . is a probate concept to determine inheritance and does not apply to proceedings for parentage, custody, and visitation.").

nancial resources[12] and women, coupled or single. This paper explores the problems arising with the parentage laws on DIY AI births.[13] Exploration follows a review of the *Gatsby* ruling and of current laws that do or could cover AI births.

## II. THE NOT-SO-GREAT GATSBY RULING

In *Gatsby v. Gatsby*,[14] two women, Linsay and Kylee, were married in June 2015.[15] Deciding to have a child through the artificial insemination of Kylee "using semen donated by a mutual friend," the women proceeded "without using the services of a physician" and "without consulting an attorney."[16] Together with the friend, the couple did sign "an artificial insemination agreement Linsay found online, listing the friend as 'donor' and both Linsay and Kylee as the 'recipient.'"[17] The pact said "the donor would not have parental rights or obligations to the child."[18]

Linsay performed the insemination of Kylee in the couple's home.[19] Kylee gave birth on October 29, 2016.[20] The birth certificate listed both Linsay and Kylee as "mother."[21] The child lived with the women "who held themselves out as the child's parents" until the summer of 2017 when the women physically fought, leading to a domestic battery conviction for Kylee and a July 2017 no contact order "which prohibited Kylee from seeing her child except at daycare."[22] Linsay filed for divorce in August 2017. Thereupon, Kylee asserted Linsay had no legal claim to child custody or visitation.[23]

Linsay had sole custody of the child from July 3 to December 27, 2017, at which time a court order of "equal custody" was entered.[24] Custody was shared until November 2018 when a magistrate court granted Kylee "sole custody," finding that "Linsay was not the child's

12. On the costs of gestational surrogacy (and the growing industry), an alternative to intended parentage for those seeking childcare parentage via AI without themselves bearing children, see Ayesha Rasheed, *Confronting Problematic Legal Fictions in Gestational Surrogacy*, 24 J. HEALTH CARE L. & POL'Y 179, 183-86 (2021), which details that the average costs run between $60,000 and $150,000.

13. The paper does not review assisted reproduction laws beyond AI, as with introduction of a fertilized egg into a woman.

14. 495 P.3d 996 (Idaho 2021).

15. Gatsby v. Gatsby, 495 P.3d 996, 999 (Idaho 2021).

16. Gatsby, 495 P.3d at 999.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 999-1000.

23. *Id.* at 1000.

24. *Id*.

legal parent," that Linsay "had established no third-party rights," and it was not in the child's best interests for Linsay to have any custody or visitation.[25]

While Linsay was deemed a presumptive spousal parent due to her marriage to Kylee at the time of birth, the magistrate found the presumption "overcome by clear and convincing evidence," seemingly only involving the established fact "that Linsay is not [the child's] biological parent."[26] The magistrate found Linsay could have attained legal parenthood via "a voluntary acknowledgement of paternity affidavit" ("VAP"), but did not do so.[27] The magistrate also found Linsay did not adopt the child and "did not comply with the Artificial Insemination Act ("AIA")."[28] Upon affirmance by a district court, an appeal went to the Idaho Supreme Court.

The high court did not address the lower court conclusion that Linsay could have completed a VAP.[29] Yet it strongly hinted that such a VAP was unavailable to Linsay for the AIA was "controlling" due to the use of assisted reproduction.[30] Further, the Idaho "common law marital presumption of paternity" was deemed inapplicable as the AIA controlled; this was not because the presumption only applied to men.[31] The court also did not address the issue of "third-party standing" regarding nonparental childcare for Linsay.[32] The court agreed with the lower courts that Linsay could have avoided the case outcome

25. *Id.*

26. *Id.*

27. *See id.* (noting Linsay did not sign a VAP pursuant to IDAHO CODE ANN. § 7-1106(1), within Paternity Act). VAPs that are later discussed herein encompass all forms of voluntary parentage acknowledgements, however denominated, and whoever may be explicitly recognized as VAP signatories, including those without alleged or actual biological ties, as with Linsay. *See, e.g.*, VT. STAT. ANN. tit. 15C, § 301 (West 2018) (signing of an "acknowledgement of parentage" by the person who gave birth and "an intended parent").

28. *Gatsby*, 495 P.3d at 1000.

29. *Id.* at 1007.

30. *Id.* at 1002, 1007 (stating the AIA "is controlling" as it is a "more specific statute" than the Paternity Act, IDAHO CODE ANN. § 7-1101 *et seq*., which contains the VAP norms at § 7-1106).

31. *Id.* at 1002. Such a presumption has been found, per Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (same-sex marriages protected), to be unconstitutional. McLaughlin v. Jones, 401 P.3d 492, 498 (Ariz. 2017).

32. *Gatsby*, 495 P.3d at 1010 ("[A]ny error in the . . . third party standing analysis was cured because the magistrate court nonetheless fully addressed whether giving Linsay custody rights would be in the child's best interest."). Third party standing had been sought under Stockwell v. Stockwell, 775 P.2d 611, 613 (Idaho 1989) (common law guidelines on a nonparent (there a stepparent) overcoming a natural parent's custodial rights). *Gatsby*, 495 P.3d at 1010. On third party statutory standing of a nonparent to seek child custody and visitation, see IDAHO CODE ANN. § 32-1703 (stating "de facto custodian" must be "related to a child within the third degree of consanguinity"); § 32-717(3) (grandparents); § 32-719 (grandparents and great grandparents); and § 15-5-204 (guardianship proceeding).

by adopting the child.[33] The court affirmed the lower court's conclusions that it was in "the child's best interest for Kylee to be awarded sole custody."[34] Though unnecessary to its ruling, the court also affirmed the "holding that Linsay could not obtain parental rights . . . under the AIA because she did not comply with all the requirements of the law."[35]

## III. PARENTAGE LAWS GOVERNING ASSISTED REPRODUCTION BIRTHS

### A. INTRODUCTION

With artificial insemination ("AI") births, there can be laws covering expecting legal parents of later born children. Such laws often distinguish between nonsurrogacy and surrogacy settings. There can also be laws covering existing legal parents following AI births. Again, laws often distinguish between nonsurrogacy and surrogacy settings. In surrogacy settings for both expecting and existing legal parents, laws also sometimes distinguish between gestational and genetic surrogacy births.[36]

Where there are explicit statutory AI birth laws, other avenues to parentage generally can be closed (i.e., upon a finding, as in *Gatsby v. Gatsby*,[37] that the laws are exclusive). But even where there are explicit statutes, and where AI is known to have prompted births, sometimes other laws can address AI parentage. Here, non-AI laws can be employed by varying state actors (like judges or administrative agencies such as a vital records office) to establish parentage of an AI child.

The following sections first review the common forms of express AI parentage laws. The final section reviews how parentage laws not explicitly addressing AI births can be used in determining AI parentage.[38]

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33. *Gatsby*, 495 P.3d at 1007.

34. *Id.*

35. *Id.* at 1004. The AIA bar to Linsay, the natural mother's spouse, was foreshadowed in Doe v. Doe, 395 P.3d 1287, 1291-92 (Idaho 2017) (explaining AIA bar applied to natural mother's former female partner).

36. Sometimes state laws recognize both gestational and genetic surrogacy, but generally apply comparable norms to each. *See, e.g.*, WASH. REV. CODE § 26.26A.700 (West 2019); § 26.26A.705; § 26.26A.710; § 26.26A.715; § 26.26A.725. Sometimes state laws only recognize gestational surrogacy. *See, e.g.*, ME. STAT. tit. 19-A, § 1933 (West 2016) ("gestational carrier agreement"); 750 ILL. COMP. STAT. ANN. 47/25 (West 2005) ("gestational surrogacy contract"). Sometimes neither form of surrogacy assisted reproduction is recognized. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.855 (West 1988) ("A surrogate parentage contract is void and unenforceable as contrary to public policy.").

37. 495 P.3d 996 (Idaho 2021).

38. Where relevant, substantive constitutional (usually "liberty" interest) procreational rights involving AI births will be noted. Such rights, however, are scarce, at best, even in states with explicit state constitutional privacy interests. *See, e.g.*, CAL. CONST.

### B. Laws on Expecting Nonsurrogacy AI Parentage

Children to be born of nonsurrogacy assisted reproduction often have two expecting parents, sometimes recognized preconception and sometimes recognized only during a pregnancy. Certain conduct after live births can bar parentage for some who were expecting legal parents.

In nonsurrogacy settings, the 1973 Uniform Parentage Act ("UPA") only recognizes an assisted reproduction birth undertaken by a married, opposite sex couple who employed "a licensed physician" and "semen donated by a man" other than the husband.[39] The donor here is always "treated in law as if he were not the natural father."[40] The husband is only "treated in law as if he were the natural father" if insemination occurred "under the supervision of a licensed physician and with the consent" of the husband.[41] The pregnant wife and her consenting husband are expecting legal parents. The 1973 UPA generally is followed in some states,[42] though some of its provisions are subject to significant constitutional challenges.[43]

The 2002 UPA expands parentage opportunities for nonspousal donors who provide sperm,[44] as well as for nondonor men who consent to nonsurrogacy assisted reproduction "with the intent to be the parent."[45] Such donors and consenting nondonor men are expecting legal parents whose parentage arises when children are born.[46] The "husband" of a "wife" who gives birth via assisted reproduction has limited opportunities to "challenge his paternity"[47] in settings where there is no resulting parentage at birth for a nonspousal sperm donor or for a nondonor man who consented to assisted reproduction with "the in-

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art. I, § 1 (privacy); Wash. Const. art. I, § 7 (private affairs). Constitutional equality interests do arise frequently when courts apply state parentage laws, in and outside of AI settings, as will be illustrated by the *Gatsby* ruling review.

39. Unif. Parentage Act § 5(a) (Unif. L. Comm'n 1973).

40. § 5(b).

41. § 5(a).

42. *See, e.g.*, Colo. Rev. Stat. § 19-4-106(1) (West 2021); Mont. Code Ann. § 40-6-106(1) (West 2021); Minn. Stat. Ann. § 257.56 (West 2022); Idaho Code § 39-5403(1) (West 2021).

43. *See, e.g.*, *Gatsby*, 495 P.3d at 1002 (noting under Obergefell v. Hodges, 576 U.S. 644 (2015), the Idaho AIA, within Idaho Code § 39-5403(1), "must be read in a gender-neutral manner" as to married couples).

44. Unif. Parentage Act § 703 (Unif. L. Comm'n, revised 2002).

45. §§ 703-704 (stating in § 704, consent "must be in a record" that is signed).

46. § 703 (stating, "a parent of the resulting child").

47. § 705. One opportunity involves a lack of consent, "before or after birth of the child," shown in a proceeding brought "within two years after learning of the birth." § 705(a)(1)-(2). Another opportunity involves a challenge at any time where there was either no sperm donation or no consent; no cohabitation "since the probable time of assisted reproduction;" and no open hold out of the child as one's own. § 705(b)(1)-(3).

tent to be the parent."[48] The 2002 UPA is generally followed in some states.[49] Again, some of its proposed laws are subject to significant challenges.[50]

The 2017 UPA further expands parentage opportunities in nonsurrogacy assisted reproduction settings. The 2017 UPA is "substantially similar" to the 2002 UPA, though it is updated so as to apply "equally to same-sex couples."[51] Thus, an "individual who consents . . . to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child."[52] The consenting individual is an expecting legal parent during the pregnancy. Where there is a nonsurrogacy assisted reproduction birth, having no such person who consented with the intent to be a parent, the spouse of the person giving birth has limited opportunities to challenge the spouse's parentage.[53] The 2017 UPA is generally followed in some states.[54]

### C. Laws on Expecting Surrogacy AI Parentage

The 1973 UPA "does not deal with many complex and serious legal problems raised by the practice of artificial insemination[ ]" outside of the practice employed by a consenting "husband" and "wife" who act "under the supervision of a licensed physician[.]"[55] Thus, surrogacy pacts that led to births would have legal parenthood guided by general parentage norms. In 1973, assisted reproduction techniques had not been significantly developed, or been made widely available where developed, so that surrogacy pacts would likely involve consensual sex.

The 2002 UPA recognizes a "prospective gestational mother" may agree with "intended parents," who are a "man" and a "woman," that "the intended parents become parents of the child."[56] An agreement

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48. § 703.

49. *See, e.g.*, Del. Code Ann. tit. 13, § 8-703(a) (West 2013); Wyo. Stat. § 14-2-903 (West 2021).

50. *See, e.g.*, Douglas NeJaime, *The Nature of Parenthood*, 126 Yale L.J. 2260, 2293-95 (2017).

51. Unif. Parentage Act § 7 cmt. (Unif. L. Comm'n 2017).

52. § 703.

53. § 705(a) (noting, spouse "at the time of the child's birth").

54. *See, e.g.*, Vt. Stat. Ann. tit. 15, § 704(a)(1) (West 2018) (stating, "person who intends to be a parent of a child born through assisted reproduction"); Cal. Fam. Code § 7613 (a)(1) (West 2020) (using the language, "consent of another intended parent"); Me. Stat. tit. 19-A, § 1924 (West 2021) ("Consent by a person who intends to be a parent of a child born through assisted reproduction must be set forth in a signed record . . . .").

55. Unif. Parentage Act § 5 cmt. (Unif. L. Comm'n 1973); *see also* § 5(a)

56. Unif. Parentage Act § 801(a) (Unif. L. Comm'n, revised 2002) (stating signatories also include the "husband" of the prospective gestational mother and "a donor or the donors").

must be validated by a court in a proceeding commenced by "the intended parents and the prospective gestational mother."[57] Such an agreement must contemplate pregnancy "by means of assisted reproduction."[58] While there is yet no pregnancy, a validated agreement may be terminated by the prospective gestational mother, her husband, or either of the intended parents.[59] After pregnancy, a "court[,] for good cause[,] shown may terminate the gestational agreement."[60] During pregnancy, the married, opposite sex couple are expecting legal parents. Upon the birth of a child pursuant to a validated gestational agreement, a court will issue an order "confirming that the intended parents are the parents of the child[.]"[61]

A gestational agreement "that is not judicially validated is not enforceable."[62] An unvalidated gestational agreement involving AI prompts expecting legal parentage, inter alia, in the prospective birth mother and at least one intended parent (man or woman), who looks to a later judicial determination of a child-parent relationship arising from a voluntary parentage acknowledgment,[63] or an anticipated residency with the mother and child in the child's first two years while holding out the child as one's own.[64] Should a prospective gestational mother deliver a child not conceived through assisted reproduction, "genetic testing" is used to "determine the parentage of the child."[65] The 2002 UPA is generally followed in some states.[66]

While the 2002 UPA treats comparably gestational agreements where the "prospective gestational mother" utilized one or two do-

57. §§ 802(a), 809. The proceeding contemplated should occur before insemination. *See, e.g.*, § 806(a) (stating, "after issuance of order," but before pregnancy by means of assisted reproduction, gestational agreement may be terminated).

58. § 801(a)(1).

59. § 806(a).

60. § 806(b). The term "cause" is left undefined. *See* § 806 cmt.

61. § 807(a) (notice filed with court by the intended parents); § 807(c) (notice filed with court by the gestational mother or the appropriate state agency).

62. § 809(a).

63. § 809(b) (nonvalidated gestational agreement has parent-child relationship determined under Article 2); § 201(b)(2) (stating, "an effective acknowledgment of paternity" under Article 3); § 106 (provisions of UPA on paternity apply to maternity). Here, acknowledgments may be limited under state laws that require actual or alleged genetic ties in the acknowledger. *Cf.* § 302(a)(4) (no requirement of genetic testing).

64. § 809(b) (nonvalidated gestational agreement has parent-child relationship determined under Article 2); § 204(a)(5) (noting that a man is presumed parent of a child if "he resided in the same household with the child and openly held out the child as his own"); § 106 (provisions of UPA on paternity apply to maternity).

65. § 807(b).

66. *See, e.g.*, OKLA. STAT. tit. 10, § 557.8(c) (West 2019) (stating an unvalidated gestational agreement is unenforceable except regarding payment/reimbursement for "any medical, legal or travel expenses"); UTAH CODE ANN. § 78B-15-809 (West 2008) (stating an unvalidated gestational agreement is not enforceable except as to support liability for intended parents); TEX. FAM. CODE § 160.756(a) (West 2003) ("A gestational agreement must be validated . . . .").

nors,[67] the 2017 UPA distinguishes the requirements for gestational (i.e., two donors)[68] and genetic (i.e., one donor)[69] surrogacy agreements. Though some requirements on enforceable pacts are comparable,[70] others differ, with genetic surrogacy pacts having more stringent requirements.[71] The 2017 UPA distinctions are now followed in a few states.[72]

The 2017 UPA does not require, unlike the 2002 UPA which does,[73] that all surrogacy agreements be validated by a court in a proceeding containing all the relevant parties.[74] Rather, a surrogacy agreement, gestational or genetic, "must be in a record signed by each party."[75] But, a genetic surrogacy agreement is usually only enforceable when validated by a court "before assisted reproduction."[76] With such validations there are recognized expecting legal parents.

The 2017 UPA is somewhat progressive. For example, it authorizes genetic and gestational surrogacy agreements involving "one or more intended parents[,]"[77] as compared to 2002 UPA agreements that encompass "intended parents," who are a man and a woman.[78]

Significant, as well, is the effective characterization in the 2017 UPA of an intended parent, or intended parents, in a genetic surrogacy setting as expecting legal parents for three days following the surrogate giving birth, since the surrogate has seventy-two hours to withdraw consent to the surrogacy agreement.[79] Upon the genetic surrogate's withdrawal of consent within the three day period, the surrogate establishes a "parent-child relationship" since the surrogate is "the individual" who gave birth to the child.[80]

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67. UNIF. PARENTAGE ACT § 801(a) (UNIF. L. COMM'N, amended 2002) (noting a written agreement includes "a donor or the donors").

68. UNIF. PARENTAGE ACT § 801(2) (UNIF. L. COMM'N 2017) (noting a gestational surrogate is a woman uses "gametes that are not her own").

69. § 801(1) (noting a genetic surrogate is a woman using "her own gamete").

70. *See, e.g.*, § 802(a)(1)-(5) (21 years old, previously gave birth, and independent legal representation); § 803 (process for executing an agreement).

71. *Compare* § 814(a)(2) (noting a genetic surrogate "may withdraw consent . . . any time before 72 hours after the birth . . ."), *with* § 808(a) (noting termination of agreement at "any time before an embryo transfer").

72. WASH. REV. CODE ANN. §§ 26.26A.700 (West 2019); CONN. GEN. STAT. § 7-36(16) (West 2022) (gestational and genetic surrogates).

73. UNIF. PARENTAGE ACT § 802(a) (UNIF. L. COMM'N, revised 2002).

74. The relevant parties include each intended parent, the surrogate and the surrogate's spouse, if there is one. UNIF. PARENTAGE ACT § 803(3) (UNIF. L. COMM'N 2017).

75. § 803(4).

76. §§ 816(a), 813(a). Exceptions include when all parties agree to validation after assisted reproduction has occurred. § 816(b). *See also* §§ 816(d), 818.

77. § 801(3).

78. UNIF. PARENTAGE ACT § 801(a) (UNIF. L. COMM'N, revised 2002).

79. UNIF. PARENTAGE ACT § 814(a)(2) (UNIF. L. COMM'N 2017).

80. § 815(c) (noting upon withdrawal, "parentage of the child" is determined under Articles 1-6); § 201(1) (parent-child relationship for individual who gives birth).

Nevertheless, at least some intended parents may also be able to establish a "parent-child relationship" even upon such withdrawals. Thus, an intended parent who is a sperm provider can be an expecting legal parent who becomes a legal parent upon birth if the provider, with the genetic surrogate, signs a parentage acknowledgment before birth and the voluntary acknowledgement of paternity affidavit ("VAP") remains unrescinded and unchallenged.[81]

The 2017 UPA treats differently than the 2002 UPA agreements on intended parentage that fail to comply with the general, gestational, and/or genetic surrogacy pact requirements. Thus, for a "child . . . conceived by assisted reproduction under a gestational surrogacy agreement" failing to meet the UPA requirements, a court must "determine the rights and duties of the parties to the agreement consistent with the intent of the parties [to the agreement] at the time of execution of the agreement."[82] By comparison, the breach of "a genetic surrogacy agreement" that is not validated can prompt certain "remedies available at law or in equity."[83] Thus, intended parents beyond birth mothers via DIY surrogacy pacts that do not conform to the UPA requirements can still be deemed expecting parents who might achieve legal parenthood after birth.

### D. Laws on Existing Nonsurrogacy AI Parentage

The 1973 UPA does not deal with the "many complex and serious legal problems raised by the practice of artificial insemination."[84] It does, however, address "one fact situation that occurs frequently[,]"[85] a "consent" by a husband to the artificial insemination of his wife with "semen donated by a man not her husband." Here, the husband is to be "treated in law as if he were the natural father" at birth where the consent was in writing and "signed by him and his wife," with certification undertaken and then filed by the supervising "licensed physician" with state governmental officials.[86] The husband is a

81. § 815(c) (stating upon withdrawal, "parentage of the child" is determined upon Articles 1-6). *See also* § 201(5) (parent-child relationship for individual who acknowledges parentage); § 301 (describing that a woman giving birth and "alleged genetic father" may sign acknowledgment); § 304(b)-(c) (stating an acknowledgment signed before birth becomes effective at birth), §§ 308-309 (procedures for rescission and challenge).

82. § 812(b).

83. §§ 816(a), 818(a). Available remedies do not include court orders "that the surrogate be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures." § 818(b).

84. Unif. Parentage Act § 5 cmt. (Unif. L. Comm'n 1973).

85. *Id.*

86. § 5(a) (stating all papers and records pertaining to the insemination are to be kept confidential, though subject to inspection pursuant to a court order "for good cause shown").

nonpresumptive spousal parent. The semen donor who is not the husband is to "be treated in law as if he were not the natural father."[87]

In response to the increasing numbers of children born of assisted reproduction, both the 2002 and the 2017 UPA contain distinct articles on nonsurrogacy and surrogacy births. In nonsurrogacy settings, the 2017 UPA "is substantively similar" to the 2002 UPA, with the "primary changes . . . intended to update the article so that it applies equally to same-sex couples."[88] The 2017 UPA recognizes that a sperm donor is not always a parent of a child conceived by assisted reproduction.[89] For there to be two legal parents, a consent to parentage must be signed by the person giving birth and "an individual who intends to be a parent[,]" though the "record" need not be certified by a physician.[90] Seemingly, "consent in a record" can be undertaken "before, on, or after birth of the child."[91] The lack of this form of consent does not foreclose childcare parentage for an intended parent where there is clear-and-convincing evidence of an "express agreement" between the individual and the person giving birth "entered into before conception."[92] As well, the lack of such consent or agreement does not foreclose an individual's parentage where the child was held out as the individual's own in the child's first two years.[93] The nonparental status of one married to a person giving birth to a child born by assisted reproduction, even if a gamete donor, may be established by a showing of a lack of consent, of any agreement, and of holding out the child as one's own.[94]

The nonsurrogacy parentage norms in the UPAs are now reflected in some U.S. state statutes,[95] and in precedents untethered to stat-

87. § 5(b).
88. UNIF. PARENTAGE ACT § 701 cmt. (UNIF. L. COMM'N 2017).
89. § 702.
90. *See* § 704(a) (lacking any mention of requiring a phsycian).
91. § 704(b).
92. § 704(b)(1). It is clear why an "express agreement" undertaken post-conception does not prompt comparable childcare parentage. Here, there is much greater certainty that a child will be born so that an agreement is far less speculative. Perhaps instead of a post-conception agreement, the 2017 UPA contemplated a prebirth VAP, as it recognizes an "intended parent" can sign a VAP. Yet, an "intended parent" under the 2017 UPA in many states has no prebirth VAP access as the states follow the 1973 UPA or 2002 UPA which only authorize post-birth (paternity) VAPs. *See* UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. L. COMM'N 1973) (noting "paternity" acknowledgment "of the child" in a "writing filed with" the state, which is not disputed by "the mother"); UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM'N, revised 2002) (stating a "man claiming to be the genetic father of the child" signs together with the "mother of a child").
93. UNIF. PARENTAGE ACT § 704(b)(2) (UNIF. L. COMM'N 2017).
94. § 705(b).
95. American state statutes include TEX. FAM. CODE § 160.7031 (West 2007) (describing fatherhood for unwed man, intending to be father, who provides sperm to licensed physician and consents to the use of that sperm for assisted reproduction by an unwed woman, where consent is in a record signed by man and woman and kept by the

utes,[96] with significant interstate variations.[97] The 2017 UPA provisions have been enacted in a few states.[98]

Childcare parentage for those giving birth and intended parents in nonsurrogacy settings often involve express consents. There could be, but there generally are no, state-required forms guiding such consents. In California, however, in nonsurrogacy settings, there are statutorily-recommended consent forms that may be used, but are not required.[99] Regardless of the nonsurrogacy parentage norms, state-formulated consent forms should be made available as informed consent would be better assured and there would be greater certainty regarding party intentions.[100] Such forms would be comparable to the required forms for VAPs.[101]

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physician); N.H. REV. STAT. ANN. § 5-C:30(I)(b) (West 2006) (noting male parentage is determined by unwed mother has sperm donor "identified on the birth record" where "an affidavit of paternity" has been executed); DEL. CODE. ANN. tit 13, § 8-704(a) ("Consent by a woman and an intended parent of a child conceived via assisted reproduction must be in a record signed by the woman and the intended parent."); WYO. STAT. ANN. § 14-2-904(a) (West 2003) (similar to Delaware); and N.M STAT. ANN. § 40-11A-703 ("A person who provides eggs, sperm or embryos for or consents to assisted reproduction as provided in Section 7-704 ["record signed . . . before the placement"] . . . with the intent to be the parent of a child is a parent of the resulting child.").

96. *See* Shineovich v. Shineovich, 214 P.3d 29, 40 (Or. App. 2009) (noting to avoid constitutional infirmity, assisted reproduction statute, as written solely for married opposite sex couple, applied to same sex domestic partners); Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789, 795-96 (Cal. App. 2d 2014) (explaining though the statute, both pre-2011 and post-2011, indicated explicitly a lack of paternity for this particular semen donor when his unwed partner delivered a child conceived via assisted reproduction, the statute on presumed parentage for one (either male or female) who receives a child into the home and openly holds out the child as one's own natural child can support—in certain circumstances—legal paternity for the semen donor); Ramey v. Sutton, 362 P.3d 217, 219 (Okl. 2015) (concluding unwritten preconception agreement prompts *in loco parentis* childcare status for former lesbian partner of birth mother, though she contributed no genetic material); *In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 501 (N.Y. 2016) (stating an agreement between lesbian partners can prompt parentage in non-birth mother).

97. The laws are reviewed and critiqued, in Deborah H. Forman, *Exploring the Boundaries of Families Created with Known Sperm Donors: Who's In and Who's Out?*, 19 U. PA. J.L. & SOC. CHANGE 41 (2016).

98. *Compare* WASH. REV. CODE ANN. § 26.26A.610 (West 2019), *and* VT. STAT. ANN. tit. 15C, § 701 (West 2018), *with* UNIF. PARENTAGE ACT §§ 701-708 (UNIF. L. COMM'N 2017) (suggested assisted reproduction statutes involving no surrogates).

99. CAL. FAM. CODE § 7613.5(a)-(e) (West 2020) (detailing the forms on assisted reproduction pacts by two married or by two unmarried people, where signatories may or may not have used their own genetic material to prompt a pregnancy).

100. I urged that such forms be created in, Jeffrey A. Parness, *Formal Declarations of Intended Childcare Parentage*, 92 NOTRE DAME L. REV. ONLINE 87, 101-04 (2017).

101. *See, e.g.*, VT. STAT. ANN. tit. 15C, § 310(a) (West 2019) (stating the Health Department shall develop a VAP form for execution of parentage). *See also* Jeffrey A. Parness & Zach Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 63-87 (2010) (reviewing similarities and differences in state-generated VAP forms). At times, some written parentage acknowledgments operate though state-generated forms were not utilized. *See, e.g.*, D.C. CODE ANN. § 16-909(a)(4) (West 2016) (noting a presumption that a man is the father of

### E. Laws on Existing Surrogacy AI Parentage

As to surrogacy, the 1973 UPA is silent.[102] The 2017 UPA, like the 2002 UPA, distinguishes between genetic ("traditional") and gestational surrogacy.[103] Their surrogacy provisions are limited to instances of assisted reproduction births.[104] Unlike the 2002 UPA, the 2017 UPA does not propose that all surrogacy agreements be validated by a court order prior to any medical procedures.[105] The 2017 UPA imposes differing requirements for the two surrogacy forms, however, with "additional safeguards or requirements on genetic surrogacy agreements[,]"[106] as only they involve a woman giving birth while "using her own gamete."[107] The 2017 UPA recognizes there can be "one or more intended parents"[108] in surrogacy settings.

The common requirements for the two forms of surrogacy pacts include signatures in a record, "attested by a notarial officer or witnesses;" independent legal counsel for all signatories; and, execution before implantation.[109] Special provisions for gestational surrogacy pacts include an opportunity for "party" termination "before an embryo transfer" and an opportunity for a prebirth court order declaring

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a child if he "has acknowledged paternity in writing"); N.M. Stat. Ann. § 40-11A-204(A)(4)(c) (West 2010) (stating a man is presumed to be the father of a child that "he promised in a record to support . . . as his own" if he married the birth mother after the child's birth); Kan. Stat. Ann. § 23-2208(a)(4) (West 2022) (stating a man is presumed to be the father of a child if he "notoriously or in writing recognizes paternity of the child, including but not limited to" acts in accordance with the voluntary acknowledgement statutes).

102. Unif. Parentage Act § 5 cmt. (Unif. L. Comm'n 1973) (noting that while addressing husband-wife pacts on assisted reproduction where the wife bears the child and intends to parent, the Act "does not deal with many complex and serious legal problems raised by the practice of artificial insemination").

103. Unif. Parentage Act § 801 cmt. (Unif. L. Comm'n 2017).

104. *See* Unif. Parentage Act § 801(a)(1) (Unif. L. Comm'n, revised 2002) (stating, "agrees to pregnancy by means of assisted reproduction"); Unif. Parentage Act § 801(3) (Unif. L. Comm'n 2017) (detailing surrogacy agreements on pregnancy "through assisted reproduction"). This is not to say there are no instances of surrogacy undertaken through consensual sex. *See, e.g.*, K.B. v. M.S.B., 2021 BCSC 1283 (deciding a parentage action by person who gave birth against sperm provider and spouse).

105. Unif. Parentage Act § 808 cmt. (Unif. L. Comm'n 2017).

106. § 801 cmt. The common safeguards or requirements for all surrogacy pacts are found in §§ 802-807. *See* §§ 808-812 (noting special requirements for gestational surrogacy agreements); §§ 813-818 (noting special requirements for genetic surrogacy agreements).

107. § 801(1). Gestational surrogacy covers births to a woman who uses "gametes that are not her own." *See* § 801(2). The special rules for gestational surrogacy pacts are found in §§ 808-812, while the special rules for genetic surrogacy pacts are found in §§ 813-818.

108. § 801(3).

109. § 803(6)-(7), (9). Thus, by definition, a person who may become pregnant through sex cannot agree to be a surrogate, as cannot a person who is pregnant and only agrees to surrogacy post-pregnancy. *See* § 801(1)-(2) (noting each surrogacy form applies only to a person "who agrees to become pregnant through assisted reproduction").

parentage vesting at birth.[110] Special provisions for genetic surrogacy pacts include the general requirements that, "to be enforceable," an agreement must be judicially validated "before assisted reproduction" upon a finding that "all parties entered into the agreement voluntarily" and understood its terms;[111] that a genetic surrogate may withdraw consent "in a record" at any time before seventy-two hours after the birth;[112] and that a genetic surrogate cannot be ordered by a court to "be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures."[113] So, existing legal parentage arises later for expecting legal parents in genetic surrogacy settings than in gestational surrogacy settings.

UPA surrogacy parentage norms are now reflected both in state statutes[114] and precedents untethered to statutes.[115] Certain provi-

110. §§ 808(a), 811(a)(1).

111. § 813(a)-(b).

112. § 814(a)(2). Genetic and gestational surrogates have both been recognized, however, as having federal constitutional parental opportunity interests under Lehr v. Robertson, 463 U.S. 248, 261-262 (1983). *See, e.g.*, *In re* Schnitzer, 493 P.3d 1071, 1082-83 (Or. App. 2021).

113. UNIF. PARENTAGE ACT § 818(b) (UNIF. L. COMM'N 2017).

114. In New Hampshire, before insemination pursuant to a surrogacy contract that will be deemed "lawful," a court "shall" be petitioned for "judicial preauthorization." *Compare* N.H. REV. STAT. § 168-B:16(I) (stating violation occurs when any provision of chapter is breached), *with* N.H. REV. STAT. § 168-B:21(I). Requirements include that the "intended mother" is "psychologically unable to bear a child without risk to her health or to the child's health;" the "intended father" "provided a gamete;" and either the intended mother or surrogate provided the ovum. Authorization is permitted only where the "surrogacy contract is in the best interest of the intended child." N.H. REV. STAT. § 168-B:23(III)(d).

115. Precedents recognizing judicial discretion to enforce surrogacy arrangements include *In re* Paternity of F.T.R., 833 N.W. 2d 634, 653 (Wis. 2013) (enforcing surrogacy pact between two couples as long as child's best interests were served, while urging the legislature to "consider enacting legislation regarding surrogacy[ ]" to ensure "the courts and the parties understand the expectations and limitations under Wisconsin law[ ]"); *In re* Baby, 447 S.W.3d 807, 833 (Tenn. 2014) (noting "traditional surrogacy contracts do not violate public policy as a general rule" where surrogate artificially inseminated with sperm of intended father, who was not married to intended mother); *In re* Amadi, No. W2014-01281-COA-R3-JV, 2015 WL 1956247, at *10 (Tenn. App. Mar. 10, 2015) (noting that gestational surrogate for married couple is placed on birth certificate, as said to be required by statute, where intended father's/husband's sperm used with egg from unknown donor and intended mother/wife was recognized by all parties as legal mother; reiterates plea from *In re* Baby that the legislature should enact a comprehensive statutory scheme); and Raftopol v. Ramey, 12 A.3d 783, 799 (Conn. 2011) (determining a biological father's male domestic partner can also be intended parent of a child born to a gestational surrogate). Beyond enforcing a surrogacy pact in the absence of statute, an intended parent (also the sperm donor) who employed a gestational surrogate was allowed in one case to adopt formally his genetic offspring. *In re* John, 103 N.Y.S.3d 541, 543 (N.Y. App. 2d 2019).

sions of the 2017 UPA have been enacted in a few states.[116] Elsewhere, there operate major sections of the 2002 UPA on surrogacy.[117]

### F. General Parentage Laws and AI Births

In *Gatsby v. Gatsby*[118], the court found that when there is a relevant (and then designated comprehensive) AI statute, there the Artificial Insemination Act ("AIA"), the statute is "controlling"[119] so that other avenues to parentage, like a VAP[120] or a spousal parent presumption,[121] but not a formal adoption,[122] are closed. The AIA was said to "specifically address issues that are unique to artificial insemination."[123] Among these unique issues were the requirements on consents by a "woman" and "her husband"; the nonparental status of a sperm donor; the performance of artificial insemination by licensed physicians and "persons under their supervision"; and the filing of the consents with the state registrar of vital statistics.[124] Further, as noted by the court, AIA compliance failures could prompt misdemeanor charges, though the court did not indicate there was state action against Kylee, Linsay, or the donor.[125] While the Idaho AIA is said to apply "to all persons conceived as a result of artificial insemination[,]" it does not explicitly foreclose parentage for an AIA child under other parentage laws.[126]

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116. *See, e.g.*, Wash Rev. Code Ann.§ 26.26A.715 (West 2019) (gestational or genetic surrogacy agreement); Vt. Stat. Ann. tit. 15C, § 801 (West 2018) (gestational carrier agreements); 15 R.I. Gen. Laws Ann. § 15.8.1-801 (West 2021) (gestational carrier agreements).

117. *See, e.g.*, Utah Code Ann. § 78B-15-801 (West 2008) (stating language similar to Unif. Parentage Act § 801 (Unif. L. Comm'n, revised 2002).

118. 495 P.3d 996 (Idaho 2021).

119. Gatsby v. Gatsby, 495 P.3d 996, 1001-02 (Idaho 2021). It was deemed controlling as it was "the more recent" and it was "specifically applicable." *Gatsby*, 495 P.3d at 1002 (citing Eller v. Idaho State Police, 443 P.3d 161, 168 (Idaho 2019).

120. *Gatsby*, 495 P.3d at 1007. The court correctly noted that no VAP was filed by Linsay. *Id.* But its suggestion that no VAP was available to Linsay since the AIA was "controlling" is a bit troublesome because the court also observed "that Linsay could have avoided this outcome by adopting the child," an "option" she did not pursue. *Id.* Why would an adoption, but not a VAP, be an "option" for Linsay? Put another way, why was an adoption not foreclosed by the "controlling" statute? Both VAPs and adoptions permit parentage arising from post-birth joint conduct of intended and actual parents.

121. *Id.* at 1001-02.

122. *Id.* at 1007.

123. *Id.* at 1001.

124. *Id.* at 1004-05 (relying on "the rules of statutory interpretation to determine the requirements" of §§ 39-5403 and 39-5405 in the AIA). While the *Gatsby* case was under advisement, the AIA requirement that the consents be filed with the state registrar were eliminated. *Id.* at 1006.

125. *See id.* at 1005 (noting § 39-5407 authorizes a "penalty" against a person who "violates the provisions" of the AIA).

126. Idaho Code Ann. § 39-5406 (West 2022).

Outside of Idaho, AI parentage can arise from conduct outside the ambits of an assisted reproduction statute. Elsewhere, assisted reproduction statutes sometimes specifically reference the possible applications of general parentage laws, often operative for conduct occurring post-birth, to determine legal parentage arising from AI births.[127] Those other laws can include residency/hold out parentage, *de facto* parentage, spousal parentage, or voluntary acknowledgment parentage.[128]

For example, the 1973 UPA "does not deal with many complex and serious legal problems raised by the practice of artificial insemination,"[129] though it does address such insemination undertaken by a "husband" and "wife."[130] The 1973 UPA does authorize, however, "[a]ny interested person" to bring "an action to determine the existence or nonexistence of a mother and child relationship," wherein, "[i]nsofar as practicable," the Act's provisions on "the father and child relationship" would "apply."[131] One such provision involves residency/hold out parentage for a man who "receives" a child into his home and "openly holds out the child as his natural child."[132]

The 2017 UPA is more explicit in its recognition of possible AI parenthood arising without any written "consent" to assisted reproduction. Thus, the 2017 UPA declares that "[f]ailure to consent in a record" as set out in the Act "does not preclude the court from finding consent to parentage" by an individual who either expressly agreed

127. *See, e.g.*, UNIF. PARENTAGE ACT § 704(b) (UNIF. L. COMM'N 2017) (noting where the statutory "consent" in a "record" on assisted reproduction parentage is not undertaken, a court may also find "consent to parentage" if there is "clear-and-convincing evidence" of "an express agreement" on intended parentage entered prebirth, or a court may find residency/hold out parentage established through parental-like acts during "the first two years of the child's life"). Section 704(b) is generally followed in Maine. *See* ME. STAT. tit. 19-A, § 1924(2) (West 2021). Texas generally follows the 2002 UPA. *Compare* UNIF. PARENTAGE ACT § 704(b) (UNIF. L. COMM'N, revised 2002). (explaining failure to consent in a record to assisted reproduction does not preclude paternity if the "woman and man, during the first two years of the child's life resided together in the same household with the child and openly held out the child as their own"), *and* § 106 (noting provisions on paternity apply to determination of maternity), *with* TEX. FAM. CODE § 160.704(b) (West 2007) (stating failure by a husband to consent properly does not preclude him from fatherhood if he and his wife "openly treated the child as their own").

128. State laws and Uniform Parentage Act proposals on these norms are surveyed in Jeffrey A. Parness, *Unconstitutional Parenthood*, 104 MARQ. L. REV. 183, 190-205 (2020).

129. UNIF. PARENTAGE ACT § 5 cmt. (UNIF. L. COMM'N 1973). This is section is followed in Montana. *See* MONT. CODE ANN. § 40-6-106 (West 1995).

130. § 5. This is section is followed in Montana. *See* MONT. CODE ANN. § 40-6-106 (West 1995).

131. § 21. This is section is followed in Montana. *See* MONT. CODE ANN. § 40-6-121 (West 1975).

132. § 4(a)(4). This is section is followed in Montana. *See* MONT. CODE ANN. § 40-6-105(d) (West 2019).

before conception with a woman that they "both would be parents of the child" or "resided together in the same household with the child" and birth mother where "both openly held out the child as the individual's child."[133]

## IV. THE GATSBY PROBLEMS

### A. Introduction

The *Gatsby v. Gatsby*[134] ruling illustrates the difficult parentage issues that can arise from do-it-yourself ("DIY") artificial insemination ("AI") births for at least some intended parents in the United States, particularly would-be parents without financial resources for lawyers and doctors, as well as would-be parents with interests in maintaining privacy regarding their procreational and childcare pursuits,[135] and would-be single or unwed coupled parents.

The difficulties confronting DIYers employing AI to achieve intended parentage, illustrated in the *Gatsby* ruling, should be mitigated. Both legislators and judges should assure that laws on childbearing by DIYers allow intended parents greater opportunities for parenthood while protecting the interest of later-born children.[136] Such assurances will also protect the constitutional guarantees of intended parents, including their rights to privacy, to procreate, and to be treated equally and rationally. Current American state parentage laws on AI can be improved by incorporating certain 2017 UPA provisions.

### B. Controlling AI Statutes

Several times, the *Gatsby* ruling characterizes the Idaho Artificial Insemination Act ("AIA") as "controlling."[137] While the Act was

133. Unif. Parentage Act § 704(b) (Unif. L. Comm'n 2017).

134. 495 P.3d 996 (Idaho 2021).

135. While *Gatsby* was "under advisement," the AIA was amended so that there was no longer "a duty on the physician . . . to file the consent form with the state registrar" and no longer a requirement "for the State Board of Health and Welfare to promulgate rules regarding recordkeeping." Gatsby v. Gatsby, 495 P.3d 996, 1006 (noting the amended language of § 59-5403 of the AIA).

136. The paper focuses on DIY AI parentage. It assumes the continuation of the current constitutional and nonconstitutional norms on "superior" parental childcare rights, wherein parentage is significantly defined by state laws which vary greatly. *See generally* Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 St. John's L. Rev. 965 (2016) (explaining, and criticizing, the deference by federal lawmakers to state lawmaking on who are childcare parents). DIY AI parentage norms would differ if state laws supported "childrens' independent interests and agency[,]" authorizing "a less strict level of scrutiny for governmental action that intrudes upon parental authority . . . ." Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 Duke L.J. 75, 75 (2021).

137. *Gatsby*, 495 P.3d at 1001-02, 1007, 1010.

deemed "controlling," it clearly does not encompass all AI births. The AIA is applicable "to all persons conceived as a result of artificial insemination as defined herein,"[138] with the definition of AI encompassing the "introduction of semen of a donor[,] . . . into a woman's vagina, cervical canal or uterus through the use of instruments or other artificial means."[139] Thus, similar introduction of a fertilized egg is not covered. Further limits arise under the statutory definition of donor, which "refers to a man who is not the husband of the woman upon whom the artificial insemination is performed."[140] Thus, the AIA does not contemplate AI usage by donor husbands or by women who seek to be single parents. Further, the AIA only applies to married couples.[141] The AIA did apply to the semen "introduction" into Kylee, as she was then married to Linsay.[142]

Because the AIA was "controlling" and was not followed by Kylee, Linsay, and the donor, the Gatsby majority effectively determined the circumstances surrounding Kylee's insemination, including Linsay's intentions, the semen donor's nonparental intentions, and Kylee's parental intentions regarding Linsay, would not be considered under parentage laws outside the AIA.[143] The court rejected any use of presumptive spousal parentage for Linsay[144] and strongly hinted that any acknowledgement of paternity affidavit ("VAP") parentage for Linsay was unavailable.[145] It did not address other possible parentage

138. IDAHO CODE ANN. § 39-5406 (West 2022).

139. IDAHO CODE ANN. § 39-5401(1) (West 2022).

140. IDAHO CODE ANN. § 39-5401(2) (West 2022).

141. IDAHO CODE ANN. § 39-5403(1) (West 2021) ("Artificial insemination shall not be performed upon a woman without her prior written request and consent and the prior written request and consent of her husband.").

142. The high court (wisely) read the statutory reference to a husband in a gender-neutral way so as to include a "spouse" of one who undertakes AI.

143. *Cf.* VA. CODE ANN. § 20-164 (West 2012) (noting the assisted conception statute, only "when applicable," governs parentage); L.F. v. Breit, 736 S.E.2d 711, 718 (Va. 2013) (noting language of § 20-164 requires it be read with other statutes and determining unwed sperm donor can pursue childcare under certain circumstances outside statutory norms).

144. *Gatsby*, 495 P.3d at 1001-02 (explaining the marital spouse presumption in Idaho arguably arises under both an earlier common law ruling in Alber v. Alber, 472 P.2d 321, 326-327 (Idaho 1970) and IDAHO CODE ANN. § 7-1119 (1969)). Linsay seemingly could not rely on this presumption if Kaylee objected as Linsay lacked genetic ties. *See, e.g.*, IDAHO CODE ANN. § 7-1119(1) (1969) (stating the presumption is overcome by "genetic tests").

145. *Gatsby*, 495 P.3d at 1002 (noting the Paternity Act, which includes VAPs under IDAHO CODE ANN. § 7-1106(1) (West 1998), is found to be preempted by the AIA). Linsay seemingly could have used a VAP if the AIA applicability was not known (i.e., method of conception not known) as it would have been subject to challenge by Kaylee more than 60 days after the child's birth only on certain grounds, including "fraud, duress, or material mistake of fact," that do not clearly appear in the *Gatsby* court record. *See* IDAHO CODE ANN. § 7-1106(2) (West 1998).

avenues for Linsay, like residency/hold out or *de facto* parenthood.[146] The court did say Linsay could have adopted,[147] leaving open whether the AIA would be wholly preemptive in AI birth cases where parentage is founded on other post-birth parental-like acts. The court did not consider any common law (i.e., nonstatutory) parentage avenue, saying that it would "properly leave it to the legislature to address the important public policy and societal implications concerning the AIA that have been raised by the dissent."[148] Given the absence in Idaho of residency/hold out, *de facto*, or similar parentage laws, which would require consideration of the parental intentions and the parental-like actions of people like Linsay who are not married to AI birth mothers, seemingly there were few parentage avenues for the likes of a Linsay beyond formal adoption, even where the best interests of a child born to the likes of a Kylee would be served. Outside of Idaho, AI statutes do recognize, expressly, the opportunity for conduct occurring only after birth, not including a formal adoption, to secure parentage for those who act in parental-like ways.[149]

While the formal adoption avenue was open to Linsay under the *Gatsby* ruling, there was no explanation of why it would not be foreclosed due to the "controlling" nature of the AIA, as with the apparent preemption of VAP parentage. In each setting, seemingly there are

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146. *See, e.g.*, UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017) (presumed residency/hold out parentage); § 609 (de facto parentage).

