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Cover Page Footnote

I want to thank my wonderful wife for always supporting me in all things we strive to accomplish. I also want to thank Dr. Carlos Bernal for the expertise and mentorship that has helped not only in this Comment but throughout my time in law school.

A CONSTITUTIONAL RIGHT TO ASYLUM? A COMPARATIVE ANALYSIS COULD GROUND THE DESIGN OF BETTER PROTECTION FOR ASYLUM SEEKERS.

*Maxwell Newsome**

"A static system of laws is the worst tyranny that any constitution can impose upon a country. An unamendable constitution means that all reform and progress are at a stand-still."

*Justice R.S. Bachawat***

I. INTRODUCTION

"One of the most obvious deductions of what we saw in the past four years is that without a robust institutional binding framework in place to administer global migration flows, any future president could do and undo as he or she pleases."[1] The immigration system, particularly the asylum-seeking system, is susceptible to significant changes through executive action. Executive orders and changes in agency personnel, policy, and culture are just a few of the more prominent ways the executive branch can formally or informally change the current asylum-seeking system.[2] Constitutionalizing the right to asylum through the Fifth Amendment Due Process Clause has frequently been suggested as one way to better protect asylum seekers from the consequences of an ever-changing executive branch; accordingly, if it is considered a constitutional right, the executive would not be able to introduce disproportionate limitations.[3] This Comment will undertake a comparative analysis and add to the scholarship centered around constitutionalizing the right to seek asylum in the United States. Specifically, this Comment will address the need for accountability and stability in the executive branch's power, the need for the judicial branch to act as a "secondary enforcer," and the need for clear guidance to the lower courts regarding their role in the asylum process.

Immigration and politics have collided multiple times throughout American history, often leading to drastic changes in immigration policy, protection, and possibilities.[4] This has been accomplished by national changes in immigration law and by changing the eligibility for citizenship.[5] Regional political power and the pressure the legislature they could place on national policy have historically created times of anti-immigrant nationalistic

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** IC Golaknath v. State of Punjab, (1967) 2 SCR 762 (India).

[1] Dany Bahar, *The Road to Fix America's Broken Immigration System Begins Abroad*, BROOKINGS (Dec. 8, 2020), https://www.brookings.edu/blog/up-front/2020/12/08/the-road-to-fix-americas-broken-immigration-system-begins-abroad/.

[2] *See* Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System*, MIGRATION POL'Y INST. (July 2020), https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency (click "Download Report").

[3] *See, e.g.*, Stephen Meili, *Asylum Under Attack: Is it Time for a Constitutional Right?*, 26 BUFF. HUM. RTS. L. REV. 147, 155–58 (2020); Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. 1982); *see also* Jamal Green, *The Supreme Court 2017 Term: Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018).

[4] *See generally U.S. Immigration Timeline*, HISTORY.COM, www.history.com/topics/immigration/immigration-united-states-timeline (last updated Aug. 23, 2022).

[5] *See, e.g.*, Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943); Immigration Act of 1917, 29 Stat. 874 (repealed 1952); Matthew Wills, *How "Prerequisite Cases" Tried to Define Whiteness,* JSTOR.ORG (Sep. 4, 2020), https://daily.jstor.org/how-prerequisite-cases-tried-to-define-whiteness/.

fervor.[6] However, the most abrupt changes in the quality of life, rights, and opportunities for immigrants come through executive orders, where a president can overturn or create new policies affecting all kinds of immigration issues.[7]

The last decade has brought renewed support and scrutiny over the various changes that have been made, or could be made, by the executive branch when dealing with issues of asylum.[8] Now, with the Title 42 Order by the Trump administration and its present adjudication, the United States must analyze how best to protect the rights of asylum seekers, particularly their right under the Fifth Amendment to bring their claim for asylum.[9] Through comparison with other countries and by evaluating the effectiveness of constitutionalizing the right to asylum, the United States can avoid pitfalls and adopt the best practices

II. BACKGROUND

A. *United States*

For at least a century, the United States has established themselves, either formally or informally, as a place of refuge for persons fleeing their home countries due to persecution.[10] Their status as a place of refuge was made law through various congressional acts, specifically on how the requests for admission by refugees are evaluated and processed.[11] The Refugee Act of 1980 is the main authority on the American asylum process.[12] This Act set the statutory procedure for seeking asylum and established the standards refugees must meet to be granted asylum.[13] It also established the rights to things such as employment, the burden of proof, including the standards for proving one's case, and removed the discretionary power of the attorney

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[6] *See, e.g.*, Lorraine Boissoneault, *How the 19th-Century Know Nothing Party Reshaped American Politics*, SMITHSONIAN MAG. (Jan. 26, 2017), https://www.smithsonianmag.com/history/immigrants-conspiracies-and-secret-society-launched-american-nativism-180961915/.