147. *Gatsby*, 495 P.3d at 1007 (noting no adoption was ever sought). Linsay may have been unable to adopt had she tried sometime after birth, given certain language in the Idaho adoption statutes. As to the statutes on adoption of a child, one set of laws requires consent in writing. IDAHO CODE ANN. § 16-1506(3) (West 2017). Another requires consent by both parents of "an adoptee who was conceived or born within a marriage[.]" IDAHO CODE ANN. § 16-1504(1)(b) (West 2020). Kylee's consent seemingly would have been given around the time of birth in October 2016, as she must have agreed to Linsay's name on the birth certificate. *Gatsby*, 495 P.3d at 999. But Kylee's consent after July 2017, seems uncertain, as she and Linsay physically fought leading to a July 2017 no contact order and as Linsay filed for divorce in August 2017. *Id.* at 999-1000.

148. *Gatsby*, 495 P.3d at 1007. This judicial reluctance was foreshadowed in *In re* Declaration of Parentage of Doe, 372 P.3d 1106, 1108 (Idaho 2016) ("Unless and until the legislature chooses to enact legislation specifically addressing surrogacy, Intended Parents must proceed within the legal avenues available to them to establish legal parenthood.").

149. *See, e.g.*, N.Y. FAM. CT. ACT (29A) § 581-304(b)-(c) (McKinney 2021) (noting where assisted reproduction birth mother is not wed to a second intended parent, the "consent to the assisted reproduction must be in a record[;]" without such a record, consent can be determined by "clear and convincing evidence that at the time of the assisted reproduction the intended parents agreed to conceive and parent the child together[ ]"). Comparable is A.B.A. Model Act Governing Assisted Reproduction. MODEL ACT GOVERNING ASSISTED REPROD. § 604(2)(a) (AM. BAR ASS'N 2019). *See also* Pueblo v. Haas, No. 357577, 2021 WL 6130700, at *2 (Mich. App. 2021) (noting nonstatutory "equitable parent" doctrine can be used by an intended parent who was married to the birth mother).

post-birth parental-like acts. Yet in only one setting could acts trigger possible parentage. Both VAPs and formal adoptions are state-controlled avenues to parentage based upon post-birth conduct by would-be parents.

As well, the *Gatsby* court did not address why there was a common law precedent on third party (i.e., nonparent) standing to seek a childcare order, but no possible common law precedent on parental standing to seek a childcare order. In earlier rulings, the Idaho Supreme Court found a nonparent could pursue a childcare order where the nonparent "has had custody of a child for an appreciable period of time" without the need to show "abandonment or patent unfitness" by a natural parent.[150]

The *Gatsby* ruling on the controlling effect of the AIA has other troubling consequences. For example, it seemingly does not allow an opposite sex wed couple to undertake a DIY AI birth with the use of semen provided by one who is not a spouse. Same sex and opposite sex wed couples are comparably treated, but many married couples without significant economic resources are left with legal parentage problems should the couples, the one-time intended parents per DIY AI pacts, split. Problems also appear for unwed couples and single women who desire to parent through DIY AI.[151]

A major lesson from *Gatsby* is that state legislators need to more comprehensively address childcare parentage in AI births. Statutes should address all who may undertake AI, however they do it, and provide clearer guidelines on consents to intended parentage. As well, AI laws should speak to whether or not other forms of expecting or existing legal parentage beyond AI pacts may be pursued by intended parents in AI settings, with expecting parentage possibly arising post-conception but prebirth as with VAPs and existing parentage possibly arising post-birth as with VAPs, residency/hold out parentage, or *de facto* parentage. In addressing these other forms of AI parentage, statutes should expressly recognize any judicial role(s) in commonlawmaking to supplement statutory provisions.

### C. Unconstitutional AI Statutes

The aforedescribed public policy problems with recognizing the controlling (or exclusive) nature of an AI statute are compounded

150. Stockwell v. Stockwell, 775 P.2d 611, 614 (Idaho 1989) (stating pursuit could only be successful if nonparent childcare served the child's best interest (citing *In re* Ewing, 529 P.2d 1296, 1298 (Idaho 1974)).

151. Without AIA protection, it is imaginable that one who supplies sperm may seek legal parentage only after birth, urging genetic ties entitle him to pursue a parental opportunity interest. Lehr v. Robertson, 463 U.S. 248, 261-62 (1983).

when the constitutional demands of Due Process and Equal Protection are considered. Of course, compelling governmental interests are needed for the state to infringe upon fundamental rights[152] or to mistreat suspect classes of people.[153] Rationality must still support AI laws which do not infringe upon fundamental rights or harm suspect classes, but nevertheless cause life, liberty, or property denials.[154] These constitutional demands cannot be eliminated even if statutes, like the AIA, were read to be the exclusive avenue to parentage in AI births.[155] The prospect of such statutory invalidation should lead courts to read AI statutes to be nonexclusive.[156]

Serious federal constitutional issues arise under the AIA. For example, the act bars medical personnel from performing assisted reproduction "upon a woman without . . . the prior written request and consent of her husband."[157] The *Gatsby* court recognized the problems with omitting spouses like Linsay and thus "read the AIA" to include for Linsay an avenue to "secure parental rights."[158] Yet the court (properly) did not address (as the issue was not presented) the statutory difficulties[159] with excluding an AIA avenue to "secure parental rights" for others, like an unmarried couple[160] outside the sur-

152. *See, e.g.*, Nat'l Inst. of Fam. and Life Advoc. v. Becerra, 138 S. Ct. 2361, 2371 (2018).

153. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996).

154. *See, e.g.*, Heller v. Doe by Doe, 509 U.S. 312, 319-20 (1993).

155. *See, e.g.*, VA. CODE ANN. § 20-157 (West 1999) (stating assisted conception statute "shall control, without exception"). Section 20-157 was later read as not controlling in L.F. v. Breit, 736 S.E.2d 711, 720 (determining the statute could not be applied literally as it would yield constitutional violations).

156. *See, e.g.*, *In re* R.C., 775 P.2d 27, 35 (Colorado 1989) (avoiding such invalidation "on statutory interpretation grounds").

157. IDAHO CODE ANN. § 39-5403(1) (West 2021). The language of the statute was quoted in the *Gatsby* opinion. *Gatsby*, 495 P.3d at 1002.

158. *Gatsby*, 495 P.3d at 1003 (relying upon Obergefell v. Hodges, 576 U.S. 644, 644 (2015) which recognized state responsibilities regarding recognitions of same sex marriages).

159. These difficulties were recognized by Justice Stegner, in dissent. *Gatsby*, 495 P.3d at 1012, n.2 (Stegner, J. dissenting).

160. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). The AIA seemingly would not bar a single woman from becoming a birth parent via assisted reproduction. IDAHO CODE ANN. § 16-2002(11)(a) (West 2016) (noting a "parent" means the "birth mother"). The AIA bar to an unmarried couple was recognized in Doe v. Doe, 395 P.3d 1287, 1291 (Idaho 2017). The differing treatment of wed and unwed couples in the Idaho AIA was not addressed in *Doe* as only the differential treatment of marital and nonmarital children was urged, which the *Doe* court found that the natural mother's former partner had no standing to raise. *Doe*, 395 P.3d at 1292. *But see* L.F., 736 S.E.2d at 724 (explaining an AI statute distinguishing between wed and unwed couples who are biological parents runs contrary to state's articulated goals and federal Due Process).

rogacy context;[161] like a husband who is a sperm provider to his wife;[162] and, like a single woman who is artificially inseminated with the aid of an anonymous sperm donor.[163] All three UPAs recognize parentage in the "natural mother" who gave birth,[164] while the latter two UPAs recognize parentage by consent in nonsurrogacy AI settings by one who may not be married to the person giving birth.[165] The 2019 ABA Model Act Governing Assisted Reproduction also recognizes "intended" parenthood arising from a preconception "express agreement" that need not reflect a "consent" within "a Record."[166]

The shortcomings of the Idaho AIA,[167] and statutes like it,[168] are clear given that the United States Supreme Court has recognized that if "the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion, into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[169] The shortcomings of current American state AI statutes have been well described in commentaries, including critiques focusing on the problems facing same-sex female couples,[170] unwed couples,[171] and single women.[172]

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161. Idaho has no surrogacy statutes and its courts do not assume judicial authority in this area (presumedly except when constitutional rights require validation). *See, e.g.*, *In re* Doe, 372 P.3d 1106 (Idaho 2016).

162. IDAHO CODE ANN. §39-5401(2) (West 2021) (stating a donor is a "man who is not the husband of the woman upon whom the artificial insemination is performed").

163. IDAHO CODE ANN. §39-5403(1) (West 2021) (restricting AI upon a woman without the "prior written request and consent of her husband").

164. UNIF. PARENTAGE ACT § 3(1) (UNIF. L. COMM'N 1973); UNIF. PARENTAGE ACT § 201(a)(1) (UNIF. L. COMM'N, revised 2002) (except in surrogacy settings); UNIF. PARENTAGE ACT § 201(1) (UNIF. L. COMM'N 2017) (except in surrogacy settings).

165. UNIF. PARENTAGE ACT § 704(a) (UNIF. L. COMM'N, revised 2002) ("man consents"); UNIF. PARENTAGE ACT § 703 (UNIF. L. COMM'N 2017) ("individual" consents).

166. MODEL ACT § 604(1), (2)(a) (AM. BAR ASS'N 2019).

167. The Idaho AIA follows somewhat the 1973 UPA. *See* UNIF. PARENTAGE ACT § 5(a) (UNIF. L. COMM'N 1973). Yet, unlike the AIA, section 39-5405(1) of the Idaho Code ("donor shall have no right, obligation or interest"), the 1973 UPA indicates that the "semen donor" who is the husband of the woman inseminated will be "treated in law as if he were" the "natural father of a child thereby conceived." §5(b).

168. *See, e.g.*, *supra* note 40 and accompanying text.

169. *Eisenstadt*, 405 U.S. at 453 (contraception access case with no majority opinion). The *Eisenstadt* declaration was later deemed to teach "that the Constitution protects individual decisions in matters of childrearing from unjustified intrusions by the State." Carey v. Population Serv. Int'l, 431 U.S. 678, 687 (1987).

170. *See, e.g.*, Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. OF GENDER, SOC. POL'Y & THE L. 467, 482-488 (2012) (arguing that denying VAP opportunities to unwed same-sex couples constitutes gender and sexual orientation discrimination). New laws could be modeled on section 26.26A.200 of the Washington Code (woman who gave birth and an "individual" who consented to an AI birth, per § 26.26A.610) or title 15c, section 301(a)(3) of the Vermont Statute (similar), each based on 2017 UPA §302(a)(1).

171. *See, e.g.*, Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1534 (2018) ("[W]hat the Court has said about the subject of parental identity makes clear that intentional parenthood is required in order to achieve the underlying objec-

The shortcomings in some states are less severe. Thus, in Texas, there are separate AI provisions for opposite sex married couples[173] and opposite sex unmarried couples,[174] but no explicit provisions for single women or same sex female couples, wed or unwed. In Texas, as well, a statute, unlike the Idaho AIA, recognizes a husband's own sperm donation in assisted reproduction settings.[175]

### D. Dicta Driving New AI Precedents

The *Gatsby* court recognized that each of the two lower courts "undertook a custody analysis to determine the best interests of the child"[176] even though each court had also found "Linsay's lack of status to the child," that is, a lack of either parental or third party standing to seek custody.[177] Instead of foregoing a custody analysis review as unnecessary, given the affirmance of Linsay's lack of standing, the Idaho Supreme Court found that it was not in the child's best interest for Kylee to be awarded custody.[178] The "myriad" of "unintended consequences" of this ruling on childcare parentage and third party childcare standing, noted by the dissent,[179] could have been avoided by simply affirming the best interest analysis, as Linsay's parental status or third party standing would become irrelevant.

Unfortunately, those consequences were not well-described by the dissent. The dissent only asked about a Leonard rather than a Linsay seeking custody, speculating that a nonbiologically-tied male spouse of a birth mother would be treated differently than a nonbiologically-tied female spouse.[180] Further, the dissent suggested that any attempt by Kylee to collect child support from Leonard, or from Linsay, unfortunately would be futile since neither was a childcare parent.[181] Yet,

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tives of constitutional parenthood."). New laws could be modeled on Washington and Vermont laws, each based on the 2017 UPA. *See supra* note 170. Precedents include *In re R.C.*, 775 P.2d at 35.

172. *See, e.g.*, Note, Patricia A. Kern and Kathleen M. Ridolfi, "The Fourteenth Amendment's Protection of a Woman's Right to be a Single Parent Through Artificial Insemination by Donor," 7 Women's Rights L. Rptr. 251, 257-66 (1982). *See also* Wash. Rev. Code Ann. § 26.26A.605 (semen donor in AI birth is "not a parent" if no consent with the intent to be a parent, per § 26.26A.610); § 26.26A.610 (no requirement for any individual beyond birth mother to consent to AI parentage).

173. Tex. Fam. Code Ann. § 160.704 (West 2021).

174. Fam. § 160.7031.

175. Fam. § 160.703.

176. *Gatsby*, 495 P.3d at 1007.

177. *Id.* at 1000.

178. *Id.* at 1009.

179. *Id.* at 1016 (Stegner, J., dissenting).

180. *Id.* (Stegner, J., dissenting).

181. *Id*. (Stegner, J., dissenting) (providing no analysis of how a child support parent need not also be a childcare parent). *But see In re* Parentage of M.J., 787 N.E.2d 144, 146 (Ill. 2003) (indicating woman could sue former intimate male partner for child

such support is clearly permissible elsewhere. That is, one can be accountable for child support though one cannot be a custodial parent.[182]

The unnecessary rulings in *Gatsby* on AI birth consents to childcare parentage, in and outside of the AIA, leave women like Linsay and men like Leonard, as well as unwed women, unwed couples, and men seeking parenthood through assisted reproduction births by their partners, needing statutory amendments or constitutional precedents favoring broader procreational rights. Bad precedents will follow the apparent dicta of this hard case, given the "'toxicity' and animosity in Linsay and Kylee's relationship;"[183] the fact that "Linsay had not spent much time as the primary caregiver and failed to act in the child's best interests during the period when she temporarily had sole custody;"[184] Kylee's "healthier relationship with the child;"[185] Linsay's conduct in creating "conflict in the child's community;"[186] the instability in the earlier joint custody schedule;[187] and Linsay's lies to the court and her "reputation for dishonesty."[188] While Linsay may not be a sympathetic would-be parent to some, not all do-it-yourselfers are similarly unsympathetic. Further, most all children would not be well served by losing their intended and loving parents simply due to scarce financial resources that preclude employing doctor and lawyer services in undertaking DIY AI.

The *Gatsby* court's overreach on legal issues should be avoided by other courts, particularly as the *Gatsby* court recognized—but did not strongly urge—the need for new General Assembly guidance on parentage (and nonparental childcare) norms, given the increasing use of AI (and the increasing parental-like actions of nonparents, in and outside of AI settings, whose continuing actions would serve the best interests of children).

### E. DIY AI and Informal Adoptions

Nonsurrogacy DIY AI births sometimes prompt parentage in those who did not consent to AI and did not formally adopt a child born of AI. Here, parentage can arise from varying forms of informal adoptions of AI children, that is, adoptions that are not founded on

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support of AI children on theories of oral contract or promissory estoppel even though the Parentage Act spoke of written consent of husband).

182. *See, e.g.*, N.E.v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004); *In re* Stephen Tyler R., 584 S.E.2d 581, 586 (W. Va. 2003).

183. *Gatsby*, 495 P.3d at 1008.

184. *Id*.

185. *Id*.

186. *Id*.

187. *Id*.

188. *Id*. at 1009-10.

court decrees on parentage following state inquiries into, *inter alia*, the suitability of the proposed adopters. As noted in *Gatsby*, an informal adoption can prompt parentage from a state-registered voluntary acknowledgment. An informal prompting parentage can also arise due to earlier wholly private actions, not registered with the state, like residing with and holding out a child as one's own or establishing a parental-like relationship with a child, accompanied by the consent or earlier acquiescence of one or two existing legal parents (*de facto*, equitable, or equitable adoption parent).[189] Here, parentage arises from parental-like acts occurring at no specific point in time. The following analyses demonstrate the *Gatsby* court's error in refusing generally to recognize that such informal adoption forms can apply to DIY AI births. Outside of Idaho, such forms sometimes protect Linsays (and Leonards) as parents, as well as their children who love and need them.

*i. Voluntary Acknowledgment and Spousal Parentage*

The *Gatsby* ruling seems inconsistent when it hints the AIA preempted a VAP and when it finds the AIA preempted any spousal parentage but declares that the AIA does not foreclose a formal adoption by Linsay. All these avenues to parentage can involve post-birth actions by intended parents.[190] There would be no inconsistency if only a formal adoption, and not a VAP or a birth during marriage, allowed intended parentage for one not biologically-tied to the child. This approach to VAPs is suggested by the *Gatsby* court's finding a lack of presumptive spousal parentage in Linsay, as she had no biological ties, with the absence of such ties making the presumption rebuttable.[191]

Yet not all VAP signors with no biological ties can be challenged in Idaho, as fraud, duress, or material mistake of fact must be shown if a challenge comes after sixty days. Here there was no fraud, duress, or material mistake of fact.[192] And not all spousal parent presumptions

189. While § 609(d)(6) of the 2017 UPA requires for de facto parentage the acquiescence or consent of "another parent," ("another parent . . . fostered or supported" the developing parental-like relationship), two state high courts require supportive action by each existing legal parent. E.N. v. . T.R., 255 A.3d 1, 33 (Md. 2021); Martin v. MacMahan, 264 A.3d 1224, 1235 (Maine 2022).

190. In some states VAPs can be signed before birth. *See, e.g.*, UNIF. PARENTAGE ACT §304(b)-(c) (UNIF. L. COMM'N 2017) (VAP takes effect at birth); TEX. FAM. CODE ANN. § 160.304(b) (West 2021) (paternity acknowledgment "may be signed before the birth of a child").

191. *Alber*, 472 P.2d at 327 (stating spousal parent presumption is rebuttable with proof of "nonaccess during the period of conception").

192. IDAHO CODE § 7-1106(2) (West 2021). While the statute speaks of "paternity" acknowledgments, it should be read, as was the AIA was read in *Gatsby*, to include female spouses of those giving birth. *Gatsby*, 495 P.3d at 1002-03.

are rebutted in Idaho though there are no biological ties; some spousal parents have no biological ties. Had Kylee, with Linsay's support, become pregnant via sex with a now unidentifiable man, the court suggests that Linsay would have been a presumptive spousal parent even though there could be no biological ties.[193] Idaho precedents recognize, as well, that rebuttal of the spousal presumption is sometimes foreclosed (as by estoppel) where there was an earlier court finding of legal parentage in the presumed spouse.[194] In fact, Linsay was seemingly found to be a parent pursuant to a July 5, 2017, no contact order, "which prohibited Kylee from seeing the child except at daycare"; about a month and a half later, the Gatsby divorce suit was filed wherein Linsay asserted the spousal parentage presumption.[195] Yet, Kylee was not estopped from denying Linsay's spousal parentage as the child was said to be subject to the AIA. Estoppel principles should not depend on how children are conceived. As with spousal parentage, a VAP should survive at times notwithstanding the AIA, as where a parent like Kylee is estopped from challenging the VAP after 60 days where a child's best interest would be served.

VAPs and marital spousal presumptions are but two forms of informal adoption, that is, an accrual of childcare parentage through earlier parental-like acts, not biological ties, where the governmental inquiries into, and statutory criteria on, fitness are not undertaken. Outside Idaho, these other avenues to informal adoptions do apply at times to DIY AI births. Such other avenues include residency/hold out parentage and *de facto* parentage.[196] These avenues (like VAPs and spousal parentage in Idaho) would be unavailable if AI statutes were "controlling." Unavailability thwarts parental intentions and children's best interests.

193. The high court found that the "common law marital presumption of paternity in Idaho" was inapplicable only because it was preempted by the AIA, and not because the presumption only applied to male spouses. *Gatsby*, 495 P.3d at 1001-02. The magistrate court had earlier found the presumption was applicable, but had been "overcome" by evidence of nonbiological ties in Linsay. *Id.* at 1000. *See* IDAHO CODE § 7-1119 ("genetic tests" overcome spousal parent presumption).

194. Waller v. State of Idaho, 192 P.3d 1058, 1062 (Idaho 2008) (former husband estopped); Miller v. Miller, 523 P.2d 827, 830 (Idaho 1974) (former wife estopped).

195. *Gatsby*, 495 P.3d at 999-1000.

196. The nomenclature, but not the essentials of these parentage avenues, differ in some states. Thus, there is sometimes recognized parentage by estoppel, equitable adoption parentage, or an equitable-parent doctrine. *See, e.g.*, *In re* Marriage of K.E.V., 883 P.2d 1246, 1253 (Mont. 1994) (wife equitably estopped from denying husband's presumptive parentage); Johnson v. Johnson, 617 N.W.2d 97, 104-05 (N.D. 2000) (equitable adoption leads to child support order); Pueblo v. Haas, 2021 WL 6130700, *2 (Mich. App. 2021) (reviewing Michigan equitable-parent doctrine applicable to spouses of birth mothers).

*ii. Hold Out/Residency Parentage*

All UPAs recognize childcare parentage in some who have resided with living children whom they held out as their own. To date, no UPA (and no state law) recognizes hold out/residency future childcare parentage based on pre-birth common residency with, and support of, expecting legal parents (including those pregnant or those awaiting formal adoption approval).

The 1973 UPA is quite different than the later UPAs. The 1973 Uniform Parentage Act has this parentage presumption:

> (a) A man is presumed to be the natural father of the child if . . .
> (4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child[.][197]

The 2002 Uniform Parentage Act altered the presumption. It says:

> (a) A man is presumed to be the father of a child if: . . .
> (5) for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.[198]

The 2017 Uniform Parentage Act altered again the presumption. It says:

> (a) An individual is presumed to be a parent of a child if: . . .
> (2) the individual resided in the same household with the child for the first two years of the life of the child, including any period of temporary absence, and openly held out the child as the individual's child.[199]

The 2000 American Law Institute Principles of the Law of Family Dissolution ("ALI Principles") also recognize hold out/residency parentage. Like the 2002 UPA and the 2017 UPA, the ALI Principles recognize "a parent by estoppel," described as one who "lived with the child since the child's birth" while holding out and accepting full and permanent responsibilities as parent as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities.[200]

Many current state laws reflect the policies of these proposed laws. Where state laws have expressly extended beyond opposite sex

197. UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM'N 1973).
198. UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. L. COMM'N revised 2002)
199. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N revised 2017)
200. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)(iii) (AM. L. INST. 2000) (requiring a finding of the need to serve the child's best interests).

couples,[201] hold out/residency parentage is generally available to a female partner of one giving birth due to equality demands.[202] Hold out/residency parentage is generally unavailable to a partner of a male who is a parent at birth where the person giving birth remains a legal parent and where state laws disallow three custodial parents.[203]

There are varying state laws reflecting the distinct UPA approaches to hold out/residency parentage.[204] In California, following the 1973 UPA, a man is "presumed to be the natural [father] of a child" if he "receive[d] the child into [his] home and openly holds out the child as his natural child."[205] There is no explicit requirement that one who holds out a child as "his natural child" must have beliefs

201. *But see, e.g.*, VT. STAT. ANN. tit. 15C, § 401(a)(4) (West 2018) ("person," not man); WASH. REV. CODE. ANN. § 26.26A.115(1)(b) (West 2019) ("individual," not man). On the need to treat equally all people involved in hold out/residency settings, see Jeffrey A. Parness, *Marriage Equality: Parentage (In)Equality*, 32 WIS. J.L. GENDER & SOC'Y 179, 189 (2017).

202. *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005) (finding former unwed lesbian partner a child support parent under California statutory law on presumed natural hold out fathers); Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 971-72 (Vt. 2006) (noting upon dissolution of civil union of lesbian couple, both women are custodial parents as statute making husband the presumed "natural parent" of a child born to his wife was applicable via a second statute saying that civil union and married couples shall have the "same" rights (citing VT. STAT. ANN. tit. 15C, §§ 308(4), 1204(f) (West 2018))). Similar equality mandates operate when there is common law, rather than statutory, hold out parentage. *See, e.g.*, Wendy G-M. v. Erin G-M., 985 N.Y.S. 2d 845, 860 (N.Y. Sup. Monroe Cty. 2014); Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 L. AND CONTEMP. PROBS. 195, 212-19 (2014) (discussing even where statutes only explicitly recognize hold out/residency parentage for men, women are sometimes deemed parents under the statutes).

203. In California, though, there can be three legal parents, including the birth mother, her spouse, and a hold out/residency parent. *See* CAL. FAM. CODE § 7612(c) (West 2020) (recognizing three parents, where recognition of only two parents "would be detrimental to the child"). *Cf.* C.G. v. J.R. 130 So.3d 776, 782 (Fla. App. 2d 2014) (noting Florida law does not support enforcement of an agreement on sharing child custody which was entered into by the married birth mother, her spouse, and the biological father of a child born of sex).

204. As well, there are doctrines that effectively recognize hold out/residency parentage, though with different terms and some different norms. *See, e.g.*, J.S.B. v. S.R.V., 630 S.W.3d 693, 704-05 (Kty. 2021) (noting the relevance of a birth mother's "parental waiver" of parental rights to allow parentage in a person who could not formally adopt children, but who held children out as one's own while residing with them for some time).

205. CAL. FAM. CODE § 7611(d) (West 2020). This is similar to Mont. Code § 40-6-105(d). The presumption in California has been sustained when challenged on the ground of interfering with federal constitutional childcare interests. *See, e.g.*, R.M. v. T.A., 233 Cal. App. 4th 760, 764 (Cal. App. 4th 2015) (preponderance of evidence norm used to establish presumption). As to what constitutes receipt into the home, see, e.g., *In re* Jesusa V., 85 P.3d 2, 15 (Cal. 2004); *In re* N.V., A141323, 2014 Cal. App. Unpub. LEXIS 8870, at *13-15 (Cal. App. 1st Div. Dec. 12, 2014) (reviewing cases). How long an alleged hold out/residency parent must so act is determined on a case-by-case basis. *See, e.g.*, *In re* J.B., No. 18CCJP02942A, 2019 WL 1451304, at *1 (Cal. App. 2d Apr. 2, 2019) (two day hold out is insufficient for presumed parent status).

about actual biological ties. California cases have recognized presumed parents, including women,[206] who knew there were no biological ties, but who acted in the community as if there were.[207] Elsewhere, state laws recognize hold out/residency parentage only for those who raise children from birth and for at least two years,[208] following the 2017 UPA. Again, seemingly here there need be no biological ties.[209] In the two settings, DIY AI births should be able to prompt hold out/residency parentage, assuming no special controlling statutes.[210]

*iii. De Facto Parentage*

Another form of informal adoption is *de facto* parentage. The 2017 UPA, but neither of its UPA predecessors, expressly recognizes "de facto" parenthood in some without biological or formal adoption ties.[211] Parenthood here is dependent upon meeting far more explicit norms than the norms underlying hold out/residency parentage.[212]

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206. *See, e.g.*, Charisma R. v. Kristina S., 175 Cal.App.4th 361, 365-66 (Cal. App. 1st 2009) (domestic partners and AI birth); *Elisa B.*,117 P.3d at 670 (noting former lesbian partner of birth mother via AI was residency/hold out parent responsible for child support).

207. How long an alleged hold out/residency parent must so act is determined on a case-by-case basis. *See, e.g.*, *In re* J.B., No. B291208, 2019 WL 1451304 at *1 (Cal. App. 2d 2019) (two day hold out is insufficient for presumed parent status).

208. *See, e.g.*, TEX. CODE ANN. § 160.204(a)(5) (man is a presumed father if "during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own"); WASH. REV. CODE § 26.26.115(b) (similar but 4 years). *Cf.* MONT. CODE ANN. § 40-6-105(d) (person is presumed the natural father if "while the child was under the age of majority, the person receives the child into the person's home and openly represents the child to be the person's natural child").

209. While the 1973 UPA references a hold out/residency parent for a "natural child," the 2017 UPA references a child held out as the "individual's child." *Compare* UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM'N 1973), *with* UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N revised 2017).

210. *See, e.g.*, Partanen v. Gallagher, 59 N.E.3d 1133, 1143 (Mass. 2016); *Elisa B.*, 117 P.3d at 667-68.

211. The term "de facto" parent did not originate in the 2017 UPA. The Comment to the Act indicates its de facto parentage standard was modeled on Maine and Delaware statutes. UNIF. PARENTAGE ACT § 609 cmt. (UNIF. L. COMM'N revised 2017). The term was also employed in the ALI Principles. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.03(1) (Am. L. Inst. 2000); *see also* RESTATEMENT OF THE LAW: CHILD. AND THE L., at 251 Appendix B (AM. L. INST., TENTATIVE DRAFT 2021) (§1.72 on de facto parentage is one of the "black letter" sections approved by membership).

212. Expecting legal parents are foreclosed under the 2017 UPA from being bound to any agreements on de facto parentage for children to be born of sex later, as the model law requires, e.g., "a bonded and dependent relationship with the child." 2017 UPA, at §609(d)(5). Thus, there is not recognized a possible "bonded and dependent relationship" with a fetus, a fertilized egg, or some child of sex yet unconceived.Expecting legal parents are foreclosed under the 2017 UPA from being bound to any agreements on de facto parentage for children to be born of sex later, as the model

For *de facto* parentage, an existing legal parent must have "fostered or supported" a "bonded and dependent relationship" between a child and a nonparent which is "parental in nature";[213] the nonparent must have held out the child as the nonparent's own child and undertaken "full and permanent" parental responsibilities;[214] and the nonparent must have "resided with the child as a regular member of the child's household for a significant period of time."[215]

Of particular note is the 2017 UPA limit on who can commence a proceeding to establish *de facto* parentage. Commencement may only be undertaken by an "individual" who is "alive" and who "claims to be a *de facto* parent of the child."[216]

The ALI Principles,[217] and an ALI Draft of a Restatement of the Law: Children and the Law,[218] also recognize forms of "de facto" parentage for those without biological or formal adoption ties. Each form requires both residence and consent by an existing legal "parent."

The ALI Principles recognize as a "de facto parent" one who is "other than a legal parent or a parent by estoppel" and who lived with and cared for the child for at least two years under an "agreement of a legal parent to form a parent-child relationship."[219] A *de facto* parent,

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law requires, e.g., "a bonded and dependent relationship with the child." UNIF. PARENTAGE ACT § 609(d)(5) (UNIF. L. COMM'N revised 2017). Thus, there is not recognized a possible "bonded and dependent relationship" with a fetus, a fertilized egg, or some child of sex yet unconceived.

213. UNIF. PARENTAGE ACT § 609(d)(5)-(6) (UNIF. L. COMM'N revised 2017).

214. *Id.* at § 609(d)(3)-(4).

215. *Id.* at § 609(d)(1).

216. *Id.* at § 609(a).

217. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.03(1)(c), 3.02(1)(c) (AM. L. INST. 2000) (noting requirements that include residence with the child, as well as "the agreement of a legal parent to form a parent-child relationship" unless the legal parent completely fails, or is unable, to perform caretaking functions").

218. RESTATEMENT OF THE LAW: CHILD. AND THE L. § 1.72(a) (AM. L. INST., TENTATIVE DRAFT 2021) (requirements include residence with the child, as well as establishing that "a parent consented to and fostered the formation of the parent-child relationship").

219. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c) (AM. L. INST. 2000) . Alternatively, a de facto parent is one who is other than a legal parent or a parent by estoppel and who lived with and cared for the child for at least two years "as a result of a complete failure or inability of any legal parent to perform caretaking functions." *Id*. Precedents predating the 2000 ALI Principles recognize the concept of de facto parentage in different settings. *See, e.g.*, *In re* Kieshia E., 859 P.2d 1290, 1296 (Cal. 1993) (standing of a de facto parent in a juvenile delinquency proceeding); *In re* Dependency of J.H., 815 P.2d 1380, 1384 (Wash. 1991) (noting in a delinquency case, permissive intervention, not intervention as of right, is available to some foster parents claiming de facto (or psychological) parent status); *In re* B.G., 523 P.2d 244, 254 n. 21 (Cal. 1974) (not resolving whether a de facto parent may have the same rights of notice, hearing or counsel as have natural parents in Juvenile Court Law proceedings under due process or equal protection principles). The Reporter's Notes to the 2000 ALI Principles observes the "law that most closely approximates the criteria for a 'de facto' parent relationship is that of Wisconsin" where visitation (but not cus-

unlike a legal parent or a parent by estoppel, has no presumptive right to "an allocation of decision-making responsibility for the child.[220] Further, a *de facto* parent has no presumptive right of "access to the child's school and health-care records to which legal parents have access by other law."[221] A *de facto* parent has standing to pursue an action involving judicial allocation of custodial and decision-making responsibility.[222]

The ALI Restatement Draft describes a *de facto* parent as a third party who establishes that he/she "lived with the child for a significant period of time;" was "in a parental role" long enough that he/she "established a bond and dependent relationship . . . parental in nature"; he/she had no "expectation of financial compensation"; and "a parent" consented to third party's parental-like role.[223] So, the ALI Restatement Draft, but not the ALI Principles, invite a childcare parentage designation adversely impacting the childcare interests of an existing and nonconsenting parent.[224]

Before, and since 2017, there exist state statutes and common law precedents on nonmarital, nonbiological, and nonadoptive childcare parentage similar to the suggested *de facto* parent norms. For example, before 2017 there were quite comparable Maine and Delaware statutes[225] and a less comparable Wisconsin Supreme Court precedent,[226] that were utilized by the drafters of the 2017 UPA.[227] Since

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tody) may be awarded "to an individual who has formed a 'parent-like relationship' with a child." PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. c (AM. L. INST. 2000).

220. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 209(2) (AM. L. INST. 2000).

221. *Id.* at § 209(4).

222. *Id.* at §2.04(1).

223. RESTATEMENT OF THE LAW: CHILD. AND THE L. § 1.72(a) (AM. L. INST., TENTATIVE DRAFT 2021) (proof by clear and convincing evidence is required).

224. The ALI Restatement Draft, like the 2017 UPA, on de facto parentage invites substantive Due Process violations of the childcare interests of existing and nonconsenting legal parents. *See* Parness, *supra* note 128, at 203-05; E.N. v. T.R., 255 A.3d 1 (Md. 2021) (noting de facto parenthood requires consent by two existing legal parents, if there are two, or a finding of unfitness in a nonconsenting parent or a finding of "exceptional circumstances").

225. ME. REV. STAT. ANN. tit. 19-A, § 1891; DEL. CODE ANN. tit. 13, § 8-201(c).

226. *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995) (determining parental-like relationship can prompt visitation rights when in child's best interests). There are common law precedents elsewhere. In 2008 the South Carolina Supreme Court, adopting a Wisconsin high court analysis, determined that a nonparent was eligible for psychological parent status if a four-prong test was met. Marquez v. Caudill, 656 S.E.2d 737, 743-44 (S.C. 2008) (following H.S.H.-K., 533 N.W. at 435-436, which set out norms for nonparent child visitation orders); *see also* Conover v. Conover, 146 A.3d 433, 446-47 (Md. 2016) (using H.S.H.-K. in recognizing de facto parent doctrine). And in 2009, a federal appeals court noted that the Mississippi Supreme Court had long recognized that a person standing "in loco parentis," meaning "one who has assumed the status and obligations of a parent without a formal adoption[,]" has the same "rights,

2017, a few states have statutorily recognized 2017 UPA *de facto* parenthood.[228]

On occasion, statutes within a single state recognize both hold out/residency and *de facto* parents. Thus, the Maine Parentage Act, effective in July, 2016, provides for presumed parents who resided since birth with a child for at least two years and "assumed personal, financial or custodial responsibilities,"[229] as well as provides for *de facto* parents who, *inter alia*, "resided with the child for a significant period of time," established with the child "a bonded and dependent relationship[,]" and "accepted full and permanent responsibilities as a parent . . . without expectation of financial compensation[.]"[230] Similarly, there are both hold out/residency and *de facto* parents in Delaware,[231] Washington,[232] and Vermont.[233]

As with hold out/residency parentage, *de facto* parentage should be available in DIY AI births in the absence of a controlling statute. In some states, such parentage has already been recognized.[234]

## V. CONCLUSION

In *Gatsby v. Gatsby*[235] in 2021, the Idaho Supreme Court determined legal parentage for a child born in October 2016 via a do-it-yourself artificial insemination ("DIY AI") to a married female couple who later divorced. In a 4-1 ruling, the court found that the Idaho

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duties and liabilities" as a natural parent. First Colony Life Ins. Co. v. Sanford, 555 F.3d 177, 183 (5th Cir. 2009) (relying on, inter alia, Favre v. Medders, 128 So.2d 877, 879 (Miss. 1961)).

By contrast, in some U.S. states where there are no de facto parent statutes, courts choose not to develop precedents because any new de facto parentage norms are the responsibility of state legislators. *See, e.g.*, Jeffrey A. Parness, *State Lawmaking on Federal Constitutional Childcare Parents: More Principled Allocations of Powers and More Rational Distinctions*, 50 CREIGHTON L. REV. 479, 479-80 (2017). For a forceful argument on the need for continuing the common law "equitable parenthood doctrine" even where there are statutes, see Jessica Feinberg, *Whither the Functional Parent?: Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOKLYN L. REV. 55, 58-59 (2017).

227. UNIF. PARENTAGE ACT § 609 cmt. (UNIF. L. COMM'N revised 2017).

228. *See, e.g.*, WASH. REV. CODE § 26.26A.440; VT. STAT. ANN. tit. 15C, § 501.

229. ME. REV. STAT. ANN. tit. 19-A, § 1881(3) (2016).

230. ME. REV. STAT. ANN. tit. 19-A, § 1891(3) (2016).

231. DEL. CODE ANN. tit. 13, § 8-204(a)(5) (presumed hold out/residency parent); DEL. CODE ANN. tit. 13, § 8-201(c) (de facto parent).

232. WASH. REV. CODE § 26.26A.115(b) (presumed hold out/residency parent "for the first four years"); WASH. REV. CODE § 26.26A.440 (de facto parent).

233. VT. STAT. ANN. tit. 15C, § 401(a)(1) (presumed hold out/residency parent after the first two years); VT. STAT. ANN. tit. 15C, § 501(a) (de facto parent).

234. *See, e.g.*, Rubano v. DiCenzo, 759 A.2d 959, 971 (R.I. 2000) (former female domestic partner of AI birth mother); *In re* Parentage of L.B., 122 P.3d 161, 176 (Wash. 2005) (nonstatutory de facto parentage available to former same sex partner for child born of AI).

235. 495 P.3d 996 (Idaho 2021).

Artificial Insemination Act ("AIA") was the controlling law and that the couple's AI agreement failed to comply with the AIA.[236] The majority did not decide if the nonbirth spouse could have completed a "voluntary acknowledgement of paternity" to become a parent or had standing to seek a childcare order as a nonparent.[237] The nonbirth spouse was found not to "have parental rights to the child"[238] regardless of the harm to the child that would follow and regardless of any actual consents to shared parentage.

The couple in *Gatsby* did not consult with an attorney in agreeing to bring a child into the marriage and did not use the services of a physician.[239] The nonbirth spouse was foreclosed from parenthood because the agreement the couple used, "found online," suffered from "severe inadequacies."[240] A dissenter found the majority "exalts form over substance" and "turns a blind eye to Idaho's policy favoring legitimacy," concluding that the "unintended consequences" of the decision "are hard to quantify, but . . . they will be myriad."

The *Gatsby* ruling is troublesome on several fronts. Its problems highlight the difficulties facing intended parents employing AI, especially those without significant financial resources, female couples, and single women. The difficulties include deeming AI statutes "controlling" even where the best interests of children are stymied and intended parent pacts are disregarded entirely; constitutional concerns about equality mandates and about thwarting procreational rights, especially for those with no parentage alternatives to DIY AI; and, foreclosing informal adoptions in DIY AI settings though recognized in non-DIY settings, as with voluntary acknowledgment, residency/hold out and *de facto* parentage. American state statutes need to address comprehensively all those who undertake AI parentage, the ways in which pre-insemination intentions can be expressed; the post-insemination acts that can prompt intended AI parentage (as with VAPs, *de facto* parentage, and other forms of informal adoptions); and, the judicial commonlawmaking power on parentage for AI births.

236. Gatsby v. Gatsby, 495 P.3d 996, 1001-04 (Idaho 2021).
237. *Gatsby*, 495 P.3d at 1007, 1010.
238. *Id.* at 1010.
239. *Id.* at 999.
240. *Id.* at 999, 1003.

# FUNCTIONAL AND FORMAL BYRD RULE COMPLIANCE

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Abstract

*Budget reconciliation is a special procedure in Congress that exempts policy from the Senate's sixty-vote threshold to overcome a filibuster. A central condition is the Byrd Rule's exclusion of non-budgetary provisions, or provisions which produce outlays or revenues that are "merely incidental" to their "non-budgetary" components. This paper makes two arguments about this exclusion. First, Congress should classify provisions as "budgetary" or "non-budgetary" based on substance rather than form, treating implicit transfers as budgetary. This is justified by underlying economic realities and administrative costs. Second, even under a formal definition of "non-budgetary," an implicit transfer can be restructured to comply with the letter and the purposes of the Byrd Rule. This is done by explicitly subsidizing the implicitly-taxed population and substituting a more general explicit tax. This paper's recurring example is a 2021 Byrd Rule decision by the Senate Parliamentarian ruling that Democrats could not include a grant of legal permanent resident status to Dreamers.*

## I. SHORT OVERVIEW OF THE BYRD RULE

Slim majorities love budget reconciliation. The combination of diametrically opposed policy and the three-fifths filibuster threshold makes passing laws pretty darn hard. Budget reconciliation, for what it allows, makes passing legislature easier.[1] That begs the question, what does budget reconciliation allow?

Broadly speaking, reconciliation can only contain budgetary provisions.[2] The relevant limitations on what can go in a budget reconciliation bill are collectively called the Byrd Rule.[3] Important for this paper, 2 U.S.C. § 644(b)(1) operates to exclude[4] a provision if it "does not produce a change in outlays or revenues . . ." or "produces changes in outlays or revenues which are merely incidental to [its] non-budgetary components."[5] Most policies will have *some* direct or downstream effect on federal finances. So, in practice, a provision is excluded where its budgetary components[6] are substantially outweighed by the non-budgetary components.[7] The Byrd Rule's enforcement has a few layers. Objecting senators can raise points of order to challenge a provision's eligibility under the Byrd Rule.[8] However, for the two just-mentioned Byrd Rule exclusions, the *de facto* decision maker is the Senate Parliamentarian.[9] Exceptions are very rare,[10] and there is formidable resistance to replacing the Parliamentarian on policy grounds or ignoring her advisory rulings.[11] The Byrd Rule's proponents envi-

1. The governing party still needs an electoral trifecta, and maybe it has to get its moderates and hard-liners on the same page, but it's easier.

2. *See* 2 U.S.C.A. § 644(b)(1)(A) (West 2021) (excluding non-budgetary provisions).

3. BILL HENIFF, JR., CONG. RSCH. SERV., THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE," RL30862, 3-4 (2021).

4. § 644(b)(1) actually defines what type of provisions are "extraneous," and § 644(e) in turn provides the mechanism for excluding extraneous provisions.

5. § 644(b)(1).

6. I will use "budgetary" or "budgetary component" as shorthand for a provision that "produces changes in outlays or revenues."

7. *See* Lisa Desjardins, *Read the Senate Rules Decision that Blocks Democrats from Putting Immigration Reform in Budget*, PBS NEWSHOUR (Sept. 20, 2021), https://www.pbs.org/newshour/politics/read-the-senate-rules-decision-that-blocks-democrats-from-putting-immigration-reform-in-budget ("The question before us is whether a series of proposed amendments . . . is a policy change that substantially outweighs the budgetary impact of that change."). It appears that the Senate Parliamentarian's office does not itself make its rulings publicly available. In this case, though, the ruling's text was obtained and published by PBS NewsHour.

8. § 644(e).

9. Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 LAW & CONTEMP. PROBS. 99, 106 (2018).

10. *Id.*

11. *See* Jordain Carney, *Democrats Reject Hardball Tactics Against Senate Parliamentarian*, The Hill (Sept. 20, 2021), https://thehill.com/homenews/senate/573087-democrats-reject-hardball-tactics-against-senate-parliamentarian.

sioned it as a way to exclude controversial provisions from reconciliation and to thereby preserve the Senate's deliberative character.[12]

## II. A RECENT EXAMPLE OF BYRD EXCLUSION: LEGAL PERMANENT RESIDENT GRANT

This article examines the Byrd Rule's contours and makes generalized observations about compliance, but this is difficult without concrete scenarios. There will be several examples, real and possible. I will repeatedly return to the 2021 attempt by Democrats to grant legal permanent resident ("LPR") status to Dreamers through reconciliation.[13] On September 19, 2021, the Senate Parliamentarian ruled that this provision flunked the Byrd Rule's balancing test.[14] In short, the provision would have provided a path to legal status for a large number of undocumented immigrants.[15] Anticipating that this would be challenged as "non-budgetary," Democrats pointed to the Congressional Budget Office's ("CBO") analysis that predicted its effects on federal finances, including increases in social safety net expenditures.[16] The Parliamentarian characterized many other components as "non-budgetary," including:

> [T]he value of having the security of LPR status[,] . . . the ability to work anywhere in almost any job, the ability to obtain a driver's license in any state, in-state tuition in any state, the ability to sponsor family members under the INA [Immigration and Nationality Act], the ability to make cam-

12. *See, e.g.*, CONG. RSCH. SERV., *supra* note 3, at 2 (quoting Senator Byrd's complaint that "any measure, no matter how controversial, [ ] can be brought to the Senate under an ironclad built-in time agreement that limits debate, plus time on amendments and motions, to no more than 20 hours"). Section IV of this paper will more fully explore the Byrd Rule's purposes and legislative history.

13. One of the primary reasons for choosing this example is that the Parliamentarian's ruling regarding the LPR status grant has been made public. *See* Desjardins, *supra* note 7.

14. Claudia Grisales, *In A Blow To Democrats, Senate Official Blocks Immigration Reform In Budget Bill*, NPR (Sept. 19, 2021), https://www.npr.org/2021/09/19/1038776731/in-a-blow-to-democrats-senate-official-blocks-immigration-reform-in-budget-bill.

15. Luke Broadwater, *Senate Aides Try to Sway Rules Enforcer Over Including Immigration Overhaul in Budget Plan*, NEW YORK TIMES (Sept. 10, 2021), https://www.nytimes.com/2021/09/10/us/politics/immigration-elizabeth-macdonough.html ("Democrats are pushing to grant legal status to people brought to the United States as children, known as Dreamers; immigrants who were granted Temporary Protected Status for humanitarian reasons; close to one million farmworkers; and millions more whom Democrats consider 'essential workers.'").

16. *See* Desjardins, *supra* note 7 ("CBO estimates that 8 million people will adjust to LPR status under this proposal and that such adjustment will increase the deficit by 140B over 10 years as a result of the social safety net/benefits programs to which LPR's would be entitled.").

> paign contributions, the freedom from the specter of deportation to the very country from which they fled.[17]

The Parliamentarian stated that these benefits "cannot be measured in federal dollars" and go well beyond the factors that generate the CBO score.[18]

So, the Parliamentarian identified a number of non-budgetary, or policy, components of the LPR status grant. But this did not end the inquiry. Remember that exclusion by the Byrd Rule is not dictated by the presence of non-budgetary aspects. Exclusion is only appropriate where the budgetary aspects are "merely incidental" to the non-budgetary ones.[19] In this case, the Parliamentarian weighed the budgetary and non-budgetary effects and advised that the Byrd Rule exclude the provision.