[7] *See, e.g.*, Exec. Order No. 9102, 7 Fed. Reg. 55, 1265 (Mar. 20, 1942); Exec. Order No. 9066, 7 Fed. Reg. 38, 1407 (Feb. 25, 1942) (giving the military power to move Japanese citizens during WWII); Proclamation No. 4417, 41 Fed. Reg. 35, 7741 (Feb. 20, 1976) (terminating authority conferred by Exec. Order 9066).

[8] *See* Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L. J. 1173 (2016); *see also*, Adam Isacson, Maureen Meyer, Stephanie Brewer & Elyssa Pachico, *Putting the U.S.-Mexico 'Border Crisis' Narrative into Context,* RELIEFWEB (Mar. 17, 2021), *https://reliefweb.int/report/mexico/putting-us-mexico-border-crisis-narrative-context*.

[9] *See* Huisha-Huisha v. Mayorkas, 560 F. Supp. 3d 146 (D.D.C. 2021) *remanded*, 27 F.4th 718 (D.C. Cir. 2022)*;* Kiakombua v. Wolf, 498 F. Supp. 3d 1 (D.D.C. 2020); *Notice of Temporary Exception From Expulsion of Unaccompanied Noncitizen Children Pending Forthcoming Public Health Determination*, 86 Fed. Reg. 30, 9942 (Feb 17, 2021); Kristina Cooke & Mica Rosenberg, *U.S. Judge Blocks Expulsions of Migrant Families Under Trump-era Order*, RUETERS (Sep. 16, 2021, 5:02 PM), https://www.reuters.com/world/us/us-judge-blocks-expulsions-migrant-families-under-title-42-order-2021-09-16/.

[10] *See Huisha-Huisha*, 560 F. Supp. 3d at 155.

[11] *Id.*

[12] *Id.*

[13] 8 U.S.C. § 1158 (2018).

general to withhold deportation for asylum seekers.[14]

The Refugee Act of 1980 codified the agreement to follow the substantive provisions made in Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees, which was then ratified by the United States in the 1967 Protocol.[15] Article 33.1 of the Convention, "imposed a mandatory duty on contracting States not to return an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons."[16] This was not entered into United States law until the 1980 act, leaving a gap of 12 years since the 1967 Protocol, during which it was not clear how much discretionary power the attorney general's office had.[17]

The Immigration and Nationality Act ("INA") governs the procedure of applying for asylum.[18] The INA states "[a]ny alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum . . . ."[19] This asylum status can only be granted to those that meet the definition of a refugee.[20] A refugee is defined as:

> [A]ny person . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[21]

While the asylum process is now found within the law, asylum seekers still face the issue of bringing their case before an immigration officer or judge.[22]

The executive branch has a great deal of power when it comes to the administration of this right, which has created a situation where constitutionalizing the right to asylum may be the most prudent course of action. This would limit the executive's power to make abrupt changes and allow the judicial branch the ability to ensure a more consistent asylum-seeking process that is free from constant changes from one presidential

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[14] *Id.*; *Huisha-Huisha*, 560 F. Supp. 3d at 155; INS v. Cardoza-Fonesca, 480 U.S. 421, 429 (1987).
[15] *Cardoza-Fonseca*, 480 U.S. at 429 (citations omitted).
[16] *Id.* (internal citation omitted).
[17] *Id.* at n. 8 ("While the Protocol constrained the Attorney General with respect to § 243(h) between 1968 and 1980, the Protocol does not *require* the granting of asylum to anyone, and hence does not subject the Attorney General to a similar constraint with respect to his discretion under § 208(a).") *Id*.
[18] *Huisha-Huisha*, 560 F. Supp. 3d at 155.
[19] 8 U.S.C. § 1158(a)(1).
[20] *Id.* § 1158 (b)(1)(A).
[21] *Id.* § 1101(a)(42)(A).
[22] *See, e.g.*, Pierce & Bolter, *supra* note 2.

administration to the next.[23]

To succeed in constitutionalizing the right to asylum, the right must be clearly defined. The core issue with constitutionalizing the right to asylum is whether it can be done in a way that limits the executive branch's disproportionate power, without ruining the intended separation of powers. There are multiple possibilities as to what this right theoretically could include; but, as a practical matter, this Comment argues for a right that would be rather limited in scope. Instead of the actual right to refuge being constitutionalized, this Comment argues for only the right to bring a claim for asylum, under the procedure established by the Refugee Convention, with the protection of due process before one could be deported or blocked from entry. This means migrants would not have a constitutional right to permanent residency or citizenship, but only the opportunity to submit and substantiate their claim for asylum. Unfortunately, other countries have shown that just because this right receives constitutionalized protection, does not mean it gets protected; however, a look at the pitfalls of the Italian constitutional right to asylum can help direct the discourse in the United States.[24] Italy is a beneficial comparator to the United States under the "most different cases" approach to choosing a comparator country.[25] As the next section will expand upon, Italy has a provision in its constitution that gives a right to asylum, whereas the United States does not.[26] Furthermore, the ages of the constitutions, the circumstances surrounding constitutional drafting, and the geographical locations of the two countries are dissimilar. However, both countries accept asylum-seekers and are a part of the Refugee Convention.[27] Seeing the different path Italy has taken can highlight the weaknesses in its approach as well as highlight what is commonly agreed upon as essential to protecting the right to asylum.[28]

B. Italy as a Comparator Country

In 1948, Italy drafted its first constitution after defeat in World War II, marking the first time it constitutionalized a right to asylum.[29] Unlike some of the other countries that give a constitutional right to asylum seekers on

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[23] *See* Stephen Meili, *Asylum Under Attack: Is It Time for a Constitutional Right?,* 26 BUFF. HUM. RTS. L. REV. 147, 158–63 (2020) (demonstrating how the recent policies that have taken place during the Trump administration show how much power the executive branch can have when they attempt diminish the power of asylum, and how constitutionalizing the right to asylum could be beneficial in limiting this power).

[24] *See* Helene Lambert et al., , *Comparative Perspectives of Constitutional Asylum in France, Italy, and Germany: Requiescat in Pace?*, 27(3) REFUGEE SURV. Q. 16, 22–25 (2008).

[25] *See* Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 THE AM. J. OF COMPAR. L. 125, 139–142 (2006).

[26] Lambert et al, *supra* note 24, at 17;*Asylum in the United States*, AM. IMMIGR. COUNCIL (June 11, 2020), https://www.americanimmigrationcouncil.org/research/asylum-united-states.

[27] *See Asylum in the United States*, *supra* note 26 .; Lambert et al., *supra* note 24, at 24.

[28] *See generally* Lambert et al., *supra* note 24.

[29] *Id*. at 22.

narrow grounds, Italy's provision gives extremely broad grounds to bring an asylum claim.[30] The right established in the 1948 Constitution, Article 10(3), reads: "A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law."[31]

The rationale for having such broad grounds, in which people could claim asylum in Italy, was that Italy needed to repay the "debt of gratitude" owed to the countries that hosted many of the Italian refugees that fled, either during the dictatorship or the war.[32] However, this broad language was substantially limited in practice, because no laws were passed to regulate the exercise of this right.[33]

Since there were no laws established to implement the constitutional right, despite the powerful language used by the drafters, the right was left without most of its strength. This was especially true after Italy ratified the "conventional asylum" process, established by the Refugee Convention of 1951, then followed through in creating a process for the adjudication of those claims.[34] In the last 60 years, it has been estimated that there have been less than 200 refugees granted constitutional asylum, a minuscule number compared to the 25,000 refugees who live in Italy.[35]