The point of this paper is not to grade the validity of the Parliamentarian's Byrd Rule decisions. The only thing to flag before moving on is the statement that "[t]he reasons that people risk their lives to come to this country" and "the value of having the security of LPR

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17. *Id.*

18. *Id.* Oddly, the Parliamentarian's listing of the provision's non-budgetary effects only includes benefits that would accrue to the immigrants gaining legal status. It almost resembles a platform statement by the Democratic Party listing all the reasons for granting LPR status to Dreamers. A complete evaluation of the non-budgetary components of an LPR grant would also have to look to the value (or disvalue) to others. What about the immigration status quo do opponents value, and what should we count? On one hand, the LPR grant would cause some economic disvalues. Probably the biggest is wage pressure. Both economists and the wider population have a sense that immigration and granting of legal status can place downward wage pressure on similarly situated citizens, primarily those at similar wage levels, with similar skills, in the same geographic areas, etc. *See* STEVEN A. GREENLAW & DAVID SHAPIRO, PRINCIPLES OF MACROECONOMICS 2E 88 (Rice University OpenStax ed. 2018) ("An increased number of workers will cause the supply curve to shift to the right. An increased number of workers can be due to several factors, such as immigration . . . ."). Indeed, the individual pandemic programs have likely affected upward wage pressure by shrinking the labor pool. *See* Ben Casselman & Jeanna Smialek, *Wage Growth is Holding Up in Aftermath of Economic Crash*, NEW YORK TIMES (July 20, 2021), https://www.nytimes.com/2021/06/03/business/economy/wage-growth-pandemic.html ("The data, while messy, match anecdotes. Reports of labor shortages in service jobs that are newly reopening abound, and surveys show businesses and consumers becoming more confident that employee earnings will increase. Job openings have been surging, and the rate at which workers are quitting suggests that they have some room to be choosy."). On the other hand, the Parliamentarian's ruling does not mention that some persons value maintaining the country's cultural and racial status quo. The Parliamentarian, of course, knows that lots of people (and Congresspeople) value these things. Maybe she implicitly factored them into her weighing of the provision's non-budgetary components or maybe she figured that cultural grievances do not deserve weight in Byrd Rule decisions. This paper does not focus on what role, if any, cultural effects should have in Byrd Rule decisions. But because exclusion by the Byrd Rule depends on weighing a provision's budgetary and non-budgetary effects, it matters what cultural effects are given weight, and this may be an important question for future scholarship.

19. 2 U.S.C.A. § 644(b)(1)(D) (West 2021).

status" cannot be "measured in federal dollars."[20] There are two ideas here. First, the reference to federal dollars is a statement that these intangible benefits are, quite literally, not budget outlays. But the Parliamentarian's listing of reasons to immigrate—"religious and political persecution, famine, war, unspeakable violence and lack of opportunity in their home countries"—appears to argue that these benefits cannot be reduced to dollars at all. If the argument is whether these benefits *should* be reduced to dollars and allocated by markets, my answer would be an emphatic no. But as a descriptive matter, our economy does commoditize these benefits in certain ways.[21] This financialization alone does not establish that these benefits can be reduced to federal dollars. However, the next section explores why traditionally non-budgetary provisions may often be more "budgetary" than is initially apparent.

## III. PROBING THE HIDDEN BUDGETARY CHARACTER OF SOME NON-BUDGETARY ITEMS

The statute 2 U.S.C. § 644[22] compares "non-budgetary components" to "produce[d] changes in outlays or revenues."[23] So the implied definition of "non-budgetary" would be not producing changes in outlays or revenues. This makes some sense; the federal budget is a compilation of the various revenues and expenditures. Based on this definition, plenty of benefits or harms bestowed by government action are non-budgetary. Take the Clean Water Act for example.[24] It requires dischargers of various pollutants to meet effluent limitations.[25] Depending on the industry and the pollutant, that can be a significant cost, but it is not paid to the federal purse. Aside from the comparably small salaries of the Environmental Protection Agency ("EPA") staff, the main effects of this legislation do not show up on the federal budget.

But a modest functional tweak to the definitions of "budgetary" and "non-budgetary" would be better. Namely, "budgetary" components could be expanded to encompass implicit transfers. In an implicit transfer, the government levies a tax and uses those proceeds to pay a subsidy, but it requires the transfer implicitly and does not do

20. Desjardins, *supra* note 7.

21. *See, e.g.*, Shirley P. Leyro & Daniel L. Stageman, *Crimmigration, Deportability and the Social Exclusion of Noncitizen Immigrants*, 15 MIGRATION LETTERS 45, 47, 53 (2018) (discussing commodification of immigration eligibility).

22. 2 U.S.C. § 644.

23. § 644(b)(1)(D).

24. 33 U.S.C.A. §§ 1281 *et seq.*

25. *See* 33 U.S.C.A. § 1311(b) (West 2021) (providing for promulgation of effluent limitations).

the collection and disbursement itself. Perhaps the most explored example of implicit government transfer, albeit not federal, is affordable housing requirements for developers.[26] In the U.S., many major cities require developers of residential apartment buildings to rent or sell some fraction of their inventory at lower-than-market rates.[27] Really, this is an implicit tax on the developer's profits[28] and a corresponding rent subsidy to qualifying renters. In other words, it would be economically identical if the city levied a tax on developers according to their number of units and rent charged and used those dollars to pay a subsidy to the low-income renters. If this were being done by the federal government instead of cities, and Congress wanted to pass it by budget reconciliation, should it be excluded by the Byrd Rule simply because the transfer is not formally passed through the government's purse? There would be no plausible basis for excluding an explicit tax on developers and subsidy to renters under the Byrd Rule, because the tax and subsidy would appear in the budget. Also, if it is more administratively costly to do this transfer explicitly,[29] then labeling implicit transfers as "non-budgetary" could cause an inefficient result.[30]

This structure applies to a lot of federal regulation. Recall the Clean Water Act's regulation of pollutant discharge. The effluent limitations are derived from pollution control technologies that the EPA identifies as effective.[31] The expectation is that the discharger will pay to install that technology or a better one at their plant. Alongside the Clean Water Act, the Water Quality Act of 1987[32] has the stated goal to eliminate pollution, but that is an intermediate proxy for the true benefits, which accrue to fishermen, swimmers, and consumers in the form of cheaper fish, improved recreation, and health.[33] The EPA already quantifies these benefits in dollar values when conducting

26. *See, e.g.*, Michael Oxley, *Implicit Land Taxation and Affordable Housing Provision in England*, 23 HOUSING STUDIES 661, 663-64 (2008) (explaining the implicit tax of affordable housing requirements).

27. *E.g.*, CHICAGO, ILL., MUN. CODE § 2-44-085(F)(1)-(3), https://codelibrary.amlegal.com/codes/chicago/latest/chicago_il/0-0-0-2598874.

28. The ultimate incidence of the tax between developer and non-affordable renters depends on the market conditions, but either way it is an implicit tax.

29. It is likely to be more costly to make the transfer explicit as it requires additional collection and disbursement. The implicit transfer only requires one type of transfer: the sending from the taxpayer to the recipient. The explicit transfer requires sending the funds from the taxpayer to the government and then sending the funds from the government to the recipient.

30. It would be inefficient if the governing party is only allowed to do the transfer explicitly by reconciliation and a explicit transfer is more costly.

31. This is a simplification; the EPA also considers a number of factors other than efficacy. *See* § 1314(b)(1)(B) (specifying factors and authorizing EPA to consider others in determining best practicable control technology).

32. 33 U.S.C.A. § 1254(a).

33. 33 U.S.C.A. 1254(a) (West 2021).

cost-benefit analyses.[34] The benefits also accrue to fish in the form of health and survival. This requirement would be equivalent to the government explicitly taxing polluters and installing the pollution control technologies itself or subsidizing those harmed by pollution to install them. These options sound silly, especially the latter, but that is because the polluter is in a better position to weigh and install various technologies that will meet the effluent standards. Again, the Byrd Rule would probably allow Congress to tax polluters and pay for the EPA to install the technologies. This differing eligibility for reconciliation inclusion based on the formalistic definition of "budgetary" is undesirable.

Effects of Affordable Housing under Formalistic Definition of Budgetary

| **Non-Budgetary Benefits & Subsidies** | **Non-Budgetary Harms & Taxes** |
|---|---|
| Lower housing costs for low-income renters | Reduced rent collected from eligible renters |
| Positive externalities from housing security | |

Effects of Affordable Housing under Substantive Definition of Budgetary

| **Non-Budgetary Benefits & Subsidies** | **Non-Budgetary Harms & Taxes** |
|---|---|
| Lower housing costs for low-income renters | Reduced rent collected from eligible renters |
| Positive externalities from housing security | |

That is not to say everything is implicitly budgetary. Even in a highly financialized world, raw cultural conflict plays a significant role in our politics and legislation.

34. *See, e.g.*, National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 41576, 41666 (July 9, 2004) (to be codified at 40 C.F.R. 9, 122) (estimating costs and benefits of requiring cooling water intake structures at certain power plants).

Redrawing the "budgetary" line to include implicit transfers may be clean enough. But there are drawbacks to this approach. It would require more economists to identify and measure the implicit taxes and subsidies. Section V will also explore how the greater transparency of explicit taxes and subsidies furthers the Byrd Rule's purposes; classifying implicit transfers as "budgetary" forgoes those benefits.[35] Some may acknowledge that differential treatment of explicit and implicit transfers is artificial and costly but believe it is necessary to constrain the role of budget reconciliation.[36] The next Section will explore the Byrd Rule's purpose and text to inform these drawbacks to set up Section V's alternative solution.

## IV. DISCUSSION OF THE PURPOSE AND LETTER OF THE BYRD RULE

There are two ways to look at the Byrd Rule's purpose that derive from the legislative history and its text, respectively. The legislative history often references that the Byrd Rule is meant to prevent controversial legislation from being passed via budget reconciliation.[37] Senator Byrd, the rule's namesake, complained that senators could "bring a controversial proposal to a vote with only a modicum of consideration."[38] Along the same lines, the Senate Committee Report explains the inclusion of non-budgetary items "damages the credibility of the budget process."[39] In other words, the Senate has a default preference for thorough debate, and budget reconciliation should stay a circumscribed exception for noncontroversial matters. But note that the text of the Byrd Rule does not use controversy as a criterion; instead, "non-budgetary" acts as a kind of proxy for "controversy." The implication is that controversy is difficult to define and measure but correlated with non-budgetary character. I will not try to divine what led Congress to think that budgetary items are comparatively uncontroversial. The legislative history contains no attempt to prove the point.

That leaves the Parliamentarian (and ultimately the Vice President)[40] with two ways to apply the Byrd Rule. The first is to do a formal, textual weighing of a provision's budgetary and non-budgetary

35. At the same time, the CBO's economic analysis of implicit transfers would make them more transparent, giving the public notice of who will bear and receive implicit taxes and benefits and how substantial they are.

36. *See* S. Rep. No. 99-146, at 4 (1985) (inclusions of non-budgetary provisions "could have the effect of circumventing Rule XXII," which notably includes the threshold for ending a filibuster).

37. *See, e.g.*, CONG. RSCH. SERV., *supra* note 3, at 2.

38. 131 CONG. REC. 28,949 (1985).

39. S. Rep. No. 99-146, at 4 (1985) (Conf. Rep.).

40. And swing-vote senators can choose to condition their support for reconciliation legislation on complying with the Parliamentarian's advisory rulings.

components. As explored in Section III, this still requires choosing a definition of "budgetary," classifying the provision's effects as "budgetary" and "non-budgetary," and then measuring the magnitude of each. Guessing at the size of non-budgetary components is inherently difficult. By definition, these include aspects that cannot be reduced to dollars and therefore cannot be numerically compared to the budgetary components. Perhaps this is an indication that "budgetary" versus "non-budgetary" does not fully remove the ambiguity of controversy as a criterion.

Alternatively, a purposive Byrd Rule application would try to estimate how controversial a provision is and factor that into the non-budgetary weighing. This runs into the definitional difficulties that led Congress to use "budgetary" as its criterion instead of "controversial." In fact, one could plausibly read from the legislative history the idea that Congress did not want controversy to be used as a Byrd Rule metric. The Byrd Rule's architects emphasized the Byrd Rule as a solution to including "controversial" provisions in reconciliation.[41] If Congress's target was "controversial" provisions, and Congress decided not to use the word "controversial" anywhere in the Byrd Rule's text, one might reasonably infer that Congress believed it would be bad criterion. All that said, "controversy" could yield *some* guidance as a factor. We use the word coherently enough to give it dictionary definitions. Merriam-Webster's Dictionary defines "controversial" as "of, or relating to, or arousing controversy," which is "a discussion marked especially by the expression of opposing views."[42] Social media has even attempted to measure it numerically. Reddit, a popular internet discussion platform with a lot of political content, allows users to sort posts by "controversial," which is based on how close a post's "upvote:downvote" ratio is to 50/50.[43] Whether or not a coher-

41. *See, e.g.*, CONG. RSCH. SERV., *supra* note 3, at 2 (quoting Senator Byrd's complaint that "any measure, no matter how controversial, [ ] can be brought to the Senate under an ironclad built-in time agreement that limits debate, plus time on amendments and motions, to no more than 20 hours").

42. This is a combination of the definition of controversial, meaning "of, or relating to, or arousing controversy," and controversy, meaning "a discussion marked especially by the expression of opposing views." *Controversial*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/controversial (last visited Oct. 16, 2021); *Controversy*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/controversy (last visited Oct. 16, 2021).

43. u/umbrae (Reddit Admin), *New Reddit Features: Controversial Indicator for Comments and Contest Mode Improvements*, REDDIT (June 25, 2014, 6:09 PM), https://www.reddit.com/r/announcements/comments/293oqs/new_reddit_features_controversial_indicator_for/. To the extent that "controversial" includes a notion of roughly even division, it is somewhat ironic as a criterion for inclusion in budget reconciliation. If a provision has 60% support in the Senate, then it can probably overcome a filibuster anyways. If that is what "controversial" means, then what is the point of a filibuster-immune path for uncontroversial legislation?

ent numerical measurement could be designed for Byrd Rule purposes, the Parliamentarian (or the Senate) could consider making rules better explaining how "non-budgetary" components or their "controversy" are to be measured.

## V. EXPLANATION OF RESTRUCTURING PROVISIONS TO COMPLY WITH THE BYRD RULE

As seen in Section III, many government actions do not register on the federal budget because they are implicit taxes and subsidies. Again, there are strong arguments, textually and administratively, that "budgetary" should be expanded to encompass these components. However, even if one disagrees with that revised definition, there is room to make these implicit transfers comply with the Byrd Rule, whether under a textual or a purposive reading. Importantly, this transformation is not a merely cosmetic one that satisfies the Byrd Rule's text but a substantive change that furthers the Byrd Rule's purposes.

An implicit transfer can be broken down into an implicit tax and implicit subsidy. Substituting the implicit taxes for a broader, explicit one will often be an effective fix. Take the grant of Legal Permanent Resident ("LPR") status that the Parliamentarian recently excluded. Under the formalistic definition of "budgetary," the LPR status has budgetary components and non-budgetary components benefitting immigrants, and non-budgetary components valued by opponents and others. The Parliamentarian counted social safety net payments that would accrue to the LPR recipients as "budgetary." This policy arguably also includes a major implicit transfer, namely expanded eligibility for work authorization.[44] The LPR recipients receive a kind of subsidy in the form of access to wages, and similarly situated workers implicitly pay for that access in the form of downward wage pressure.[45] Congress could offset this implicit tax on workers with an explicit subsidy to leave them net unaffected by the LPR status grant and substitute a more distributed explicit tax. This restructuring will require hiring more economists to identify and explain what populations are paying the implicit taxes and to design explicit subsidies tailored to offset those implicit taxes, but this is within their abilities.

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44. The wage transfer accomplished by expanding work authorization is subtler than the implicit tax of affordable housing requirements. But Congress's power over immigration (and related work authorization) arguably enables it to transfer wage income by deciding who can legally work within U.S. borders, even though it may not be the employer.

45. *See* GREENLAW & SHAPIRO, *supra* note 18, at 88 ("An increased number of workers will cause the supply curve to shift to the right. An increased number of workers can be due to several factors, such as immigration . . . .").

Here are (simplified) illustrative tables of the provision with the implicit tax and with a substituted explicit tax.

Effects of LPR Status Grant with Implicit Tax on Workers[46]

| **Non-Budgetary Benefits & Subsidies** | **Non-Budgetary Harms & Taxes** |
|---|---|
| Social Safety Net Payments to LPR Recipients | Downward Wage Pressure on Similarly Situated Workers |
| Legal Access to Wages | Action Against Racial and Cultural Grievance |
| Safety & Security | |

Effect of LPR Status Grant with Explicit General Tax

| **Non-Budgetary Benefits & Subsidies** | **Non-Budgetary Harms & Taxes** |
|---|---|
| Social Safety Net Payments to LPR Recipients | Downward wage pressure on similarly situated workers |
| Legal Access to Wages | Action Against Racial and Cultural Grievance |
| Safety & Security | General Tax Increase |
| Subsidy offsetting downward wage pressure for similarly situated workers | |

By assumption, the downward wage pressure on workers and their explicit subsidy are offsetting budgetary and non-budgetary items, so the above table can be simplified to omit them:

46. These tables are *very* general and incomplete. They are meant to illustrate the effect of the proposed restructuring on the Byrd Rule weighing.

Effect of LPR Status Grant with Explicit General Tax

| **Non-Budgetary Benefits & Subsidies** | **Non-Budgetary Harms & Taxes** |
|---|---|
| Social Safety Net Payments to LPR Recipients | Action Against Racial and Cultural Grievance |
| Legal Access to Wages | General Tax Increase (to pay for legal access to wages) |
| Safety & Security | |

This shift makes the provision more likely to be included under the Byrd Rule, whether under a textual or purposive reading. The textual argument is pretty simple. Before restructuring, one of the pay-fors was an implicit tax. But now it is an explicit tax; accordingly, it counts towards the budgetary components instead of the non-budgetary components.[47] Depending on the rest of the components, that may tip the scales so that the budgetary components are no longer "merely incidental" to the non-budgetary components. That may sound mechanical, but that is because "budgetary" as a defining criterion is mechanical.

Diving deeper, this change is not as mechanical as it looks. The policy is substantially altered and improved in ways that correspond to the Byrd Rule's purposes.

First, the relative narrowness and arbitrariness of an implicit tax base arguably makes implicit transfers more controversial. It can sometimes feel random who bears an implicit tax burden. Take the LPR status example. It is hard to logically or morally explain why similarly situated workers should be the ones bearing the cost of the LPR recipient's access to wages. Sometimes it may be intentionally arbitrary. With a narrow, implicit tax, it could be easier for a governing party to precisely lay the burden on the opposing party's supporter populations and to precisely direct the benefits to their own.[48] This is harder to do if the tax is explicit and more general because the general tax base may well be politically heterogeneous. The governing

47. Note that it's not as if the implicitly-taxed population is still taxed but with an explicit rather than an implicit tax. By assumption, they are compensated to be net unaffected by the provision. The broader tax source (e.g. personal income tax, corporate income tax, etc.) is paying for the access to wages instead.

48. Even though income tax bills may correlate with political affiliation, those correlations are imperfect, and increases in tax rates affect large swaths of the population. When passing implicit taxes through various kinds of regulation, Congress can target with more charactistics than just income or tax liability. In the affordable housing example, the government is able to target an implicit tax burden on the landlord population.

party will be pressured to be balanced and broad in constructing the explicit tax because it would be more overtly craven to construct an explicit tax targeting the minority party's supporters.

Second, the restructured provision is more transparent. That is because implicit transfers are inherently less transparent. Implicit taxes receive less legislative scrutiny because they do not show up on the budget and because the taxpayer may not even make an explicit payment to anyone.[49] In fact, the congressional budget procedures already acknowledge and attempt to correct for a similar scrutiny difference in the context of tax expenditures.[50] The scrutiny of new, explicit taxes is intense.[51] This means that if a party wanted to restructure an implicit tax to make the provision budgetary, it would be *inviting* extra scrutiny. The party will have to affirmatively explain that the explicit tax is there to pay for the restructured provision.[52] Parties already choose to publicly link proposed taxes to corresponding spending when it helps pass the tax, but they would *have* to for the substituted tax to satisfy the Parliamentarian. What does that have to do with the Byrd Rule? The Byrd Rule was partly about preserving the deliberative nature of the Senate.[53] Transparency serves that. Firstly, some of the lost deliberation time would arguably be made up for by required analyses quantifying the effects and identifying the taxpayers and recipients. Part of deliberating on a policy is divining who the affected populations are and arguing over the magnitude of those effects. Senators will still have to spend this time; it will just be

49. The explicitness of the tax from the taxpayer's perspective depends on the policy. In the affordable housing requirement context, the developer sees very plainly on her balance sheets the reduced rent she receives from the designated units. The higher income renters do not see the portion of that implicit tax that they are paying. In the LPR status context, the similarly situated worker may have no idea that her wages are affected. Even if she does, she is never explicitly confronted with a charge and has no idea how great the effect is. In any event, it is always implicit from Congress's perspective.

50. *See* 2 U.S.C.A. § 602(a) (West 2021) (requiring the Congressional Budget Office to monitor tax expenditures); 31 U.S.C.A § 1105(a)(16) (West 2021) (requiring the President's budget to quantify the sum of tax expenditures).

51. *See, e.g.*, *Taxes*, U.S. CHAMBER OF COMMERCE, https://www.uschamber.com/taxes (listing "Prevent[ing] rollback of any parts of the Tax Cuts and Jobs Act" as a priority).

52. As Section VI will go into, there will be, as there already is, judgment about the scope of a "provision." If the offering party wants to convince the Parliamentarian of the connection of an explicit tax increase to one of these restructurings, they will have no choice but to overtly press the argument that these are linked.

53. *See* 131 CONG. REC. § 14032 (daily ed. Oct. 24, 1985) (statement of Sen. Byrd) ("So if the budget reform process is going to be preserved, and more importantly if we are going to preserve the deliberative process in this U.S. Senate—which is the outstanding, unique element with respect to the U.S. Senate, action must be taken now to stop this abuse of the budget process.").

done in front of the Parliamentarian in a Byrd Rule proceeding instead of on the Senate floor.

It could also have a positive effect on senators' incentive to deliberate. Senators who would otherwise be trying to pass more implicit transfers would have to accept that they are restrained by the extra scrutiny attached to explicit taxes. Likewise, senators on the other side will see a more honest and pared-down[54] accounting of the provision's costs. At that point, the partisan gap may be small enough that a minority party moderate is better off supporting the legislatioon in exchange for concessions than opposing it. So not only does the restructuring increase the provision's literal budgetary impact; it does so in a way that respects and furthers the purposes of the Byrd Rule.

## VI. DEFINING AND DISTINGUISHING PROVISIONS

This article has so far neglected to define "provision," but it is a crucial issue. In the abstract, it is hard to come up with clear principles for what can qualify as *one* provision and what is a *collection* of provisions. The statute gives no answer; "provision" is not defined at all. For the Byrd Rule to be meaningfully enforceable, there has to be some restraint. Otherwise, there is nothing to stop a party from combining large budgetary items with wildly unrelated to the non-budgetary components into one huge "provision," thereby sneaking the latter past the Byrd Rule. One possibility is to break the legislation down into the smallest possible legally-operative pieces and treat those as independent provisions. The Parliamentarian has occasionally taken an approach along these lines.[55] This does not make much sense, both in terms of internal coherence and policy. One might posit that the smallest possible change in the Legal Permanent Resident ("LPR") example is the grant of LPR status. But LPR status is a bundle of rights and privileges that *a priori* could be conferred separately. Moreover, the provision could be viewed as a grant and a collection of requirements, each of which can operate to disqualify an LPR candidate. The requirements are not separate "provisions" simply because the grant could operate without them. Under no plain English meaning of "provision" would we think that those conditions are separate provisions from the grant of immigration status. Other times, the Parliamentarian treats larger legislative chunks as a single provision.[56]

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54. Pared down to compensate for the comparative difficulty of selling an explicit tax.

55. *See* Aprill & Hemel, *supra* note 9, at 125 ("In these cases, the Parliamentarian appears to be applying the Byrd rule on a word-by-word and sentence-by-sentence basis.").

56. *See id.* at 112 (The provision as defined by the Parliamentarian "does not produce a change in outlays, but if the measure is construed as containing two provisions—

This article is not going to solve the entire definitional problem of "provision." That said, an unduly restrictive definition would pose a plain problem for using explicit substituted taxes to comply with the Byrd Rule. For the explicit tax to make the offered provision more "budgetary," it has to be considered a part of the provision. Fortunately, the rationale for including the substituted tax is straightforward. Reading the LPR grant as a single provision, the downward wage pressure/implicit tax is a natural consequence of the provision. There is no way for Congress to grant the LPR status but decide that no one will pay for their legal access to wages. Congress can change who bears the cost by substituting, but it cannot choose that there be no cost. That is why it gets factored into the Byrd Rule weighing. Therefore, Congress is not changing the scope of the provision by substituting an explicit tax; it is just exercising its judgment about who should bear the unavoidable tax burden. Congress is not free to append unrelated budgetary provisions to increase the budgetary effect. Under this view, the scope of the provision is actually fixed by its natural economic consequences, so it is out of Congress's hands. So, substituting an explicit tax for an implicit one should almost certainly not be considered a separate provision.

## VII. COUNTING ACCESS TO NONVARIABLE BUDGET ITEMS AS NON-BUDGETARY

There is one more wrinkle of Byrd Rule application worth mentioning, especially as far as immigration reform is concerned. There are a number of budget outlays that may not scale with the expanded number of legal residents but nonetheless have major impacts on their lives. For example, the defense budget may not change drastically due to the increased population, but immigrants enjoy some of the benefits of the country's high national security. Should this be counted as a budgetary component of an immigration change? A non-budgetary one? Or should it be excluded from the Byrd Rule analysis? In a literal sense, a Legal Permanent Resident ("LPR") status grant may not change military outlays much, but it has a major impact on the LPR recipients. That would seem to make it a non-budgetary component. But this feels excessively artificial. Defense spending is being allocated across a wider number of persons. We are spending a sum of military dollars for each of the immigrants; it is just offset by reducing the military spending per existing citizen. The only difference is the historical accident of who had legal status at the time Congress com-

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one that increases spending on abstinence education by $75 million and one that cuts $75 million from the block grant—then each provision produces a change in outlays.").

mitted to our military spending.[57] Moreover, to the extent that military spending does scale with the increased number of legal residents, those increases may well be done separately in a military bill. This is not because they are unrelated, but for political or administrative reasons. When the Parliamentarian cites benefits like safety or security of legal status in America,[58] part of that is arguably the benefit of federal spending that provides safety and security. A certain amount of those funds are allocable to each legal resident, so that could be a budgetary component of a legal status grant. At the very least, it should not count as a non-budgetary component.

## VIII. CONCLUSION

To summarize, the Byrd Rule circumscribes what matters can be passed in a budget reconciliation bill. A provision can be excluded where its budgetary effects are "merely incidental" to its non-budgetary effects. A formalistic conception of "budgetary" ignores economic realities and incentivizes less efficient means of implementing policy, so "budgetary" should be defined to include implicit transfers, which are economically equivalent to an explicit tax and outlay. Even if one rejects a substance-driven definition of "budgetary," non-budgetary policies can sometimes be transformed by offsetting implicit taxes with explicit subsidies, paid for by a more general explicit tax. This transformation is consistent with both textual and purposive readings of the Byrd Rule. Finally, there is a separate issue of classifying the increased access to nonscaling budget items, such as national security.

57. Fixed in the sense that they do not scale with population, not in the sense that they do not vary with volume of military operations.

58. *See* Desjardins, *supra* note 7.

# THE THREE-YEAR LAW DEGREE: EXCLUSIVE, UNAFFORDABLE, AND UPHELD BY LAW SCHOOL ACCREDITATION STANDARD 311

## I. INTRODUCTION

"In the first year they scare you to death; in the second year they work you to death; in the third year they bore you to death" reflects a longstanding insight into the life of a law student.[1] The three-year schooling requirement has been officially endorsed by the American Bar Association ("ABA") and formally adopted by its independent accreditation group, the Section on Legal Education and Admissions to the Bar ("Section"), as law school accreditation Standard 311.[2] Yet, throughout its existence there has been opposition to this length requirement.[3] Scholars have highlighted how the three-year length has historically served as an intentional mechanism to exclude non-white

1. Brian Z. Tamanaha, Failing Law Schools 20 (Univ. of Chi. Press 2012).

2. Robert Stevens, Law School Legal Education in America from the 1980s 172 (G. Edward White ed., Univ. of N.C. Press 1983); Council of the American Bar Association Section of Legal Education and Admissions to the Bar, *ABA Standards and Rules of Procedure for Approval of Law Schools 2021-2022*, A.B.A. i, v, vii, 22-23 (Aug. 26, 2021) [hereinafter *ABA Standards and Rules of Procedure*], https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure.pdf.

3. *See, e.g.,* Peter A. Joy, *The Uneasy History of Experiential Educ. in U.S. Law Schools*, 122 Dick. L. Rev. 551, 556-57 (2018) (proposing and tabling a three-year law school requirement at initial ABA meetings); Stevens, *supra* note 2, at 206-08, 242 (noting states did not begin requiring ABA-approved, three-year programs until the 1950s and 60s, and a push for a two-year degree in the 1970s); Paul D. Carrington, Training for the Public Professions of the Law: 1971, pt. One, sec. II (Association of American Law Schools 1971), *reprinted in* Herbert L. Packer & Thomas Ehrlich, New Directions in Legal Education app. A, at 97 (McGraw-Hill Book Company 1972) [hereinafter Carrington] (naming law schools should not be bound by the idea that law degrees can only

and poorer individuals from the legal field; increases the cost of entering the legal profession; and lacks a connection to current teaching methodologies.[4] A more accessible and cheaper two-year degree program could be created through a simple change—lowering the number of required credit hours for graduation in Standard 311.[5]

Amid heightened movements for racial justice and the increasing burden of student loan debt, the ABA and the Section have called upon law schools and Congress to come to their aid to ensure the accessibility and affordability of the legal profession.[6] In supporting nationwide advocacy events, releasing statements, performing studies, and even adjusting other accreditation standards, the ABA has avoided turning its attention toward Standard 311.[7] In providing re-

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be awarded after three years of law school); Tamanaha, *supra* note 1, at 173-74 (advocating for two- and three-year law degree programs).

4. *See generally* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (Oxford Univ. Press 1976) (describing the development of the legal profession as a way to preserve homogeneity and exclusivity); Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Educ.*, 79 WASH. UNIV. L. Q. 1035, 1087-88, 1098 (2001) (describing how accreditation standards and the three-year program length increase cost of attendance); Russel L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 561-665 (1991) (describing how desirable legal skills can be learned in less than three years and do not necessarily require the use of a certain teaching methodology).

5. *E.g.*, TAMANAHA, *supra* note 1, at 173-74 (describing increased affordability and greater accessibility to law school by allowing differentiation through two- and three-year degrees). Professor Tamanaha's proposal references classroom hours, which have since been restructured into credit hours within the ABA accreditation standards. *Id.*; Memorandum from the A.B.A. Section on Legal Education and Admissions to the Bar Managing Director's Guidance Memo Standard 310 1, 1-2 (May 2016) (on file with the American Bar Association), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2016_standard_310_guidance_memorandum.authcheckdam.pdf.

6. *See ABA signs CEO Action for Diversity and Inclusion Pledge*, A.B.A. (Sept. 21, 2020), https://www.americanbar.org/news/abanews/aba-news-archives/2020/09/ceo-action-for-diversity-and-inclusion/ (announcing increased signing of the CEO Action for Diversity and Inclusion Pledge in response to nationwide protests and racial justice conversations after George Floyd's death by police in 2020); Reginald Turner, *Tackling the Debt Crisis*, A.B.A. J., Dec. 2021 6, at 6 (describing how the Covid-19 pandemic has truly showed the crushing level of student debt); Memorandum from the American Bar Association Council Chair of the Section on Legal Education and Admissions to the Bar to all Interested Persons and Entities (Dec. 16, 2021) (on file with the American Bar Association), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/12-16-21-notice-comment.pdf (requiring law schools to focus particularly on diversity through proposed changes to accreditation standards); *Join the Student Debt Week of Action Sep. 20*-24, A.B.A., https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/august-2021-wl/week-of-action-0821wl/ (last visited March 7, 2022) (advocating for Congress to address the student debt crisis).

7. *See, e.g., Advocacy & Initiatives*, A.B.A., https://www.americanbar.org/advocacy/ (last visited January 20, 2022) (describing various actions taken and issues supported by the ABA); *ABA launches new racial justice resources website*, A.B.A., https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/racial-equity-in-the-justice-system/ (last visited Feb. 27, 2022) (launching a central clearinghouse for re-

sources for attorneys and community members to address structural inequities, the ABA has avoided addressing this internal source of inequity it helped create and continues to perpetuate.[8] While two-year law degree programs will not solve all issues regarding the accessibility and affordability of law school, allowing such programs is a structural change the ABA and the Section can and should take.[9]

This Note advocates for a change to law school accreditation Standard 311 to allow two-year law degree programs.[10] Part II of this Note briefly summarizes the history of the legal profession in the United States, including the creation and role of the ABA in developing the current law school accreditation requirements.[11] Part III of this Note highlights how the ABA has the authority to change accreditation standards, including the length of law school.[12] Next, this Note emphasizes how the three-year law degree program is rooted in exclusionary tactics and designed to be unaffordable—in contradiction to the ABA's goals of accessibility and affordability.[13] Finally, this Note shows how a two-year degree option could create greater accessibility and affordability without violating other curriculum-based accreditation standards.[14]

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sources regarding bias, racism, and prejudice); Stephanie Francis Ward, *For second time, ABA Legal Education, Section seeks public comment on diversity accreditation standard*, A.B.A. J. (Nov. 22, 2021), https://www.abajournal.com/news/article/for-the-second-time-aba-seeks-public-comment-on-law-school-diversity-accreditation-standard (noting the Section proposed changes to accreditation Standard 206 regarding diversity within law schools). *See Notice and Comment*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/notice_and_comment/ (last visited March 6, 2022) (indicating no changes have been made or proposed to Standard 311).

8. *Compare Racial Equity in the Justice System*, A.B.A., https://www.americanbar.org/advocacy/justice-system/ (last visited March 6, 2021) (highlighting resources for others to use to pursue equity and structural change with no mention of internal, ABA-driven changes regarding law school structure), *with Notice and Comment*, *supra* note 7 (indicating changes to accreditation standards but not Standard 311), *and* STEVENS, *supra* note 2, at 174 (providing the ABA's endorsement of the three-year law degree), *and ABA Standards and Rules of Procedure*, *supra* note 2, at 79 (holding the power to revise accreditation standards within the Section).

9. TAMANAHA, *supra* note 1, at 174 (indicating a shift to two-year programs can create other issues); *ABA Standards and Rules of Procedure*, *supra* note 2, at vii (giving the Section and the larger ABA the ability to create and confirm changes to accreditation standards). The author acknowledges a change allowing two-year degree programs can and will have various repercussions. Said repercussions are outside the scope of this Note, which aims to highlight the historical underpinnings of the three-year degree, its disconnect with ABA goals, and offer a potential solution to bring legal programs more in line with the ABA's goals.

10. *See infra* notes 189-342 and accompanying text.

11. *See infra* notes 15-184 and accompanying text.

12. *See infra* notes 189-207 and accompanying text.

13. *See infra* notes 208-94 and accompanying text.

14. *See infra* notes 295-342 and accompanying text.

## II. BACKGROUND

### A. The American Bar Association: Accreditor and Advocate

The American Bar Association ("ABA") is a professional organization serving as a national representative of the legal community.[15] The ABA is divided into various groups referred to as sections, centers, and commissions; its members include attorneys and law students.[16] These groups spearhead studies, host trainings, and encourage advocacy pertaining to the legal field.[17] Much of this activity ties to two of the ABA's overarching goals: advocating for the profession and eliminating bias and enhancing diversity.[18]

#### *1. Advocating for the Profession: Law School Accreditation*

The ABA includes quality legal education within its goal of advocating for the legal profession.[19] Specifically, the Section on Legal Education and Admissions to the Bar ("Section") utilizes its law school accreditation power to promote quality legal education.[20] This power was granted by the United States Department of Education in 1952, although the ABA published lists of schools it considered quality well before receiving official power.[21] The accreditation process is run by the Section and its Council, both of which are independent from the ABA, per Department of Education regulations, although accredited law schools are typically referred to as "ABA-approved."[22] Forty-six

15. A.B.A., https://www.americanbar.org/ (last visited Feb. 27, 2022).

16. *Membership FAQ*, A.B.A., https://www.americanbar.org/membership/faq/ (last visited Feb. 27, 2022); *A.B.A. Groups*, A.B.A., https://www.americanbar.org/groups/ (last visited Feb. 27, 2022). The Commission on the Future of Legal Education studied law schools and found there was a design problem. *Principles for Legal Education and Licensure in the 21st Century*, 2020 A.B.A Comm'n on the Future of Legal Educ. 1, 3 (2020), https://www.americanbar.org/content/dam/aba/administrative/future-of-legal-education/cflle-principles-and-commentary-feb-2020-final.pdf.

17. *A.B.A. Groups*, *supra* note 16.

18. *The American Bar Association*, A.B.A., https://www.americanbar.org/about_the_aba/ (last visited Feb. 1, 2022) (dividing the ABA groups' work amongst its four goals). The ABA has four main goals: serving its members, advocating for the profession, eliminating bias and enhancing diversity, and advancing the rule of law. *Id.*

19. *Advocacy & Initiatives*, *supra* note 7.

20. *About Us*, A.B.A., https://www.americanbar.org/groups/legal_education/about_us/ (last visited Feb. 1, 2022).

21. *Compare List of Agencies*, Database of Accredited Postsecondary Institutions and Programs, https://ope.ed.gov/dapip/#/agency-list (last visited Dec. 20, 2021) (granting the Section accrediting power in 1952), *with* Stevens, *supra* note 2, at 173 (indicating the first publication of ABA-approved schools occurred in 1923). For additional information regarding the Department's ability to provide accrediting power, see *The Database of Postsecondary Institutions and Programs*, Database of Accredited Postsecondary Institutions and Programs, https://ope.ed.gov/dapip/#/home (last visited Dec. 20, 2021).

22. *A.B.A. Standards and Rules of Procedure*, *supra* note 2, at v.

states require, and all states recognize, graduation from an ABA-approved law school as a prerequisite to be a licensed attorney.[23]

The Council annually promulgates accreditation standards and procedures.[24] Originally, the standards underwent only sporadic review; however, in 1995, the United States Department of Justice sued the ABA for antitrust violations within the accreditation process.[25] This resulted in a consent decree in which the ABA agreed to have a special committee review the standards.[26] The Council has since continually reviewed the standards.[27] Through its review, the Council solicits suggestions and allows public comments regarding proposed changes to standards, interpretations of those standards, and procedural rules.[28] The only role of the larger ABA is to "concur" or "refer back" suggested changes.[29] A concurrence makes the proposed changes effective immediately; referring back sends the suggested changes back to the Council for further review.[30] If the ABA refers back twice, the Council can confirm the changes without a concurrence.[31]

The standards cover all aspects of a law school and require full compliance to receive accredited status.[32] A school must show an extraordinary circumstance, extreme hardship, or innovation that will improve legal education to deviate from the standards while maintaining compliance.[33] Even with numerous accreditation standards, law

23. *About Us*, *supra* note 20 (limiting bar admission to graduates of ABA-approved law schools in forty-six states).

24. *A.B.A. Standards and Rules of Procedure*, *supra* note 2, at vi.

25. *Id.*; Press Release, U.S. Dep't of Just., Justice Department and American Bar Association Resolve Charges That the ABA's Process for Accrediting Law Schools was Misused (June 27, 1995) [hereinafter 1995 Dep't of Just. Press Release]. The allegations involved Standard 405, which required maintaining comparable faculty compensation nationally and with schools in similar geographic areas. *Standards for Approval of Law Schools and Interpretations*, A.B.A. 102-05 (Oct. 1994) [hereinafter *1994 Standards*], https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1994_95_standards.pdf.

26. 1995 Dep't of Just. Press Release, *supra* note 25.

27. *A.B.A. Standards and Rules of Procedure*, *supra* note 2, at vi.

28. *Id.*

29. *Id.* at vii.

30. *Id.*

31. *Id.*

32. *Id.* at 1-2, 6 (showing the topics covered by the accreditation standards). The accreditation standards can make it costly and difficult for a law school to obtain accredited status. *See* David Segal, *For Law Schools, a Price to Play the A.B.A.'s Way*, NY-TIMES (Dec. 17, 2011), https://www.nytimes.com/2011/12/18/business/for-law-schools-a-price-to-play-the-abas-way.html (describing the increased tuition rate one school must charge after attempting to meet ABA standards and receive accreditation).

33. *A.B.A. Standards and Rules of Procedure*, *supra* note 2, at 9. No variances have been granted to lower the required number of credit hours or minimum length of a law school program as of 2017. *Applications for Variances*, A.B.A., https://

schools are given wide breadth to create their own curriculum.[34] The standards ensure law schools meet general learning outcomes and divide the required curricular aspects of the degree into credit hours.[35] A credit hour constitutes no less than one hour of faculty instruction and two hours of student work outside of class per week for fifteen weeks, or some equivalent over a different amount of time.[36] The standards specifically require at least two credit hours of professional responsibility, six credits of experiential learning (through a course, clinic, or field placement), and two faculty-supervised writing experiences.[37]

Of particular importance is Standard 311, which requires a law school program to be a minimum of eighty-three credit hours and span at least twenty-four months.[38] Law schools accomplish this timing requirement through a three-year degree program, two-year accelerated program, or longer part-time program—all with the same number of credit hours.[39] Thus, even accelerated and part-time programs cost

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www.americanbar.org/groups/legal_education/public-notice/applications-for-variances/ (last visited Dec. 31, 2021).

34. *See generally A.B.A. Standards and Rules of Procedure*, *supra* note 2, at 17-25 (providing only limited guidance and requirements for law school curriculum).

35. *Id.* at 17-22. The learning outcomes require, at minimum, competency in knowledge and understanding of substantive and procedural law; legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context; exercise of proper professional and ethical responsibilities to clients and the legal system; and other professional skills needed for competent and ethical participation as a member of the legal profession. *Id.* at 17. School curriculum and tuition costs vary widely. *See, e.g.*, *Law*, CREIGHTON UNIV., https://www.creighton.edu/admission-aid/cost-attendance/law (last visited Feb. 27, 2022); *Juris Doctor Curriculum*, CREIGHTON UNIV., https://catalog.creighton.edu/law/juris-doctor-curriculum/#degreerequirementstext (last visited Feb. 27, 2022); *Financial Information*, NEB. COLL. OF LAW, https://law.unl.edu/prospective/financial-information/ (last visited Feb. 24, 2022); *Academic Requirements*, NEB. COLL. OF LAW, https://law.unl.edu/academic-requirements/ (last visited Feb. 24, 2022). Law schools also provide various extracurricular activities for students. *See, e.g.*, *Competition Teams*, CREIGHTON UNIV., https://www.creighton.edu/law/academics/student-resources/competition-teams (last visited Feb. 27, 2022); *Law Journal*, CREIGHTON UNIV., https://www.creighton.edu/law/academics/student-resources/law-journals (last visited Feb. 27, 2022); *Curriculum*, NEB. COLL. OF LAW https://law.unl.edu/prospective/curriculum/ (last visited Feb. 24, 2022).

36. *A.B.A. Standards and Rules of Procedure*, *supra* note 2, at 22.

37. *Id.* at 18-19.

38. *Id.* at 22-23. A standard requiring three years of law school has existed in past promulgations of accreditation standards. *See, e.g.*, Section of Legal Education and Admissions to the Bar, *Review of Legal Education*, A.B.A. 26 (Fall 1968) [hereinafter *1968 Review of Legal Education*], https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1968_review.pdf.

39. *E.g.*, *Degree Programs*, CREIGHTON UNIV., https://www.creighton.edu/law/academics/degree-programs (last visited Feb. 27, 2022) (indicating Creighton provides three-year, two-year accelerated, and longer part-time law degree programs); *Your fast track to a law degree*, CREIGHTON UNIV., https://www.creighton.edu/law/academics/degree-programs/accelerated-jd-program (last visited Feb. 27, 2022) (ensuring the accelerated J.D. program meets the same credit hour requirement as the three-year program).

the same amount of tuition.[40] While the other standards only require eight specific credit hours and two writing experiences, law schools cannot lower the required number of credit hours for graduation below eighty-three without violating accreditation Standard 311.[41] Schools out of compliance with any standard risk losing accreditation and can render their students ineligible to take the bar exam or be admitted to practice law.[42]

### *2. Eliminating Bias and Enhancing Diversity: Affordability and Accessibility*

To help eliminate bias and enhance diversity, the ABA engages in substantial advocacy, resource sharing, and data collection, including information about the accessibility and affordability of law schools.[43] Beginning in 1986, with the creation of the Commission of Racial and Ethnic Diversity in the Profession ("Commission"), the ABA began a concerted effort to increase the overall diversity of the legal profession.[44] In creating the Commission, the ABA wanted to address the underrepresentation of attorneys of color and female attorneys in the profession and legal education.[45] The Commission began releasing re-

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*Cf. In Alphabetical Order*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order/ (last visited Feb. 27, 2022) (providing Creighton University School of Law with accredited status).

40. TAMANAHA, *supra* note 1, at 20; Maureen A. O'Rourke, *The "Law" and "Spirit" of the Accreditation Process in Legal Educ.*, 66 SYRACUSE L. REV. 596, 603-04 (2016) (describing how accelerated programs do not save students on tuition cost). *See, e.g.*, *Tuition and Fees – School of Law*, CREIGHTON UNIV., https://catalog.creighton.edu/law/tuition-fees/ (last visited Feb. 27, 2022) (charging tuition per credit hour).

41. *A.B.A. Standards and Rules of Procedure*, *supra* note 2, at 6, 18, 22-23 (requiring full compliance with accreditation standards to receive accredited status, including Standard 311's minimum credit hour requirement and other standards' minimum curricular requirements).

42. *A.B.A. Standards and Rules of Procedure*, *supra* note 2, at 58 (naming noncompliance with accreditation standards as a reason for withdrawal of approval); *About Us*, *supra* note 20 (noting forty-six states require graduation from an ABA-approved law school to be eligible for bar admission).

43. *See Diversity and Inclusion Center*, A.B.A., https://www.americanbar.org/groups/diversity/ (last visited March 7, 2022) (highlighting various groups conducting research and initiatives aimed at eliminating bias and enhancing diversity within the legal profession); *Council for Diversity in the Educational Pipeline*, A.B.A., https://www.americanbar.org/groups/diversity/diversity_pipeline/ (last visited Dec. 31, 2021) (specifically compiling resources regarding increasing diversity in pipeline programs leading students to the legal profession); *Student Loans & Finances*, A.B.A., https://www.americanbar.org/groups/young_lawyers/student-loans/ (last visited Feb. 27, 2022) (providing resources regarding student loan debt and advocating to lower the student debt burden).

44. *Commission on Racial and Ethnic Diversity in the Profession*, A.B.A., https://www.americanbar.org/groups/diversity/DiversityCommission/ (last visited Feb. 27, 2022).

45. *Timeline*, A.B.A., https://www.americanbar.org/groups/diversity/DiversityCommission/timeline/ (last visited Feb. 27, 2022); *Goal III Report 2021 Demographic Diver-*

ports tracking demographic data and diversity within the ABA.[46] More recently, the ABA has begun releasing demographic data regarding the legal profession as a whole.[47] While these reports show some progress, the legal profession is still predominantly white and male.[48] In 2021, only thirty-seven percent of attorneys were women, up from thirty-three percent in 2011.[49] Only 14.6% of attorneys identified as a person of color, up from 11.7% in 2011.[50] These percentages are significantly lower than the overall make-up of women and people of color in the United States.[51]

In addition to the efforts of the Commission, the ABA has created new coalitions and member groups to continue raising awareness about racism, oppression, and the need for change within the justice system and legal profession.[52] These groups host conferences, publish resources, and advocate on behalf of underrepresented populations within the legal community.[53] These efforts are supported by numerous statements and commitments from ABA leadership, including

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*sity of the A.B.A.'s Leadership and Members*, A.B.A. 1, 4 (2021), https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/2021-aba-goal-III-report-final.pdf.

46. *Timeline, supra* note 45. *See, e.g.*, *Goal III Report 2021 Demographic Diversity of the A.B.A.'s Leadership and Members*, *supra* note 45, at 5.

47. *See generally, e.g.*, *Profile of the Legal Profession 2021*, A.B.A. 1 (2021), https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf

48. *Id.* at 12-13; *Goal III Report 2021 Demographic Diversity of the A.B.A.'s Leadership and Members*, *supra* note 45, at 5.

49. *Profile of the Legal Profession 2021*, *supra* note 47, at 12.

50. *Id.* at 12-13.

51. *Compare Profile of the Legal Profession 2021*, *supra* note 47, at 12-13 (indicating just over one-third of attorneys identify as female and under one-fifth of attorneys identify as a person of color), *with QuickFacts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/LFE046219 (last visited March 7, 2022) (indicating approximately one-half of United States citizens identify as female and forty percent identify as a person of color). This difference is unwarranted since there is no data showing women or people of color have any less desire to be attorneys, indicating the difference stems from structure rather than desire. *See generally* Edward J. Littlejohn & Leonard S. Rubinowitz, *Black Enrollment in Law Schs.: Forward to the Past*, 12 T. MARSHALL L. REV. 415 (1986) (describing various structural barriers prevent Black students from accessing law schools).

52. *See generally Diversity and Inclusion Center*, *supra* note 43 (highlighting various organizations aiming to eliminate bias and enhance diversity within the legal profession through different initiatives and research). The groups include the Coalition on Racial and Ethnic Justice, the Commission on Disability Rights, the Commission on Hispanic Legal Rights & Responsibilities, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, the Commission on Women in the Profession, and the Council for Diversity in the Educational Pipeline. *Id.*

53. *See generally Center for Diversity and Inclusion in the Profession High-Level Overview 2021-2022 Bar Year*, A.B.A., https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/2020-aba-diversity-high-level-overview.pdf (naming various projects and goals of the different groups within the ABA's Diversity and Inclusion Center).

signing the CEO Action for Diversity and Inclusion Pledge in fall 2020.[54]

The ABA has also become increasingly concerned with the affordability of law school.[55] This concern took root after various studies highlighted the impact of student debt on law school graduate career choices and the overall rise in student debt levels over the past few decades.[56] In 1985, average yearly tuition for a private law school was about $7,500 and $2,000 for public law schools.[57] As of 2019, private law school tuition has jumped to an average of over $49,000 per year and public law school tuition has increased to over $28,000.[58] With the increase in tuition costs, student debt rates have also increased, causing great hardship for recent graduates.[59] Most recently,

54. *See, e.g.*, *A.B.A. signs CEO Action for Diversity and Inclusion Pledge*, *supra* note 6; *Policy & Positions*, A.B.A., https://www.americanbar.org/advocacy/justice-system/policies/ (last visited Feb. 27, 2022) (describing statements, policies, and resources from the ABA regarding equity and improvement of the justice system); *Statement of A.B.A. President Hilarie Bass Re: Standing up for justice and equality*, A.B.A. (Aug. 17, 2021), https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/statement_of_abapre2/ (noting the ABA's dedication to equality and justice in the U.S., particularly through the ABA's goal of eliminating bias and enhancing diversity within the legal profession, and loudly declaring the ABA values diversity and inclusion); A.B.A. Young Lawyers Division, *Resolution 100B*, A.B.A. (Aug. 2020), https://www.americanbar.org/content/dam/aba/directories/policy/ annual-2020/100b-annual-2020.pdf [hereinafter *Resolution 100B*] (resolving that the ABA encourages review of policies to remove hair discrimination and supporting congressional action); *Center for Diversity and Inclusion in the Profession High-Level Overview*, *supra* note 53 (describing the various ABA entities that focus on eliminating bias and increasing diversity in the legal profession); *Goal III Report 2021 Demographic Diversity of the A.B.A.'s Leadership and Members*, *supra* note 45, at 5 (showing demographic information of ABA membership); *Member Diversity, Equity, and Inclusion Plan*, A.B.A. (Aug. 2021), https://www.americanbar.org/content/dam/aba/ administrative /diversity-inclusion-center/new-bog-approved-member-dei-plan.pdf (creating a strategic plan for increasing diversity, equity, and inclusion within the ABA).

55. *See, e.g.*, Turner, *supra* note 6.

56. *See generally* A.B.A. Commission on Loan Repayment and Forgiveness, *Lifting the Burden: Law Student Debt as a Barrier to Public Service*, A.B.A. (2003) [hereinafter *Lifting the Burden*], https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_lrap_finalreport.pdf (finding an increase in student borrowing amounts as law school tuition has increased, and that debt kept sixty-six percent of law school graduate respondents from considering government and public interest jobs); *Student Loans & Finances*, *supra* note 43 (providing debt surveys and additional advocacy resources regarding student loan debt).

57. *Law School Cost*, Law School Transparency, https://www.lawschooltransparency.com/trends/costs/tuition (last visited Feb. 27, 2022).

58. *Id.* In 1985 dollars, private law school tuition would be approximately $18,000 and public law school tuition just under $4,800 in 2019. *Id.* In other numbers, public law school tuition increased 543% for nonresidents and 820% for residents between 1985 and 2009, and private tuition has increased by 375%. TAMANAHA, *supra* note 1, at 108.

59. *See generally* TAMANAHA, *supra* note 1, at 107-22 (providing statistical information regarding increased tuition and debt loads for law students and the difficulty of paying such high levels of student debt); A.B.A. Young Lawyers Division, *Student Debt: The Holistic Impact on Today's Young Lawyer*, A.B.A. iii (2021) [hereinafter *Student*

the ABA Young Lawyers Division began a debt survey in 2020 to determine how recent graduates are affected by student loan debt.[60] The survey indicated ninety percent of law students take on debt to attend law school or prior education and are graduating, on average, $125,000 in debt.[61] The survey also found debt levels and rates of borrowing were higher among students of color.[62] In addition, the ABA hosts an annual Student Debt Week of Action.[63] This involves advocating for Congress to tackle the large debt loads students are taking on to attend law school through increasing loan forgiveness programs.[64]

The rising cost and debt of pursuing a legal education can deter students from attending law school altogether, particularly students from lower socioeconomic backgrounds.[65] Within the United States, white individuals are more likely to be of a higher socioeconomic status and have greater access to graduate programs like law school.[66]

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*Debt*], https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2021-student-loan-survey.pdf (describing how debt impacts the careers, emotional well-being, and life milestones of law school graduates).

60. *Student Debt*, *supra* note 59, at ii.

61. *Id.* at 4.

62. *Id. See also* Melanie Hanson, *Student Loan Debt by Race*, EDUCATION DATA INITIATIVE, https://educationdata.org/student-loan-debt-by-race (last visited March 10, 2022) (finding Black students tend to owe more student loan debt than white students after undergraduate graduation). A discussion of the structural factors that lead to higher rates of borrowing for students of color is outside the scope of this Note. This Note begins from an understanding that structural and systemic racism has privileged white individuals, and allows white individuals to, generally, have greater access to monetary resources and be able to pursue higher education with less debt, compared to students of color. For more information regarding educational inequality, see generally AUERBACH, *supra* note 4 (describing how wealth and one's ethnicity and social status dictated access to the legal field); Dara Bright & Willie Pearson Jr., *Race, Soc. Just., and the Higher Educ. Financial Aid in the U.S.: The Case for African Americans* 149-70 (Pearson Jr. W., Reddy, V. eds Springer, Cham 2021) (reviewing several federal financial aid policies and their inequitable effects on Black students pursuing higher education).

63. *Join the Student Debt Week of Action Sep. 20*-24, *supra* note 6.

64. *Id.*

65. TAMANAHA, *supra* note 1, at 108-109 (describing the rapid increase in law school tuition cost and corresponding student debt increase); Jeff Allum & Katie Kempner, *Inside the Minds of Future Law School Grads: Some Findings from Before the JD*, THE BAR EXAMINER 1, 13 (2018) (indicating sixty-three percent of students surveyed named cost and debt were reasons they would not attend law school); Catherine M. Millett, *How Undergraduate Loan Debt Affects Application and Enrollment in Graduate or First Pro. School*, 74 J. OF HIGHER EDUC. 386, 406 (2003) (finding higher levels of undergraduate debt was a predictor of a student's decreased likelihood of applying to professional school); Eli Wald, *The Visibility of Socioeconomic Status and Class-Based Affirmative Action: A Reply to Richard Sander*, DENVER UNIV. L. REV. 861, 878 (2000) (noting a potential for higher deterrence of attendance for students from lower socioeconomic backgrounds due to the rising cost of law school).

66. *Ethnic and Racial Minorities & Socioeconomic Status*, AM. PSYCH. ASS'N (July 2017), https://www.apa.org/pi/ses/resources/publications/minorities (noting white individuals are less likely to be from a lower socioeconomic background). *Compare Educa-*

While the ABA does not track the socioeconomic status of law students, statistically, students from higher socioeconomic statuses have, and continue to, attend law school in significantly greater numbers than those from lower socioeconomic backgrounds.[67] The correlation between socioeconomic status and affordability of law school interferes with the ABA's goal of ensuring the legal field is more diverse and accessible.[68]

### B. Becoming an Attorney: Now and Then

To obtain a law degree in the United States, one must complete approximately seven years of school: a four-year college degree followed by three years of law school.[69] Additionally, in most states, one must then pass an exam, known as the bar exam, to be a licensed attorney.[70] This "bar" originated in England and refers to the railing dividing the courtroom that separates the public from the judge and jury.[71] An attorney who passes the bar exam can receive a license to practice law and the privilege to "pass the bar" and occupy the same space as the judge and jury.[72] Unlike England, which had two types

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*tion and Socioeconomic Status*, Am. Psych. Ass'n (July 2017), https://www.apa.org/pi/ses/resources/publications/education (indicating individuals from higher socioeconomic backgrounds are eight times more likely to complete a bachelor's degree), *with FAQs*, Ass'n of Am. L. Schs., https://www.aals.org/prospective-law-students/faqs/ (last visited Dec. 27, 2021) (indicating a bachelor's degree is required for law school entrance).

67. Richard Sander, *Class in American Legal Educ.*, 88 Denver U. L Rev. 631, 632-42 (2011) (describing a high socioeconomic status among law students in the 1960s and early 2000s); *Statistics*, A.B.A, https://www.americanbar.org/groups/legal_education/resources/statistics/ (last visited Feb. 27, 2022) (collecting data about law students and graduates without including socioeconomic status).

68. *Compare Ethnic and Racial Minorities & Socioeconomic Status*, *supra* note 66 (noting white individuals are less likely to be from a lower socioeconomic background), *and* Wald, *supra* note 65, at 878-79 (indicating students from lower socioeconomic backgrounds may be less likely to pursue law school due to the increasing cost), *with* Turner, *supra* note 6 (describing the ABA's desire for law schools to be affordable for students), *and Diversity and Inclusion Center*, *supra* note 43 (highlighting various organizations aiming to eliminate bias and enhance diversity, including access to law school through support of pipeline programs).

69. *Occupational Outlook Handbook, Lawyers*, U.S. Bureau of Lab. Stats. (Sept. 8, 2021), https://www.bls.gov/ooh/legal/lawyers.htm#tab-4; *FAQs*, *supra* note 66 (indicating a bachelor's degree is required for law school entrance and that most law school programs are three years long). Some programs allow matriculation into law school after three years of undergraduate education, often known as "3-3" programs. *See, e.g.*, *3-3 Applicants*, Creighton Univ., https://www.creighton.edu/law/future-students/apply/3-3-applicants (last visited March 6, 2022).

70. *Bar Exams*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/bar-admissions/bar-exams/ (last visited March 6, 2022). For more information about the subjects covered on the bar exam, see *Barbri Bar Exam Digest 2020*, Barbri 1, 29 (Jan. 5, 2022), https://www.barbri.com/bar-exam-digest/.

71. *What is BAR*, The Law Dictionary, https://thelawdictionary.org/bar/ (last visited Feb. 1, 2022).

72. *Id.*; *Bar Exams*, *supra* note 70.

of attorneys with different educational tracks, duties, and access to courts, the United States has a unitary bar with one class of attorneys.[73] Qualifications to be admitted to the bar are vested in either state supreme courts or state legislatures.[74]

While there are currently robust and stringent standards to practice law, there were minimal requirements to become an attorney at the country's founding.[75] States adopted lenient entry requirements to become an attorney to facilitate the early legal community's desire for greater accessibility to the legal field.[76] Each state had different requirements, with four states admitting any citizen of good moral character with no additional requirements.[77] Most states had few formal education requirements, and only a handful required an apprenticeship.[78]

73. *Compare The Solicitor and Barrister Profession in the UK–What is the Difference?*, QLTS SCHOOL (Oct. 30, 2011), https://www.qlts.com/blog/the-solicitor-and-barrister-profession-in-the-uk-what-is-the-difference (describing the difference between solicitors and barristers in England), *with* ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW—HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF THE CONDITIONS IN ENGLAND AND CANADA 36-37 (Charles Scribner's Sons 1921) [hereinafter TRAINING FOR THE PUBLIC PROFESSION OF THE LAW] (noting only one type of attorney remained in the United States).

74. *Comprehensive Guide to Bar Admission Requirements 2020*, NATIONAL CONFERENCE OF BAR EXAMINERS 1, 1-2 (2020).

75. *Compare Occupational Outlook Handbook, Lawyers*, *supra* note 69 (describing the educational, licensure, and continuing educational requirements to be an attorney), *with* ALFRED Z. REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA 6 (The Merrymount Press 1927) [hereinafter PRESENT-DAY LAW SCHOOLS] (indicating states abolished many qualifications and prerequisites to become an attorney prior to the Civil War).

76. PRESENT-DAY LAW SCHOOLS, *supra* note 75, at 7 (stating "[u]ndeniably the emphasis of the period was on the side of making the bar accessible rather than making it competent," and "a lack of faith in the efficacy of governmental action, or even a formal preparatory training. . . [r]eliance was placed on experiences as a teacher, and upon the free play of competition as a means of winnowing the good lawyers from the bad").

77. TRAINING FOR THE PUBLIC PROFESSION OF THE LAW, *supra* note 73, at 41 ("In four states the judges were at one time obliged by the legislatures to admit to their bar, as fully privileged professional practitioners, citizens or voters of good moral character, without imposing any educational tests . . . ."); STEVENS, *supra* note 2, at 7 (describing how different states lessened requirements to become an attorney).

78. STEVENS, *supra* note 2, at 7 (describing the lessening of apprenticeship requirements among states); John A. Matzko, The Early Years of the American Bar Association, 1878-1928 5 (Aug. 1984) (Ph.D. dissertation, University of Virginia), https://doi.org/10.18130/V3G914 (indicating only nine of thirty states required any educational prerequisites for entering the bar).

## C. The Increase in Standards

### *1. Different Paths Develop: Apprenticeships, Full-Time Programs, and Part-Time or Night Programs*

The shift from minimal standards to practice law to the current standards took close to a century.[79] This shift away from accessibility to increasing requirements for bar admission was part of a larger movement toward institutionalization in the United States.[80] At this time, some apprenticeship programs had formalized and were run almost as private law schools within law offices.[81] A small number of law schools opened within public and private colleges and universities to absorb these programs or to start their own law program.[82] These new law programs ranged from one to three years long, were not compulsory, and functioned as an alternative to an apprenticeship.[83] There was disagreement regarding which path was the best, with some law schools finding the apprenticeship route an imperfect way of learning the law.[84] Other law schools, like Columbia School of Law, incorporated apprenticeships and practical training into their curriculum with students attending lectures and working in law offices.[85]

In addition to full-time educational programs, part-time and night programs also developed.[86] Such educational programs were the most common type of law school in the late 1800s and were sometimes run in conjunction with a full-time program.[87] Part-time and night pro-

79. *Compare* Training for the Public Profession of the Law, *supra* note 73, at 41-42 (describing the lax requirements to be admitted to the bar in the mid 1800s), *with* Stevens, *supra* note 2, at 205 (indicating legal education at ABA-approved schools became the norm after World War II).

80. Stevens, *supra* note 2, at 20.

81. *Id.* at 3 ("Formalized apprenticeship . . . also led to the establishment of private law schools. They were generally outgrowths of the law offices of practitioners who had shown themselves to be particularly skilled, or popular, as teachers.").

82. Training for the Public Profession of the Law, *supra* note 73, at 46; Bethany R. Henderson, *Asking the Lost Question: What is the Purpose of Law School?*, J. of Legal Educ. 48, 54 (Mar. 2003).

83. Stevens, *supra* note 2 at 25, 36 (describing the different lengths of law school programs).

84. *Id.* at 22, 24 (citations omitted) (stating students in apprenticeships "generally pursue their studies unaided by any real instruction, or examination, or explanation. They imbibe error and truth, principles which are still in force with principles which have become obsolete; and when admitted to practice, they find . . . that their course of study has not made them sound lawyers or correct practitioners," and "even when the principals were diligent, the chances of any one office offering a good all-around training were small").

85. *Id.* at 23-24; *Our History*, Colum. Univ., https://www.law.columbia.edu/about/our-history (last visited Dec. 30, 2021).

86. Stevens, *supra* note 2, at 74.

87. *Id.* at 74-75.

grams also were various lengths but consisted of less school hours.[88] These law schools were often started by the local area bar association as a substitute for clerking in a law office or as a competitor to a school that did not offer a night program.[89] They promoted connections with law offices, were cheaper than full-time programs, and provided a way for students with full-time jobs to attend law school.[90] These programs focused on accessibility and allowed the average citizen to obtain a law degree, including poorer individuals, white immigrants, and sometimes Black people and women.[91] Some argued these programs were inferior because students were not spending their full time studying.[92] By the end of the 1800s there were three main paths to enter the bar: completing an apprenticeship, graduating from a full-time law school program, or graduating from a part-time or night law school program.[93]

### *2. Competency and Overcrowding or Exclusion: The Role of the ABA*

As law schools developed, the field of law became a way to achieve upward social mobility.[94] Particularly through accessible part-time and night programs, poor white men, immigrants, Black people, and women were all able to access the legal field to differing degrees.[95] Some members of the legal profession desired to narrow access to the field and focused on, what was referred to as, competency rather than

88. *Id.* at 76; Alfred Z. Reed, *Recent Progress in Legal Education*, U.S. DEPT. OF INTERIOR 1, 21 (1926) (describing part-time and evening law schools as requiring less hours of study because students were working to support themselves and could not devote as much time to studying).

89. STEVENS, *supra* note 2, at 74, 79.

90. *Id.* at 74.

91. *Id.* at 81 (noting night programs allowed poor people, white immigrants, and to a lesser extent, women and Black people, access to a legal education); TRAINING FOR THE PUBLIC PROFESSION OF THE LAW, *supra* note 73, at 56 ("[T]he modern night school . . . is justified by the democratic desire to extend the privileges of education to the many . . . ."). The author has made the decision to capitalize the "B" in *Black* as an attempt to recognize and center a shared culture and identity of many Black individuals living in the United States, which often does not exist for white individuals in the same way. For more information regarding the capitalization (or not) of racial identifiers, see Nancy Coleman, *Why We're Capitalizing Black*, NYTIMES (July 5, 2020), https://www.nytimes.com/2020/07/05/insider/capitalized-black.html; Kwame Anthony Appiah, *The Case for Capitalizing the* B *in Black*, ATLANTIC (June 18, 2020), https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/.

92. Reed, *supra* note 88, at 21.

93. Josef Redlich, Common Law and the Case Method in American University Law Schools: A Report to the Carnegie Foundation for the Advancement of Teaching 18 (1914). Some states also required passing a bar exam. *Id.*

94. STEVENS, *supra* note 2, at 21.

95. *Id.* at 81; TRAINING FOR THE PUBLIC PROFESSION OF THE LAW, *supra* note 73, at 56 ("[T]he modern night school . . . is justified by the democratic desire to extend the privileges of education to the many . . . .").

accessibility.[96] The argument was that adding prerequisites to enter law school and lengthening the degree program would ensure attorneys would be competent.[97] Not all members of society, however, had access to or could afford the prerequisites and longer program, namely poorer individuals, immigrants, and non-white people.[98] It was from these ideas the ABA was formed in 1878, with initial meetings open only to wealthy, white men.[99]

The ABA was not the only group pursuing an increase in standards for legal education.[100] In 1900, the Association of American Law Schools ("AALS") was created to address the concerns of some law professors who desired an organization of elite law schools.[101] These two organizations attempted to raise the standards of entry to the legal profession to ensure attorneys were competent and further ensure the legal field was not overcrowded.[102] The ABA suggested overcrowding was occurring because other fields, like medicine, raised their standards, shifting unqualified students to the field of law.[103] The ABA used the idea of overcrowding to rationalize its decision to

96. STEVENS, *supra* note 2, at 24, 99-101 (noting there were various reasons behind raising standards including controlling the market and keeping out immigrants, Black people, and Jewish people; generally, "the concept of providing part of legal training through an institution known as the law school had become associated with the parallel aspect of institutionalization—the urge to raise standards and so make the bar more competent and more exclusive").

97. *Id.*; Matzko, *supra* note 78, at 294-95 (citation omitted) (describing the desire of elite attorneys to require schooling "to weed out, or prevent admission, of those who are unfit").

98. AUERBACH, *supra* note 4, at 29 ("[T]he critical question was whether a Jew, a black, a woman, or a Polish Catholic son of a day laborer could first qualify for admission to the school."). Often, women and Black people were simply excluded from entry to law schools. Lisa G. Lerman, et al., *The Legal Profession: Bar Admission, History, and Diversity* 47, 54 (Wolters Kluwer 2020).

99. Matzko, *supra* note 78, at 232-36 (citation omitted) (noting the decision to not include Black lawyers in the first ABA meeting and that the accidental admittance of a Black man to the bar led to friction within the organization); STEVENS, *supra* note 2, at 27 (indicating the ABA was formed after discussions that the unworthy be excluded from the legal field).

100. STEVENS, *supra* note 2, at 96-97 (describing the formation of the AALS, which lobbied for increased standards for law schools).

101. *Id.* at 96 ("In 1899, the ABA, under pressure from the new breed of academic lawyer, called for the establishment of an organization of 'reputable' law schools . . . as the Association of American Law Schools.").

102. *Id.* at 24, 96-97, 100 (describing the ABA and AALS voicing concerns about competency and ensuring educational standards were not lowered while adding prerequisite educational requirements and lengthening law school programs); Matzko, *supra* note 97, at 302 (naming overcrowding as a concern of the ABA).

103. Matzko, *supra* note 78, at 303-04 (emphasis in original) ("Ignoring population growth, increased demand for legal services, and the growing preference for law school training over apprenticeship, the Committee suggested that the rise in law school enrollments might have resulted from higher educational standards in *medical and other professional schools*, which thereby encouraged more mediocre students to choose law as the career path of least resistance.").

implement longer programs and prerequisite educational requirements, as these could deter attendance by immigrants and non-white people, or hypothetically, allow time to inculcate similar values of the elite, white members.[104] The fear of overcrowding, however, was an illusion.[105] In reality, there were fewer attorneys per capita and attorneys were restricting their services to wealthier clients, which limited the overall client base.[106]

The ABA and AALS recommended various standards for schools that increased over time.[107] In one of its first meetings, the ABA created the Section to draft these recommendations.[108] The Section initially proposed all schools should have a specific, three-year legal curriculum with a bar exam and paid faculty.[109] The larger ABA felt this was too strict and instead recommended two years of schooling while urging schools to allow shorter periods of study and to give credit for apprenticeships.[110] After several years of discussion, the ABA endorsed a three-year program in 1921.[111] The AALS imposed its recommendations by requiring a law school to meet the recommendations before it could be considered a member school.[112] These recommendations included a high school diploma for student entrance to law school, a two-year legal curriculum, and access to a library.[113] These requirements continually increased, eventually requiring some college education, certain student-faculty ratios, and a library with a certain number of volumes—all of which increased the cost to run a law school.[114] As the AALS added requirements for member schools,

104. *Id.* at 307-08.

105. STEVENS, *supra* note 2, at 179.

106. *Id.* ("There was merely an appearance of overcrowding because everyone was trying to enter the same sector of the market . . . ."); Lloyd K. Garrison, *Is the Bar Overcrowded?*, 40 DICK. L. REV. 179, 181 (1936) (calculating fewer attorneys per capita by 1940 compared to 1900); Matzko, *supra* note 78, at 304, 309.

107. STEVENS, *supra* note 2, at 173, 176 (indicating the requirement of one full-time teacher per 100 students was increased to a minimum of four full-time teachers, and the requirements of spending a minimum of $1000 on library maintenance and having at least 7,5000 volumes were increased to $2000 with at least 10,000 library volumes between 1924 and 1932).

108. Joy, *supra* note 3, at 556. The Section was initially called the Committee on Legal Education and Admissions to the Bar. James P. White, *History of the Administration of the American Law School Accreditation Process*, J. OF LEGAL EDUC. 438, 440 (Sept. 2001).

109. STEVENS, *supra* note 2, at 93. Other recommendations included well-paid teachers, written exams, a law degree for being able to practice law, and new curriculums. *Id.*

110. *Id.* at 93; Joy, *supra* note 3, at 557.

111. STEVENS, *supra* note 2, at 94-95, 172.

112. Joy, *supra* note 3, at 559.

113. *Id.*

114. STEVENS, *supra* note 2, at 173, 176 (indicating increasing minimum dollar amounts required for library maintenance, as well as additional book and faculty requirements).

many were also recommended by the ABA for all non-member schools.[115] By 1905, the AALS required all member schools to have a three-year course of study.[116] Neither organization provided an explicit rationale for selecting a three-year program.[117]

Neither the AALS nor the ABA could mandate that law schools follow their recommended policies and initially represented only a small portion of the legal field, which made the impact of the organizations small.[118] Over time the organizations gained additional members and succeeded in convincing more schools to adopt their recommendations, as well as convincing states to adopt the recommendations as perquisites to be admitted to the bar.[119]

### *3. Part-Time and Night Law School Programs*

A driving force behind the ABA and AALS's desire for a longer, three-year legal education program was to close the part-time and night law school programs they considered inferior.[120] The AALS, in particular, outwardly condemned night programs and refused to admit any school as a member if they had a night program or were planning on adding one.[121] The goal of eliminating these programs was pursued even over the objections of other attorneys and the profitability of such programs.[122] These part-time and night programs were at one time the most common way to achieve a legal education and served those who might otherwise be excluded from the legal profession.[123] As the growing number of part-time and night programs increased the diversity and socioeconomic backgrounds of members of

115. *Id.* (noting the ABA followed in the footsteps of the AALS in providing recommendations).

116. *Id.* at 97.

117. *Id.* at 206-09 (describing the increase of standards and lack of provided explanation); Littlejohn & Rubinowitz, *supra* note 51, at 424-25 (indicating scholars hold various understandings of why the law school standards were raised).

118. STEVENS, *supra* note 2, at 97 (noting an inability to force students to go to law school through legislation and acknowledging the small number of ABA members and few schools with AALS membership due to schools failing to meet the increasing requirements); HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 25 (McGraw-Hill Book Company 1972) (noting the ABA represented only nine percent of attorneys in 1920).

119. STEVENS, *supra* note 2, at 172-74 (describing the general acceptance of the ABA's standards by law schools and states throughout the mid-1900s); Donna Fossum, *Law Sch. Accreditation Standards and the Structure of Am. Legal Educ.*, 3 A.B.A. RSCH. J., 515, 520-22 (1978) (naming the growth of ABA influence and gradual adoption of ABA standards into state bar admission requirements).

120. AUERBACH, *supra* note 4, at 109 (acknowledging elite members of the bar understood their commitment to higher standards would push out night schools).

121. Reed, *supra* note 88, at 22.

122. STEVENS, *supra* note 2, at 99.

123. *Id.* at 74-75, 81 (noting night law schools served students with full-time jobs, and students who were poor, Black, and female); TRAINING FOR THE PUBLIC PROFESSION

the bar, the ABA and AALS raised concerns about competency, overcrowding, and the need for a three-year, full-time program.[124]

In addition to being considered inferior by the ABA and AALS, the part-time and night programs did not adopt the teaching methodologies utilized by the full-time programs.[125] The full-time schools were moving away from lecture-based teaching methods and began adopting the case method.[126] The case method came out of Harvard Law School and was taught solely through studying appellate cases and the Socratic method, a question-and-answer class format.[127] The casebooks used to facilitate the case method merely provided abridged judicial decisions with no additional information, leaving students to decipher the law under the guidance of their professor.[128] Dean Christopher Langdell of Harvard Law School introduced this method while shifting the law degree to a three-year program.[129] He firmly believed this was a scientific way to teach law, which he felt was necessary if law was to be an elite profession, as opposed to a trade and learned through an apprenticeship.[130] While he adopted this method at the same time as the three-year curriculum, the only explanation he provided regarding the length of time was that it was necessary to teach fundamental legal principles.[131]

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OF THE LAW, *supra* note 73, at 56 ("[T]he modern night school. . . is justified by the democratic desire to extend the privileges of education to the many . . . .").

124. AUERBACH, *supra* note 4, at 106-07; Fossum, *supra* note 119, at 117-18. Not all members of the ABA supported raising standards and exclusion; some raised their concerns at ABA meetings. STEVENS, *supra* note 2, at 175.

125. *Compare* REDLICH, *supra* note 93, at 12-13 (describing lecture-based teaching methods as typical before the adoption of the case method by law schools), *with* Bruce A. Kimball, *The Proliferation of Case Method Teaching in Am. Law Schs.: Mr. Langdell's Emblematic "Abomination," 1980-1915*, HIST. EDUC. Q. 192, 228-29 (2006) (describing the expense of the case method, the socioeconomic norms it implied, and the lack of full acceptance of the method by part-time programs).

126. *See* Kimball, *supra* note 125, at 228-29 (indicating the case method was not adopted by many part-time programs since the method required full-time professors and full-time students); STEVENS, *supra* note 2, at 61, n.81 (describing the adoption of the case method by some schools and the lengthening of law programs to three years).

127. STEVENS, *supra* note 2, at 53.

128. REDLICH, *supra* note 93, at 12.

129. STEVENS, *supra* note 2, at 36-37 ("It was Langdell's goal to turn the legal profession into a university-educated one—and not at the undergraduate level but at a level that required a three-year post-baccalaureate degree.").

130. REDLICH, *supra* note 93, at 15 (first quoting CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL 374 (Lewis Publ'g Co. vol. ii 1908); and then quoting Professor Langdell, "[i]f law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practises [*sic*] it"); Weaver, *supra* note 4, at 529.

131. PACKER & EHRLICH, *supra* note 118, at 79.

Initially, even elite law schools pushed back on the case method, but the method was eventually widely adopted.[132] Those opposed found the case method helped students write and argue well but did not teach students to advise clients or demonstrate the interconnectedness of legal doctrines like lecture-based methods.[133] Yet, the influence of Harvard Law School ensured other full-time law schools would follow its lead, and the method took hold.[134] Part-time and night programs often partially adopted or did not adopt the case method.[135] Often, when a law school picked the Harvard "elite" route utilizing the case method, a night school was formed nearby to serve immigrants and poorer individuals seeking to enter the profession.[136]

Throughout this period of shifting teaching methodologies, the ABA and AALS continued advocating for raising standards and three years of full-time study.[137] Despite this advocacy, students continued to attend part-time programs in great numbers.[138] Eventually, the organizations acquiesced, and recommendations were adopted to approve part-time programs if they were equivalent in hours to a full-time program over a longer period of time.[139]

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132. Kimball, *supra* note 125, at 228-29 (noting some full-time schools like Yale and the University of Virginia were staunchly opposed to the case method); Weaver, *supra* note 4, at 533-34.

133. STEVENS, *supra* note 2, at 59 (quoting *Report of Committee on Legal Education*, 15 ABA PROCEEDINGS 317, 323, 368 (1892)) (describing the case method as "[t]he result of this elaborate study of actual disputes, and ignoring of the settled doctrines that have grown out of past ones, is a class of graduates admirably calculated to argue any side of any controversy, or to make briefs for those who do so, but quite unable to advice a client when he is safe from litigation;" with one person noting, "[t]he study of cases *only* . . . seems to me to be a danger of presenting the law in too disconnected, isolated and detached fragments . . . and would fail to indicate the bearing and relation of one another, and their mutual interdependence upon each other, and would like the vivifying and unifying quality which a properly prepared lecture may have."). A judge advocated against the case method arguing the goal of law school was to prepare one for the practice of law, not to "shine like a juris." REDLICH, *supra* note 93, at 21 (quoting Simeon E. Baldwin, *Teaching Law by Case*, 15 HARV. L. REV. 259 (1900)).

134. Kimball, *supra* note 125, at 195-97, 212 (describing the adoption of the case method as a symbol of prestige for a law school).

135. *Id.* at 220-24, 228-29; STEVENS, *supra* note 2, at 102 (noting aspiring lawyers who were poor or immigrants would be unlikely to obtain a law degree from a school utilizing the case method or a full-time school).

136. STEVENS, *supra* note 2, at 79 (showing examples of when a Wisconsin law school became "Harvardized," Marquette Law School opened to serve immigrants and poorer individuals, and when the Minnesota Law School appointed a dean to increase standards and phase out the night program, three new night law schools opened); Kimball, *supra* note 125, at 195-97, 212 (describing the adoption of the case method as a symbol of prestige for a law school).

137. STEVENS, *supra* note 2, at 96-100 (describing various and continuous attempts to raise prerequisite entrance requirements and the lengthening law school programs).

138. *Id.* at 103.

139. PACKER & EHRLICH, *supra* note 118, at 27.

*4. The Reports: Redlich, Reed, Root (and Flexner)*

Several external reports also influenced and encouraged the ABA's push for a three-year degree program.[140] The Flexner Report, published in 1910, was commissioned by the American Medical Association and performed by the Carnegie Institute to assess the state of medical education.[141] The report supported the American Medical Association's desire for higher entrance requirements and professionalism, and drove out, what many considered inferior, part-time medical schools.[142] In doing so, the Flexner Report reduced the number of medical students and decreased the diversity and accessibility of the field through the resulting closure of almost all medical schools that served Black students.[143] The ABA collaborated with the Carnegie Institute hoping for the same result.[144] The Carnegie Institute engaged Josef Redlich to assess the case method and Alfred Reed to survey the entire legal field.[145]

Redlich visited ten law schools, six of which used the case method.[146] He concluded the case method was the most efficient method of teaching law but did not allow students to grasp the bigger picture.[147] He found the unqualified rejection of lecture-based instruction an exaggeration of the value of the case method, as no single method of teaching could provide all necessary skills.[148] Most importantly, Redlich found the existence of night schools would not hinder the operation of full-time law schools.[149]

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140. *See generally*, STEVENS *supra* note 2, at 112-116 (describing the Flexner, Redlich, Reed, and Root reports and their impact).

141. Moya Bailey, *The Flexner Report: Standardizing Medical Students through Region-, Gender-, and Race-Based Hierarchies*, 43 AM. J.L. & MED. 209, 209-210 (2017).

142. *Id.* at 209-10, 14 (emphasis in original) (describing the desire for *professional patriotism* among doctors and Flexner's push for increased prerequisite educational requirements to enter medical school and a smaller number of medical schools overall); STEVENS, *supra* note 2, at 102-03 (indicating Flexner's report resulted in the closure of many medical schools including night and part-time programs).

143. Bailey, *supra* note 141, at 213-14 (indicating Flexner called on medical schools to stop accommodating students from rural backgrounds; estimated the number of needed doctors based only on the number of white, and not Black, citizens in an area; excluded medical schools that served Black students from his list of adequate schools; and pushed for prerequisite entrance requirements that were not affordable for all citizens).

144. STEVENS, *supra* note 2, at 102-03, 112 (citation omitted) (indicating the Section was "most anxious to have a similar investigation made by the Carnegie Foundation into the conditions under which the work of legal education is carried on in this county").

145. *Id.*

146. REDLICH, *supra* note 93, at vi.

147. *Id.* at 21, 41.

148. *Id.* at 54.

149. *Id.* at 67 (indicating the existence of part-time and night law schools will not prevent the expansion of full-time programs).

Reed opined that law was a public profession and should be accessible, concluding night and part-time schools should not be abolished.[150] He advocated for attorneys with different roles and qualifications, rather than a universal standard for legal education.[151] Reed found part-time programs were necessary to ensure people of all socioeconomic statuses could become attorneys and help shape the laws.[152]

These reports did not support the ABA and AALS's desire to eliminate part-time and night programs, as they had hoped.[153] To overcome their dissatisfaction, the ABA appointed Elihu Root to chair the Section and create recommendations that were more palatable.[154] The Root Report recommended bar admittance only after graduation from a three-year law program and passage of a bar exam, with a compromise allowing longer, part-time programs.[155] The ABA adopted the findings from the Root Report and directed the Section to begin publishing lists of schools that did and did not comply with the three-year requirement.[156] The Section continued to publish a list of approved schools and was given official accreditor status from the United States Department of Education in 1952.[157]

### D. The Adoption and Pushback on the Three-Year Standard

#### *1. The Eventual Adoption of the Three-Year Law School Standard*

While the ABA began advocating for changes to legal education in the late 1800s, several decades passed before their advocacy gained any traction.[158] It was not until the 1930s that a few states began requiring law school attendance, as opposed to completing an apprenticeship, with some states requiring three years of law school.[159]

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150. Auerbach, *supra* note 4, at 110-11.

151. Packer & Ehrlich, *supra* note 118, at 26.

152. Auerbach, *supra* note 4, at 110.

153. *Compare* Stevens, *supra* note 2, at 112 (expressing the ABA's desire for a report like the Flexner Report, which drove out part-time medical schools), *with* Reed, *supra* note 88, at 22-23 (reiterating Reed's earlier points about maintaining the existing of night schools).

154. Packer & Ehrlich, *supra* note 118, at 27.

155. *Id.* For a list of current part-time programs, see *ABA-Approved Law Schools with Approved Part-Time Programs*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/approved-part-time-programs/ (last visited Feb. 27, 2022).

156. Richard W. Nahstoll, *Current Dilemmas in Law-School* Accreditation, 32 J. of Legal Educ. 236, 236 (1982); Stevens, *supra* note 2, at 172-73. The first list was published in 1923 with thirty-nine schools. *Id.* at 173, n.12.

157. *See generally ABA-Approved Law School Archive*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/archive/ (last visited March 7, 2022) (noting schools granted accreditation between 1921 and 1952).

158. Stevens, *supra* note 2, at 205.

159. *Id.* at 174.

Some schools made the decision to close their night programs to gain the reputation that came with ABA approval and AALS admission, while others were driven out of business.[160] Some reprieve was given when the AALS allowed part-time programs to regain membership in 1939, and a few part-time schools were given tentative ABA approval.[161]

When the Section's Council was given official accreditation power, states began requiring graduation from an ABA-accredited school to sit for the bar exam.[162] By 1958 there were only thirty unapproved law schools, all in states that did not require ABA-accredited schooling to take the bar exam.[163] This trend has continued, with forty-six states requiring, and all fifty states recognizing, graduation from an ABA-accredited law school to fulfill the educational requirement to take the bar exam.[164] As of 2021, unaccredited schools still exist, although students are not allowed to sit for the bar exam unless they are in one of the few states that does not require an ABA-approved law school degree.[165]

### *2. Pushback on the Three-Year Standard*

Since the adoption of the three-year standard there has been protest.[166] Even in the initial ABA meetings adopting the increased standards, members raised concerns that the standards were rooted in selfishness and elitism.[167] The 1960s and 70s were particularly fraught with criticism regarding the case method, the lack of experiential learning, and the inaccessibility of the legal profession.[168] Legal educators found it was impossible to teach all substantive law in three years as Langdell desired and shifted the case method into teaching

160. *Id.* at 195-96, 207.

161. *Id.* at 195.

162. *Id.* at 206, n.9 (emphasis in original) (describing states' adoption of prelegal educational requirements and attendance at law school as barriers to access the legal field, with *ABA-approved* schools receiving favorable treatment).

163. *Id.* at 207-08.

164. *About Us*, *supra* note 20; White, *supra* note 108, at 441; Fossum, *supra* note 119, at 520-22.

165. *Admission to the Bar*, USLEGAL, https://attorneys.uslegal.com/admission-to-the-bar/ (last visited Dec. 27, 2021).

166. *E.g.*, Joy, *supra* note 3, at 557 (proposing and tabling a three-year law school requirement at initial ABA meetings); STEVENS, *supra* note 2, at 242 (pushing for a two-year degree in the 1970s); CARRINGTON, *supra* note 3, at 97 (naming law schools should not be bound by the idea that law degrees can only be awarded after three years of law school); TAMANAHA, *supra* note 1, at 172-73 (advocating for a decreased amount of time to complete a law degree and allowing two- and three-year law degree programs).

167. STEVENS, *supra* note 2, at 175-76 (alleging racketeering within the legal profession); AUERBACH, *supra* note 4, at 116.

168. STEVENS, *supra* note 2, at 234, 243; Joy, *supra* note 3, at 566.

students how to "think like a lawyer."[169] Many schools also returned to lecture-based classes for upper-level courses in response to student complaints that the case method was dull after the first year.[170] Clinical and experiential educational opportunities were also added to the law school curriculum after practitioners raised concerns about the lack of practical skills of law school graduates.[171] The ABA responded to this concern by adding professional skills as a curricular requirement for accreditation.[172] The Civil Rights and women's movements brought discussions about accessibility, the lack of women and people of color in the legal field, and the increase in law students from higher socioeconomic backgrounds.[173]

The accreditation standards themselves came under fire in 1995 when the United States Department of Justice sued the ABA for antitrust violations.[174] The Department of Justice alleged the ABA had been artificially inflating faculty wages and the cost of attendance through the accreditation standards.[175] The ABA flatly denied the allegations and the matter was settled through a consent decree.[176] The decree required a review of the accreditation standards, prohibited the ABA from fixing faculty compensation, and ensured more input from non-faculty members in the accreditation process.[177] In 2006, the

169. Weaver, *supra* note 4, at 549 (providing "thinking like a lawyer" as the most commonly used rationale for the case method); Charles E. Clark, *"Practical" Legal Training: An Illusion*, 3 J. LEGAL EDUC. 423, 424-26 (1951) (providing a judge and law professor's insight regarding the inability of teaching all legal problems and information within three years). "Thinking like a lawyer" refers to learning how to critically analyze legal problems. Weaver, *supra* note 4, at 449-50.

170. Weaver, *supra* note 4, at 561-62 (indicating the case method could not maintain student attention for three years); Henderson, *supra* note 82, at 65 (noting ninety-four percent of faculty used a lecture-based teaching method for at least some portion of upper-level courses, eighty-two percent in seminars, and eighty-six percent in skills-based courses as of 1996); STEVENS, *supra* note 2, at 211.

171. STEVENS, *supra* note 2, at 240-41.

172. Joy, *supra* note 3, at 567-68.

173. STEVENS, *supra* note 2, at 234; Robert Stevens, *Law Schools and Law Students*, VA. L. REV. 551, 573 (1973) (examining socioeconomic backgrounds of law students of the1960s).

174. *ABA Standards and Rules of Procedure*, *supra* note 2, at vi; 1995 Dep't. of Just. Press Release, *supra* note 25.

175. TAMANAHA, *supra* note 1, at 11; 1995 Dep't. of Just. Press Release, *supra* note 25.

176. Debbie Goldberg, *ABA Settles Antitrust Case Over Certifying Law Schools*, WASH. POST (June 28, 1995), https://www.washingtonpost.com/archive/politics/1995/06/28/aba-settles-antitrust-case-over-certifying-law-schools/91496e17-3da3-4640-bf50-5b76db84e01d/.

177. 1995 Dep't. of Just. Press Release, *supra* note 25.

ABA was fined for violating several compliance aspects of the consent decree.[178]

The three-year curriculum was also challenged as two-year law school models regained popularity.[179] The Carrington Report, published in 1971, advocated that law schools need not be bound by a three-year program and provided a model for a two-year curriculum.[180] Others advocated for a two-tiered educational system or a two-year program followed by one year of clinical work.[181] Even the Section itself proposed a two-year law degree, but it was rejected by elite law schools due to concerns for the increasing complexity of the law and, yet again, overcrowding.[182] In 2012, Professor Brian Tamanaha advocated for a two-year law school option accomplished by decreasing the total number of credits required for graduation.[183] While no credit hour or length changes have been made, law students have begun working part-time in law offices during their schooling and are even allowed limited court appearances after completing a certain number of credit hours.[184]

178. Press Release, Dept. of Just., Justice Department Asks Court to Hold American Bar Association in Civil Contempt (June 23, 2006) [hereinafter 2006 Dept. of Just. Press Release].

179. STEVENS, *supra* note 2, at 242.

180. CARRINGTON, *supra* note 3, at 97-98.

181. STEVENS, *supra* note 2, at 242-43 (noting Chief Justice Burger's proposal).

182. *Id.* at 242; Preble Stolz, *The Two-Year Law School: The Day the Music Died*, 25 J. OF LEGAL EDUC., 37, 39-40 (1973) (indicating the Section proposed a two-year program in 1973). Matzko, *supra* note 78, at 302-04 (noting ABA members used a supposed overcrowding of the legal profession as a rationale for increasing standards for law schools in the 1890s). The law schools that rejected the two-year proposal included Harvard, Columbia, and Yale. STEVENS, *supra* note 2, at 242.

183. TAMANAHA, *supra* note 1, at 173. Professor Tamanaha specifically suggested reducing the required number of classroom instruction hours, which have since been recalculated into credit hours. *Id.*; Memorandum from the ABA Section on Legal Education and Admissions to the Bar Managing Director's Guidance Memo Standard 310, *supra* note 5, at 1-2. For additional mentions of two-year degree programs, see Barry B. Boyer & Roger C. Cramton, *American Legal Education: An Agenda for Research and Reform*, CORNELL L. FAC. PUBL'N 221, 229 (1974); *How to Fix Law School*, NEW REPUBLIC (July 22, 2013), https://newrepublic.com/article/113983/how-fix-law-school-symposium.

184. *ABA Standards and Rules of Procedure*, *supra* note 2, at 22 (requiring eighty-three credit hours spanning twenty-four months to obtain a law degree as of 2021); STEVENS, *supra* note 2, at 243 (noting law students have begun working in law offices during law school and that even Harvard allowed some students to spend a third year within a purely clinical program in 1979). The ABA removed the prohibition on paid externships for class credit in 2016 and allows each school to determine if students can receive payment for any externship experiences. *See generally* D'lorah Hughes et al., *CLEA Externship Committee Report: Survey of Schools on Payment of Students for For-Credit Externships*, CLINICAL LEGAL EDUC. ASS'N (2018), https://www.cleaweb.org/resources/Documents/CLEA.PaidExternships.SurveyReportFINAL.10-9-18.pdf.