Part of the problem for migrants seeking asylum under Article 10(3) was the lack of initial recognition that it was an enforceable, binding right.[36] It was not until 1997 that the *Corte Suprema di Cassazione* (Italian Supreme Court of Cassation) held this right was binding.[37] Before this decision, there

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[30] *See id*. at 24. France is a good example of a country with narrow grounds for granting constitutional asylum. Article 120 of the 1793 French constitution stated France shall "[s]erve[] as a place of refuge for all who, *on account of liberty*, are banished from their native country." *1793: French Republic Constitution of 1793*, ONLINE LIBR. OF LIBERTY, https://oll.libertyfund.org/page/1793-french-republic-constitution-of-1793 (last visited Sept. 29, 2022) (emphasis added). Since only those who are fleeing because of their political beliefs meet this standard, the constitutional right to asylum in France is not as strong as the conventional route to asylum under the Refugee Convention. Lambert, *supra* note 24, at 18, 21.

[31] *The Constitution of the Italian Republic, 1948*, Article 10(3), CONSTITUTIONNET.ORG, https://constitutionnet.org/sites/default/files/Italy.Constitution.pdf (last visited Oct. 15, 2022) (English translation).

[32] Lambert, *supra* note 24, at 22. Despite the majority of the members at the Constitutional assembly advocating for the broad language adopted, it was by no means unanimously supported. *Id.* There was opposition within the Constitutional Assembly, as some members did not approve of the broad grounds for granting asylum. *Id.* Some members wanted to mirror the right in the 1946 French Constitution so that it would limit asylum to only those persecuted for "actions for freedom" and thereby protect against "a mass influx of asylum-seekers." *Id.* (citations omitted).

[33] *Id.* (There was not any law passed to regulate the exercise of constitutional asylum like article 10(3) calls for; ultimately creating uncertainty as to the enforceability of the right, and whether the right could be brought directly to Italian domestic courts) *Id.*

[34] *Id*. at 24. It should be noted it was not until 1990 that a law was passed establishing procedure in the Italian legal system. *Id.*
This law failed to incorporate any procedure for constitutional asylum leaving some disappointed as they could have used this law to establish one overarching asylum procedure. *Id.*(citations omitted).

[35] *Id.*at 25.

[36] *Id.* at 22.

[37] *Id.* (citations omitted).

was debate on whether asylum was a "legitimate interest" or a "subjective right" of the person.[38] The *Allen* decision led to clarification in legal scholarship that asylum was a "subjective right" of the asylum seeker, giving the individual more enforcement opportunities.[39] However, the courts do not give the same rights to the constitutional asylee as they would someone under the Refugee Convention; rather, they give them "a temporary right of entry and residence to seek asylum under the procedure set out for the recognition of refugee status[,]" established by the Refugee Convention.[40]

Since holding that the right to asylum is a "subjective right," the court has started to condition the right to asylum.[41] Contrary to their prior ruling in *Allen*, suggesting that it was a subjective—and therefore unconditional—right, the Court held the following: without a law implementing the constitutional right to asylum, the seeker will only have the rights afforded to those whose situation fell under the protection afforded to refugees by the Refugee Convention.[42] This was not initially an issue since the courts maintained that Article 10 was implemented through the "pluralistic system of protection." However, Decree-law no. 113/2018 (known as the "Salvini Decree") abolished the "pluralistic system of protection," once again putting the constitutional right of asylum in jeopardy.[43]

Additionally, the constitutional right was not always correctly given. In *Öcalan v. Turkey*, the head of a Turkish political party was arrested and, according to the European Court of Human Rights, was not given a fair trial.[44] Article 111 of the Italian Constitution states that "[j]urisdiction is implemented through due process regulated by law."[45] Öcalan was the leader of the Workers' Party of Kurdistan, listed by the Turkish government as a terrorist organization.[46] He was arrested by Turkish authorities, and tried with monitored and restricted access to legal assistance.[47] Therefore, Öcalan was not afforded a democratic liberty in his own country, which is guaranteed in

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[38] *Id.* at 22–23. This distinction is significant for Italian administrative law. *Id.* at 23. A "legitimate interest" of the person is not an unconditional right. *Id.* Rather it is "protected only insofar as it is either compatible with the public interest or is the incidental result of the lawful exercise of administrative power." *Id.* A "subjective right" is protected by the law unconditionally, this would give asylum seekers more protection as they could not be affected by the subjective public interest of the people in power. *Id.*

[39] *Id.* at 22 (citations omitted). Lambert does however note, "that some isolated decisions of other courts have recently ignored the authoritative decision by the Court of Cassation. For instance, the Council of State (the highest administrative court) held in 2002 that art. 10(3) is no more than a non-binding norm with no scope for creating a 'subjective right.'"*Id.* (citations omitted).