## III. ANALYSIS

This Note urges the American Bar Association ("ABA") to adjust accreditation Standard 311 to allow shorter, cheaper, two-year degree programs.[185] This Note first shows the power of the ABA to control and change law school accreditation standards, including the three-year curricular requirement.[186] Next, this Note asserts the three-year law school model was designed to be exclusionary and unaffordable, which does not align with current ABA goals.[187] Finally, this Note argues a two-year law degree option is more aligned with the ABA's goals of accessibility and affordability, while fulfilling all other curriculum-based accreditation requirements.[188]

### A. The ABA Has the Power to Set and Change Law School Accreditation Standards

Since 1952, the ABA has been the federally-recognized accreditation body for law schools.[189] This power, granted by the United States Department of Education, affords the ABA's Section on Legal Education and Admissions to the Bar ("Section") the ability to craft its own evaluation criteria with limited oversight.[190] With forty-six states requiring graduation from an ABA-accredited law school to take the bar exam and practice law, meeting these standards is crucial for law schools.[191] The Section, through its Council, coordinates the accreditation process and annually promulgates accreditation standards and procedural rules for law schools.[192] These procedural rules explicitly provide the Council the authority to add, revise, and remove any standard, rule, or interpretation of a standard.[193]

The accreditation standards span the entirety of the operation of a law school.[194] Regarding curriculum, the standards only name vari-

185. *See infra* notes 189-342 and accompanying text.
186. *See infra* notes 189-207 and accompanying text.
187. *See infra* notes 208-294 and accompanying text.
188. *See infra* notes 295-342 and accompanying text.
189. *List of Agencies*, *supra* note 21.
190. *The Database of Postsecondary Institutions and Programs*, *supra* note 21 (noting the role of the Department of Education is to ensure approved accrediting agencies enforce accreditation standards effectively, while allowing accrediting agencies to develop their own evaluation criteria).
191. *Compare About Us*, *supra* note 20 (noting forty-six of fifty states require graduation from an accredited law school for bar admission), *with ABA Standards and Rules of Procedure*, *supra* note 2, at 6 (requiring full compliance with accreditation standards for a school to receive accredited status).
192. *ABA Standards and Rules of Procedure*, *supra* note 2, at vii.
193. *Id.* at 79.
194. *See generally ABA Standards and Rules of Procedure*, *supra* note 2 (providing accreditation standards that touch on various aspects of the law school, such as the dean, faculty, curriculum, and facilities).

ous competencies law schools should achieve, provide minimal curricular requirements, and establish a minimum credit hour and program length requirement.[195] Standard 311 specifically requires a law school curriculum to be a minimum of eighty-three credit hours and last at least twenty-four months before a student is eligible for graduation.[196] To ensure compliance with Standard 311, law schools utilize a three-year degree program, a two-year accelerated program, or a longer part-time program.[197] All options require students to pay for the same number of credit hours, keeping overall tuition cost the same.[198]

Through the Section, the ABA has complete authority to adopt a lower credit hour requirement and has revised Standard 311 before.[199] In the 1970s, the Section wielded this power by proposing a two-year law degree—which was flatly rejected.[200] More recently, the Section redefined Standard 311 by converting the calculation of required classroom instruction from minutes to credit hours.[201] The three-year, two-year accelerated, and longer part-time program structures were unaltered by this change because the change merely adopted a different measurement for the same amount of time.[202] While state supreme courts or legislatures could stop requiring an ABA-accredited law degree to take the bar exam—circumventing the

195. *Id.* at 17-23.

196. *Id.* at 22-23.

197. *See, e.g.*, *Degree Programs*, *supra* note 39 (indicating Creighton University School of Law provides three-year, two-year accelerated, and longer part-time law degree programs). *Cf. In Alphabetical Order*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order/ (last visited Feb. 27, 2022) (providing Creighton University School of Law with accredited status).

198. *See ABA Standards and Rules of Procedure*, *supra* note 2, at 22 (requiring eighty-three credit hours for graduation); TAMANAHA, *supra* note 1, at 20 (indicating accelerated programs are only two years long but cost three years of tuition).

199. *ABA Standards and Rules of Procedure*, *supra* note 2, at v, 22, 79 (describing the Section's duty to promulgate and revise accreditation standards, and Standard 311's credit hour and program length requirement requirement); Memorandum from the ABA Section on Legal Education and Admissions to the Bar Managing Director's Guidance Memo Standard 310, *supra* note 5, at 1-2 (noting changes to Standards 310 and 311).

200. Stolz, *supra* note 182, at 39-40.

201. Memorandum from the ABA Section on Legal Education and Admissions to the Bar Managing Director's Guidance Memo Standard 310, *supra* note 5, at 1-2 (describing the switch in calculation from classroom minutes to credit hours within Standard 310, which functions with updated Standard 311's requirement of eighty-three credit hours for graduation).

202. *Compare ABA Standards and Rules of Procedure*, *supra* note 2, at 22-23 (requiring eighty-three credit hours for graduation), *with* Memorandum from the ABA Section on Legal Education and Admissions to the Bar Managing Director's Guidance Memo Standard 310, *supra* note 5, at 1-2 (shifting the calculation of classroom time from minutes to credit hours). *Degree Programs*, *supra* note 39 (indicating Creighton provides a three-year, two-year accelerated, and longer part-time program to receive a law degree).

ABA process—no state has opted to do so.[203] This leaves the ABA's amendment process the most effective way to shift the credit hour requirements for law schools.[204]

The ABA, through the Section, has the explicit authority to change accreditation standards.[205] Standard 311 requires eighty-three credit hours and a twenty-four-month program before graduation, which schools accomplish through a three-year program, accelerated two-year program, or longer part-time program, all priced the same as a full three-year program.[206] Through a change to Standard 311, the ABA can reduce the required number of credit hours and length of law school.[207]

## B. The Three-Year Law School Curriculum is Inconsistent With the ABA's Goals of Accessibility and Affordability

### *1. The ABA Designed the Current Three-Year Law School Structure to Limit Access to the Legal Field and Increase the Cost of Attendance*

#### a. The Three-Year Curriculum was Designed by the ABA to be Exclusive

When the ABA was formed in 1878, founding members clearly articulated their desire to narrow access to the legal profession, which served as a pathway to higher social status.[208] The exclusion was fo-

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203. *About Us*, *supra* note 20 (indicating forty-six states require graduation from an ABA-accredited law school for bar admission). *See, e.g.*, Tamanaha, *supra* note 1, at 176-77 (denying a graduate's request to sit for the bar exam after graduating from an unaccredited law school).

204. *Compare ABA Standards and Rules of Procedure*, *supra* note 2, at 79 (giving the Section that power to revise accreditation rules), *with e.g.*, Tamanaha, *supra* note 1, at 176-77 (providing an example of a state supreme court denying a waiver for the requirement of graduating from an ABA-approved law school to take the state bar exam).

205. *ABA Standards and Rules of Procedure*, *supra* note 2, at 79.

206. *Compare ABA Standards and Rules of Procedure*, *supra* note 2, at 22-23 (requiring a law school curriculum of at least eighty-three credit hours), *with Degree Programs*, *supra* note 39 (indicating Creighton University School of Law provides three-year, two-year accelerated, and longer part-time law degree programs), *and Your fast track to a law degree*, *supra* note 39 (ensuring accelerated and three-year degree students have the same credit hour requirement at Creighton University School of Law), *and Tuition and Fees – School of Law*, *supra* note 40 (charging tuition per credit hour).

207. Tamanana, *supra* note 1, 173-74 (reducing the minimum amount of required classroom instruction hours in accreditation standards to allow two- and three-year degree programs); Memorandum from the ABA Section on Legal Education and Admissions to the Bar Managing Director's Guidance Memo Standard 310, *supra* note 5, at 1-2 (shifting the calculation of classroom time to credit hours and placing the required minimum in Standard 311).

208. Matzko, *supra* note 78, at 32-33, 295-300 (citation omitted) (noting a founding goal of the ABA was to uphold "the honor of the profession," which was used to support increased entrance standards to law school and longer degree programs); Stevens, *supra* note 2, at 21, 27 (indicating law was a field for social mobility and that the ABA

cused on poorer individuals, immigrants, and non-white individuals.[209] One way the organization limited access was by adjusting law school admission and length requirements.[210] The ABA proposed these changes to legal education through the Section.[211] The proposed changes focused on raising standards for law school admission, such as requiring a high school diploma and college degree and increasing the overall time it took to obtain a law degree.[212]

When discussing these increased standards, ABA members often framed the issue as ensuring competency of practitioners.[213] This rhetoric, however, acted as a shroud for ABA members to keep people out of the legal profession they found undesirable, mainly immigrants and poorer individuals.[214] By increasing prerequisites for admission and lengthening the course of law school, ABA members ensured access was limited to those more likely to obtain these prerequisites and those able to afford a longer span of law school, namely wealthy, white men.[215] Some ABA members were overt in their exclusionary ideology and expressed concerns about immigrants, Jewish people, and

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was formed after discussions about the need to exclude the unworthy from the legal field).

209. STEVENS, *supra* note 2, at 100 (citation omitted) ("You can produce a moral and intelligent bar, by raising the standard, not only of education, but along economic lines so that every Tom, Dick and Harry cannot come to the Bar."); TAMANAHA, *supra* note 1, at 21 (quoting Harry S. Richards, "Progress in Legal Education," in *Handbook of the Association of American Law Schools and Proceedings of the . . . Annual Meeting*, vol. 15 (1915) 60, 63) (describing a concern with the number of "foreign names" in law schools); AUERBACH, *supra* note 4, at 107 (noting attorneys were concerned about how "to preserve our Anglo-Saxon law of the land" upon entrance into the legal field by immigrants); Matzko, *supra* note 78, at 304 (indicating attorneys wanted to ensure the profession did not have anyone of "that class").

210. STEVENS, *supra* note 2, at 93, 96.

211. *Id.* at 93.

212. *Id.* at 93, 96.

213. AUERBACH, *supra* note 4, at 113 (citation omitted) (highlighting discussions among ABA members about the need to save "society from the incompetent, the uneducated, and the careless, ignorant members of the bar" by requiring three years of law school and at least two years of undergraduate education before admission); Matzko, *supra* note 78, at 303 (indicating one law school dean found the bar overcrowded with incompetent lawyers); STEVENS, *supra* note 2, at 100-101 (noting an intelligent bar would come from raising entrance standards).

214. STEVENS, *supra* note 2, at 100-01 (citation omitted) (naming the need for an intelligent bar with higher prerequisite educational standards to keep out those from poorer backgrounds and prevent "the invasion of foreign stock"); Matzko, *supra* note 78, at 294-97 (describing the desire of elite attorneys to require prerequisite schooling "to weed out, or prevent admission, of those who are unfit," as more immigrants began entering the profession). *Compare* AUERBACH, *supra* note 4, at 109 (indicating how the ABA aimed its standards to devalue and close the night programs), *with* STEVENS, *supra* note 2, at 74-75, 81(noting night law schools served those with full-time jobs and those who were poor, immigrants, Black, and female).

215. STEVENS, *supra* note 2, at 93, 96 (naming a longer, three-year law school curriculum and educational prerequisites like a high school degree and college as increased standards); AUERBACH, *supra* note 4, at 29, 116-17 (describing how immigrants, Black

Black people as unfit to practice law.[216] Others were appalled that waitstaff and firefighters could access the legal profession.[217]

Overcrowding rhetoric was also used as a disguise for exclusionary interests.[218] The rise of night and part-time law school programs concerned elite members of the bar because this led to an increasing number of people of color, poorer individuals, and immigrants becoming attorneys.[219] ABA members wished to cut the overall number of attorneys in half and, therefore, rid the profession of people from lower socioeconomic classes.[220] But this overcrowding was not real.[221] In fact, there were fewer attorneys per capita than in past years.[222] Any sense of overcrowding was due to attorneys restricting

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people, and others were less likely to be able to obtain, or even afford, a college degree and legal education).

216. TAMANAHA, *supra* note 1, at 21-22 (quoting Harry S. Richards, "Progress in Legal Education," in *Handbook of the Association of American Law Schools and Proceedings of the . . . Annual Meeting*, vol. 15 (1915) 60, 63) (expressing concerns about too many "foreign names" attending law school); AUERBACH, *supra* note 4, at 115, 121 (citation omitted) (warning of the "pestiferous horde" of people who knew English imperfectly that would occur in the legal profession without higher entrance standards, the absolute necessity for attorneys to be "men 'able to read, write, and talk the English language—not Bohemian, not Gaelic, not Yiddish, but English,'" and the concern that poorer individuals would not have the required discipline to be an attorney); Matzko, *supra* note 78, at 299 (quoting Edward J. Phelps, 3 A.B.A. REP. 31 (1880)) (recalling how ABA-President Edward Phelps felt the need for elevated standards to "exterminate the rats").

217. Matzko, *supra* note 78, at 308 (lamenting about how bar examinations alone were not keeping out "undesirable classes" like waitstaff, firefighters, and bartenders from the legal profession).

218. *Id.* at 302.

219. *Compare* STEVENS, *supra* note 2, at 74 (describing part-time programs as the most common in the late 1800s and providing access to women and immigrants), *with* Matzko, *supra* note 78, at 302 (indicating concerns of overcrowding were raised as the overall number of lawyers from different socioeconomic and ethnic backgrounds increased in the 1890s), *and* AUERBACH, *supra* note 4, at 107-09 (indicating the push for increased educational standards to keep people of color and immigrants out of the legal field gained more traction in the early 1900s).

220. Matzko, *supra* note 78, at 302-03 (first quoting David J. Brewer, *A Better Education the Great Need of the Profession*, 18 ABA REP. 411, 452 (1895); and then quoting Elihu Root, *Public Service by the Bar* , 41 A.B.A. REP. 355, 359 (1916)) (reiterating that Justice Brewer found "it would be a blessing to the profession . . . if some Noachian deluge would engulf half of those who have a license to practice," and that Elihu Root felt any extra attorneys "ought to be set to some other useful work. There is plenty of work for them to do on the farms of the country."). This commentary occurred during an influx of people from various ethnic and socioeconomic backgrounds into the legal profession. *Id.*

221. STEVENS, *supra* note 2, at 179 (referencing attorneys limiting their services to the elite and inferring "[t]here was merely an appearance of overcrowding because everyone was trying to enter the same sector of the market . . ."); Garrison, *supra* note 106, at 181-82 (calculating fewer attorneys per capita by 1940 compared to 1900). *Contra* Matzko, *supra* note 78, at 302 (naming overcrowding as a concern of the early ABA).

222. Garrison, *supra* note 106, at 181 (calculating fewer attorneys per capita by 1940 compared to 1900). *Contra* Matzko, *supra* note 78, at 302 (naming overcrowding as a concern of the early ABA).

their services to wealthy clients, which limited the overall client base.[223] ABA and American Association of Law Schools ("AALS") members were again using this rhetoric to further their desire to keep poorer individuals, immigrants, and others, such as Jewish and Black people, out of the legal field.[224]

The push for a longer educational program was aimed at closing part-time and night law schools, which primarily served poorer individuals, immigrants, and sometimes women and Black people.[225] Most full-time schools already excluded women and people of color by simply denying admission.[226] Members of the bar did not feel they had a duty to ensure poorer individuals had access to the legal profession and would rather eliminate these schools altogether.[227] The AALS, founded as an organization for elite law schools, helped in this endeavor by specifically excluding part-time and night programs from continued membership until 1939.[228] When the ABA began publishing lists of approved law schools, no part-time programs were listed for the first twenty-one years.[229] As a result of failing to meet the standards, many of the part-time and night schools closed; the overall number of law students declined; and more incoming students attended the approved, full-time, three-year programs.[230]

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223. STEVENS, *supra* note 2, at 179.

224. AUERBACH, *supra* note 4, at 106-07 (indicating that cries of overcrowding occurred after increased immigration and greater access to the legal profession); Matzko, *supra* note 78, at 304, 308-09 (first quoting E. F. Trabue, 3 A.B.A. REP. 809 (1914); and then quoting John H. Wigmore, 40 A.B.A. REP. 736 (1915)) (indicating that one attorney provided no explanation for overcrowding, other than the need to rid the profession of attorneys of "that class," while another claimed "a requirement of two years of college [was] a rational and beneficial measure for reducing hereafter the spawning mass of promiscuous semi-intelligence which now enters the Bar. The legal profession all over the world is a selected, limited group; and such is the Anglo-American tradition . . . .").

225. *Compare* AUERBACH, *supra* note 4, at 107-08 (acknowledging that elite members of the bar knew their commitment to higher standards would push out night schools), *with* STEVENS, *supra* note 2, at 81 (noting how night programs allowed poorer people, white immigrants, and to a lesser extent, women and Black people, access to a legal education).

226. Lerman, et al., *supra* note 98, at 54; STEVENS, *supra* note 2, at 81-84 (indicating limited numbers of law schools admitted women and Black people with Harvard not admitting women until 1950).

227. STEVENS, *supra* note 2, at 97, 99 (quoting 4 AM. L. SCH. REV. 26 (1916)) (indicating one attorney said, "[t]he universities can turn out all the lawyers the country needs; we don't have to sit up nights to find ways for the poor boy to come to the Bar," as the push to close part-time and night schools continued even over their profitability).

228. *Id.* at 96-97, 173, 195 (noting the AALS provided schools with part-time and night programs membership but revoked and later reextended membership in 1939).

229. *See id.* at 79-81, 195 (offering approval to a YMCA-run law school, most of which were part-time, in 1942).

230. Fossum, *supra* note 119, at 522-23 (describing the decline in part-time programs, in part due to accreditation standards that were not feasible to meet); STEVENS, *supra* note 2, at 177, 180 (noting the number of law students at ABA-approved schools increased while the overall number of law students decreased).

The process of convincing law schools to adopt longer programs was slow.[231] To expedite the process, the ABA requested help from the Carnegie Institute.[232] The ABA wanted a report regarding the state of legal education in the hopes it would help close part-time law schools, just like the Flexner Report had done for the medical field.[233] While changes may have been needed to ensure adequate medical education, Flexner's report articulated a one-size-fits-all uniformity that privileged mainly upper-class white males who had the resources to fulfill the new prerequisite requirements and longer schooling period of medical school.[234] The ABA wanted to emulate this result.[235] The commissioned reports, however, did not have the effect the ABA desired, as the authors, Redlich and Reed, advocated for the continuation of part-time and night programs.[236] In response, the ABA commissioned and adopted its own report, the Root Report, to recommend their desired three-year program.[237] As a compromise, the ABA allowed part-time programs to continue if the programs required the same number of schooling hours as full-time programs.[238]

Upon solidifying the three-year requirement, the ABA's Section began publishing a list of schools that met its standards.[239] In 1952, this list became the nationally recognized source of accreditation for law schools upon the Section's receipt of such authority from the United States Department of Education.[240] The three-year requirement has since been present in some form in the accreditation standards.[241] The ABA increased the enforceability of the longer schooling requirement through its continued lobbying efforts to state legislatures and supreme courts to condition taking the bar exam and

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231. STEVENS, *supra* note 2, at 205.

232. *Id.* at 112.

233. AUERBACH, *supra* note 4, at 109-110 ("In 1913 the American Bar Association, doubtlessly wishing for lightning to strike twice, requested a similar study of legal education.").

234. Bailey, *supra* note 141, at 214.

235. *Compare* STEVENS, *supra* note 2, at 112 (citation omitted) (indicating the Section was "most anxious to have a similar investigation made by the Carnegie Foundation into the conditions under which the work of legal education is carried on in this county."), *with* AUERBACH, *supra* note 4, at 109 (noting the Flexner Report helped close many night medical schools).

236. AUERBACH, *supra* note 4, at 110-11; REDLICH, *supra* note 93, at 67.

237. PACKER & EHRLICH, *supra* note 118, at 27 (describing the Root Report as a compromise and in response to Reed's Report).

238. *Id.*

239. Nahstoll, *supra* note 156, at 236.

240. *List of Agencies*, *supra* note 21; *The Database of Postsecondary Institutions and Programs*, *supra* note 21.

241. *See, e.g.*, *1968 Review of Legal Education*, *supra* note 38, at 26 (requiring a three-year law school program for full-time students or a longer program for part-time programs in 1968).

practicing law upon graduation from an ABA-approved law school.[242] The ABA was successful in this endeavor, as forty-six of fifty states mandate graduation from an ABA-accredited school as a prerequisite to practice law as of 2021.[243] While the ABA was unsuccessful at completely removing part-time and night programs, the push for increased entrance requirements and longer programs resulted in the closing of many schools that served women, people of color, immigrants, and poorer individuals.[244] These changes to legal education were specifically and purposefully designed to exclude.[245]

b. ABA Actions and the Three-Year Requirement Unnecessarily Increase the Cost of Attending Law School

The ABA has increased the cost of law school attendance in a variety of ways.[246] In advocating for increased standards for law school admittance and longer program length, the ABA recognized this would increase the cost of attendance and further their exclusionary goals.[247] The ABA not only set initial requirements for law schools but also continually added and increased the costly requirements, like

242. STEVENS, *supra* note 2, at 206-08, n.9 (describing how states eventually adopted ABA and AALS recommendations with nineteen states requiring a degree from an ABA-approved law school to take the bar exam or giving approved schools more favorable treatment in 1947); Fossum, *supra* note 119, at 521-22 (indicating thirty-six states required graduation from an ABA-accredited law school to obtain bar admission with nine others requiring essentially the same condition in 1976).

243. *About Us*, *supra* note 20.

244. *Compare ABA-Approved Law Schools with Approved Part-Time Program*, *supra* note 155 (noting part-time programs have received accredited status), *with* Fossum, *supra* note 119, at 522-23 (indicating many part-time programs closed due to an inability to meet accreditation standards), *and* STEVENS, *supra* note 2, at 81 (describing how many part-time and night programs served Black people, women, and poorer individuals).

245. *Compare* AUERBACH, *supra* note 4, at 108-09 (describing increased standards that were aimed at closing night and part-time legal programs), *with* STEVENS, *supra* note 2, at 81 (describing how part-time and night programs served poorer people, women, and Black people), *and* TAMANAHA, *supra* note 1, at 21-22 (quoting Harry S. Richards, "Progress in Legal Education," in *Handbook of the Association of American Law Schools and Proceedings of the . . . Annual Meeting*, vol. 15 (1915) 60, 63) (expressing concerns about too many "foreign names" attending law school), *and* Matzko, *supra* note 78, at 299 (quoting Edward J. Phelps, 3 A.B.A. REP. 31 (1880)) (recalling how ABA-President Edward Phelps felt the need for elevated standards to "exterminate the rats").

246. *See, e.g.*, STEVENS, *supra* note 2, at 173 (describing initial standards with minimum mandatory amounts to be spent by law schools on libraries); TAMANAHA, *supra* note 1, at 18-19 (providing an example of tuition increases in a law school after becoming accredited and needing to meet each accreditation standard); 1995 Dep't. of Just. Press Release, *supra* note 25 (alleging the ABA utilized accreditation standards to increase faculty salaries).

247. *Compare* Matzko, *supra* note 78, at 306-09 (indicating increased educational prerequisites were thought to discourage nonelite members of society from entering law school), *with* AUERBACH, *supra* note 4, at 29, 117-18 (noting socioeconomic status and ethnicity often determined one's educational attainment and ability to afford prerequisite educational requirements and law school).

having a certain number of full-time faculty and library volumes.[248] These initial standards are reflected in the current accreditations standards.[249] The cost of achieving full compliance with the standards is passed on to students through higher tuition costs.[250] Unaccredited law schools often have lower tuition costs and are prevented from becoming accredited without increasing tuition.[251] Unaccredited law schools, however, may not provide a route for their students to practice law as graduation from ABA-accredited school is necessary in forty-six states.[252] This ensures ABA-approved law schools are essentially the only route to access the legal profession and are more costly to students.[253]

Standard 311, in particular, increases the cost of law school by requiring an eighty-three credit hour minimum for law school graduation.[254] Students are required to take and pay for this minimum number of credit hours, even though there is no valid rationale for this number.[255] The accreditation standards only require two credit hours of professional responsibility; six credit hours of experiential learning;

248. STEVENS, *supra* note 2, at 173, 176 (indicating the requirement of one full-time teacher per 100 students was increased to a minimum of four full-time teachers, and the requirements of spending a minimum of $1,000 on library maintenance and having at least 7,500 volumes were increased to $2,000 with at least 10,000 library volumes between 1924 and 1932).

249. *Compare* STEVENS, *supra* note 2, at 173, 176 (naming library and faculty standards for law schools), *with ABA Standards and Rules of Procedure*, *supra* note 2, at 39-42 (requiring law schools to meet certain library and faculty standards).

250. TAMANAHA, *supra* note 1, at 21-22 (naming ABA accreditation standards as a reason for increased costs due to faculty and library collection requirements); Segal, *supra* note 32 (describing how the accreditation standards increased expenses and tuition for a law school seeking accreditation).

251. TAMANAHA, *supra* note 1, at 18-19 (describing the increase in tuition cost after a school met accreditation standards); *E.g.*, Segal, *supra* note 32 (indicating how the accreditation standards increased expenses and tuition for a law school seeking accreditation).

252. *About Us*, *supra* note 20 (requiring graduation from an accredited law school to be admitted to the bar in forty-six states); Segal, *supra* note 32 (noting graduates from an unaccredited law school in Tennessee would only be able to practice law in a few states).

253. *Compare About Us*, *supra* note 20 (requiring graduation from an accredited law school for bar admission in forty-six states), *with* TAMANAHA, *supra* note 1, at 19 (indicating the market price for an accredited law school is $10,000 higher than an unaccredited school).

254. *Compare ABA Standards and Rules of Procedure*, *supra* note 2, at 22 (requiring a law school curriculum to be at least eighty-three credit hours), *and Tuition and Fees – School of Law*, *supra* note 40 (charging tuition per credit hour), *with* TAMANAHA, *supra* note 1, at 20 (noting accelerated programs cost the same, tuition-wise, as three-year programs).

255. *ABA Standards and Rules of Procedure*, *supra* note 2, at 22-24 (requiring at least eighty-three credit hours in a law degree program with no rationale or interpretation for the number listed). *See, e.g.*, *Tuition and Fees – School of Law*, *supra* note 40 (charging tuition per credit hour at Creighton University School of Law). *Compare* AUERBACH, *supra* note 4, at 106-09 (describing overcrowding as a rationale for lengthen-

and two faculty-supervised writing experiences, leaving the vast majority of credit hour subject matter to a school's discretion.[256] Many schools have formed their curriculum around mandatory first-year classes, certain mandatory second-year classes, and a third year of electives.[257]

The three-year curriculum at Harvard Law School was linked to using the case method as Langdell found that was the adequate amount of time to teach all fundamental legal principles.[258] This specific length was never given a rationale, and since the 1970s, legal educators have acknowledged teaching all legal doctrine in three years is impossible.[259] The method is currently used to teach critical analytical skills, which can be taught in one or two years, rather than three.[260] In fact, for upper-level courses, many schools have reverted to lecture-based teaching methods and added experiential or practical-based opportunities.[261] The use of both lecture-based teaching and case method, coupled with experiential opportunities, can impart all desired legal skills in under three years.[262]

Some schools have even turned the entire third year of law school into non-classroom-based opportunities.[263] Yet, students are still charged full tuition price for each credit, regardless of if the credits are earned within the classroom environment.[264] The cost to attend law

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ing the law school degree), *with* Matzko, *supra* note 78, at 308-09 (noting overcrowding was not real).

256. *ABA Standards and Rules of Procedure*, *supra* note 2, at 18 (providing minimal curricular guidance).

257. Preble Stolz, *Training for the Public Profession of the Law (1921): A Contemporary Review*, AALS PROCEEDINGS (1971) *reprinted in* PACKER & EHRLICH & THOMAS NEW DIRECTIONS IN LEGAL EDUCATION, app. A, app II, at 256 (McGraw-Hill Book Company 1972). *See, e.g., Juris Doctor Curriculum*, *supra* note 35 (mandating certain first-year curriculum, some second-year curriculum, and electives to fulfill the remaining credit hour requirements).

258. PACKER & EHRLICH, *supra* note 118, at 79.

259. *Id.*; Clark, *supra* note 169, at 424-25 (providing a judge and law professor's insight regarding the inability to teach all legal problems and information within three years).

260. Weaver, *supra* note 4, at 549-50, 562.

261. Henderson, *supra* note 82, at 65, 70-71 (noting the use of lecture-based teaching methods in upper-level courses and clinical opportunities for upper-level students).

262. Weaver, *supra* note 4, at 561-65 (describing how law students are taught case reading, critical analysis, resiliency, advocacy skills, and the legal process in law school, which can be taught in less than three years by both the case method and lecture-based teaching methods); *ABA Standards and Rules of Procedure*, *supra* note 2, at 18 (requiring only six credit hours of experiential learning).

263. *See, e.g.*, STEVENS, *supra* note 2, at 243 (describing Harvard Law School allowing students to participate in a clinical-based, third year); TAMANAHA, *supra* note 1, at 20 (noting Washington and Lee School of Law has turned the third year of law school into experiential-based opportunities).

264. TAMANAHA, *supra* note 1, at 20 (describing tuition costs when students are performing work in practice-based settings). Students may be able to receive payment for externships; however, payment must be allowed by the individual law school. *See gen-*

school is the same even in an accelerated, two-year program, as the minimum number of ABA-required credit hours is the same.[265] While a student may save money on housing and living costs spread over two years instead of three, Standard 311 ensures all law students pay the same tuition regardless of the length of the program.[266]

The ABA has also used its accrediting power to bolster faculty wages at the expense of students.[267] In 1995, the Department of Justice sued the ABA for antitrust violations alleging legal educators had captured the law school accreditation process.[268] The lawsuit alleged the ABA artificially inflated faculty salaries, by requiring comparable compensation between law schools, and created other costly accreditation standards that were not related to a quality education.[269] Shared wage information, capping teaching loads at eight credit hours per semester, and adding significant time for research and absences increased faculty salaries.[270] These costs were then passed on to students through tuition.[271] The lawsuit resulted in a consent decree in which the ABA agreed not to connect faculty salaries to the accreditation process, but the damage was already done.[272] In the past few decades, the cost of law school, and corresponding debt, has skyrocketed.[273] This cost and debt load may be interfering with aspiring law

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*erally* D'lorah Hughes et al., *supra* note 184 (indicating law school response to the ABA allowing payment for externships).

265. *Compare ABA Standards and Rules of Procedure*, *supra* note 2, at 22 (requiring an eighty-three-credit hour minimum), *with Your fast track to a law degree*, *supra* note 39 (reassuring students the three-year law program and accelerated two-year program require the same number of credit hours), *and Tuition and Fees – School of Law*, *supra* note 40 (charging tuition per credit hour).

266. *Compare Your fast track to a law degree*, *supra* note 39 (indicating an accelerated degree can help save money on living expenses), *with ABA Standards and Rules of Procedure*, *supra* note 2, at 22 (requiring the same minimum amount of credit hours for all law degrees), *and Tuition and Fees – School of Law*, *supra* note 40 (charging tuition per credit hour).

267. *See generally* TAMANAHA, *supra* note 1, at 11-19 (discussing how accreditation standards were used to bolster faculty wages, which were reflected through increased tuition costs, and resulted in a lawsuit filed by the Department of Justice against the ABA).

268. *Id.* at 11; 1995 Dep't. of Just. Press Release, *supra* note 25.

269. 1995 Dep't. of Just. Press Release, *supra* note 25; *1994 Standards*, *supra* note 25, at 102-05 (interpreting non-compliance with accreditation standards if faculty salaries ranked too low compared to other faculty salaries nationally or within the geographic area).

270. TAMANAHA, *supra* note 1, at 11.

271. *Id.* at 15-16 (describing how salary increases for faculty resulted in tuition increases of ten percent at private law schools and almost twelve percent at public law schools over four years).

272. 1995 Dep't. of Just. Press Release, *supra* note 25; TAMANAHA, *supra* note 1, at 15-16 (describing how the accreditation standards contributed to the sharp increase in faculty salaries).

273. *Law School Cost*, *supra* note 57; TAMANAHA, *supra* note 1, at 108-09; *Lifting the Burden*, *supra* note 56, at 10.

students' ability to attend law school, particularly those from lower socioeconomic backgrounds.[274] This is the result of numerous factors, including the ABA's actions and accreditation standards.[275]

### 2. *The ABA is Committed to Accessibility and Affordability Within the Legal Profession*

On September 15, 2020, the ABA signed the CEO Action for Diversity and Inclusion Pledge.[276] This pledge reinforced a core goal of the ABA: to eliminate bias and enhance diversity in the association and profession.[277] This is one of many actions and statements taken by the ABA to show its support for a diverse legal field.[278] These actions stretch back to 1986, when the ABA created the Commission on Racial and Ethnic Diversity in the Profession ("Commission").[279] The ABA recognized the lack of diversity within the legal profession and created the Commission to assist with the entry and retention of more diverse attorneys.[280]

The ABA has since built the Diversity and Inclusion Center, consisting of various groups researching and advocating for increased accessibility for historically underrepresented populations in the legal field, including women and people of color.[281] Particularly in 2020, the ABA released multiple statements and provided resources for members of the legal profession, and beyond, regarding the importance of diversity, equity, and inclusion.[282] In these statements, the

274. Allum & Kempner, *supra* note 65, at 13 (finding sixty-three percent of students surveyed indicated cost and debt was a reason they would not attend law school); *Ethnic and Racial Minorities & Socioeconomic Status*, *supra* note 66 (noting those from lower socioeconomic backgrounds can have decreased educational attainment).

275. TAMANAHA, *supra* note 1, at 127 (assigning some blame for cost increases to accreditation standards and other factors); 2006 Dep't. of Just. Press Release, *supra* note 178 (finding the ABA violated a consent decree regarding accreditation standards).

276. *ABA signs CEO Action for Diversity and Inclusion Pledge*, *supra* note 6.

277. *Id.*

278. *See, e.g.*, *Statement of ABA President Hilarie Bass Re: Standing up for justice and equality*, *supra* note 54 (noting the ABA's dedication to equality and justice in the U.S., particularly through the ABA's goal of eliminating bias and enhancing diversity within the profession, and loudly declaring the ABA values diversity and inclusion); *Resolution 100B*, *supra* note 54 (resolving that the ABA encourages a review of policies to remove hair discrimination and supporting congressional action); *Center for Diversity and Inclusion in the Profession High-Level Overview*, *supra* note 53 (describing the various ABA entities that focus on eliminating bias and increasing diversity in the legal profession); *Member Diversity, Equity, and Inclusion Plan*, *supra* note 54 (creating a strategic plan for increasing diversity, equity, and inclusion within the ABA).

279. *Commission on Racial and Ethnic Diversity in the Profession*, *supra* note 44.

280. *Id.*

281. *See Diversity and Inclusion Center*, *supra* note 43 (describing the Diversity and Inclusion Center as promoting collaboration and communication to enhance diversity and eliminate bias within the legal field).

282. *See generally ABA launches new racial justice resources website*, *supra* note 7 (collecting ABA statements and resources regarding diversity, equity, and inclusion).

ABA acknowledged the importance of diversity and a desire to work for change.[283] The ABA has clearly expressed an interest in supporting increased diversity within the legal profession, which includes increasing diversity among law school students.[284]

The ABA has also shown a commitment to the financial accessibility of law school.[285] A major study in 2003, commissioned by the ABA, noted the increasing levels of debt among law students and the impact of this debt on the ability of students to pursue public interest careers.[286] Beginning in 2020, the ABA Young Lawyers Division began a survey regarding the impact of student debt.[287] Not only did this survey identify the large amount of debt students were taking on, the survey also noted the disproportionate impact of this debt on students of color, including higher rates of taking out loans and higher total debt upon graduation.[288] In addition to collecting data, the ABA also supports an annual Student Debt Week of Action to call on Congress to address the increasing amount of student debt.[289] Both the affordability of law school and the disproportionate impact of debt on students of color have been acknowledged by the ABA and is an area the ABA has committed to changing.[290]

### *3. The Three-Year Curriculum is Inconsistent with the ABA's Goals*

The three-year law school curriculum is rooted in an ideology that is antithetical to current ABA goals and aspirations.[291] The shift to requiring a three-year program, reflected in Standard 311's eighty-three credit hour and twenty-four-month minimum program length,

283. *Id.* (naming intensified efforts to ensure justice); *Policy & Positions*, *supra* note 54 (compiling position statements from ABA leadership relating to equity and diversity within the justice system).

284. *See, e.g.*, *Diversity and Inclusion Center*, *supra* note 43 (promoting groups focused on increased diversity within the legal field, including pipeline programs to increase diversity among law students).

285. *See, e.g.*, Turner, *supra* note 6 (calling on the legal community to continue lobbying for assistance with the student debt crisis and a desire to ensure all aspiring attorneys are not deterred due to a fear of debt).

286. *Lifting the Burden*, *supra* note 56, at 10-11.

287. *Student Debt*, *supra* note 59, at ii.

288. *Id.* at 4.

289. *Join the Student Debt Week of Action Sep. 20-24*, *supra* note 6.

290. *See, e.g.*, Turner, *supra* note 6 (calling on the legal community to continue advocating to Congress for change regarding student debt).

291. *Compare* AUERBACH, *supra* note 4, at 109, 112-13 (indicating increased educational standards and length would prevent access to the legal field), *and* Stevens, *supra* note 2, at 24, 27, 99-101 (indicating the ABA was formed after meetings discussing that the unworthy be excluded from the legal field and a general desire to raise standards to keep out Black people and immigrants), *with Diversity and Inclusion Center*, *supra* note 43 (promoting an elimination of bias and increased diversity within the legal profession by ABA organizations), *and* Turner, *supra* note 6 (advocating for solutions to ensure debt does not deter aspiring law students).

was rooted in a desire to exclude certain people from the legal profession.[292] This shift increased the cost of a legal education and is not grounded in any teaching methodology.[293] A costly and exclusionary-based program of education does not support the ABA's current promotion of increasing diversity within the legal profession and the affordability of legal education.[294]

### C. A Two-Year Law Degree Allows Greater Accessibility and Affordability

A true, two-year law degree allows students to complete course requirements in two years and only requires payment for two years of classes, unlike current accelerated programs.[295] To allow true, two-year degree programs, the ABA must change accreditation Standard 311 to lower the required credit hour total and program length for graduation.[296] Law schools would then be free to create shorter degree programs as well as maintain current three-year or longer programs if desired.[297]

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292. *Compare* Parker & Ehrlich, *supra* note 118, at 27 (describing the adoption of a three-year curriculum by the ABA), *and ABA Standards and Rules of Procedure*, *supra* note 2, at 22 (requiring law school programs to be eighty-three credit hours and twenty-four months in length), *with* Auerbach, *supra* note 4, at 109, 112-13 (indicating increased educational standards and length would prevent access to the legal field), *and* Stevens, *supra* note 2, at 24, 99-101 (noting a desire to raise standards to keep out Black people and immigrants).

293. Lao, *supra* note 4, at 1087-88, 1098 (noting a longer law program contributes to increased cost); Packer & Ehrlich, *supra* note 118, at 78-79 (indicating no teaching methodology provides an adequate rationale for three years of law school); Weaver, *supra* note 4, at 561-65 (describing how both the case method and lecture method can teach legal and other necessary skills in less than three years).

294. *Compare* Lao, supra note 4, at 1087-88, 1098 (noting a longer law program contributes to increased cost), *and* Auerbach, *supra* note 4, at 109, 112-13 (indicating increased educational standards and length would prevent access to the legal field), *with Diversity and Inclusion Center*, *supra* note 43 (promoting an elimination of bias and increasing diversity within the legal profession), *and* Turner, *supra* note 6 (advocating for a more affordable legal education).

295. Tamanaha, *supra* note 1, at 20; O'Rourke, *supra* note 40, at 603-04 (describing how accelerated programs do not save students on tuition costs).

296. *ABA Standards and Rules of Procedure*, *supra* note 2, at 6, 22 (requiring full compliance with accreditation standards including the eighty-three-credit hour minimum); Tamanaha, *supra* note 1, at 173-74 (lowering the required minimum classroom hours to allow true, two-year law degree programs). Professor Tamanaha specifically suggested reducing the required number of classroom instruction hours, which have since been recalculated into credit hours. *Id.*; Memorandum from the ABA Section on Legal Education and Admissions to the Bar Managing Director's Guidance Memo Standard 310, *supra* note 5, at 1-2.

297. *E.g.*, Stolz, *supra* note 182, at 39-40 (indicating past proposals would allow law schools to create two-year programs if desired); Tamanaha, *supra* note 1, at 173-74.

*1. A Two-Year Law Degree is Not a Novel Idea*

A two-year law degree is not a new idea.[298] Many law programs, including full-time programs, were only two years until the late 1920s.[299] The ABA itself initially recommended a two-year program in 1892, which it reintroduced in 1972, although it was soundly rejected by elite law schools who raised renewed concerns about overcrowding.[300] States were slow to adopt three-year legal education programs as a prerequisite for taking the bar exam, and many did not until after the 1950s.[301] Additionally, in 1969, California briefly considered allowing students at accredited schools to sit for the bar exam after two years but was worried about pushback from students who had attended law school for three years.[302]

In 1971, the Carrington Report explicitly advocated for a two-year program after three years of undergraduate study.[303] The report provided a model curriculum that attempted to create a more functional, individualized, diversified, and accessible legal education.[304] In 2012, Professor Brian Tamanaha advocated for both two- and three-year law school programs based on what students desired and could afford.[305] To create the two-year program, Professor Tamanaha lowered the number of credits required for graduation.[306] A recent ABA report, Principles for Legal Education and Licensure in the 21st Century, hinted at examining both the structure and the funding model of law school but did not explicitly mention a two-year option.[307]

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298. *See, e.g.*, CARRINGTON, *supra* note 3, at 97-98 (naming law schools should not be bound by the idea that law degrees can only be awarded after three years of law school and proposing a two-year law degree model).

299. *See* STEVENS, *supra* note 2, at 172, 174, 209 (noting only half of law schools met the ABA three-year requirement in 1927 and no two-year schools remained by the 1950s).

300. *Id.* at 95, 242.

301. *Id.* at 206-07 (indicating state legislature began conforming to ABA standards); Fossum, *supra* note 119, at 521-22 (naming only eighteen states required ABA-approved law school graduation to take the bar exam in 1956 with seven others essentially requiring ABA school approval; thirty-six states mandated ABA-approved graduation with nine others having similar practices by 1976).

302. *Id.* at 209.

303. CARRINGTON, *supra* note 3, at 96-97.

304. *Id.* at 97-99.

305. TAMANAHA, *supra* note 1, at 172-74.

306. *Id.* at 173. Professor Tamanaha specifically suggested reducing the required number of classroom instruction hours, which have since been recalculated into credit hours. *Id.*; Memorandum from the ABA Section on Legal Education and Admissions to the Bar Managing Director's Guidance Memo Standard 310, *supra* note 5, at 1-2.

307. *Principles for Legal Education and Licensure in the 21st Century*, *supra* note 16, at 3, 8.

### 2. *A Two-Year Law Degree is More in Line with the ABA's Goals of Affordability and Accessibility*

A two-year law degree can increase accessibility and affordability.[308] Currently, ninety percent of law students take on debt to attend law school and, on average, graduate $125,000 in debt.[309] This level of debt is unlikely to be paid off quickly and can extend for many decades.[310] The current accreditation requirement of eighty-three credit hours ensures no law student can avoid paying a certain level of tuition, regardless of whether the program is three years in length or accelerated into two.[311] Students with high levels of student debt after receiving an undergraduate degree, or those wary of the potential debt to attend law school, are less likely to apply for and pursue a professional degree.[312] Not only do potential debt levels deter aspiring law students, but white students generally have lower levels of undergraduate debt than students of color.[313] Thus, debt thwarts the ABA's advocacy for affordability and accessibility by inhibiting further diversity within the legal field.[314]

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308. *Compare* TAMANAHA, *supra* note 1, at 173-74 (describing how cutting the required number of credits can create more affordable options for students), *and* Allum & Kempner, *supra* note 65, at 13 (noting potential law students have indicated cost is a reason to not pursue a law degree), *and* Millett, *supra* note 65, at 406 (finding higher levels of undergraduate debt was a predictor of a student's decreased likelihood of applying to professional school), *with Education and Socioeconomic Status*, *supra* note 66 (indicating students from lower socioeconomic backgrounds are more likely to accumulate significant student debt burdens), *and Ethnic and Racial Minorities & Socioeconomic Status*, *supra* note 66 (noting white individuals are less likely to have a lower socioeconomic background), *and* Hanson, *supra* note 62 (finding Black students tend to owe more student loan debt that white students after undergraduate graduation).

309. *Student Debt*, *supra* note 59, at 4.

310. TAMANAHA, *supra* note 1, at 119.

311. *ABA Standards and Rules of Procedure*, *supra* note 2, at 22 (requiring eighty-three credit hours for law school curriculums); *Your fast track to a law degree*, *supra* note 39 (providing that the three-year law degree program and accelerated two-year program require the same number of credits); O'Rourke, *supra* note 40, at 603-04 (describing how accelerated programs do not save students on tuition costs).

312. Millett, *supra* note 65, at 406; TAMANAHA, *supra* note 1, at 157-59 (advising students to consider debt loads when applying to law school; it may be prudent to not attend law school, or a student should leave without graduating to avoid greater debt).

313. Millett, *supra* note 65, at 406; Hanson, *supra* note 62.

314. *Compare Diversity and Inclusion Center*, *supra* note 43 (promoting an elimination of bias and increased diversity within the legal profession), *and* Turner, *supra* note 6 (advocating for more affordable law degrees), *with* Allum & Kempner, *supra* note 65, at 13 (noting sixty-three percent of students are concerned about the cost and debt of law school), *and* Millett, *supra* note 65, at 406 (finding higher levels of undergraduate debt was a predictor of a student's decreased likelihood of applying to professional school), *and* Hanson, *supra* note 62 (finding Black students tend to owe more student loan debt that white students after undergraduate graduation).

A two-year model would immediately cut one-third of tuition cost by simply not requiring payment for as many credit hours.[315] Reducing the overall tuition cost could provide greater access for students concerned about cost, particularly students from lower socioeconomic backgrounds who are likely to need more financial assistance.[316] Students of color, which often overlap with lower socioeconomic status, may have a greater need for financial assistance and may not be attending law school due to the cost.[317] A significant decrease in cost could increase the number of students from lower socioeconomic backgrounds and students of color attending law school, which would result in greater diversity within the legal field.[318] A two-year model provides greater accessibility to the very people the ABA attempted to keep out and creates a more affordable degree overall.[319]

Additionally, the option for a two-year degree program allows law schools to provide multiple avenues to access the legal profession.[320] Schools could maintain a three-year program or make the third year optional with opportunities to earn additional certifications or concentrations.[321] Schools could create third-year apprenticeship programs, in which schools connect students with various community partners to

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315. TAMANAHA, *supra* note 1, at 173-74 (describing how cutting the required number of credit hours creates differentiation and allows students to select the legal education they can afford); Boyer & Cramton, *supra* note 183, at 229 (describing a two-year program as a potential way to reduce length and cost); *How to Fix Law School*, *supra* note 183 (suggesting two years of law school could reduce cost because less faculty would be needed).

316. Allum & Kempner, *supra* note 65, at 13 (noting sixty-three percent of students are concerned about the cost and debt of law school); *Education and Socioeconomic Status*, *supra* note 66 (indicating students from lower socioeconomic backgrounds are more likely to accumulate significant student loan debt).

317. *Compare Ethnic and Racial Minorities & Socioeconomic Status*, *supra* note 66 (noting white individuals are less likely to have a lower socioeconomic background), *with Education and Socioeconomic Status*, *supra* note 66 (indicating students from lower socioeconomic backgrounds are more likely to accumulate significant student loan debt), *and* Allum & Kempner, *supra* note 65, at 13 (noting potential law students have indicated cost is a reason to not pursue a law degree).

318. *Compare* TAMANAHA, *supra* note 1, at 173-74 (creating more affordability by allowing two- and three-year law degree programs), *with* Wald, *supra* note 65, at 878-79 (indicating students from lower socioeconomic backgrounds may be less likely to pursue law school due to the increasing cost), *and Ethnic and Racial Minorities & Socioeconomic Status*, *supra* note 66 (noting white individuals are less likely to have a lower socioeconomic background).

319. *Compare* TAMANAHA, *supra* note 1, at 174 (indicating two-year law degree programs can provide greater affordability), *with* STEVENS, *supra* note 2, at 97, 99-100 (naming the ABA did not deem it necessary to ensure Black people, immigrants, and those from lower socioeconomic backgrounds could obtain a law degree).

320. *See, e.g.*, TAMANAHA, *supra* note 1, at 173-75 (providing examples of different types of two- and three-year law degree programs); PACKER & EHRLICH, *supra* note 118, at 80-84 (describing the potential for diversity among types and lengths of law degrees).

321. TAMANAHA, *supra* note 1, at 174 (indicating students could add a third year to develop a specialization).

provide legal services but with students receiving payment for the legal assistance they provide rather than the schools collecting a year's worth of tuition.[322] This would allow students to enter the legal field without taking on an additional year of tuition debt.[323] The flexibility and differing length options allow students to pay for the type of legal education they need or desire, as well as provide a more affordable education.[324]

### *3. A Two-Year Law Degree Satisfies All Curriculum-Based Accreditation Standards*

A two-year law degree satisfies all other curricular requirements in the accreditation standards.[325] Schools today utilize case method instruction, lecture-based seminars, and clinical or experiential programs.[326] All of these methodologies could be utilized in a two-year program that also meets all other ABA accreditation curriculum standards.[327] Beyond two credit hours of professional responsibility, six credit hours of experiential learning, and two faculty-supervised writing experiences, ABA accreditation standards do not address what law schools must teach.[328] Rather, each law school sets the majority of its own curriculum.[329]

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322. *Id.* at 175-76.

323. *Id.*

324. *Id.* at 174; Boyer & Cramton, *supra* note 183, at 229 (describing a two-year program as a potential way to reduce length and cost).

325. *Compare ABA Standards and Rules of Procedure*, *supra* note 2, at 18 (requiring only eight credit hours and two writing experiences within a law school's curriculum), *with, Law*, *supra* note 35 (indicating students typically take fifteen or sixteen credit hours per semester).

326. Weaver, *supra* note 4, at 543 (indicating all law schools utilize the case method); Henderson, *supra* note 82, at 65 (noting the use of lecture-based teaching methods in upper-level courses, and clinical opportunities for upper-level students).

327. *Compare* Weaver, *supra* note 4, at 561-65 (describing how law students are taught case reading, critical analysis, resiliency, advocacy skills, and the legal process in law school, which can be taught in less than three years by both the case method and lecture-based teaching methods), *and* Henderson, *supra* note 82, at 65, 70-71 (noting the use of lecture-based teaching methods in upper-level courses, and practical, clinical opportunities for upper-level students), *with ABA Standards and Rules of Procedure*, *supra* note 2, at 18 (mandating only six credit hours of experiential learning in addition to two credit hours of professional responsibility and two writing experiences).

328. *ABA Standards and Rules of Procedure*, *supra* note 2, at 18-19 (providing no additional guidance on required curriculum components beyond eight required credit hours, two writing experiences, and general learning outcomes).

329. *ABA Standards and Rules of Procedure*, *supra* note 2, at 18-19 (requiring specifically eight credit hours and two writing requirements for graduation). *E.g.*, *Juris Doctor Curriculum*, *supra* note 35 (selecting fifty-four required credit hours for students at Creighton University School of Law); *Academic Requirements*, *supra* note 35 (requiring forty-eight specific credit hours for graduation from the University of Nebraska College of Law).

Both Creighton University School of Law and the University of Nebraska College of Law provide accredited legal education in the State of Nebraska.[330] Currently, all required courses for graduation at each school could be completed within two years.[331] At Creighton University School of Law, students are required to take seven mandatory classes after the first-year curriculum.[332] These twenty-two credit hours include three credits of professional responsibility and could all be completed in a second year.[333] If students enroll in sixteen credit hours each semester of the second year, as in their first year, then ten credit hours remain to take the six credits of experiential learning and four elective credits.[334] These remaining four credits could also be accomplished through non-classroom-based extra curriculars such as law review, trial team, or a clinic.[335] Creighton satisfies the two faculty-supervised writing experiences in its first year curriculum and requires an additional third writing experience, included in the second-year mandatory classes.[336]

At the University of Nebraska College of Law, students are only required to take two additional courses and a seminar with a substantial writing component after the designated first-year curriculum.[337] One of the additional courses must be professional responsibility.[338] These two remaining classes and seminar could be completed within one semester, in addition to the six experiential credit hours the accreditation standards require.[339] This would create a remaining semester for students to select electives of their choice, participate in an

330. *In Alphabetical Order*, *supra* note 39.

331. *Compare Juris Doctor Curriculum*, *supra* note 35 (requiring sixty specific credit hours for graduation), *and Law*, *supra* note 35 (indicating students typically take fifteen or sixteen credit hours each semester), *with Academic Requirements*, *supra* note 35 (requiring only forty-eight specific credit hours for graduation), *and Financial Information*, *supra* note 35 (noting students take between twelve and eighteen credit hours per semester).

332. *Juris Doctor Curriculum*, *supra* note 35.

333. *Id.* (indicating students should take the seven classes, constituting twenty-two credit hours, within the second year and with a maximum of eighteen credit hours per semester).

334. *Id.* (indicating students take sixteen credit hours each semester in the first year of law school and must take an additional twenty-two mandatory credit hours in addition to the six experiential credits required by the accreditation standards).

335. *Competition Teams*, *supra* note 35; *Law Journal*, *supra* note 35.

336. *Juris Doctor Curriculum*, *supra* note 35 (requiring Legal Research and Writing I and II in the first year and Legal Research and Writing III in the second year of law school).

337. *Academic Requirements*, *supra* note 35.

338. *Id.*

339. *Compare id.* (requiring approximately fifteen credit hours in the second year from two courses, a seminar, and six experiential credit hours), *with Financial Information*, *supra* note 35 (indicating students take twelve to eighteen credit hours per semester).

externship, or focus on courses covered on the bar exam but not required for graduation.[340] Both law schools in Nebraska have curriculums that fulfill the ABA's accreditation standards and all mandatory portions thereof can be completed within two years.[341] Reducing the number of required credit hours for graduation would not detract from or violate any Nebraska law school or ABA requirements for a law degree.[342]

## IV. CONCLUSION

The American Bar Association ("ABA"), through its Section on Legal Education and Admissions to the Bar ("Section"), possesses the authority to change law school accreditation standards, including the required number of credit hours and program length.[343] The current three-year structure was designed to exclude people and to be unaffordable, which contradicts the ABA's goals of accessibility and affordability in the legal field.[344] A true, two-year law degree program creates a more accessible and affordable legal education, while satisfying all other curriculum-based accreditation standards.[345]

340. *Curriculum*, NEB. COLL. OF LAW, https://law.unl.edu/prospective/curriculum/ (last visited Feb. 24, 2022); *Compare Academic Requirements*, *supra* note 35 (requiring courses in Civil Procedure, Contracts, Criminal Law, Property, Torts, and Constitutional Law), *with Barbri Bar Exam Digest 2020*, BARBRI 1, 29 (Jan. 5, 2022), https://www.barbri.com/bar-exam-digest/ (testing Civil Procedure, Contracts, Criminal Law, Property, Torts, and Constitutional Law, as well as Evidence, Criminal Procedure, Business Associations, Family Law, Trusts and Estates, and Secured Transactions on the Nebraska bar exam).

341. *Compare ABA Standards and Rules of Procedure*, *supra* note 2, at 18 (mandating only eight particular credit hours and two writing experiences in law school curriculums), *with Juris Doctor Curriculum*, *supra* note 35 (requiring three semesters with a writing course, three credits of professional responsibility, and six credits of experiential learning in addition to other school-mandated courses totaling sixty specific credit hours required for graduation), *and Law*, *supra* note 35 (indicating students typically take fifteen or sixteen credit hours each semester), *and Academic Requirements*, *supra* note 35 (requiring one additional course, three credit hours of professional responsibility, one writing-based seminar, and six credits of professional skills courses, in addition to other school-mandated courses totaling forty-eight specific credit hours required for graduation), *and Financial Information*, *supra* note 35 (indicating students take twelve to eighteen credit hours per semester).

342. *Compare ABA Standards and Rules of Procedure*, *supra* note 2, at 18 (listing accreditation curricular requirements as eight specific credit hours and two writing experiences), *with Law*, *supra* note 35 (indicating students typically take fifteen or sixteen credit hours each semester), *and Juris Doctor Curriculum*, *supra* note 35 (requiring only sixty specific credit hours for graduation), *and Financial Information*, *supra* note 35 (noting students take between twelve and eighteen credit hours per semester), *and Academic Requirements*, *supra* note 35 (requiring only forty-eight specific credit hours for graduation).

343. *See supra* notes 189-207 and accompanying text.

344. *See supra* notes 208-294 and accompanying text.

345. *See supra* notes 295-342 and accompanying text.

This Note is not the first, and will certainly not be the last, to advocate for a true, two-year law degree program. This Note does not pretend a two-year curriculum would solve all accessibility and affordability issues within the legal community; however, allowing two-year programs is a step in the right direction. The ABA has taken declarative and performative steps in calling for greater accessibility and affordability in the wake of increasing awareness of racial injustice and the impacts of student loan debt. The ABA has commissioned studies, held advocacy days, and released resources, while ignoring the underlying structure of law schools. This structure was designed by the ABA and designed to exclude. Actions speak louder than words, and it is time for the ABA and the Section to take actual steps to address the inequities inherent in the current law school structure—future law students deserve nothing less.

*Katlyn Martin '23*

# SAME-SEX COMMON LAW MARRIAGE: AN EXAMINATION OF THE CONSTITUTIONALITY OF STATE PROCESSES IN DETERMINING A VALID COMMON LAW MARRIAGE POST *OBERGEFELL V. HODGES*

*No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.*

–Justice Anthony Kennedy[1]



1. Obergefell v. Hodges (*Obergefell I*), 576 U.S. 644, 681 (2015).

## I. INTRODUCTION

Same-sex marriage may be federally guaranteed, but same-sex couples still face a plethora of hurdles.[2] *Obergefell v. Hodges*[3] had a profound impact on the LGBTQIA+ community, but equitable legal remedies, such as common law marriage, remain inaccessible to same-sex couples.[4] Same-sex common law marriage is only allowed in a minority of states and is generally defined as a legally recognized marriage between two same-sex individuals without a purchased marriage license or without having been solemnized through a wedding ceremony.[5] Some hurdles same-sex couples faced, and in some instances continue to face, include the inability to adopt children until 1995, no legal engagement in sexual conduct until 1997, not being recognized as spouses by both insurance and medical companies in 1999, and no joint health insurance until 2004.[6] The underlying problem

2. *See generally* Mark A. Momjian, *Common-Law Marriage Recognition After Obergefell: Evidentiary Challenges*, 91 PA. BAR ASS'N Q. 142, 146 (2020) ("[W]hen lower courts consider that evidence, short of testamentary evidence by a witness who observed the exchange of words, or short of a videotape documenting the exchange of words, reputation evidence will invariably be divided because same-sex couples were prohibited from filing joint tax returns as married persons and from owning real property as tenants by the entireties. And even if they were 'out' to their respective communities, because of the daily discrimination faced by LGBTQ persons, many of them hid their sexual orientation from employers, religious communities, and secular organizations. Not surprisingly, the failure of same-sex litigants to secure declarations of common-law marriage in the context of divorce is largely predictable.").

3. 576 U.S. 644 (2015).

4. *See generally* Momjian, *supra* note 2, at 145-46 (finding that in securing evidence to prove a valid common-law marriage, same-sex couples have largely failed). LGBTQIA+ means Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual. Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES (June 21, 2018), https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html.

5. *See Common Law Marriage by State*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 11, 2020), https://www.ncsl.org/research/human-services/common-law-marriage.aspx (defining common law marriage, which generally can be imputed to same-sex couples).

6. *In re* M.M.D., 662 A.2d 837, 843 (D.C. 1995) (stating that no legal theory prevents same-sex couples from adopting); Gryczan v. State, 942 P.2d 112, 115, 126 (Mont. 1997) (stating that the statute "criminalizing consensual sex between adults of the same gender" violated a fundamental right to privacy, and thus was in violation of the Montana Constitution; further, the unconstitutional statute treated same-gender sexual relationships the same as bestiality (citing Mont. Code Ann. § 45-2-101(2)))); Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999) (preventing a spouse in a same-sex marriage from recovering damages in a medical malpractice suit that left the other spouse dead); Snetsinger v. Montana Univ. Sys., 104 P.3d 445, 453 (Mont. 2004) (stating orga-

presented in same-sex common law marriage cases is the unintentional bias present in the judiciary's application of the elements of common law marriage.[7] Four states and Washington, D.C. will be analyzed in this Note because only nine states currently recognize common law marriages, with Pennsylvania having recently abolished it, and five of those states lack sufficient legal precedent for this issue.[8] This Note will also address issues central to same-sex common law marriage and what the judiciary must do to satisfy the *Obergefell* decision.[9] This Note further proposes the judiciary adopt a factor-based test, rather than the currently controlling element-based test, when determining whether a common law marriage is present as applied to same-sex couples to comport with *Obergefell*.[10]

This Note will first explore *Obergefell*, explain common law marriage, and explore the elements present in the various cases from Colorado, Washington, D.C., Montana, Pennsylvania, and Texas to determine how *Obergefell* has been applied to common law marriage.[11] Next, this Note will look to the hurdles preventing same-sex couples from proving the requisite elements to satisfy common law marriage.[12] This review covers the three main elements to satisfy common law marriage and contains a fourth catchall section comprised of other various state requirements.[13] Second, this Note will address the constitutional concerns relating to the hurdles in place for same-sex couples to prove common law marriage under the Equal Protection Clause.[14] Third, and finally, this Note will explore the difference in element-based and factor-based tests and propose what courts should adopt to satisfy the *Obergefell* decision.[15]

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nizations may not provide employee benefits to some and deny them for others, as it would violate equal protection).

7. *See* Momjian, *supra* note 2, at 146 (stating that courts have not adapted to determine cases based on evidence that was not available to same-sex couples until *Obergefell*, such as filling joint tax returns and legally marrying).

8. Hogsett v. Neale, 478 P.3d 713, 727 (Colo. 2021); Dugan v. Greco, No. 1924 EDA 2019, 2020 WL 1139061, at *8 (Pa. Super. Ct. Mar. 9, 2020); *In re* J.K.N.A., 454 P.3d 642, 649 (Mont. 2019); Gill v. Nostrand, 206 A.3d 869, 884 (D.C. 2019); *In re* Estate of Whetstone, No. 05-18-00165-CV, 2019 WL 698090, at *1 (Tex. App. Feb. 20, 2019). This Note will only explore five states and the District of Columbia due to the lack of cases looking into this issue; the states selected provide a snapshot of common-law marriage which can be applied to all other states that allow common-law marriage. *See generally* Momjian, *supra* note 2, at 151 (indicating nine states and Washington, D.C. allow common law marriage).

9. *See infra* notes 186 – 328 and accompanying text.

10. *See infra* notes 280 – 328 and accompanying text.

11. *See infra* notes 67 – 185 and accompanying text.

12. *See infra* notes 192 – 267 and accompanying text.

13. *See infra* notes 192 – 267 and accompanying text.

14. *See infra* notes 268 – 279 and accompanying text.

15. *See infra* notes 280 – 328 and accompanying text.

## II. BACKGROUND

### A. OBERGEFELL V. HODGES: The United States Supreme Court Federally Recognizes Same-Sex Marriage

In *Obergefell v. Hodges*,[16] the United States Supreme Court held that same-sex couples may exercise their fundamental right to be married in all fifty states.[17] The Court consolidated several cases challenging various state marriage statutes which barred same-sex couples from marriage in Ohio, Michigan, Kentucky, and Tennessee.[18] These plaintiffs argued the state statutes banning same-sex marriage violated the Equal Protection Clause ("EPC") and the Due Process Clause ("DPC") of the Fourteenth Amendment.[19] All district courts found in favor of the plaintiffs in determining that same-sex marriage would fall under a heightened standard of review.[20] The district courts reasoned that restricting same-sex marriage did not relate to

16. 576 U.S. 644 (2015).

17. Obergefell v. Hodges (*Obergefell I*), 576 U.S. 644, 681 (2015); *see also* Kenji Yoshino, *A New Birth of Freedom? Obergefell v. Hodges*, 129 HARV. L. REV. 147, 147 (2015) (finding the Fourteenth Amendment requires all states to perform and recognize same-sex marriages). *Obergefell I* held that same-sex couples are entitled to "civil marriage on the same terms and conditions as opposite-sex couples." 1 KAREN MOULDING, *Practical Considerations: Dissolution, Retroactivity, and Common Law Same-Sex Marriage, in* SEXUAL ORIENTATION AND THE LAW § 2.9, § 2.9 (2020).

18. *Obergefell I*, 576 U.S. at 653-54.

19. *Id.* at 655, 672. Previously, Michigan's state constitution only recognized marriage as the union of one man and one woman. MICH. CONST. art. 1, § 25, *invalidated by* Obergefell v. Hodges, 576 U.S. 644 (2015). In part, the Michigan constitution read, "[t]o secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." *Id*. Previously, Kentucky's constitution stated, "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." KY. CONST. § 233A, *invalidated by* Obergefell v. Hodges, 576 U.S. 644 (2015). Additionally, the former Ohio code stated, in part, "[a]ny marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state." OHIO REV. CODE ANN. § 3101.01(B)(1), *invalidated by* Obergefell v. Hodges, 576 U.S. 644 (2015). The Tennessee constitution previously stated, in part:

> The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee.

TN. CONST. art. 11, § 18, *invalidated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

20. *Obergefell I*, 576 U.S. at 656; Obergefell v. Wymyslo (*Obergefell II)*, 962 F. Supp. 2d 968, 997 (S.D. Ohio 2013); Bourke v. Beshear, 996 F. Supp. 2d 542, 558 (W.D. Ky. 2014); Tanco v. Haslam, 7 F. Supp. 3d 759, 772 (M.D. Tenn. 2014); DeBoer v. Snyder, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014); Henry v. Himes, 14 F. Supp. 3d 1036, 1061-62 (S.D. Ohio 2014).

an important government objective, and therefore determined the state statutes banning same-sex marriage were unconstitutional.[21]

The states appealed to the United States Court of Appeals for the Sixth Circuit, claiming the DPC and the EPC of the Fourteenth Amendment did not require states to expand the definition of marriage to include same-sex couples.[22] The Sixth Circuit determined that one's sexual orientation was to be reviewed under rational basis review rather than strict scrutiny because sexual orientation was not considered a suspect classification.[23] To determine this, the court looked to several factors, including: (1) whether the group has historically been targeted by governmental discrimination; (2) whether the group has a defining characteristic bearing on the group's classification; (3) whether the group can be defined as a discrete group due to unchanging characteristics; and (4) whether the group is politically powerless.[24] The court subsequently concluded that unless the Supreme Court ruled on this issue, they would rely on the historical construct of marriage.[25]

James Obergefell then appealed to the United States Supreme Court, which granted certiorari to review two issues.[26] First, the Court sought to determine whether the Fourteenth Amendment required states to allow same-sex marriage.[27] Second, the Court wanted to resolve whether the Fourteenth Amendment required states to recognize valid same-sex marriages performed outside of the state.[28] Obergefell argued that the Sixth Circuit erred because the respondents violated the Fourteenth Amendment in denying the petitioners' ability to lawfully marry or be recognized when the marriage was lawfully performed in another state.[29] The Court reversed the Sixth Circuit, holding same-sex couples may exercise their fundamental right to marriage in all fifty states and states must recognize same-sex marriages lawfully performed in another state.[30] The Court reasoned that under the EPC all individuals, including same-sex couples, are guaranteed the same fundamental rights, which includes the right to a valid marriage.[31] Marriage is a fundamental liberty, inherent to indi-

21. *Obergefell II*, 962 F. Supp. 2d at 995.
22. DeBoer v. Snyder, 772 F.3d 388, 399 (6th Cir. 2014).
23. *Snyder*, 772. F.3d at 418-19.
24. *Id.* at 413.
25. *Id.* at 420-21.
26. *Obergefell I,* 576 U.S. at 656.
27. *Id.*
28. *Id*.
29. *Id*. at 655.
30. *Id*. at 681.
31. *Id.* at 665 (citing U.S. CONST. amend. XIV, § 1); *see also* Yoshino, *supra* note 17, at 148.

vidual autonomy because marriage protects the intimate association between parties and protects children and families.[32] Further, because no difference exists between same-sex and heterosexual marriages, the exclusion of this right for same-sex couples would violate the DPC and the EPC because of the unequal treatment between such parties in the eyes of the law.[33] The Supreme Court further reasoned the impracticability of preventing same-sex marriage because thirty-seven states and Washington, D.C. already conducted thousands of lawful same-sex marriages.[34] Therefore, same-sex couples have a fundamental right to marry under the DPC and EPC of the Fourteenth Amendment.[35]

### B. Overview of the Equal Protection Scrutiny Levels

To determine whether a statute or general practice violates the EPC of the Fourteenth Amendment, courts have divided violations of the clause into three levels of scrutiny: rational basis review, intermediate scrutiny, and strict scrutiny.[36] Rational basis review is applied to state laws that do not implicate a fundamental right or a suspect class of people and is generally the easiest for states to overcome.[37] Courts examine whether the state law rationally relates to a legitimate government interest.[38] To determine this, the Supreme Court of Kansas in *Stephenson v. Sugar Creek Packing*[39] explained that the constitutional safeguards are offended only when the classification uses reasons irrelevant to the achievement of the state's objective.[40]

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32. *Obergefell I*, 576 U.S. at 665-66. The district courts reasoned same-sex marriage was similar to concepts like contraception, family relationships, procreation, and childrearing, all of which are protected by the U.S. Constitution. *Id*. at 666 (citing to U.S. Const. amends. V, XIV).

33. *Id*. at 670.

34. *See id.* at 680 (discussing the societal shift towards inclusivity and acceptance). The thirty-eight states and districts which allowed same-sex marriage before *Obergefell I* include: Connecticut, Delaware, District of Colombia, Hawaii, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Washington, and Wisconsin. Bill Chappell, S*upreme Court Declares Same-Sex Marriage Legal in All 50 States*, NPR (June 26, 2015, 10:05 AM), https://www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages.

35. *Obergefell I*, 576 U.S. at 681.

36. Garma v. Twp. of Lakewood, 14 N.J. Tax 1, 11 (N.J. Tax Ct. 1994) (citing Brown v. City of Newark, 552 A.2d 125, 129 (N.J. 1989)).

37. *Rational Basis Test*, Black's Law Dictionary (11th ed. 2019).

38. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S.Ct. 1780, 1782 (2019) (determining the law only needs to be rationally related to a recognized and constitutional government interest).

39. 830 P.2d 41 (Kan. 1992).

40. Stephenson v. Sugar Creek Packing, 830 P.2d 41, 45 (Kan. 1992) (citing McGowan v, Maryland, 366 U.S. 420, 425 (1961)).

Therefore, if the methods used by the state are justified in any rational way to achieve the state's objective, then the statute or regulation passes.[41]

The next level of scrutiny is intermediate scrutiny, which is applied to laws restricting quasi-suspect classifications, like gender.[42] Under intermediate scrutiny, courts analyze the classification to determine whether a law is substantially related to the achievement of an important government goal.[43] This differs from strict scrutiny in only requiring a substantial relationship between the objective and the methods taken instead of the least restrictive means.[44] Courts have applied intermediate scrutiny to state regulations of speech, age, sex, and disabilities.[45]

Finally, strict scrutiny, the most restrictive form of scrutiny, is used to review laws burdening suspect classifications, like race and national origin, or laws implicating fundamental rights, like voting.[46]

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41. *Stephenson*, 830 P.2d at 48.

42. *Intermediate Scrutiny*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Obergefell v. Wymyslo (hereinafter *Obergefell II*), 962 F. Supp. 2d 968, 979 (S.D. Ohio 2013) (determining intermediate scrutiny would be appropriate where Ohio is intruding into the marital and family relations of the plaintiffs). Under the *Obergefell II* facts, the law prohibiting same-sex marriage was not neutral, as its purpose was to restrict marriage, which was outlined in the various state bills at issue. *Id.* at 984. Intermediate scrutiny is applied to incidental burdens on speech, disabilities premised on illegitimacy, and discrimination on the basis of sex, and to withstand this tier of scrutiny, the government must show a serious government interest with a substantial connection between furthering the interest and restricting the limits on the constitutional right. U.S. v. Laurent, 861 F. Supp. 2d 71, 98 (E.D.N.Y. 2011) (citing Clark v. Jeter, 486 U.S. 456, 461 (1988); Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 622 (1994); Mills v. Habluetzel, 456 U.S. 91, 98-99 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976)).

43. *Intermediate Scrutiny*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* U.S. v. Chester, 628 F.3d 673, 678 (4 th Cir. 2010) (stating the requirement under intermediate scrutiny means "the government need not establish a close fit between the statute's means and its end, but it must at least establish a *reasonable* fit."); U.S. v. Virginia, 518 U.S. 515, 570-71 (1996) (citing Heckler v. Mathews, 456 U.S. 728, 744 (1984)) (Scalia J. Dissenting) (explaining intermediate scrutiny falls between strict scrutiny and rational basis and must substantially relate to an important government objective); Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 573 (1980) (Blackmun J. Concurrence) (explaining intermediate scrutiny is permitted when a substantial governmental interest is not more extensive than necessary); *Turner Broad. Sys., Inc.*, 512 U.S. at 622-23 (outlining the standard for intermediate scrutiny, which is "applicable to content-neutral restrictions that impose an incidental burden on speech" and stating that the law is required to further an important government interest unrelated to the suppression of fundamental rights).

44. *Virginia*, 518 U.S. at 573.

45. *Id.* at 568 (Scalia, J., dissenting) ("So far [intermediate scrutiny] has been applied to content-neutral restrictions that place an incidental burden on speech, to disabilities attendant to illegitimacy, and to discrimination on the basis of sex." (citing *Turner Broad. Sys., Inc.*, 512 U.S. at 662; *Craig*, 429 U.S. at 197; *Mills*, 456 U.S. at 98-99)).

46. *Id.* at 567. Suspect classification is defined as "[a] statutory classification based on race, national origin, or alienage, and thereby subject to strict scrutiny under equal-protection analysis." *Suspect Classification*, BLACK'S LAW DICTIONARY (11th ed.

Under strict scrutiny, the determination is whether the state law burdening the right at issue advances a compelling state interest and is narrowly tailored to serve that interest.[47] The United States Supreme Court has determined that analysis of compelling state interests should specifically examine whether the right being claimed is named or implied within the Constitution.[48]

### C. A Beginner's Guide to Common Law Marriage

Common law marriage, like all common law rules, is a product of judicial law created through a state court's legal precedent; however, common laws are still directed by *stare decisis*.[49] Common law marriage, therefore, is inherently different between states.[50] This Note focuses on the common law marriage requirements found in Colorado, Washington, D.C, Montana, Pennsylvania, and Texas, none of which are identical.[51] Despite the differences between the jurisdictions

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2019). "Examples of laws creating suspect classifications are those permitting only U.S. citizens to receive welfare benefits and setting quotas for the government's hiring of minority contractors." *Id.*

47. Republican Party of MN. v. White, 416 F.3d 738, 749 (8th Cir. 2005).

48. *Stephenson*, 830 P.2d at 48 ("'[T]he determination of a fundamental interest focuses upon whether the right asserted is explicitly or implicitly guaranteed by the Constitution.'" (quoting State ex. Rel. Schneider v. Liggett, 223 Kan. at 617, 576 P.2d 221)).

49. *Common Law*, Black's Law Dictionary (11th ed. 2019); *see also* Casey v. Planned Parenthood of S. Pa., 14 F.3d 848, 856, 862 (3d Cir. 1994) (describing the "law of the case" doctrine and its exceptions).

50. *Common Law Marriage States*, FindLaw, https://www.findlaw.com/family/marriage/common-law-marriage-states.html (last visited Mar. 5, 2022); *see also* Peter Nicolas, *Common Law Same-Sex Marriage*, 43 Conn. L. Rev. 931, 935 (2011) (examining the elements required to enter into a common law marriage in Iowa, New Hampshire, and Washington, D.C.).

51. Hogsett v. Neale, 478 P.3d 713, 727 (Colo. 2021) ("[C]ommon law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement."); Dugan v. Greco, No. 1924 EDA 2019, 2020 WL 1139061, at *4 (Pa. Super. Ct. Mar. 9, 2020) ("Common law marriage . . . can only be created by an exchange of words in the present tense, spoken with the specific purpose of establishing a marital relationship.") (citing Staudenmeyer v. Staudenmeyer, 714 A.2d 1016, 1020 (Pa. 1998). "Pennsylvania law also provides for a rebuttable presumption of a common law marriage that may be raised where the proponent of the marriage demonstrates (i) constant cohabitation by the parties and (ii) a reputation of marriage 'which is not partial or divided but is broad and general.'" *Dugan*, 2020 WL 1139061, at *4 (quoting *Staudenmeyer*, 714 A.2d at 1020-21); J.K.N.A., 454 P.3d 642, 649 (Mont. 2019) ("The party asserting a valid common law marriage must prove by a preponderance of the evidence that the parties: 1) were competent to enter into a marriage; 2) assumed a marital relationship by mutual consent and agreement; and 3) confirmed their marriage by cohabitation and public repute.") (citing *In re* Estate of Hunsaker, 968 P.2d 281, 285 (Mont. 1998.))); Gill v. Nostrand, 206 A.3d 869, 875 (D.C. 2019) ("[T]he elements of common law marriage as follows: cohabitation following an express mutual agreement, which must be in words of the present tense, to be permanent partners with the same degree of commitment as the spouses in a ceremonial marriage."); *In re* Estate of Whetstone, No. 05-18-00165-CV,

listed above, there are many similarities among states in the requirements needed to prove a valid common law marriage.[52] Mandatory elements for many of the states include: (1) the intent of the parties to enter into a marriage, (2) cohabitation, and (3) public repute, or whether the couple held themselves out to the public as being married.[53] A few states have completely unique common law marriage requirements not shared across all featured states; for instance, Montana explicitly requires individuals to be competent enough to enter into a common law marriage.[54] Another unique element is *per verba de praesenti*, meaning one or both parties must indicate that they

2019 WL 698090, at *1 (Tex. App. Feb. 20, 2019) (requiring the petitioner to show: "(1) she and Whetstone agreed to be married; (2) after the agreement, they lived together in Texas as spouses; (3) and they represented to others that they were married." (quoting Russell v. Russell, 865 S.W.2d 929, 932 (Tex. 1993))); *see also* PNC Bank Corp. v. W.C.A.B. (STAMOS), 831 A.2d 1269, 1282-86 (Pa. Commw. Ct. 2003) (determining common law marriage is henceforth banned in Pennsylvania in 2003, but courts could allow a same-sex couple to retroactively prove they had a valid common law marriage if it occurred before 2003); 23 PA CONS. STAT. § 1103 (2004) ("No common-law marriage contracted after January 1, 2005, shall be valid.").

52. *Compare Hogsett*, 478 P.3d at 715 (analyzing the common law marriage elements in Colorado as requiring a mutual consent or agreement to be married and conduct manifesting that mutual agreement), *with Dugan*, 2020 WL 1139061, at * 4 (analyzing the elements in Pennsylvania as requiring *per verba de praesenti*, intent to be married, cohabitation, and a reputation of marriage), *and J.K.N.A.*, 454 P.3d at 649 (analyzing the elements in Montana as requiring competence to enter into a marriage, assumed marital relationship by mutual consent, cohabitation, and public repute), *and Gill*, 206 A.3d at 884 (analyzing the elements in D.C. as requiring cohabitation and *per verba de praesenti*), *and Estate of Whetstone*, 2019 WL 698090, at *1 (analyzing the elements in Texas as requiring an agreement to be married, cohabitation, and holding themselves out to the public as married).

53. *Hogsett*, 478 P.3d at 723-24 (creating new requirements for common law marriage which "may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement. The key question is whether the parties mutually intended to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and mutual obligation."); *Dugan*, 2020 WL 1139061, at * 4 (requiring the following elements for a common law marriage: *per verba de praesenti*, intent to be in a marital relationship, cohabitation, and a reputation of marriage in the community); *J.K.N.A.*, 454 P.3d at 649 ("The party asserting a valid common law marriage must prove by a preponderance of the evidence that the parties: 1) were competent to enter into a marriage; 2) assumed a marital relationship by mutual consent and agreement; and 3) confirmed their marriage by cohabitation and public repute.") (citing *In re* Estate of Hunsaker, 968 P.2d 281, 285 (Mont. 1998)); *Gill*, 206 A.3d at 875 ("[T]he elements of common law marriage as follows: cohabitation following an express mutual agreement, which must be in words of the present tense, to be permanent partners with the same degree of commitment as the spouses in a ceremonial marriage."); *Estate of Whetstone*, 2019 WL 698090, at *1 (listing the three requirements to establish a common law marriage as (1) an agreement to be married; (2) living together as spouses; and (3) holding themselves out as married); *In re* Marriage of Martin, 681 N.W.2d 612, 617 (Iowa 2004); FRANK L. MCGUANE, JR. & KATHLEEN A. HOGAN, *Conduct Manifesting Mutual Agreement, in* 19 COLO. FAMILY LAW & PRACTICE § 4:3 (2d ed. 2021).

54. *In re J.K.N.A.*, 454 P.3d at 649.

have spoken words indicating a present intent to be married at the moment of the alleged common law marriage.[55]

### D. Environmental and Societal Barriers Negatively Impacting Same-Sex Couples' Ability to be Recognized Under Common Law Marriages

After *Obergefell v. Hodges*,[56] a growing question in the judiciary was how courts should handle same-sex couples hoping to prove a common law marriage when many of the elements of common law marriage negatively impact same-sex couples.[57] Although common law marriage has been around since 1877, the number of states still allowing common law marriage is dwindling.[58] Only nine states, along with Washington, D.C., recognize common law marriage at all.[59] Courts resoundingly disfavor common law marriage, making the elements increasingly more difficult to prove by the petitioner, further causing the decline in its application.[60] States disfavor common law marriage primarily because the law is only used when parties have no other applicable grant of authority to obtain relief sought.[61] As evidence of their disdain for common law marriage, courts have utilized the clear and convincing evidentiary standard to review common law marriage, which is the highest burden of proof in civil cases.[62] In addition to courts' overall disdain for common law mar-

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55. *Dugan*, 2020 WL 1139061, at * 4 (opining the statements made must have been uttered with and for the purpose of establishing a marital relationship); *Gill*, 206 A.3d at 875 (stating that the words must "inescapably and unambiguously imply that an agreement" to be married was entered into (quoting Coates v. Watts, 622 A.2d 25, 27 (D.C. 1993)).

56. 576 U.S. 644 (2015).

57. Hogsett v. Neale, 478 P.3d 713, 721-22 (Colo. 2021) (indicating it will be more difficult to show a common-law marriage); Dugan v. Greco*,* No. 1924 EDA 2019, 2020 WL 1139061, at *4 (Pa. Super. Ct. Mar. 9, 2020) (citing Staudenmeyer v. Staudenmeyer, 714 A.2d 1016, 1020 (Pa. 1998) (indicating common-law marriage was already strongly disfavored and parties bear a heavy burden to prove it)); *In re* Estate of Carter, 159 A.3d 970, 974 (Pa. 2017).

58. Momjian, *supra* note 2, at 151 (indicating there are only nine states and the District of Columbia that still allow common-law marriage); *What is Common Law Marriage?*, FindLaw, https://www.findlaw.com/family/marriage/common-law-marriage.html#:~:text=in%20the%20United%20States%2C%20common,and%20the%20District%20of%20Columbia (last visited Feb. 8, 2022).

59. Heidi Glenn, *No, You're Not in a Common-Law Marriage After 7 Years Together*, NPR (Sept. 4, 2016), https://www.npr.org/2016/09/04/487825901/no-you-re-not-in-a-common-law-marriage-after-7-years-of-dating (stating that the nine states and districts that allow common-law marriage include Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia).

60. Momjian, *supra* note 2, at 144.

61. *See id.* at 151 (finding courts disfavor common law marriage because litigants fight over medical, pension benefits, and death benefits).

62. Valentine v. Wetzel, No. 790 MDA 2018, 2019 WL 1130441, at *5 (Pa. Super. Ct. Mar. 12, 2019). Clear and convincing means "proof beyond a reasonable well-

riage, same-sex common law marriage only became federally available post-*Obergefell* in 2015.[63] Prior to *Obergefell*, laws across the country banned everything from same-sex couples jointly owning property to filing taxes, and courts glossed over evidence of overtly-homophobic neighborhoods.[64] Further hurdles for same-sex couples include the inability to adopt children, engage in legal sexual conduct, not being recognized as spouses by both insurance and medical companies, and no access to joint health insurance.[65] This lack of access to obtain proof of marriage has created a near-impenetrable barrier for same-sex couples to meet all requirements to prove a valid common law marriage.[66]

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founded doubt." *Clear and Convincing Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

63. *See generally* Momjian, *supra* note 2, at 145 (leading courts to limit and even full out prevent same-sex common law marriage from ever being deemed valid).

64. Momjian, *supra* note 2, at 146; Gill v. Nostrand, 206 A.3d 869, 879 (D.C. 2019) ("The record supports Mr. Gill's assertion that the parties' families had 'harsh anti-gay views' at least in the early days of the parties' relationship that explain why the couple might not have immediately told their families about their (claimed) new status.").

65. *In re* M.M.D., 662 A.2d 837, 843 (D.C. 1995). The D.C. Court of Appeals reversed the trial court's decision that found same-sex couples do not have the ability to adopt. *In re M.M.D.*, 662 A.2d at 843. The court of appeals reasoned that no legal theory prevents same-sex couples from adopting and it is in the best interest of the adoptee to be adopted. *Id.* at 843. In *Gryzcan*, the Montana Supreme Court affirmed the trial court's determination in finding that the statute did violate Montana's fundamental right to privacy and subsequently the Montana Constitution. Gryczan v. State, 942 P.2d 112, 126 (Mont. 1997). Prior to this law, Montana had a joint prohibition on people as well as animals, in short treating same-sex relationships the same as bestiality. *Gryzcan*, 942 P.2d at 116 (citing MONT. CODE ANN. § 45-5-505 (West 2013). In Littleton, the Texas Court of Appeals took up this case after the district court found that the ceremonial marriage was not valid and therefore the surviving partner from their spouses' medical malpractice incident which left them dead, was not considered the victims surviving spouse. Littleton v. Prange, 9 S.W.3d 223, 255 (Tex. App. 1999). The court affirmed, finding same-sex couples were not legal and no compensation could be paid to the petitioner. *Littleton*, 9 S.W.3d at 231. The Supreme Court of Montana in *Snetsinger* reversed the lower court's determinations in finding that organizations may not provide employee benefits to some and deny them for others, as it would violate equal protection. Snetsinger v. Mont. Univ. Sys., 104 P.3d 445, 453 (Mont. 2004). The court reasoned that the University System's policy violated the Equal Protection Clause of the Fourteenth Amendment and therefore is unconstitutional. *Snetsinger*, 104 P.3d at 453. Bestiality is defined as sexual activity between a human and an animal. *Bestiality*, BLACK'S LAW DICTIONARY (11th ed. 2019).

66. *See, e.g.*, *Gill*, 206 A.3d at 884 ("For all the foregoing reasons, we are satisfied that the evidence did not compel the trial court to conclude that the parties had an express mutual agreement to be permanent partners with the same degree of commitment as the spouses in a ceremonial marriage."); Michael J. Higdon, *(In)formal Marriage Equality*, 89 FORDHAM L. REV. 1351, 1409 (2021) (determining that courts must reevaluate the process through which they view evidence that would not have been available to parties pre-*Obergefell*).

### E. The Application of *Obergefell* to Same-Sex Marriage Through the Enumerated Common Law Elements Within Each Featured State

#### *1. First Element: Present Intent by Parties to be Married*

The first element utilized in a majority of the states to prove a common law marriage is whether the parties have the intent to be married.[67] This element is satisfied when parties demonstrate a present intent to be married through actions such as a marriage ceremony or an exchange of rings.[68] Two cases are demonstrative when examining the differences in how intent is analyzed by the courts.[69] The first case, *Cutler v. Cutler*,[70] is an example of a court determining there was a high possibility of a valid common law marriage, while the second case, *Hogsett v. Neale*,[71] shows the opposite result.[72]

*Cutler* came before the Court of Appeals of Texas after Teresita Martell and Ernest Cutler's long-term relationship ended, subsequently leading Martell to file a petition for divorce.[73] Cutler was legally married in Florida when the alleged common law marriage to Martell began; thus, no common law marriage could have materialized in Texas without a legal dissolution of the prior marriage.[74] Although Cutler could not legally be concurrently married, the trial court entered a decree of divorce in favor of Cutler rather than declaring the marriage void, indicating their alleged common law marriage was valid.[75] The court of appeals reversed, stating there was not

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67. Hogsett v. Neale, 478 P.3d 713, 723-24 (Colo. 2021).

68. Dugan v. Greco, No. 1924 EDA 2019, 2020 WL 1139061, at *7 (Pa. Super. Ct. Mar. 9, 2020); Valentine v. Wetzel, No. 790 MDA 2018, 2019 WL 1130441, at *6 (Pa. Super. Ct. Mar. 12, 2019); John Tingley & Nicholas B. Svalina, *updated by* Nancy McKenna, *Nonmarital Partners—Recent Developments*, in 1 Marital Property Law § 36:20 (2d ed.).

69. *See infra* II - D and accompanying text.

70. No. 04-15-00693-CV, 2016 WL 4444418 (Tex. App. Aug. 24, 2016).

71. 478 P.3d 713 (Colo. 2021).

72. *Compare* Cutler v. Cutler, No. 04-15-00693-CV, 2016 WL 4444418, at *3 (Tex. App. Aug 24, 2016) (finding the prior marriage not dispositive and all evidence since that marriage indicating a possible valid common law marriage), *with Hogsett*, 478 P.3d at 726 (determining no valid common law marriage existed because the parties had not intended to be married back in 2001 when it was not legally possible to be common law married).

73. *Cutler*, 2016 WL 4444418 at *1. Of further importance in *Cutler*, Martell purchased a house in Florida in 2001, in which they cohabited until 2004 when they moved to Japan. *Id.* During this time in Japan, Martell rented the house out and used the money to pay for the mortgage on the house. *Id.* The trial court divided the marital assets between the parties, which resulted in Martell being awarded $42,375. *Id.*

74. *Id.* at *1-2.

75. *Id.*; *see also* Joal Cannon Sheridan, *Informal Marriage*, *in* The Great Divide-Part III: Property Case Law Update XII (2017) (finding that Cutler was already married to someone else, and his divorce was not finalized until November 2002). Bigamy is defined as "[t]he act of marrying one person while legally married to another." *Bigamy*,

enough evidence to show a common law marriage in Florida, where they had lived before, but there might be enough to show a common law marriage in Texas.[76] The trial court reasoned no marriage to Martell could have occurred in Florida, as Cutler was still legally married at the time of the alleged common law marriage.[77] Because the couple had left Florida eight years prior, the court of appeals found there was more than a scintilla of evidence indicating an agreement or intent to be married; therefore, the trial court's decision was reversed.[78]

An appeals court will reverse and remand a trial court's rejection of a common law marriage on summary judgment if the appeals court finds a scintilla of evidence, rather than a clear and convincing standard, that a common law marriage could have existed.[79] The court of appeals found more than a scintilla of evidence of a common law marriage because the couple had intended to marry and had proven the elements of cohabitation and holding themselves out as being married.[80] The court found such intent because the parties had a marriage ceremony in 2002, moved to Texas together, cohabited, jointly filed tax returns, held themselves out to the public as married, and used symbols indicating a marriage.[81] While this court found intent, intent to be married can be rather hard to meet in some jurisdictions

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BLACK'S LAW DICTIONARY (5th ed. 2016). Bigamy voids any and all marriage from the start, including common law marriage, and no subsequent marriage can be valid unless the original is annulled. 177 AM. JUR. 3D *Proof of Facts* § 7 (2019).

76. *Cutler*, 2016 WL 4444418 at *3. A valid common law marriage could not have been created in Florida as one party was not legally separated from a prior marriage thereby applying bigamy laws to the parties, effectively preventing any subsequent marriages until the prior marriage was successfully annulled. *Id*. at *2-3. Texas the court determined was sufficiently attenuated or separated from the prior marriage and therefore the common law marriage can be valid in Texas. *Id*. at *3. While the court does not use the specific term "bigamy," it does imply the bigamy law, which states individuals who are already married may not be married again. *Compare id.* at *3 ("The marriage of a man and woman, where one of them has a husband or wife by a prior marriage, who is then living and undivorced, is generally held to be absolutely voidFalse" (quoting Jones v. Jones, 161 So. 836, 839 (Fla. 1935)), *with* Zitter, 177 AM. JUR. 3D *Proof of Facts* § 7 (2019) (stating bigamy voids any and all marriage, and no subsequent marriage can be valid unless the original is annulled).

77. *Id.* at *3.

78. *Id*. at *3.

79. *Clear and Convincing Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining clear and convincing as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain."); *Scintilla of Evidence Rule*, BLACK'S LAW DICTIONARY (11 th ed. 2019) (defining scintilla of evidence as "even the slightest amount of relevant evidence exists on an issue, then a motion for summary judgment or for directed verdict should not be granted . . . .").

80. *Cutler*, 2016 WL 4444418 at *3.

81. *Id*. at *3.

for same-sex couples, namely in *Hogsett v. Neale*,[82] in which the court found no valid common law marriage.[83]

*Hogsett* came before the Supreme Court of Colorado after Edi Hogsett and Marcia Neale were in a thirteen-year same-sex relationship after which they jointly filed a petition for dissolution despite never having been formally married.[84] They mediated a separation agreement covering many of the concerns they had at the time.[85] Hogsett brought suit against Neal, seeking certain retirement assets and maintenance not originally put in the separation agreement with Neale.[86] Neale moved to dismiss, stating the parties were never married under common law.[87] After both lower courts found no valid common law marriage, Hogsett appealed to the Supreme Court of Colorado, which granted certiorari to reexamine how courts should determine same-sex common law marriage within the state.[88] The court affirmed the lower courts' decisions in finding the parties did not enter into a valid common law marriage.[89] The court, in deciding the holding, developed a new test to determine whether the parties had established and outwardly manifested a mutual intent to enter into marriage.[90] The old test, from *People v. Lucero*,[91] did not follow the *Obergefell v. Hodges*[92] determination because the elements of that test raised a barrier to same-sex couples because of a historical inability to acquire or show many of the elements.[93] The new factors are more inclusive and more forgiving in order to allow same-sex couples to have a chance to prove a valid common law marriage.[94] In using the new test, the court looked to several aspects where Hogsett's testi-

82. 478 P.3d 713 (Colo. 2021).