[40] *Id.* at 24 (citations omitted).

[41] Cecilia Corsi, *The Twist and Turns of Asylum Laws in Italy*, MPC BLOG (Feb. 28, 2019), https://blogs.eui.eu/migrationpolicycentre/twist-turns-asylum-laws-italy/.

[42] Lambert et al., *supra* note 24, at 24.

[43] *Id.*

[44] Öcalan v. Turkey, App. No. 46221/99, Eur. Ct. H.R. at 2, 65 (2003).

[45] *The Constitution of the Italian Republic, 1948*, Article 111, CONSTITUTIONNET.ORG, https://constitutionnet.org/sites/default/files/Italy.Constitution.pdf (last visited Oct. 15, 2022) (English translation).

[46] *Öcalan*, Eur. Ct. H.R. at 3–5.

[47] *Id.* at 5–8.

Italy. This should have resulted in him being granted asylum in Italy, as he had met the requirements to receive asylum according to the Constitution, but his asylum application was denied.[48] He was not extradited to Turkey, but Italy did place him under house arrest and then pressured him to leave the country on his own.[49] *Öcalan* demonstrates that just because there is a right written in the constitution, the right does not always lead to the protection it was designed to create. This decision, as well as the Italian court's decision putting a condition on what should be an unconditional right, illustrates the fact that the constitutional right to asylum in Italy is largely irrelevant.

The United States should view the Italian constitutional right to asylum as a cautionary tale about what could happen if the right to asylum was recognized as a constitutional right, but not proactively enforced through procedures that allow for migrants to use that right. Furthermore, constitutionalizing the actual right to asylum, as opposed to the right to submit and substantiate a claim for asylum, can lead to poor outcomes. *Öcalan* is just one example of how too strong of language can force a country into a difficult position. If Italy had only given the right to submit and substantiate the asylee's claim, it may have better navigated that public policy travesty.

III. ANALYSIS

As evidenced by the inconsistent and underwhelming enforcement of the constitutional right to asylum in Italy, simply adding in an article or amendment that articulates the right to asylum is not enough. There must also be a system in place to administer the right and handle the various claims people will bring, and a judicial branch that, when cases are brought in opposition, is willing to consistently hold migrants are afforded the right to asylum.

Through analyzing where the law and various circuit courts currently stand, how the right could be found in the constitution, and how the judicial branch should enforce this right, the Supreme Court should hold that the Due Process Clause of the Fifth Amendment requires migrants be afforded the right to seek asylum in the United States. First, this right would limit how much control the executive branch has on the administrative and adjudicative process for seeking asylum, because it would limit the options executives have for new procedures. Second, it would create more stability in the system, because it would limit how much the asylum-seeking process could be changed. Lastly, it would provide clear guidance to lower courts, making it easier for asylum seekers to rely on consistent rulings, no matter where in the

[48] *Id.* at 4; *see also The Constitution of the Italian Republic, 1948*, Article 10, CONSTITUTIONNET.ORG, https://constitutionnet.org/sites/default/files/Italy.Constitution.pdf (last visited Oct. 15, 2022) (English translation).

[49] *Öcalan*, Eur. Ct. H.R. at 4.

country their case is tried.

The asylum law needs reform and circuit courts need guidance. Constitutionalizing the right of asylum under the Due Process Clause of the Fifth Amendment, would best accomplish the above goals. The judiciary would then need to act as a slightly stronger "secondary enforcer." Rather than giving explicit directives, the courts would limit their power to simply assuring that asylum seekers can submit and substantiate their claim.