83. *Compare Cutler*, No. 04-15-00693-CV, 2016 WL 4444418, at *3 (determining there was a valid common law marriage with a heterosexual couple who demonstrated intent with traditional marriage elements), *with Hogsett*, 478 P.3d at 727 (determining there was not a valid common law marriage because of a lack of intent for a same-sex couple without traditional marriage evidence).

84. *Id.* at 715; Amy K. Rosenberg, *"I Do?" Common Law Marriage and A "Refined" Look at People v. Lucero*, COLO. LAW. (June 2021), https://cl.cobar.org/features/i-do-common-law-marriage-and-a-refined-look-at-people-v-lucero/.

85. *Hogsett*, 478 P.3d at 715; Rosenberg, *supra* note 84.

86. *Hogsett*, 478 P.3d at 716; Rosenberg, *supra* note 84.

87. *Hogsett*, 478 P.3d at 716; Rosenberg, *supra* note 84.

88. *Hogsett*, 478 P.3d at 717-18.

89. *Id.* at 727.

90. *Id.* at 723-24. The old test was deemed the *Lucero* test which consisted of a "mutual consent or agreement by the parties to be married, followed by a mutual and open assumption of a marital relationship . . . followed by cohabitation as husband and wife." People v. Lucero, 747 P.2d 660, 663 (Colo. 1987) (quoting Taylor v. Taylor, 50 P. 1049, 1049 (Colo. App. 1897)).

91. 747 P.2d 660 (Colo. 1987).

92. 576 U.S. 644 (2015).

93. *Hogsett*, 478 P.3d at 721-22.

94. *Id.* at 721.

mony demonstrated a valid common law marriage had been formed.[95] First, Hogsett testified she and Neale exchanged custom wedding rings in a ceremony.[96] Second, the same-sex couple had joint ownership of property, a joint banking account, a joint retirement fund, and placed each other as life partners on their medical forms.[97] Finally, the couple did not necessarily hold themselves out as a same-sex couple, with only Hogsett saying Neale was her wife.[98] In using this new test, the court still found no common law marriage because of the absence of communication indicating a marriage or tangible intent by either party.[99] This new test further eliminated the weight of several factors, including cohabitation, child rearing, name-changing practices, joint ownership of assets, and traditions and symbols of marriage, finding them non-uniform and less reliable than other factors such as having a wedding ceremony and other traditional markers of marriage.[100]

The court's reasoning for finding no proper intent within the elements for common law marriage was because the differences in the petitioner's stories negated much of the evidence before the court.[101] Further, although the court moved from a determinative elements test to a nondeterminative factors test, meaning there would likely be more opportunity for a court to find a valid common law marriage, the court also took away many of the available factors to same-sex couples and reduced the weight they would receive in favor of factors that demonstrate what a traditional heterosexual marriage would look like.[102] Therefore, without evidence of traditional non-LGBTQIA+

95. *Id.*, 478 P.3d at 716-17.

96. *Id.* at 716; Rosenberg, *supra* note 84. The court noted that only Hogsett referred to her as her wife or even mentioned marriage. *Hogsett*, 478 P.3d at 717.

97. *Hogsett*, 478 P.3d at 717; Rosenberg, *supra* note 84.

98. *Hogsett*, 478 P.3d at 717 (determining this may be "attributed to marriage being unrecognized for same-sex couples at the time"); *see also* Thimgan v. Mathews, 219 P. 211, 212 (Colo. 1923) (indicating the repute of marriage, also referred to as holding out to the public as married, may be enough to show a valid marriage). "Notwithstanding that cohabitation and reputation in the community may be used to prove the existence of the necessary agreement for a common law marriage, it does not follow that all instances of cohabitation result in a common law marriage." FRANK L. MCGUANE, JR. & KATHLEEN A. HOGAN, *Necessity of Mutual Consent*, in 19 COLO. PRAC., FAMILY LAW & PRAC. § 4:2 (2d ed.).

99. *Hogsett*, 478 P.3d 727.

100. *Id.* at 722-23; Caroline Kitchener, *Why More Young Married Couples Are Keeping Separate Bank Accounts*, THE ATLANTIC (Apr. 20, 2018), https://www.theatlantic.com/family/archive/2018/04/young-couples-separate-bank-accounts/558473/.

101. *Hogsett*, 478 P.3d at 726-27.

102. *Id.* at 721-25 (looking to elements such as cohabitating, procreating, name-changing, joint finances, traditions of marriage, and symbols of marriage).

marriage symbols, courts are unlikely to find a valid common law marriage for same-sex couples.[103]

*2. Second Element: Cohabitation*

The second nearly universal element of common law marriage is cohabitation, defined as the fact or condition of living with somebody else as partners in life.[104] Cohabitation is satisfied by a couple living together, and it usually travels alongside the third element of common law marriage, public repute or societal knowledge that the couple is living together.[105] In the case *In re Marriage of Farjardo*,[106] the Court of Appeals of Texas, leading to the appellate court remanding the case back to the trial court for further proceedings.[107]

The *Farjardo* case came before the Texas Court of Appeals after Maria Farjardo and Guillermo Farjardo were in a relationship and had four children together.[108] The evidence presented by Maria showed Guillermo introduced Maria as his wife, and the two had joint tax returns, cohabited, and had a joint banking account; Guillermo's presented evidence showed the opposite.[109] The trial court determined no common law marriage was found from the evidence provided because there was no agreement to be married as required under section 2.401 of the Texas Family Code.[110] The Texas Court of Appeals reversed and remanded, determining the evidence presented was enough for the trial court to find a valid common law marriage.[111] In

103. Compare *Cutler*, 2016 WL 4444418, at *3 (determining there was a valid common law marriage with traditional marriage elements), *with Hogsett*, 478 P.3d at 727 (determining there was not a valid common law marriage because of a lack of traditional marriage evidence in part).

104. *Cohabitation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

105. *In re* J.K.N.A., 454 P.3d 642, 651 (Mont. 2019); Valentine v. Wetzel, No. 790 MDA 2018, 2019 WL 1130441, at *6 (Pa. Super. Ct. Mar. 12, 2019). Colorado has addressed cohabitation in changing it from an element test to a non-determinative factor test in response to more heterosexual couples living apart, subsequently limiting its importance in judicial analysis. *Hogsett*, 478 P.3d at 722 (citing Sue Shellenbarger, *The Long-Distance Marriage That's Built to Last*, WALL ST. J. (Aug. 14, 2018), https://www.wsj.com/articles/the-long-distance-marriage-thats-built-to-last-1534252845); *see also* Timothy Ramos, *Pennsylvania Superior Court Finds No Common Law Marriage Between a Lesbian Couple*, LGBT L. NOTES, Apr. 2019, at 12 (analyzing common law marriage requirements which demonstrated a lack of support for cohabitation due in part to a lack of knowledge by others of the alleged marriage).

106. No. 14-15-00653-CV, 2016 WL 4206009 (Tex. App. Aug. 9, 2016).

107. *In re* Marriage of Farjardo, No. 14-15-00653-CV, 2016 WL 4206009, at *4 (Tex. App. Aug. 9, 2016).

108. *Farjado,* 2016 WL 4206009, at *1.

109. *Id.*

110. *Id.* at *2.

111. *Id.* at *4. Reverse means to overturn either a judgment or a ruling. *Reverse*, Black's Law Dictionary (11th ed. 201 BLACK'S LAW DICTIONARY 9). While remand means "sending something (such as a case, claim, or person) back for further action." *Remand*, BLACK'S LAW DICTIONARY (11th ed. 2019).

determining whether a valid common law marriage could be found, the court looked to evidence indicating the parties lived together and had agreed to live together.[112] The court found these two indications constituted enough evidence to remand the case back to the trial court; additionally, the court found there was an overall lack of evidence disproving the common law marriage between the two.[113]

On the other hand, cohabitation can be difficult to prove in some jurisdictions for same-sex couples.[114] In one case, *In re Estate of Whetstone*,[115] the Texas Court of Appeals found no valid common law marriage because no cohabitation could be determined.[116] *Whetstone* came before the court of appeals after the same-sex relationship between Deanine Reed and Linda Whetstone ended in 2016 when Whetstone passed away.[117] Reed subsequently filed an application of heirship and letters of administration as the spouse of Whetstone.[118] Reed stated they had a common law marriage due to both a traditional marriage ceremony and cohabitation by the parties.[119] Several witnesses also testified about the relationship but gave conflicting accounts.[120] One witness stated that Reed and Whetstone were cohabiting, while others said they were not living together.[121] Reed stated that they did hold themselves out in public to a degree, but not always due to anti-LGBTQIA+ sentiment in the neighborhood.[122] Reed also had pictures of the alleged wedding but the friend who allegedly took them was unavailable for trial, so no pictures were admitted at trial.[123]

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112. *Farjardo*, 2016 WL 4206009, at *3.

113. *Id.* at *3-4.

114. *Compare id.* at *4 (indicating the possibility of a valid common law marriage for heterosexual couples because more than a scintilla of evidence was found indicating a marriage), *with In re* Estate of Whetstone, No. 05-18-00165-CV, 2019 WL 698090 at *5 (Tex. App. Feb. 20, 2019) (determining there was no valid common law marriage because of the large disparity in the parties' accounts).

115. No. 05-18-00165-CV, 2019 WL 698090 (Tex. App. Feb. 20, 2019).

116. *Whetstone*, 2019 WL 698090 at *5.

117. *Id.* at *1.

118. *Id.*

119. *Id*. at *2; *see also* Garcia v. Garcia, No. 02–11–00276–CV, 2012 WL 3115763 at *3 (Tex. App. 2012) (exploring the elements and factors used in determining a valid common law marriage including legal/factual sufficiency of evidence, agreement to be married, and held out to the public as married). "Informal marriage existed where couple lived together for 18 years, filed joint tax returns and signed mineral leases as husband and wife." 1 IKE VANDEN EYKEL & KATHRYN J. MURPHY, *Holding out As Husband and Wife*, TEX. PRAC. GUIDE FAM. LAW § 2:108 (2021).

120. *Whetstone*, 2019 WL 698090, at *2-3.

121. *Id.* at *2-3, *5 (looking to evidence by Rhodes concerning Reed living with her from 2014 to 2015); *see* Arthur S. Leonard, *Civil Litigation Notes*, LGBT L. NOTES, Mar. 2019, at 32, 43-44 (2019) (looking to evidence that Rhodes did not live with Reed at that time which was corroborated by a neighbor).

122. *Whetstone*, 2019 WL 698090, at *2.

123. *Id.* at *2, *4.

On appeal, the Texas Court of Appeals affirmed the trial court's determination that no valid common law marriage was formed.[124] Both courts' reasoning for not finding a valid common law marriage was based on a lack of clarity and conflicting evidence concerning whether the two parties lived together.[125] One neighbor indicated they did live together, while another neighbor indicated they did not.[126] The courts did not address Reed's assertion that not everyone knew she was in a relationship with Whetstone due to the anti-LGBTQIA+ character of their neighborhood.[127]

### *3. Third Element: Public Repute, or Holding Themselves Out to the Public as Being in a Marital Relationship*

The third main element of common law marriage is public repute, or whether the couple holds themselves out to the public as being in a marital relationship.[128] Public repute is satisfied when individuals hold themselves out through either actions or words that express to society, as a whole, that they are in a marriage.[129] For example, in *Elk Mountain Ski Resort, Inc. v. Workers' Compensation Appeal Board*,[130] the Commonwealth Court of Pennsylvania affirmed the petitioners had a valid common law marriage through *per verba de praesenti*, as well as cohabitation and public repute.[131]

*Elk Mountain* came before the Commonwealth Court of Pennsylvania after Tara Tietz-Morrison and Wayne Tietz were in a heterosexual relationship for seven years, which tragically ended after Wayne passed away from injuries sustained in a utility-tractor rollover.[132] Tara filed a fatal claim petition through the Pennsylvania Workers' Compensation Act.[133] The Workers' Compensation Appeal

124. *Id.* at *5. In this example the petitioner must show "she and Whetstone agreed to be married, after the agreement they lived together in Texas as spouses, and they represented to others that they were married." *Id.* at *1 (citing Russell v. Russell, 865 S.W.2d 929, 932 (Tex. 1993)).

125. *Id.* at *5.

126. *Id*. at *2-3 (examining conflicting evidence by various witnesses in regard to whether the couple ever lived together); Leonard, *supra* note 121, at 43-44 (looking to evidence that Rhodes did not live with Reed at that time which was corroborated by a neighbor).

127. *See Whetstone*, 2019 WL 698090, at *2, *4 (describing that "[t]here can be no secret common law marriage," and not addressing Reed's testimony that the couple did not hold themselves out to be married due to social pressures discouraging same-sex relationships).

128. Rosenberg, *supra* note 84.

129. *Farjardo*, 2016 WL 4206009, at *4.

130. 114 A.3d 27 (Pa. Commw. Ct. 2015).

131. Elk Mountain Ski Resort, Inc. v. Workers Comp. App. Bd., 114 A.3d 27, 36 (Pa. Commw. Ct. 2015).

132. *Elk Mountain Ski Resort, Inc.*, 114 A.3d at 30.

133. *Id.*

Board found in favor of Tara after determining the parties had entered into a valid common law marriage and the appellate court affirmed.[134] This was determined after finding (1) the petitioner and his wife exchanged vows, rings, wedding gifts, and meat and corn wrapped in red pursuant to Native American traditions; (2) asked each other to be married; (3) had a ceremony; (4) raised their kids; and (5) held themselves out to the public as married, among other evidence.[135] This evidence satisfied the elements needed for a common law marriage due, in part, to the evidence being credible.[136] In determining a valid common law marriage was created, the Commonwealth Court reasoned the parties satisfied the *per verba de praesenti* requirement, while also satisfying the public repute requirement in holding themselves out to the public as married by being recognized as a couple in their community and at work.[137]

On the other hand, public repute may be harder to prove in some jurisdictions, specifically for same-sex couples.[138] For example, the court in *Dugan v. Greco*[139] found no valid common law marriage after determining the evidence Dugan presented did not satisfy the requirement for a reputation of marriage in the community.[140] *Dugan* was brought before the Superior Court of Pennsylvania after John Dugan and Joseph Greco were in a same-sex relationship for twenty years.[141] Dugan filed for a divorce of their common-law marriage in order to recoup money and a division of marital assets, and Greco filed a petition for declaratory judgment to avoid those issues.[142] The trial court

134. *Id.* at 31-32, 36.

135. *Id.* at 31.

136. *Id.* at 36; s*ee also* 40 TRACY BATEMAN ET AL., *Definition of Widow or Widower Under Workers' Compensation; Common-Law Husband or Wife,* STANDARD PA PRAC. § 167:568 (2d ed. 2022) (looking to other factors to prove a valid common law marriage outside the typical elements).

137. *Elk Mountain Ski Resort, Inc.*, 114 A.3d at 36.

138. *Dugan*, 2020 WL 1139061, at *8.

139. No. 1924 EDA 2019, 2020 WL 1139061 (Pa. Super. Ct. Mar. 9, 2020).

140. *Id.* at *8.

141. *Id.* at *1-2 (indicating Dugan and Greco began their relationship in May 1998, followed by a vacation in Mexico, where Dugan and Greco purchased rings for themselves which they wore on their right hands, though Dugan testified the rings did not symbolize marriage; further, they celebrated their anniversary, lived together, and jointly purchased property a house and vehicles); *see also* David Escoto, *Superior Court of Pennsylvania Denies Same-Sex Common Law Marriage in Divorce Action, Noting Failure to Meet Heavy Burden of Proof,* LGBT L. NOTES, Apr. 2020, at 11 (citing *Dugan*, 2020 WL 1139061, at *3-8) (looking at an overview of the court's holding in the *Dugan* case).

142. *Dugan*, 2020 WL 1139061, at *3. Declaratory judgment is defined as "[a] binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement." *Declaratory Judgment*, BLACK'S LAW DICTIONARY (11 th ed. 2019).

found in favor of Greco, finding no common law marriage.[143] The Superior Court of Pennsylvania affirmed, finding no valid common law marriage.[144] The court in coming to this conclusion looked to information from Dugan that they purchased rings together as a symbol of their togetherness instead of a formal marriage.[145] The couple also celebrated their anniversary on the day they met and not on a specific wedding day, showing the importance of a traditional wedding day to the court.[146] The couple also co-owned two cars and pooled their money together to buy a house to show joint ownership of assets.[147] Further, Dugan and Greco were domestic partners under their health insurance and had a joint savings account, which can be used to demonstrate a reputation and intent to be married.[148] The court went on to state that the same burden of proof for determining common law marriage would exist for same-sex couples and heterosexual couples, with no ease of burden for same-sex couples, despite the recent illegality of same-sex marriage.[149] The court's reasoning after determining there was no valid common law marriage was that despite evidence indicating the parties held themselves out to their family as a couple, wore their exchanged rings, and were in a twenty-year relationship, the evidence did not rise to a clear and convincing evidence standard to satisfy a valid common law marriage.[150]

*4. Other State Elements Used*

Beyond the more common elements discussed above, some state courts use other elements to determine whether the parties were in a valid common law marriage.[151] For instance, in Montana, courts look

143. *Dugan,* 2020 WL 1139061, at *3. Dugan listed five errors of the trial court in his appeal: (1) not taking into account the parties were same-sex couples, (2) giving too much weight to the fact that one party was already married from a celebration in Mexico, (3) not using specific words of a marriage contract during the ceremony, (4) including information pertaining to the partners calling each other domestic partners, and (5) that the parties never obtained a marriage certificate even when it was legal. *Id.*

144. *Id.* at *8.

145. *Id.* at *6.

146. *Id.* at *7.

147. *Id.* at *2.

148. *Id.*

149. *Compare id.* at *1-2 (noting the parties purchased a house and car together, purchased rings and had them inscribed with each other's initials, had joint insurance, and a joint savings account among other things), *with Elk Mountain Ski Resort, Inc.*, 114 A.3d at 31, 32 (determining the same-sex couple did have a valid common law marriage after the evidence showed the parties participated in a traditional Native American wedding which involved wrapping in a blanket to signify joining as one, exchanging vows, praying, the decedent giving claimant meat, the claimant giving the decedent corn wrapped in red, and exchanging silver wedding rings and bands).

150. *Dugan*, 2020 WL 1139061, at *7-8.

151. *See J.K.N.A.*, 454 P.3d at 649 (looking at the competency of parties to enter into a common law marriage); Gill v. Nostrand, 206 A.3d 869, 875 (D.C. 2019) (looking at *per*

to whether the parties were competent to enter into a marriage in the first place.[152] In Washington, D.C. and Pennsylvania, the courts look to *per verba de praesenti*, or words of present tense.[153] These differences allow courts to consider evidence beyond the three above-discussed elements, and look at evidence through a different lens, which is a direct result of the impact common law has in being inherently different between states.[154]

a. Competency to Enter into a Common Law Marriage: Montana's Unique Element

Competency to enter into a marriage is satisfied when no prior marriage exists with another individual, or where a prior marriage has been dissolved.[155] The *In re J.K.N.A.*[156] court found a valid common law marriage, in part, due to no competency issues being raised.[157] The court determined that all elements of a common law marriage had been met, including martial intent by both parties, cohabitation, and public repute.[158]

*J.K.N.A.* was brought before the Supreme Court of Montana after Karen Nelson and Lora Adami cohabited for eighteen years but were in a relationship for nearly twenty years.[159] During this time, they parented three children through artificial insemination and actively held themselves out as a married couple.[160] Adami requested the implementation of a parenting plan, child support, equitable division of assets, and a petition for parentage.[161] After the district court found a valid common law marriage in favor of Adami, Nelson appealed, but

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*verba de praesenti* or words of present tense in determining a valid common law marriage).

152. *J.K.N.A.*, 454 P.3d at 649.

153. *Gill*, 206 A.3d at 875 (indicating the mutual agreement by both partners must be expressly stated with words of present tense to satisfy the requisite element of common law marriage); *Dugan*, 2020 WL 1139061, at *4 (citing Staudenmeyer v. Staudenmeyer, 714 A.2d 1016, 1020-21 (Pa. 1998)).

154. *Common Law*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* Momjian, *supra* note 2, at 146 (noting that *per verba de praesenti* is an issue for many parties, including in Pennsylvania).

155. *In re* Estate of Hunsaker, 968 P.2d 281, 285 (Mont. 1998.)

156. 454 P.3d 642 (Mont. 2019).

157. *J.K.N.A.*, 454 P.3d at 649; 655. ("The party asserting a valid common law marriage must prove by a preponderance of the evidence that the parties: 1) were competent to enter into a marriage; 2) assumed a marital relationship by mutual consent and agreement; and 3) confirmed their marriage by cohabitation and public repute." (citing *Hunsaker*, 968 P.2d at 28); affirming the common law marriage was valid because the couple met all three elements)); s*ee also* Zitter, *supra* note 75 (looking specifically to cohabitation and public repute through the lens of *In re J.K.N.A.*).

158. *J.K.N.A.*, 454 P.3d at 651.

159. *Id.* at 646.

160. *Id.* at 646-47.

161. *Id.* at 648

the Montana Supreme Court affirmed the lower court's decision.[162] It reasoned Adami had met all three requirements for common law marriage.[163] These three requirements were influenced by the evidence presented by Nelson, which included having children together, picking a sperm donor with the physical traits of the couple, and assuming roles as primary caregiver and primary breadwinner.[164] Further, both parties contributed to the home, including giving Adami family health insurance through Nelson's employment.[165] Additionally, the couple held themselves out as a family and were accepted in their church as a family.[166] They also had a joint checking account and joint assets, and they listed each other as beneficiaries on various policies and documents.[167] Due to no competency issue being raised by the petitioner, the court did not give a reason indicating the importance of the competency element in determining its finding; while competency was not a factor here, it demonstrates that courts have other avenues to determine a valid common law marriage.[168]

b. *Per Verba de Praesenti* in Proving a Valid Common Law Marriage

The second non-standard element, used in Washington, D.C. and Pennsylvania, is *per verba de praesenti,* or words of present intent.[169] This element is satisfied when the parties express the same degree of commitment as couples in a traditional marriage, and the couple must inescapably and unambiguously imply an agreement to enter into a valid common law marriage.[170] For example, in *Gill v. Nostrand*,[171] the court did not find a valid common law marriage due, in part, to the lack of words of present intent.[172]

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162. *Id.* at 648, 655. Montana does not have a court of appeals, so all cases appealed go straight to the Supreme Court of Montana. *About Judicial Branch*, MONT. JUD. BRANCH, https://courts.mt.gov/aboutus#:~:text=unlike%20most%20state%20court%20systems,Court%20and%20the%20Water%20Court (last visited Mar. 23, 2022).

163. *J.K.N.A.,* 454 P.3d at 651. The requirements are a mutual intent/consent to be married, holding themselves out as a married couple, and competency to enter a marriage. *Id.* at 649.

164. *Id.* at 646; *see also* Zitter, *supra* note 75, at 111 (finding they had children together).

165. *J.K.N.A.*, 454 P.3d at 646. Adami stayed at home and cared for the home, while Nelson provided their income. *Id.*

166. *Id*. at 647; Zitter, *supra* note 75, at 111.

167. *J.K.N.A.*, 454 P.3d at 648.

168. *Id*. at 649, 655.

169. *Gill*, 206 A.3d at 875 (stating that the mutual agreement by both partners must be expressly stated with words of present tense to satisfy the requisite element of common law marriage); *Dugan*, 2020 WL 1139061, at *4.

170. *Gill*, 206 A.3d at 875 (quoting Coates v. Watts, 622 A.2d 25, 27 (D.C. 1993)).

171. 206 A.3d 869 (D.C. 2019).

172. *Gill,* 206 A.3d at 884.

*Gill* came before the Court of Appeals of Washington, D.C. after Brian Gill and Rodney Van Nostrand were in a romantic relationship for several years until Nostrand had a ceremonial wedding in Brazil to another man, leading to Gill subsequently filing for legal separation, seeking alimony and a distribution of marital assets.[173] The main issue Gill raised on appeal was the unconstitutionality of the requirement for the relationship to follow traditional and well-defined paths of form, custom, and marital consciousness in order to meet the common law marriage element test.[174] This means same-sex couples would not fall within the state's prejudicial assumptions and expectations regarding traditional marriage, which leads to an overall lack of understanding by the courts in dealing with untraditional customs.[175]

After both lower courts found in favor of Nostrand in finding no common law marriage existed, Gill appealed to the Washington, D.C. Superior Court, which affirmed no common law marriage was formed.[176] While the court found some indication the parties intended to enter into a marriage, as evidenced by Gill purchasing two rings, having candies inscribed with a question of marriage for Nostrand, getting down on one knee and asking Nostrand if he would marry Gill (to which Nostrand allegedly said yes), this evidence was insufficient.[177] Further, the couple did not hold themselves out as married to the community due to the parties' families having anti-LGBTQIA+ views and an overall homophobic environment in the community.[178] The trial court found that neither party inscribed their rings, which would have indicated the engagement had concluded with marriage.[179] It also found that the finances were largely, but not exclu-

173. *Id.* at 873, 875 ("[T]he exchange of words must inescapably and unambiguously imply that an agreement is being entered into to become permanent partners, with the same degree of commitment as the spouses in a ceremonial marriage, as of the time of the mutual consent."). Common law marriage is defined as "cohabitation following an express mutual agreement, which must be in words of the present tense, to be permanent partners with the same degree of commitment as the spouses in a ceremonial marriage." *Id.* at 875; *see also* Arthur S. Leonard, *District of Columbia Court of Appeals Rules on Same-Sex Common Law Marriage Claim,* 2019 LGBT L. NOTES, May 2019, at 8 (2019) (citing Coleman v. United States, 948 A.2d 534, 544 (D.C. 2008)) (outlining the elements of common-law marriage in D.C., and finding Nostrand did have a ceremonial marriage in Brazil to another guy leading to Gill filing for divorce); 55 C.J.S. *Marriage* § 33 (2022) ("[I]f one party to a purported common-law marriage believes they are married, but the other party does not, a marriage cannot be established."); Le Blanc v. Yawn, 126 So. 789, 790 (Fla. 1930) (describing how cohabitation and general repute must be proven by actual positive proof, not by hearsay).

174. *Gill*, 206 A.3d at 874.

175. *Id.*

176. *Id.*

177. *Id.* at 878.

178. *Id.* at 879.

179. *Id.* at 880.

sively, separate.[180] The court also determined that due to Gill not knowing about common law marriage until after the divorce and talking with an attorney, he could not have intended to create a valid common law marriage.[181] The court, however, reviewed these facts under non-traditional elements of common law same-sex marriage that were not required to prove such marriage under the court's precedent.[182] Primarily, the court could not find explicit facts and determinative evidence of the marriage date, intent to be married by both parties, joint finances, and the fact that they referred to each other as spouses in the community.[183] The court in *Gill* reasoned that despite statements indicating that Gill got on one knee and asked Nostrand to marry him and had candies inscribed with a similar question, no express *per verba de praesenti* was found.[184]

## III. ANALYSIS

This Note will argue that courts must reevaluate the criteria for common law marriage elements because many elements unintentionally discriminate against same-sex couples.[185] Although petitioners often argue the hurdles, they face in trying to prove the stated elements, courts only ever looked to whether those elements were present and subsequently whether they had been proven, and not why they were absent.[186] Courts determine same-sex common law marriage evidence through the lens of the clear and convincing evidentiary standard, which raises the burden for petitioners, making it near

180. *Id.* at 881-82.

181. *Id.* at 883; *see also* Moulding, *supra* note 17 ("The Court held that in determining whether there is sufficient indicia to prove a same-sex marriage, a court should 'consider the realities and norms of a same-sex relationship, particularly during the period before same-sex marriages were legally recognized in Colorado.'" (quoting *In re* Marriage of Hogsett and Neale, 2018 COA 176, 2018 WL 6564880 (Colo. App. 2018))).

182. *Gill*, 206 A.3d at 883.

183. *Id.*; 55 C.J.S. *Marriage* § 77 (2022) ("The existence of the required mutual agreement to be permanent partners, as required for common-law marriage, may be inferred from the character and duration of cohabitation or from other circumstantial evidence, such as testimony by relatives and acquaintances as to the general reputation regarding the parties' relationship.").

184. *Gill*, 206 A.3d at 878-79.

185. *See infra* notes 186 – 328 and accompanying text.

186. Dugan v. Greco, No. 1924 EDA 2019, 2020 WL 1139061, at *2, *5-8 (Pa. Super. Ct. Mar. 9, 2020); Gill v. Nostrand, 206 A.3d 869, 884 (D.C. 2019) ("For all the foregoing reasons, we are satisfied that the evidence did not compel the trial court to conclude that the parties had an express mutual agreement to be permanent partners with the same degree of commitment as the spouses in a ceremonial marriage."); Valentine v. Wetzel, No. 790 MDA 2018, 2019 WL 1130441, at *5 (Pa. Super. Ct. Mar. 12, 2019); *see also In re* Estate of Whetstone, No. 05-18-00165-CV, 2019 WL 698090, at *2, *5 (Tex. App. Feb. 20, 2019) (determining no valid common law marriage could be found as the necessary elements were not present, but not examining why the elements were not present).

impossible to prove.[187] This Note will first assert that same-sex couples face many hurdles heterosexual couples do not face due to the current element-based test.[188] Second, this Note will look to the constitutional concerns under the Fourteenth Amendment Equal Protection Clause ("EPC") that burden same-sex couples.[189] Finally, this Note will look at the differences between the current element-based test and its inherent problems with the proposed factor test and will end with a call to action.[190]

### A. Hurdles Prevent Same-Sex Couples from Proving the Requisite Elements to Common Law Marriages; However, the Same Element-Based Test has No Adverse Effect on Heterosexual Couples

Despite the number of cases, there is no court, besides the Supreme Court of Colorado in *Hogsett v. Neale*,[191] has found, nor even proffered, a solution to the inequality between same-sex common law marriage analysis and heterosexual common law marriage analysis.[192] To best compel a court to make changes to common law—espe-

187. *Gill*, 206 A.3d at 874.

188. *See infra* notes 192 – 267 and accompanying text.

189. *See infra* notes 268 – 279 and accompanying text.

190. *See infra* notes 280 – 328 and accompanying text.

191. 478 P.3d 727 (Colo. 2021).

192. *Compare* Hogsett v. Neale, 478 P.3d 713, 724-25 (Colo. 2021) (noting the court did proffer a solution to the disadvantages same-sex couples face by moving from a determinative element test to a factor test), *with* Dugan v. Greco, No. 1924 EDA 2019, 2020 WL 1139061, at *5-8 (Pa. Super. Ct. Mar. 9, 2020) (noting the judiciary in Pennsylvania has declined to change its element test to be more inclusive to same-sex couples who are trying to prove a valid common law marriage despite same-sex couples struggling to meet certain elements), *In re* J.K.N.A., 454 P.3d 642, 651 (Mont. 2019) ("Nelson strongly asserts that there is no justification for treating same-sex and opposite-sex couples differently in our analysis of whether a common law marriage existed, and that doing so would violate equal protection clauses of the Montana and United States Constitution. We agree that regardless of the fact that Nelson and Adami were in a same-sex relationship, the record demonstrates that a common law marriage existed."), Gill v. Nostrand, 206 A.3d 869, 875 (D.C. 2019) (deciding not to change its approach to same-sex couples to be better in line with the *Obergefell* decision), Valentine v. Wetzel, No. 790 MDA 2018, 2019 WL 1130441, at *5 (Pa. Super. Ct. Mar. 12, 2019) (utilizing the same common law marriage elements for any party regardless of gender), *In re* Estate of Whetstone, No. 05-18-00165-CV, 2019 WL 698090, at *5 (Tex. App. Feb. 20, 2019) (following the elements outlined and not changing any element regardless of gender), *In re* Estate of Carter, 159 A.3d 970, 979 (Pa. 2017) (inserting same-sex couples into the already formed common law marriage structure without change), Cutler v. Cutler, No. 04-15-00693-CV, 2016 WL 4444418, at *3 (Tex. App. Aug 24, 2016) (applying the standard common law marriage elements and no change in how they are applied), *In re* Marriage of Farjardo, No. 14-15-00653-CV, 2016 WL 4206009, at *4 (Tex. App. Aug. 9, 2016) (deciding not to adapt the common law marriage elements to better fit the *Obergefell* determination), *and* Elk Mountain Ski Resort, Inc. v. Workers' Comp. Appeal Bd., 114 A.3d 27, 36 (Pa. Commw. Ct. 2015).

cially with inequality concerning a protected class as found here—outside influences like a constitutional violation are needed.[193]

### *1. Common Hurdles Preventing Same-Sex Couples from Proving Common Law Marriages*

Generally, there are three elements to prove a valid common law marriage: (1) intent by the parties to be married, (2) cohabitation, and (3) public repute, or whether the parties hold themselves out to the public as being in a marital relationship.[194] All three elements are typically required within each state in order to prove a valid common law marriage.[195]

The first main general element in proving a common law marriage is an intent by the parties to be married.[196] This element is satisfied when parties demonstrate a present intent to be in a marital relationship through actions like a ceremony or an exchange of rings.[197] Heterosexual couples have a substantially easier time showing the courts evidence of an intent to enter into a marriage than same-sex couples because more evidence is available to heterosexual couples.[198] Until 2015, same-sex couples were unable to be legally married in many states and, as such, those individuals could not have had the proper mental state to form a common law marriage when it was not possible to be married at that time.[199] To prove that the parties did have the proper intent to be married, courts can and should look to things and behaviors like exchanging rings, cohabitation, exchanging words, terms of endearment used by the couples, and recognizing days of importance like anniversaries.[200] These factors as determinative elements can be burdensome to same-sex couples, while non-determinative factors can instead be used to benefit the limited

193. Obergefell v. Hodges *(Obergefell I)*, 576 U.S. 644, 663-64 (2015).

194. E.g., *Dugan,* 2020 WL 1139061, at *4; *Cohabitation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

195. *See* infra notes 197 – 222 and accompanying text.

196. *Hogsett*, 478 P.3d at 724.

197. *Dugan*, 2020 WL 1139061, at *7; *Valentine*, 2019 WL 1130441, at *6.

198. *See generally* Momjian, *supra* note 2, at 146 (looking at burdens present for same-sex couples in proving a valid common law marriage).

199. *Compare Dugan,* 2020 WL 1139061, at *5 ("Thus, we held that 'because opposite-sex couples in Pennsylvania are permitted to establish, through a declaratory judgment action, the existence of a common law marriage prior to January 1, 2005, same-sex couples must have that same right.'" (quoting *Estate of Carter*, 159 A.3d at 977-78)), *with Hogsett*, 478 P.3d at 717 (exploring whether the lack of evidence of a marriage could be attributed to same-sex marriage being unrecognized at the time of the parties alleged marriage).

200. *Dugan*, 2020 WL 1139061, at *6-8. The court determined the couple had not entered into a common law marriage because the couple did not have a ceremony, despite Dugan making rings and telling friends and family that they had made rings. *Id.* at *2, *7.

facts couples may have to prove a valid marriage.[201] The Supreme Court of Colorado determined in *Hogsett* the parties only had to prove an intent to enter into a marital relationship to show a valid common law marriage, and courts could utilize non-determinative factors to infer this intent based upon the parties' conduct.[202] This change to non-determinative factors, while facially positive, still burdens same-sex couples by requiring an intent to form a marriage that until 2015 was simply not possible nor conceivable for many.[203] Further, when Colorado moved to a factor test, many of the prior components that were used to prove the elements are now not as important in the court's determination, such as indications of cohabitation, children, name-changing, joint finances, and marital symbols.[204] The court reasoned that each factor, although still important in determining a party's intent to be married, is no longer dispositive.[205] Despite this, a factor test examining these categories will still provide more evidence to the court and a better chance for a same-sex couple to prove a valid common law marriage.[206] The non-determinative factor test adopted by Colorado courts removes the hurdles placed by the rigorous determinative elements because the factor test allows Colorado courts to review more evidence with equal weight.[207] This change allows same-sex couples to demonstrate a potential valid common law marriage with the facts they are able to show, instead of limiting them to facts that are inaccessible to them.[208]

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201. *Dugan*, 2020 WL 1139061, at *6-8.

202. *Hogsett*, 478 P.3d at 724.

203. *See generally* Momjian, *supra* note 2, at 146 (stating that since same-sex couples were unable to be legally married, the intent to form a marriage is a burden that is hard for same-sex couples to overcome). Actions taken by the courts to be more in line with *Obergefell* harmed same-sex couples even more, specifically with the court still finding the common law marriage here was invalid. *Hogsett*, 478 P.3d at 727.

204. *Hogsett*, 478 P.3d at 716-24 (stating that marital traditions and symbols can be things such as wedding ceremonies and remembering or commemorating anniversaries with things like cards, gifts that indicate a valid marriage, as well as labels for one another). Name-changing practices for couples is no longer a dispositive fact, though still a telling fact, if one of the party's names changes to match the other partner. *Id.* Financial arrangements for couples are also less dispositive than they once were, with more heterosexual couples having largely separate finances. *Id.* at 723 (citing *Gill*, 206 A.3d at 882); *see also* Kitchener, *supra* note 100 (indicating married couples are not conforming to traditional banking norms in no longer having joint bank accounts).

205. *Hogsett*, 478 P.3d at 723.

206. *See generally* Momjian, *supra* note 2, at 146 (determining same-sex couples have an inherent disadvantage in proving a valid common law marriage due to lack of evidence available to them).

207. *See Hogsett*, 478 P.3d at 724-25 (indicating the current element-based test strongly disadvantaged same-sex couples, while the new proposed factor-based test would remove those hurdles).

208. *See* Momjian, *supra* note 2, at 146 (discussing same-sex couples have a difficult time proving same-sex common law marriage under the elements-based test); *Hogsett*,

The second main recurrent element in proving a common law marriage is cohabitation, which is defined as the fact or condition of living with somebody else as partners in life.[209] Cohabitation rarely travels alone and has become much more contentious; with a degree of public repute or societal knowledge the couple is living together often being paired with cohabitation.[210]Cohabitation can be difficult for same-sex couples to demonstrate because courts require unequivocal evidence of the parties living together, often needing statements by neighbors or family to show a valid common law marriage.[211] Outside witnesses are the main avenue by which many courts determine whether an alleged common law marriage was secret, along with whether the parties were cohabiting or holding themselves out to the public.[212] Parties must therefore hold themselves out to the public as cohabitating, which can be problematic if a neighborhood is largely homophobic.[213] Therefore, with differing accounts between the parties, along with hurdles concerning holding themselves out to the public as living together, proving cohabitation in court is very difficult for same-sex couples.[214]

The third recurrent element in proving a common law marriage is public repute or holding themselves out to the public as being in a marital relationship.[215] Public repute is satisfied when individuals hold themselves out through either actions or words that express to society as a whole that they are in a marriage.[216] Public repute can be

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478 P.3d at 727 (opining non-determinative factors give same-sex couples a better chance at proving a valid common law marriage).

209. *Cohabitation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

210. *J.K.N.A.*, 454 P.3d at 651; *Valentine*, 2019 WL 1130441, at *5. Colorado has addressed cohabitation by changing it from an element to a non-determinative factor in response to more heterosexual couples living apart, subsequently limiting its importance in a courts analysis. *Hogsett*, 478 P.3d at 722 (citing Shellenbarger, *supra* note 105).

211. *Whetstone*, 2019 WL 698090 at *5 (looking to conflicting evidence regarding Rhodes and Reed cohabitating from 2014-2015); *see also* Leonard, *supra* note 121, at 43-44 (examining the neighbor's statement that Rhodes and Reed did not live together).

212. *Whetstone*, 2019 WL 698090, at *4.

213. *Id*. at *2; *Gill*, 206 A.3d at 879 ("The record supports Mr. Gill's assertion that the parties' families had 'harsh anti-gay views' at least in the early days of the parties' relationship that explain why the couple might not have immediately told their families about their (claimed) new status.").

214. *See Whetstone*, 2019 WL 698090, at *5 (citing conflicting accounts concerning cohabitation in the decision to find the common law marriage invalid without addressing the concerns of the same-sex couple in being open to the public about their relationship); *Valentine*, 2019 WL 1130441, at *6 (same); Momjian, *supra* note 2, at 146 (looking to issues same-sex couples face in proving a valid common law marriage). *But see J.K.N.A.*, 454 P.3d at 649, 659 (finding a valid same-sex common law marriage with the stated elements of competence to enter a marriage, intent to be in a valid marriage, cohabitation, and public repute).

215. Rosenberg, *supra* note 84, at 54.

216. *Farjardo*, 2016 WL 4206009, at *2-3.

near impossible for some same-sex couples because they may be unable to demonstrate to their community that they are in a marital relationship when that community is largely homophobic.[217] This is further compounded when courts do not look at factors that would help prove the parties publicly held themselves out as married, outside of traditional evidence.[218] In *Dugan v. Greco*,[219] the parties held themselves out to their family, wore exchanged rings, and were in a twenty-year relationship, and yet they were still deemed to not have a common law marriage because they lacked words indicating to the world they were married.[220] Public repute can be near impossible for many same-sex couples to prove, preventing them from showing they had a valid common law marriage.[221]

### *2. Heterosexual Couples Do Not Have the Same Hurdles Same-Sex Couples Do Under the Current Element-Based Test*

Although the hurdles listed above impede same-sex couples from proving a valid common law marriage, heterosexual couples do not have the same hurdles.[222] There are inherently unique hurdles same-sex couples must face in proving a common law marriage.[223] Despite the common law marriage requirements being facially the same, same-sex couples have unique hurdles to overcome in proving a valid common law marriage, due to both environmental and societal barriers.[224] These barriers for same-sex couples range from issues with adoption to not being recognized as joint partners by insurance and medical companies, among many other constraints.[225] This means

217. *Gill*, 206 A.3d at 879 ("The record supports Mr. Gill's assertion that the parties' families had 'harsh anti-gay views' at least in the early days of the parties' relationship that explain why the couple might not have immediately told their families about their (claimed) new status."); *Whetstone*, 2019 WL 698090, at *3 (acknowledging Reed's testimony ??that they were "a bisexual couple in a neighborhood who frowned upon people who don't do the will of God").

218. *Dugan*, 2020 WL 1139061, at *3, *7-8.

219. No. 1924 EDA 2019, 2020 WL 1139061 (Pa. Super. Ct. Mar. 9, 2020).

220. *Dugan*, 2020 WL 1139061, at *8.

221. *Id.* at *7-8.

222. Momjian, *supra* note 2, at 146.

223. *See* Higdon, *supra* note 66, at 1409 (noting the pre-*Obergefell* construct is no longer acceptable due to hurdles still pervasive in parties trying to prove a valid common law marriage). Same-sex couples have an inherent disadvantage in that no state has adequately addressed the disadvantage same-sex couples face in proving a common law marriage. *Id.*

224. *See id*. at 1408-09 (noting the vast challenges same-sex couples face).

225. *In re* M.M.D., 662 A.2d 837, 862 (D.C. 1995) (overturning a law banning same-sex couples from adopting, reasoning no legal theory prevents same-sex couples from adopting and is in the best interest of the adoptee to be adopted); Gryczan v. State, 942 P.2d 112, 116, 126 (Mont. 1997) (stating the statute prohibiting same-sex relationships violated the Montana Constitution's fundamental right to privacy; prior to this law, Montana had a joint prohibition on people as well as animals, in short treating same-

the evidence available to a same-sex couple to prove they had a valid common law marriage is minimal to nonexistent.[226]

Even though petitioners have brought up their concerns regarding the hurdles faced by same-sex couples to prove a common law marriage, courts have not analyzed these concerns in their decisions.[227] Courts have gone so far as to discredit these concerns and instead have focused on previously articulated elements without considering the parties' personal and societal struggles.[228] Therefore, to best address the unintentionally homophobic common law marriage elements that are in violation of both the Due Process Clause ("DPC") and Equal Protection Clause ("EPC") of the Fourteenth Amendment, and

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sex relationships the same as bestiality); Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999) (affirming the district court's determination that same-sex couples were not legal and no wrongful death medical malpractice compensation could be paid to the petitioner); Snetsinger v. Montana University System, 104 P.3d 445, 453 (Mont. 2004) (reversing the lower court's determinations, and explaining that organizations may not provide employee health benefits to some and deny them for others, as it would violate the Equal Protection Clause of the Fourteenth Amendment).

226. *See Snetsinger*, 104 P.3d at 448 (reasoning that until 2004, same-sex couples could not be on the same health insurance plan); *Littleton*, 9 S.W.3d at 231 (holding as of 1999 that same-sex individuals cannot be the surviving spouse of their same-sex spouse for insurance or for medical companies); *Gryczan*, 942 P.2d at 126 (discussing that consensual sex between same-sex individuals was illegal in Montana until the court's ruling in 1997); *M.M.D.*, 662 A.2d at 843 (reasoning that same-sex couples could not adopt a child until 1995).

227. *See Hogsett*, 478 P.3d at 725-27 (not addressing hurdles faced by same-sex individuals in proving a valid common-law marriage in denying the petitioner's claim for a common-law marriage); *Dugan*, 2020 WL 1139061, at *8 (not addressing unique hurdles faced by same-sex individuals in proving a valid common-law marriage in denying the petitioner's claim for a common law marriage for lack of *verba in praesenti*); *Gill*, 206 A.3d at 884 (determining no valid common law marriage existed without conducting an analysis concerning hurdles faced by same-sex individuals in proving a valid common-law marriage); *Valentine*, 2019 WL 1130441, at *2 (not analyzing corroborating evidence of a valid same-sex common-law marriage); *Whetstone*, 2019 WL 698090, at *5 (denying petitioner's claim for a common law marriage due to inconsistent testimony regarding whether the couple cohabited or held themselves out to the public as married without considering the hardships on same-sex couples in doing so); *Carter*, 159 A.3d at 982 (declining to look at hurdles faced by same-sex individuals in proving a valid common-law marriage, such as same-sex marriage not yet being legal). *But see J.K.N.A.*, 454 P.3d at 651 (declining to look at hurdles faced by same-sex individuals in proving a valid common-law marriage, but finding the couple was in a common law marriage).

228. *See Hogsett*, 478 P.3d at 725 (dismissing evidence provided by the parties that did not relate to or did not influence existing elements of common-law marriage); *Dugan*, 2020 WL 1139061, at *5-6 (declining implications from the same-sex parties regarding a general lack of evidence and why that has occurred); *Gill*, 206 A.3d at 874 (describing Gill's argument that the trial court did not properly take into account prejudicial assumptions and expectations of traditional marriage that will not be present in a same-sex marriage); *Valentine*, 2019 WL 1130441, at *5 (imposing a high clear and convincing evidence standard on the same-sex couple to prove a valid common law marriage).

negate the advantage heterosexual couples have, each state must change their current common law marriage elements.[229]

The first difference between same-sex couples and heterosexual couples proving common law marriage is courts requiring same-sex couples to demonstrate they performed a formal, traditional wedding ceremony and not implementing the same requirement for heterosexual couples.[230] This question has been addressed for same-sex couples in several cases, including in *Gill v. Nostrand*,[231] *Dugan*, and *Hogsett*, in one way or another for same-sex couples, and is not found in any of the heterosexual common law marriage cases.[232]

Courts have fallen into two camps in dealing with questioning same-sex couples on whether or not they attempted to be traditionally married.[233] In one camp, courts have admonished the question, stating no weight will be given to statements indicating the couple did not attempt to be traditionally married prior to the litigation and after the *Obergefell v. Hodges*[234] decision.[235] On the other side, courts have re-

229. *Compare Gill*, 206 A.3d at 874 (describing the petitioner's argument that the trial court did not properly consider prejudicial assumptions and expectations of traditional marriage that will not be present in a same-sex marriage); *with Hogsett*, 478 P.3d at 721-722 (indicating the inherent issues with the current common law marriage elements which unequally disadvantaged same-sex couples over heterosexual couples, leading to the court changing its requirements).