A. The Asylum Law and Circuit Split Necessitate Reform to Protect Migrants Fleeing Persecution.

The United States does not currently have any protection or rights for asylum seekers explicitly stated in the Constitution, nor has the Supreme Court adopted any by reading them into current amendments.[50] The Refugee Act of 1980 is the formal law as to asylum procedure, qualifications, and definitions.[51] However, because of the large role various executive agencies have in fulfilling the procedure, and the power of the President in indirectly depriving migrants of the opportunity to make a claim, the executive branch holds a disproportionate amount of power over asylum seekers.[52] Considering the United States has shown a history of legislating away the rights afforded to immigrants in times of distress, mere legislative law is not enough to solidify the right migrants—fleeing from persecution—need in order to bring a claim before being sent back to the place they fled.[53] If nothing else, a Supreme Court decision would finally unify the stance of the circuit courts that are currently in disagreement about whether the Due Process Clause of the Fifth Amendment gives migrants a right to seek asylum.

1. The Disproportionate Power the Executive Branch Holds

The United States asylum process is governed by a complex network of multiple executive agencies and their codes.[54] These agencies are in charge of implementing the laws Congress makes, as well as prosecuting and judging cases where the applicant is in the process of deportation proceedings.[55] At the administrative trial that applicants must prove they qualify as a refugee.[56] This means the applicant for asylum needs to establish they are not willing, or unable, to return to their home country because of a "well-founded fear of persecution" that is based on one of the five protected categories.[57]

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[50] Meili, *supra* note 23, at 147–48.
[51] *See supra* text accompanying notes 12–17.
[52] *See infra* Section III.B.1.
[53] *See infra* Section III.B.1.
[54] *Asylum in the United States*, AM. IMMIGR. COUNCIL (Aug. 2022), https://www.americanimmigrationcouncil.org/research/asylum-united-states.
[55] *Id.*
[56] *Id.*
[57] *Id.*

An applicant for asylum has to go through many steps to prove they meet the required qualifications.[58] Once they have applied with the United States Citizenship and Immigration Services ("USCIS"), they will be given an interview with an asylum officer.[59] In this interview, the applicant will answer the officer's questions, under oath, to determine if they meet the qualifications for being granted asylum.[60] If the officer does not grant asylum after this interview, the applicant will be "referred" to the Immigration Court.[61] They will then receive a trial date and have an opportunity to present evidence and testimony, and the Immigration Judge will then make a decision, independent of the decision by the officer, as to whether granting asylum would be proper.[62]

Currently, there are too many different agencies that hold prosecutorial power in immigration. Prosecutorial power rests with the President, the Attorney General, and the Department of Homeland Security ("DHS"), which is further split into Immigration and Customs Enforcement ("ICE"), USCIS, and Customs and Border Protection ("CBP").[63] In any one of these agencies, a policy could be changed affecting the prosecutorial discretion their agents use, which could lead to either insignificant border protection or over adjudication and/or denial of entry for migrants fleeing persecution.[64]

The President and the Attorney General can also significantly change the procedures around seeking asylum, and can do so without having to consult with the legislative branch.[65] There are many examples just from President Trump's administration where the administration or Attorney General Jeff Sessions used their discretionary power to overturn past orders or create new ones.[66] Of the more significant actions taken, one has been the policy of "metering," established by the Trump administration, and another was the decision made by Attorney General Jeff Sessions to overturn the decision of an immigration appeals court holding that fear of domestic

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[58] *The Affirmative Asylum Process*, USCIS, https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process (last updated May 31, 2022).

[59] *Asylum in the United States*, *supra* note 57.

[60] Shoshanna Malett, *Your Asylum Appointment: A Walk-Through*, NOLO, https://www.nolo.com/legal-encyclopedia/your-asylum-interview-appointment-a-walk-through.html (last visited Sept. 29, 2022); Svetlana Prizant, *The Asylum Interview*, PRIZANT L. (Sept. 30, 2016), https://www.prizant-law.com/the-asylum-interview/.

[61] Ilona Bray, *How Many Times You Can Appeal an Asylum Denial*, NOLO, https://www.nolo.com/legal-encyclopedia/how-many-times-you-can-appeal-asylum-denial. (last visited Sept. 29, 2022).

[62] *Id.*

[63] Landau, *supra* note 8, at 1189.

[64] *See id* at 1188–92.

[65] Pierce & Bolter, *supra* note 2, at 49–50.