230. *Hogsett*, 478 P.3d at 726 (stating the parties' failure to attempt to get married in a state where same-sex marriage was legal weighs against a finding of common law marriage); *Dugan*, 2020 WL 1139061, at *7-8 (acknowledging Dugan's contention that the trial court allowed information concerning whether the parties had a ceremonial marriage after the legalization of same-sex marriage, but the appeals court determined the evidence still did not overcome a clear and convincing standard).

231. 206 A.3d 869, 875 (D.C. 2019.

232. *Compare Gill*, 206 A.3d at 883 (allowing this question on whether or not the same-sex couples did or did not attempt a traditional wedding without any explanation), *Hogsett*, 478 P.3d at 726-27 (stating that whether or not the same-sex couple attempted a traditional wedding is not a determinative factor in proving a common law marriage, but still affirming the trial court's determination which gave weight to the couple not being in a traditional marriage), *and Dugan*, 2020 WL 1139061, at *3 (analyzing whether the same-sex parties did or did not attempt a traditional wedding), *with Cutler*, 2016 WL 4444418, at *4 (declining to discuss why the parties did not attempt a traditional marriage), *Farjardo*, 2016 WL 4206009, at *4 (declining to discuss why the parties did not attempt a traditional marriage), *and Elk Mountain Ski Resort, Inc.*, 114 A.3d at 36 (declining to discuss why the parties did not attempt a traditional marriage).

233. *Compare Hogsett*, 478 P.3d at 726 (stating that the question on whether or not the same-sex couples attempted a traditional wedding is not a determinative factor in proving a common law marriage), *with Gill*, 206 A.3d at 883 (stating it would not reweigh or redetermine the trial court's decision despite the trial court giving weight to the couple not being traditionally married), *and Dugan*, 2020 WL 1139061, at *7-8 (giving weight to whether same-sex couples attempted a traditional wedding but not explaining why it gave weight to that factor).

234. 576 U.S. 644 (2015).

235. *Valentine*, 2019 WL 1130441, at *2-3, 7 (failing to explore or give weight to the question of whether the parties were in a traditional ceremonial marriage with a marriage license or not).

lied on and given weight to statements indicating same-sex couples could have been traditionally married and did not do so.[236] Appellate courts' passive affirmation of these cases gives precedent to the practice of other courts giving weight to whether or not same-sex couples have attempted to be, or considered being, traditionally married.[237]

The first issue is one of courts requiring same-sex couples to demonstrate that they were traditionally married while at the same time not requiring the same for heterosexual couples, which can be viewed in nearly all the cases discussed in this Note.[238] This concern stems from the fact that many same-sex couples did not feel the need to be traditionally married, having been together for many years before they could have been traditionally married.[239] Furthermore, it is not required in any of the nine states or Washington, D.C. to be traditionally married and still have a valid common law marriage recognized by the state.[240] This habit for courts to ask and give weight to same-sex couples not being traditionally married despite the inability to do so until recently unintentionally violates the Fourteenth Amendment DPC.[241]

This difference between same-sex couples and heterosexual couples is further illustrated by the way courts offer heterosexual couples more flexibility in applying the element test while requiring

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236. *Hogsett*, 478 P.3d at 727 (affirming the trial court's determination rejecting a common law marriage despite the trial court acknowledging the testimony of the couple's decision to not traditionally marry); *Gill*, 206 A.3d 883 (stating the court would not reweigh or redetermine the trial court's determinations despite the trial court giving weight to the couple not being traditionally married); *see also Dugan*, 2020 WL 1139061, at *7-8 (acknowledging the testimony on whether the parties had attempted to get a marriage certificate).

237. *See Hogsett*, 478 P.3d at 726-27 (disagreeing with the court of appeals' decision regarding the couple's failure to attempt to be married traditionally, and affirming the overall decision, resulting in a quasi-affirmation that gave legal weight to this component); *Gill*, 206 A.3d at 882-83 (affirming the lower court's decision to give legal weight to whether the parties attempted to have a traditional marriage); *Dugan*, 2020 WL 1139061, at *7-8 (disregarding Dugan's concerns that the lower court gave weight to whether the parties had attempted a traditional marriage, thereby affirming the practice).

238. *Hogsett*, 478 P.3d at 726; *Dugan*, 2020 WL 1139061, at *3; *Gill*, 206 A.3d at 883 (analyzing whether the parties were traditionally married to satisfy a common law marriage claim).

239. *Hogsett*, 478 P.3d at 715 (acknowledging Edi L. Hogsett and Marcia E. Neale were in a thirteen-year long relationship spanning from 2001 until 2014); *Dugan*, 2020 WL 1139061, at *1 (acknowledging John Dugan and Joseph A. Greco were in a roughly twenty-year relationship which started in 1998 and ended in 2018); *Gill*, 206 A.3d at 873 (acknowledging Brian Gill and Rodney Van Nostrand were in a multi-year relationship which started back in 2004 and ended sometime before 2017 when the trial took place).

240. Nicolas, *supra* note 50, at 933; Glenn, *supra* note 59 (stating only 9 states and D.C. recognize common law marriage with several other states only having common law marriage for inheritance purposes).

241. Ramos, *supra* note 105, at 12 (citing U.S. CONST. amend. XIV).

strict compliance with the element test for same-sex couples.[242] In *Elk Mountain Ski Resort, Inc. v. Workers' Compensation Appeal Board*,[243] the court looked at different factors to demonstrate a valid common law marriage had been created between a heterosexual couple.[244] This demonstrates the difference between how courts treat heterosexual couples versus how they treat same-sex couples is immense.[245]

The second difference between courts analyzing same-sex and heterosexual couples is the lack of specificity in addressing petitioners' explanations for why they lack certain evidence, and how courts disregard evidence that falls outside of the narrow common law elements.[246] Despite a plethora of evidence, the court in *Hogsett*

242. *Compare Elk Mountain Ski Resort, Inc.*, 114 A.3d at 31-32, 36 (changing what elements and facts it would normally look to in order to find a valid heterosexual marriage), Tingley, *supra* note 68 ("The court acknowledged that there is 'is no set formula' for the express mutual agreement, but 'the exchange of words must inescapably and unambiguously imply that an agreement was being entered into to become permanent partners with the same degree of commitment as the spouses in a ceremonial marriage as of the time of the mutual consent.'" (quoting *Gill*, 206 A.3d at 875)), *and* McGuane, *supra* note 53 ("The court has acknowledged that with some couples a choice not to broadly publicize the nature of their relationship might be explained in some instances by reasons other than the lack of mutual agreement to be married. In such cases there is a general requirement to introduce some objective evidence of the relationship that will sufficiently guard against fraudulent assertions of marriage."), *with Hogsett,* 478 P.3d at 722 (reevaluating common-law marriage elements allowing more evidence to be given weight), *Dugan*, 2020 WL 1139061, at * 8 (contemplating only the listed elements and not diverging from them), *J.K.N.A.*, 454 P.3d at 649 (examining only the stated elements, although also stating that evidence may arise over the course of the relationship and not at one specific time), *Gill*, 206 A.3d at 875 ("[T]he elements of common law marriage [are] as follows: cohabitation following an express mutual agreement, which must be in words of the present tense, to be permanent partners with the same degree of commitment as the spouses in a ceremonial marriage."), *Valentine*, 2019 WL 1130441, at *5 (analyzing only the stated elements), *and Whetstone*, 2019 WL 698090, at *1 (analyzing only the stated elements).

243. 114 A.3d 27 (Pa. Commw. Ct. 2015).

244. *Elk Mountain Ski Resort, Inc.*, 114 A.3d at 31 (looking at evidence that that the parties exchanged meat, corn wrapped in red, exchanged rings, as well as provided a traditional Native American meal of fried bread and venison); *see also* Bateman, *supra* note 136 ("A workers' compensation claimant who alleged that she was entitled to death benefits as the surviving wife of the worker entered into a common-law marriage contract with him prior to January 1, 2005, and thus the claimant was entitled to benefits; the claimant testified to their *per verba de praesenti* during a marriage ceremony in which they asked each other to be husband and wife consistent with the Native American religion of the worker and the claimant and that their customs did not include obtaining a marriage license or certificate.").

245. *Compare Cutler*, No. 04-15-00693-CV, 2016 WL 4444418, at *3 (determining the potential for a valid common law marriage), *with Hogsett*, 478 P.3d at 727 (indicating the couple had no valid common law marriage).

246. *Compare, e.g.*, *Dugan*, 2020 WL 1139061, at *8 (dismissing arguments by appellant regarding hostile laws concerning cohabitation and reputation of marriage), *and Hogsett*, 478 P.3d at 724-27 ("There may be cases where, particularly for same-sex partners, a couple's choice not to broadly publicize the nature of their relationship may be explained by reasons other than their lack of mutual agreement to be married."), *with*

dismissed each common law marriage element as either being irrelevant or unhelpful; the court noted the lack of other evidence it wanted may be attributed to the parties' inability to acquire it because they were unable to be legally married at the time.[247] This approach is different than the approach in *Valentine v. Wetzel*,[248] where the petitioner did not raise any specific societal or environmental hurdles to same-sex couples due to a lack of knowledge by the judiciary regarding same-sex common law marriage, and so this argument was not considered by the courts.[249] In *Dugan*, the court did not go into specifics concerning pre-*Obergefell* hostile laws in regards to cohabitation and reputation of marriage; instead, the Pennsylvania court left it up to other courts to interpret its silence.[250] Further, the court, after bringing up the lack of intent to form a traditional marriage twice in the decision, never addressed the petitioner's concerns regarding a lack of available evidence.[251]

### *3. Heterosexual Couples Face Fewer Hurdles with Other State Elements Used to Prove a Valid Common Law Marriage.*

For same-sex couples, the inability to be legally married meant that *per verba de praesenti* simply were not used by the parties, as words of present intent usually require an outward vocalization indicating the two parties intended to be married at a specific time as well as the fact same-sex couples were unable to get legally married.[252] Further, courts largely have not allowed other words of intent to sat-

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*Valentine*, 2019 WL 1130441, at *6-7 (denying the claim for common law marriage despite testimony by one party of an exchange of rings, vows were given, told people they were married, and had an anniversary).

247. *Hogsett*, 478 P.3d at 717, 724 ("[T]he refined test reflects that it is more difficult today to say that a court will know a marriage when it sees one.").

248. No. 790 MDA 2018, 2019 WL 1130441 (Pa. Super. Ct. Mar. 12, 2019).

249. *See Valentine*, 2019 WL 1130441, at *6-7 (applying the traditional element-based test for common law marriage and not addressing any societal differences that may exist between heterosexual and same-sex couples); Momjian, *supra* note 2, at 148 (noting same-sex couples face major hurdles that are often not dealt with by the modern-day judiciary).

250. *See Dugan*, 2020 WL 1139061, at *8 (dismissing arguments by the appellant regarding several hostile laws concerning both cohabitation and a reputation of marriage in the community).

251. *Id.* at *3, *8.

252. *See Valentine*, 2019 WL 1130441, at *5 (describing the *verba in praesenti* requirement for common law marriage and ways to circumvent the requirement when a party is unable to demonstrate it; like for same-sex couples); *Hogsett*, 478 P.3d at 723-24 (indicating that words or conduct of present intent to form a marital relationship is a requirement that is difficult to prove for a same-sex couple); *Gill*, 206 A.3d at 875 (indicating present intent to have a valid common law marriage but cannot be a future intent when marriage would be legal). *Per verba de praesenti* means "[b]y words of the present tense. A phrase applied to contracts of marriage." *Per Verba de Praesenti*, BLACK'S LAW DICTIONARY (5 th ed. 1979); s*ee Dugan*, 2020 WL 1139061, at *6 (stating that no words of present intent were found or even considered by the parties).

isfy this element.[253] The court in *Valentine* did not find persuasive evidence that Kimberly exchanged rings by giving Melissa a sapphire ring and reaffirmed the decision to be a married couple after having asked Melissa to be hers; the court stated this evidence was not a clear and convincing demonstration of *per verba de praesenti*.[254] This is further emphasized by the court in *Gill*, which determined the words spoken during their proposal indicated, at best, a future intent to be married instead of a present intent.[255] The court in *Gill* gave no weight to the evidence that the parties did not know they could theoretically get married in the future or that common law marriage was available to them at that time.[256]

Courts can look to other evidence indicative of a present intent to be married in the absence of evidence indicating *per verba de praesenti*.[257] How this other evidence is evaluated and analyzed between same-sex couples and heterosexual couples is drastically different.[258] The *In re Marriage of Farjardo*[259] court determined evidence covering public repute, joint tax returns, cohabitation, and a joint banking account for heterosexual couples was enough for a court to find a valid intent to be married.[260] However, the court in *Valentine* stated that without a clear, present intent to be married, the court may look at factors such as cohabitation and marital reputation in the

253. *Hogsett*, 478 P.3d at 716. The court relies on words specifying an intent to be legally married and of presenting oneself as a spouse. *Id*.

254. *Valentine*, 2019 WL 1130441, at *3, *7.

255. *See Gill*, 206 A.3d at 880 ("It was reasonable for the trial court to infer that if Mr. Van Nostrand had agreed to a present commitment comparable to marriage. in 2004, he would have commemorated it in a big way, notwithstanding that same-sex marriage was not lawful in the District of Colombia at that time.").

256. *See id.* (denying a same-sex common law marriage in part because the couple could have had a marriage ceremony but did not). Notably, the court made no statements indicating it took into consideration the fact that same-sex marriages were illegal at the time of their alleged common law marriage. *Id.*

257. *See Hogsett*, 478 P.3d at 724 (reasoning conduct manifesting an intent to be married may be used in the absence of words of present intent including the *Lucero* factors like cohabitation, child rearing, name-changing post-marriage, joint finances, traditions of marriage, and symbols of marriage); *J.K.N.A.*, 454 P.3d at 650 (indicating other factors that can be and, in this case, were used to circumvent the lack of *per verba de praesenti*); *Gill*, 206 A.3d at 875 ("The existence of the required mutual agreement 'may be inferred from the character and duration of cohabitation, or from other circumstantial evidence such as testimony by relatives and acquaintances as to the general reputation regarding the parties' relationship.'" (quoting Mesa v. United States, 875 A.2d 79, 83 (D.C. 2005))).

258. *Compare Farjardo*, 2016 WL 4206009 at *3-4 (looking to evidence stating the parties had cohabited, held themselves out to the public as married, filed joint taxes, and Maria believed that Guillermo had agreed to be married, instead the specific words of present intent required by the court in *Valentine*), *with Valentine*, 2019 WL 1130441, at *6 (requiring that the words be spoken with the specific intent to create a legal relationship of marriage).

259. No. 14-15-00653-CV, 2016 WL 4206009 (Tex. App. Aug. 9, 2016).

260. *Farjardo,* 2016 WL 4206009, at *3-4.

community – without looking at any other factors or evidence.[261] Without a re-evaluation of this element by the courts, no same-sex couple will be able to overcome the high clear and convincing evidence standard for the foreseeable future.[262]

The second particularized element is whether the parties are competent to enter into a marriage.[263] Despite rarely being an explicit element to prove a valid common law marriage, competency is still looked at in many jurisdictions and therefore courts should be aware of its existence.[264] Due to an overall lack of information about the limits of competency as an element, no generalizations can be made regarding its impact on same-sex couples in proving a common law marriage.[265]

## B. The Various Hurdles Same-Sex Couples Face in Proving a Valid Common Law Marriage Pose Constitutional Concerns Under the Equal Protection Clause of the Fourteenth Amendment

### *1. Laws or Practices Which Burden One Class of People Violate the Equal Protection Clause of the Fourteenth Amendment*

The Fourteenth Amendment's Equal Protection Clause ("EPC") requires all states to provide equal protection of the laws for all people within their jurisdiction.[266] Laws may violate the EPC when they unduly burden only one class of people while not restricting, or limiting, actions by other classes of people.[267] Normally, laws that burden sex

261. *Valentine*, 2019 WL 1130441, at *5; *see also J.K.N.A.*, 454 P.3d at 650 (looking to factors such as children, cohabitation, and a joint bank account).

262. Momjian, *supra* note 2, at 148.

263. *J.K.N.A.*, 454 P.3d at 649.

264. *Id.*; *see also* In re Estate of Hunsaker, 968 P.2d 281, 285 (Mont. 1998) (requiring courts to look at the competency of the parties in determining a valid common law marriage); *Snetsinger*, 104 P.3d at 451 (same).

265. *See, e.g., J.K.N.A.*, 454 P.3d at 649-55, n1 (referencing the requirement that parties be "competent to enter into a common law marriage," but not analyzing the issue because "*Obergefell* applies retroactively and no other competency issues have been raised"). Therefore, this issue will not be discussed any further in this Note.

266. U.S. Const. amend. XIV, § 1.

267. Obergefell v. Hodges (*Obergefell I*), 576 U.S. 644, 673-74. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("[S]tatutory classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.'" (quoting Reed v. Reed, 404 U.S. 71, 75 (1971))); Stephenson v. Sugar Creek Packing, 830 P.2d 41, 45 (1992) ("[T]he United States Supreme Court has described the concept of 'equal protection' as one which 'emphasizes disparity in the treatment by a State between classes of individuals whose situations are arguably indistinguishable'" (quoting Ross v. Moffitt, 417 U.S. 600, 609 (1974))); Laura Hunter Dietz, *Proof of Common-Law Marriage, Generally*, 15 Summ. Pa. Jur. 2d Family Law § 1:28 (2d ed.); U.S. CONST. amend. XIV – 1. In determining this, the Fourteenth Amendment states in part that no state can make or enforce any laws which would deny any individual the equal protection of the laws. *Id.*

or gender would fall under intermediate scrutiny, and other courts have analyzed this issue under other standards, but the United States Supreme Court in *Obergefell v. Hodges*[268] determined marriage is a fundamental right and therefore must be analyzed under strict scrutiny.[269] This determination extends to common law same-sex marriage, as highlighted in the various states discussed in this Note.[270]

### *2. The Current Element Test for Common Law Marriage Burdens Same-Sex Couples Differently than Heterosexual Couples*

The common laws at issue in Colorado, Washington, D.C., Montana, Pennsylvania, and Texas are applied differently to same-sex couples than heterosexual couples, thus violating the EPC.[271] If the judiciary declined to recognize a couple's common law marriage, which they were otherwise eligible for, solely because the couple was of the same sex, then such deprivation would violate the EPC of the Fourteenth Amendment.[272] Same-sex couples, like heterosexual partners,

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268. 576 U.S. 644 (2015).

269. *Obergefell I*, 576 U.S. at 681 (citing U.S. CONST. amend. XIV); *see also* Box v. Planned Parenthood of Indiana and Kentucky, Inc., 139 S.Ct. 1780, 1782 (2019) (defining rational basis review); United States v. Chester, 628 F.3d 673, 678 (4 th Cir. 2010) (explaining intermediate scrutiny); *see* Republican Party of Minnesota v. White, 416 F.3d 738, 749 (8th Cir. 2005) (analyzing structure of strict scrutiny).

270. Dugan v. Greco, No. 1924 EDA 2019, 2020 WL 1139061, at *5-8 (Pa. Super. Ct. Mar. 9, 2020); *In re* J.K.N.A., 454 P.3d 642, 655 (Mont. 2019); Gill v. Nostrand, 206 A.3d 869, 884 (D.C. 2019) (determining no common law marriage was established); Valentine v. Wetzel, No. 790 MDA 2018, 2019 WL 1130441, at *5 (Pa. Super. Ct. Mar. 12, 2019); *In re Estate of* Carter, 159 A.3d 970, 977-78 (Pa. 2017) (". . . same-sex couples have precisely the same capacity to enter marriage contracts as do opposite-sex couples, and a court today may not rely on the now invalidated provisions of the Marriage Law to deny that constitutional reality. Consequently, because opposite-sex couples in Pennsylvania are permitted to establish, through a declaratory judgment action, the existence of a common law marriage prior to January 1, 2005. . . same-sex couples must have that same right." (*citing* 23 PA. CONS. STAT. § 1103 (2005)).

271. *Compare Dugan*, 2020 WL 1139061, at *4 (determining that despite satisfying several elements of common law marriage no valid common law marriage was found), *Gill*, 206 A.3d at 874 (looking to a plethora of evidence indicating a valid marriage but still finding no valid common law marriage), *and Valentine*, 2019 WL 1130441, at *7 (noting that despite evidence for several factors, no valid common law marriage was found), *with* Cutler v. Cutler, No. 04-15-00693-CV, 2016 WL 4444418 at *4 (Tex. App. Aug 24, 2016) (determining a valid common law marriage despite the law of bigamy - despite not being specifically mentioned), *J.K.N.A.*, 454 P.3d at 651 (determining that the all elements were met in forming a common law marriage and applying the same elements to this same-sex relationship as would be applied to a heterosexual relationship), *and* Snetsinger v. Montana University System, 104 P.3d 445, 451-52 (Mont. 2004) (citing U.S. CONST. amend. XIV) (indicating unequal treatment between heterosexual and same-sex couples violates the Fourteenth Amendment Due Process and Equal Protection clauses).

272. *Compare* U.S. CONST. amend. XIV (providing "equal protection of the laws"), *and Snetsinger*, 104 P.3d at 451-52 (noting the unequal treatment between same-sex and heterosexual couples in regard to health benefits is unconstitutional under the Fourteenth Amendment Equal Protection Clause), *with Valentine*, 2019 WL 1130441, at

have a fundamental right to marry, which is recognized as a liberty interest under the Fourteenth Amendment's Due Process Clause ("DPC").[273] Accordingly, unequal treatment of same-sex couples in their search for marriage violates the EPC of the Fourteenth Amendment and must be addressed, or be in violation of the Constitution.[274]

The current element-based test, used by a majority of states, leads to an unequal footing as couples try to prove a valid common law marriage.[275] With courts changing what can and cannot prove a valid common law marriage, same-sex couples are the most impacted due to an inability to provide much evidence of a valid common law marriage, especially when living together and commingling assets are no longer strong indicia of marriage.[276] If same-sex and heterosexual couples are to have an equal footing in proving a valid common law marriage, the requirements for finding that same-sex marriage must change.[277]

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*5 (requiring the petitioner to meet the clear and convincing evidence standard, and denying the common law marriage despite substantial evidence indicating the parties intended to be married), *and Carter*, 159 A.3d at 976 (not adjusting the common law marriage element-based test, and not addressing hurdles faced by same-sex couples in proving a marriage).

273. *Obergefell I,* 576 U.S. at 664-65.

274. *Compare* U.S. CONST. amend. XIV (providing "equal protection of the laws"), *Obergefell I,* 576 U.S. at 664-65 (stating that marriage is a fundamental right and same-sex couples cannot be discriminated against), *and Snetsinger*, 104 P.3d at 451-52 (noting the unequal treatment between same-sex and heterosexual couples is unconstitutional under the Fourteenth Amendment Equal Protection Clause), *with Dugan,* 2020 WL 1139061, at *6 (denying a same-sex couple a common law marriage despite the couple meeting several of the common law elements), *Gill*, 206 A.3d at 874 (looking to a plethora of evidence indicating a valid marriage but still finding no valid common law marriage), *Valentine*, 2019 WL 1130441, at *5 (noting that despite evidence for several factors, no valid common law marriage was found), *and Carter*, 159 A.3d at 976 (acknowledging same-sex couples should have access to common law marriage, but applying a rigid structure and not accounting for differences between same-sex and heterosexual couples).

275. *Gill*, 206 A.3d at 875-79; Hogsett v. Neale, 478 P.3d 713, 721 (Colo. 2021) ("Most notably, *Lucero's* 'holding out' requirement that couples publicly affirm their marital status fails to account for the precarious legal and social status LGBTQ people and their relationships have occupied for most of this nation's history." (citing People v. Lucero, 747 P.2d 660 (Colo. 1987))); *Dugan*, 2020 WL 1139061, at *5-6; *Valentine*, 2019 WL 1130441, at *5; *see In re Estate of* Whetstone, No. 05-18-00165-CV, 2019 WL 698090, at *5 (Tex. App. Feb. 20, 2019) (indicating petitioner failed to meet all three elements necessary to prove a valid common marriage, despite the court not examining outside factors).

276. *Hogsett*, 478 P.3d at 722 (exploring cohabitation and commingled asset requirements which are difficult for same-sex couples to prove and are increasingly less persuasive in court); Ramos, *supra* note 105, at 13.

277. *See Hogsett*, 478 P.3d at 721 (determining changes must occur to the common law marriage elements to put same-sex couples on an equal footing with heterosexual couples); U.S. CONST. amend. XIV (requiring equal protection of the law).

### C. Judiciary's Use of a Factor-Based Test as Applied to Same-Sex Couples When Proving Common Law Marriages Provides More Favorable Outcomes and Can be Easily Applied

Several years have passed since *Obergefell v. Hodges*[278] was decided, yet common law marriage elements remain virtually unchanged due to courts' refusal to hear petitioners' pleas for justice.[279] In fact, courts are increasingly unwilling to separate themselves from the stated common law elements – even though the elements are a creation of the judiciary and may be overturned at any time for any reason.[280] *Stare decisis* means to follow what has come before or the doctrine of precedent in which courts must follow earlier judicial determinations on factually identical or factually similar litigation.[281] Despite this, courts may still re-examine, or even overturn, precedent when there is an intervening change in controlling law.[282] Changes like the *Obergefell* decision, which fundamentally transformed how sexual orientation is classified for purposes of the EPC, fall within the exception requirement of an intervening change to controlling law meriting an exception to *stare decisis*.[283] Courts may, and, in fact,

278. 576 U.S. 644 (2015).

279. *Compare* Hogsett v. Neale, 478 P.3d 713, 724 (Colo. 2021) (replacing the elements for common law marriage with factors to align with *Obergefell*, which resulted in changes to what the court deemed important), *with* Dugan v. Greco, No. 1924 EDA 2019, 2020 WL 1139061, at *8 (Pa. Super. Ct. Mar. 9, 2020) (dismissing all arguments by the appellant regarding the discriminatory nature of the common law marriage elements), *In re* J.K.N.A., 454 P.3d 642, 649 (Mont. 2019) (same), Gill v. Nostrand, 206 A.3d 869, 878-79 (D.C. 2019) (same), Valentine v. Wetzel, No. 790 MDA 2018, 2019 WL 1130441, at *5 (Pa. Super. Ct. Mar. 12, 2019) (same), *In re Estate of* Whetstone, No. 05-18-00165-CV, 2019 WL 698090, at *1 (Tex. App. Feb. 20, 2019) (same).

280. *See Gill*, 206 A.3d at 884 (changing none of their prior elements in proving a valid common law marriage); Momjian, *supra* note 2, at 151 (determining little to no change has occurred in states' common law marriage elements post-*Obergefell*); Casey v. Planned Parenthood of Southern Pennsylvania, 14 F.3d 848, 862 (3d Cir. 1994) (observing common law marriage and courts following what has come before despite no statutory obligation to do so).

281. *Stare Decisis*, Black's Law Dictionary (11th ed. 2019).

282. *E.g.*, *Casey*, 14 F.3d at 862. This exception only applies to intervening changes taking place in a different case which does not apply to changes of controlling law made in the same court or appellate court. *Id.*

283. *Compare* Obergefell v. Hodges *(Obergefell I)*, 576 U.S. 644, 681 (2015) (stating same-sex couples were entitled to marry, which was a substantial shift from existing law because states were divided on the issue of whether same-sex couples could be denied the right to marry), *with Casey*, 14 F.3d at 862 (stating that changes within the existing law which are controlling and are a substantial switch from previous law are ripe for a departure from *stare decisis*).

should re-examine common law marriage elements in order to comply with the United States Supreme Court's mandate in *Obergefell*.[284]

Currently, courts apply a rigid application of the common law and fail to evaluate potential improvements to these antiquated judicial decisions.[285] This is clearly demonstrated in *Dugan v. Greco*,[286] where the Superior Court of Pennsylvania explained no adaptation to the elements was needed.[287] As such, if a petitioner is unable to prove the common law marriage elements by a clear and convincing evidence standard, then courts will likely not find a common law marriage.[288] Further, the *Dugan* court reasoned there was no difference between same-sex couples and heterosexual couples in deciding the validity of an alleged common law marriage.[289]

Additionally, courts look only to the fact that elements are missing without exploring the rational justifications for why they are missing.[290] The current evidence required of same-sex couples is nearly impossible to demonstrate; instead of keeping the system, changes must be made to make it equal in outcome instead of equal in application.[291] Therefore, to ensure equal application of the law, the steps and factors considered must be unequal between same-sex and heterosexual couples.[292]

Despite the discussion surrounding the various changes that need to be made to same-sex common law marriage, questions exist regarding why these changes would matter when states generally disfavor

284. *Obergefell I*, 576 U.S. at 681; *see Hogsett*, 478 P.3d at 714-15 (indicating that because same-sex couples may now lawfully marry, the common law marriage elements must be reexamined).

285. *E.g.*, *Dugan*, 2020 WL 1139061, at *8; *see also* Higdon, *supra* note 66, at 1400, 1406 (stating that courts are too rigid in their application of state common law marriage elements, specifically concerning cohabitation and equitable adoption).

286. No. 1924 EDA 2019, 2020 WL 1139061 (Pa. Super. Ct. Mar. 9, 2020).

287. *Dugan*, 2020 WL 1139061, at *5-6.

288. *Id.* at *4; *see also Gill*, 206 A.3d at 874 ("The court concluded, however, that Mr. Gill had failed to prove by clear and convincing evidence the existence of a common law marriage between him and Mr. Van Nostrand. The court therefore dismissed Mr. Gill's complaint.").

289. *Dugan*, 2020 WL 1139061, at *5-6.

290. *See Gill*, 206 A.3d at 877 (citing Mesa v. United States, 875 A.2d 79, 83 (D.C. 2005)) (restricting evidence presented by the petitioner outside the stated common law elements); *Dugan*, 2020 WL 1139061, at *8 (same).

291. *Hogsett*, 478 P.3d at 721-24 (reexamining the current common law marriage requirements after finding them harmful to same-sex couples); Momjian, *supra* note 2, at 148.

292. *See Hogsett*, 478 P.3d at 721, 723-24 (determining the current system of common law elements is harmful to same-sex couples while not necessarily being harmful to heterosexual couples); Ramos, *supra* note 105 (noting common law marriage is protected under the Due Process and Equal Protection Clause of the Fourteenth Amendment).

common law marriage.[293] Due to common law marriage being a creation of the courts, it may at any point be abolished, as seen in the *PNC Bank Corp. v. W.C.A.B. (STAMOS)*[294] decision.[295] In *PNC Bank Corp.*, the Commonwealth Court of Pennsylvania abolished common law marriage, ending any and all attempts to prove a common law marriage before any court in Pennsylvania for any reason.[296] The court described its dislike of common law marriage, by calling it a "legal raincoat" that petitioners are able to use in order to get ahead for tax liabilities and for what will best benefit them.[297] Courts in Illinois, Washington, D.C., and New Jersey all stated to some degree that common law marriage is antiquated and must either be fully abolished or dealt with by the state legislature.[298] The judiciary in states without statutes prohibiting common law marriage have the power to abolish or reinstate it at their will.[299] Courts thus have the ability to move from a strict element-based test to a more flexible factor-based test.[300]

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293. Momjian, *supra* note 2, at 144; *see, e.g.*, *Dugan*, 2020 WL 1139061, at *4 (indicating common law marriage was generally disfavored before being abolished in 2005 in Pennsylvania) (citing *Staudenmeyer*, 714 A.2d at 1020).

294. 831 A.2d 1269 (Pa. Commw. Ct. 2003).

295. PNC Bank Corp. v. W.C.A.B. (STAMOS), 831 A.2d 1269, 1275, 1282 (Pa. Commw. Ct. 2003); Momjian, *supra* note 2, at 144; *see also Casey*, 14 F.3d at 862 (looking to the ability of the judiciary to change common law elements due to the intervening change exception).

296. *PNC Bank Corp.*, 831 A.2d at 1281-82.

297. *Id.* at 1281.

298. *Id.* at 1277-78. The Illinois Supreme Court noted, "[d]espite its judicial acceptance in many states, the doctrine of common-law marriage is generally frowned on in this country, even in some of the states that have accepted it." *Id.* at 1277 (*quoting* Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979)). The District of Columbia Court of Appeals noted, "[w]e recommend to the attention of Congress the question whether such an informal and almost uniformly misunderstood status should not be abolished to end creation of such relationships in the future." *Id.* (*quoting* McCoy v. District of Columbia, 256 A.2d 908, 910 (App. D.C. 1969)). The Supreme Court of New Jersey noted, "[t]he many abuses arising from common law marriages, with their effect on public morality, private property rights and the legitimacy of children, called for correction. Our Legislature dealt with such mischiefs in this act in sweeping and emphatic language, permitting no exception or evasion." *Id.* at 1278 (*quoting* Dacunzo v Edgye, 117 A.2d 508, 514 (N.J. 1955)).

299. *Common-Law Marriage*, 23 PA Cons. Stat. § 1103 (2004); *see Casey*, 14 F.3d at 862 (looking to the ability of the judiciary to change common law elements due to the intervening change exception). The Pennsylvania legislature codified the abolition of common law marriage stating, "[n]o common-law marriage contracted after January 1, 2005, shall be valid – [n]othing in this part shall be deemed or taken to render any common-law marriage otherwise lawful and contracted on or before January 1, 2005, invalid. *Id.*

300. *See generally Hogsett*, 478 P.3d at 723-24 (refining its common-law marriage requirements from determinative elements to non-determinative factors that can be used to prove the conduct needed under the common-law marriage requirements).

### 1. *Judicial Application of the Element-Based Test Solidifies Hurdles for Same-Sex Couples*

Courts have a general unwillingness to look beyond pre-*Obergefell* common law marriage rulings, impacting both environmental and societal issues for same-sex couples.[301] First, courts are unwilling to account for prejudicial assumptions and expectations surrounding traditional marriage.[302] Courts are also unwilling to look at the circumstances surrounding why certain elements are missing for same-sex couples, and instead look to the fact that they are missing.[303] Courts analyze petitioners' arguments through the lens of a traditional marriage rather than looking at the relationship in a societal context.[304] Courts ignore the fact that parties may be unable to have a public reputation of being married due to anti-LGBTQIA+ views.[305] Further, courts compare marriage parties and celebrations of same-sex couples prior to *Obergefell* with marriage parties and celebrations of heterosexual couples, thereby assuming similarities when their situations are vastly different.[306] When courts find some evidence of a valid common law marriage that falls within an element, they often claim other elements have not been met.[307]

If any court can get rid of common law marriage at any time, like Pennsylvania did in *PNC Bank Corp.*, why would common law marriage matter for the future?[308] In Pennsylvania, common law mar-

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301. *Valentine*, 2019 WL 1130441, at *7 (noting the limitations the appellate court faced due to the lower court's lack of discussion of environmental or societal hurdles). The lower court's decision is unavailable through a reasonable search.

302. *Gill*, 206 A.3d at 874.

303. *Id.* at 875.

304. *See id.* at 878-79 (affirming the lower court giving legal weight to whether the parties attempted to have a traditional marriage); *Hogsett*, 478 P.3d at 726 (affirming the trial court's determination despite the trial court giving legal weight to the couple's decision to not traditionally marry); *Dugan*, 2020 WL 1139061, at *7-8 (disregarding Dugan's concerns that the lower court gave weight to whether the parties had attempted a traditional marriage, thereby affirming the practice).

305. *Gill*, 206 A.3d at 879.

306. *Compare Gill*, 206 A.3d at 880 (examining Gill's extravagant proposal in 2014 versus his first proposal in 2004, despite Gill stating that the acceptability of same-sex relationships had drastically changed since 2004 to allow such an extravagant ceremony), *and* Momjian, *supra* note 2, at 134-44 (looking at a decision from 1877 stating that marriage without the proper celebration is void), *with* Elk Mountain Ski Resort, Inc. v. Workers' Comp. Appeal Bd., 114 A.3d 27, 31 (Pa. Commw. Ct. 2015) (changing its approach slightly to include evidence of another type of wedding, but still required evidence of some sort of celebration with weight given to the fact the celebration was photographed and rings were exchanged).

307. *J.K.N.A.*, 454 P.3d at 651 (indicating that although mutual consent to marriage existed, other elements such as public repute were not found, and so no valid common law resulted).

308. *Compare PNC Bank Corp.*, 831 A.2d at 1281 (noting the judiciary abolished common law marriage in Pennsylvania without influence from the legislative or executive branches) *with*, *J.K.N.A.*, 454 P.3d at 648 (allocating funds and assets from the

riage was statutorily outlawed in 2004; however, same-sex marriage was not nationally legalized by *Obergefell* until 2015.[309] Couples who wish to retroactively establish a common law marriage, which existed prior to the abolition of common law marriage and the legalization of same-sex marriage, fall within an exception to the statute abolishing common law marriage in Pennsylvania.[310] For other states, same-sex couples have a major disadvantage in the amount of evidence available to them in proving a valid common law marriage, and sentiment in many parts of the country with strong homophobia further prevents individuals from being traditionally married.[311] These factors combined demonstrate same-sex couples need common law marriage as an equitable remedy to protect their rights.[312] These important rights include but are not limited to alimony, distribution of marital property, retirement assets, marital maintenance, parenting plan, child support, equitable distribution of property, and equitable apportionment of assets and debts accrued during their party's relationship.[313]

### *2. Judicial Application of a Factor-Based Test Removes the Hurdles for Same-Sex Couples*

The changes to common law marriage requirements proposed by this Note can be made without legislative intervention and should be enacted as soon as possible.[314] Namely, courts should adopt a non-determinative factor test, similar to what the court in *Hogsett v. Neale*[315] did for Colorado's common law marriage test.[316] Currently,

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validly formed common law marriage to the ex-spouse including implementing a parenting plan, division for child support, equitable division of property, and equitable apportionment of assets and debts accrued during the party's relationship).

309. 23 PA. CONS. STAT. § 1103 (2004); *Obergefell I*, 576 U.S at 681.

310. *Dugan*, 2020 WL 1139061, at *5-6.

311. *See* Snetsinger v. Mont. Univ. Sys., 104 P.3d 445, 451-52 (Mont. 2004) (determining that until 2004, same-sex couples could not be on the same health insurance plan); Littleton v. Prange, 9 S.W.3d, 223, 225 (Tex. App. 1999) (determining as of 1999 that same-sex individuals cannot be the surviving spouse of their same-sex spouse for insurance or for medical companies); Gryczan v. State, 942 P.2d 112, 126 (Mont. 1997) (determining that consensual sex between same-sex individuals was illegal in Montana until the court's ruling in 1997); *In re* M.M.D., 662 A.2d 837, 843 (D.C. 1995) (determining that until 1995, same-sex couples were unable to adopt a child).

312. *Hogsett*, 478 P.3d at 721-22 (looking to same-sex couples unable to prove a valid marriage even with the current common law marriage requirements; thereby requesting new requirements be implemented); *see also* Momjian, *supra* note 2, at 145-46 (looking to the change in approach post Obergefell to same-sex couples rushing to prove common law marriages once it was then legal to do so).

313. *Hogsett*, 478 P.3d at 716, *Gill*, 206 A.3d at 873, *J.K.N.A.*, 454 P.3d at 648.

314. *See Casey*, 14 F.3d at 862 (noting common law may be changed by the judiciary when determined necessary); *Common Law*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining common law).

315. 478 P.3d 713 (Colo. 2021).

316. *See Hogsett*, 478 P.3d at 724-25 (including factors such as such as the parties' cohabitation, reputation in the community as spouses, maintenance of joint banking

many states require petitioners to give clear and convincing evidence of particularized actions, the absence of which means no common law marriage can be found despite other evidence the petitioner may have presented in proving a valid common law marriage.[317] This rigidity means other evidence will be disregarded by the court and no weight will be given to it, no matter how compelling it may be.[318]

The factors which may replace the element-based test must be broad enough to encompass any and all situations for same-sex couples trying to prove a valid common law marriage.[319] Factors could include groupings such as to keep cohabitation of the parties; holding themselves out to the community as spouses; evidence of shared/joint financial responsibilities to include banking, taxes, payments; adoption of one spouse's surname by the other; evidence of shared/joint estate planning; outward symbols of the parties commitment to each other; and the sincerely held beliefs of the parties re-

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and credit accounts, purchase and joint ownership of property, filing of joint tax returns, and use of one spouse's surname by the other or by children raised by the parties may still be considered as evidence manifesting the couple's intent to be married).

317. *Gill*, 206 A.3d at 878-79 (disregarding evidence that the parties could not hold themselves out to the public due to homophobic sentiment in the community); *see also Hogsett*, 478 P.3d at 716-17 (acknowledging evidence that parties exchanged custom rings, jointly owned property, joint banking, and were each other's primary beneficiaries and domestic partners on medical records); *Dugan*, 2020 WL 1139061, at *1-2 (acknowledging evidence such as vacationing together, buying similar rings and placing them on their right hands, had an anniversary each year, jointly purchased property, jointly purchased vehicles); *Valentine*, 2019 WL 1130441, at *5-6 (requiring the petitioner to meet the clear and convincing evidence standard, and denying the common law marriage despite acknowledging testimony that Kimberly bought Melissa a sapphire and diamond ring, proposed to her, acquired real estate, cohabited, exchanged rings, held each other out to the public as married, used verbiage consistent with marriage, and celebrated an anniversary); *Whetstone*, 2019 WL 698090, at *2 (acknowledging the parties cohabited and had a marriage ceremony).

318. *Gill*, 206 A.3d at 878-79 (disregarding evidence that the parties could not hold themselves out to the public due to homophobic sentiment in the community); *see also Hogsett*, 478 P.3d at 716-17 (ignoring evidence that the parties exchanged custom wedding rings, had joint ownership of property, a joint banking account, joint retirement funds, and jointly placed each other as life partners on their medical forms, and determining no valid common law marriage existed); *Dugan*, 2020 WL 1139061, at *8 (ignoring evidence that the parties purchased rings, co-owned two cars, and pooled their money together to buy a house, were domestic partners under their health insurance, and had a joint savings account); *Valentine*, 2019 WL 1130441, at *3, *6-7 (ignoring evidence of Valentine giving a sapphire and diamond ring to Wetzel and asking Wetzel to be hers, re-exchanging rings, calling each other their wife, and living in a single-family home); *Whetstone*, 2019 WL 698090, at *5 (ignoring Reed's evidence and instead focusing on the ambiguity surrounding that evidence).

319. *Hogsett*, 478 P.3d at 723-24 (noting common law elements were inherently problematic and thereby changing the requirements to follow the *Obergefell* determination).

garding the institution of marriage would give same-sex couples a better shot at providing a valid common law marriage.[320]

### *3. A Factor-Based Approach Will Satisfy the Equal Protection Clause.*

To best serve justice, the judiciary should replace the element-based test and adopt a factor-based test when reviewing same-sex couples' claims of common law marriage.[321] A solution would be a factor-based test similar to the test established in *Hogsett*, but which still allows those factors the court took away.[322] This will enable courts to offer same-sex couples equal protection when compared to heterosexual couples.[323] Changing the judiciary's current system would allow more avenues for couples to bring evidence into the court, the court to give weight to that evidence, and for the court to exchange the selective determinative elements for the non-determinative factors.[324] The current system of strict elements substantially limits a same-sex couple's ability to demonstrate a valid common law marriage by restricting what evidence they are able to use from the small amount of evidence that is available to same-sex couples in the first place.[325] Without common law marriage rights, same-sex couples who split up will face inequities in distributing joint marital assets, child support, and more.[326]

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320. Tingley, *supra* note 68 (noting these factors would ease the burden on same-sex couples to prove a valid common law marriage); McGuane, *supra* note 98. "[C]ohabitation; reputation in the community as spouses; maintenance of joint banking and credit accounts; purchase and joint ownership of property; filing of joint tax returns; use of one spouse's surname by the other or by children raised by the parties; evidence of shared financial responsibility, such as leases in both partners' names, joint bills, or other payment records; evidence of joint estate planning, including wills, powers of attorney, beneficiary and emergency contact designations; symbols of commitment, such as ceremonies, anniversaries, cards, gifts, and the couple's references to or labels for one another; and parties' sincerely held beliefs regarding institution of marriage." Tingley, *supra* note 68.

321. *See, e.g.*, *Hogsett*, 478 P.3d at 724 (moving to a factor-based test from an element-based test).

322. *Id.* at 722-24.

323. *See, e.g.*, *id.* at 721, 724 (remarking that current options to prove a valid common law marriage are underinclusive while the new non-determinative factors help to open the avenues to prove a valid marriage).

324. *See id.* at 727 (providing that non-determinative factors give same-sex couples a better chance at proving a valid common law marriage).

325. *See generally* Momjian, *supra* note 2, at 146 (determining that same-sex couples have an inherent disadvantage in proving a valid common-law marriage due to lack of evidence available to them).

326. *See Hogsett*, 478 P.3d at 716 (noting that the petitioner was looking for retirement assets and maintenance from the marriage but did not receive them after determining that no valid common law marriage existed).

## IV. CONCLUSION

Current common law marriage elements are unconstitutional under the Fourteenth Amendment Due Process Clause ("DPC") and Equal Protection Clause ("EPC") and so must be changed to conform with the *Obergefell v. Hodges*[327] decision.[328] First, this Note determined that the present hurdles prevent same-sex couples from proving the requisite elements, without having an adverse impact on heterosexual couples.[329] Second, the hurdles same-sex couples face in proving a valid common law marriage are unconstitutional under the EPC and DPC of the Fourteenth Amendment because they burden one class of people while not burdening another.[330] Third, this Note proposed a factor-based test which removes the hurdles same-sex couples face in trying to prove a valid common law marriage, instead of the current element-based test which solidifies those hurdles.[331] This Note ended in finding the current common law marriage elements are unconstitutional and so must be changed by courts.[332]

This area of law is drastically moving with all of the same-sex common law marriage cases occurring in the last three years. Further, with Colorado revising their common law marriage test, it is only a matter of time before other courts will also revise their tests to reflect the *Obergefell* decision, for better or for worse. This constitutional violation raises several questions concerning how this issue will ultimately be resolved. First, what necessarily will need to be changed to have a completely equal outcome for common law marriage? Second, does there need to be two completely different tests for same-sex couples and heterosexual couples, or can there be a unified test that can equally cover both types of couples? Third, will these new tests raise other constitutional concerns? Without a clear direction from any court towards a test that accounts for the hurdles same-sex couples face, nothing will likely change in the immediate future

327. 576 U.S. 644 (2015).
328. *See supra* notes 279 – 327 and accompanying text.
329. *See supra* notes 192 – 266 and accompanying text.
330. *See supra* notes 267 – 278 and accompanying text.
331. *See supra* notes 279 – 327 and accompanying text.
332. *See supra* notes 322 – 327 and accompanying text.

and subsequently, no answers will be given to any of the posed questions.[333]

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333. I want to state that in no manner was I arguing that all these cases were decided incorrectly; rather, they present a trend of courts not considering petitioners' concerns regarding the various hurdles present that prevent those individuals from having a fighting chance in proving a common law marriage.

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