[66] *See generally id*.

violence is not to be considered as a fear of persecution.[67]

The "metering" policy formally began in May of 2018.[68] "Metering" refers to the practice of limiting the number of asylum seekers allowed to enter a port of entry in one day.[69] The CBP, who controls the ports of entry, "maintain[ed] that its capacity issues involve staffing as well as physical space constraints."[70] Yet, the Associated Press found that between July 2018 and June 2019, "CBP holding cells at 75 percent of stations along the U.S.-Mexico border were at most half full . . . ."[71] This left many asylum seekers in a state of unknown, as they did not have control of how long the wait at the border would be before they could enter and claim asylum.[72]

The decision by Jeff Sessions to overturn the immigration appellate courts, which held that a fear of persecution could be established by fear of domestic violence, is another example of the executive branch's power.[73] In one decision, Sessions stripped all migrants fleeing domestic violence the chance at asylum.[74] That is a great deal of power to give a person in a position that has constant turnover as each new administration seeks to appoint a person they are confident will work in alliance with them.

If there is not a constitutional right to seek asylum that acts as a check on administrations, there could be constant changes made to the procedures, which increase the backlog of cases and limit expansion on who is eligible for asylum. As a result, this lack of a constitutional right limits the efficacy of the procedure as a whole and risks putting the United States into a similar situation as Italy, where, without the procedural process clearly established, the right would only have symbolic value. Therefore, one of the goals for constitutionalizing the right to seek asylum must be protecting the procedural process from constant change by the executive branch.

2. Why Leaving Immigration to Legislation is Not Enough.

A constitutional right to seek asylum, at first glance, could seem redundant because the right to seek asylum has already been codified by Congress. However, the long history of cultural changes in how immigrants are treated should indicate that, to best establish the stability of this right, constitutionalizing it is necessary.

The United States does not have to look elsewhere to see how

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[67] *Id.* at 69–70; Kallie Benner & Caytlin Dickerson, *Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum*, N.Y. TIMES (Jun. 11, 2018), https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html.

[68] Pierce & Bolter, *supra* note 2, at 74.

[69] *Id.* at 68.

[70] *Id.* at 74.

[71] *Id.* (citation omitted).

[72] *Id.*

[73] Pierce & Bolter, *supra* note 2, at 50.

[74] Benner & Dickerson, *supra* note 70.

changing legislation, both locally and nationally, can be detrimental to the rights of migrants. A few of the many examples of clearly racist acts that have been codified are: the Chinese Exclusion Act of 1882; the Immigration Act of 1917, which expanded exclusion to more countries in the Asian region; and the horrors of Operation Wetback (1953), which deported undocumented migrants as well as American citizens after the economy stalled, and public perception changed from the pre-WWII Bracero Program, which encouraged short term migrants to work in America.[75]

Furthermore, political parties who make it their main issue to criticize the immigration system and demand the United States not allow as many migrants to come, has been present before and is currently showing new life.[76] The Know Nothing party of the mid-19th century and the early 1900s resurgence of the Ku Klux Klan provide historical accounts of how conspiracy theories and nationalistic views can change the course of legislation and power, at least at the local level.[77]

Therefore, while the current legislation provides a route for migrants if they are not allowed to seek asylum as a legal remedy, a constitutional right would be a more stable action that could better handle fluctuations in times of anti-immigration nationalistic pressure.[78] As Lucas Kowalczyk and Mila Versteeg have stated, "where a right to asylum is constitutionalized, states effectively restrict their ability to make their response to refugees dependent on prevailing political sentiments."[79]

3. The Circuit Split Provides a Path for Constitutionalizing the Right to Asylum Through the Due Process Clause of the Fifth Amendment.

Currently, the decision as to whether there is any constitutional protection afforded to asylum seekers has resulted in a circuit split.[80] Unlike

[75] *Constitutional Amendments, Treaties, Executive Orders, and Major Acts of Congress Referenced in the Text*, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Data/Legislation/ (last visited Sept. 29, 2022); Brent Funderburk, *Operation Wetback United States Immigration Law-Enforcement Campaign*, BRITTANICA (Sep. 24, 2021), https://www.britannica.com/topic/Operation-Wetback. While Operation Wetback was not a specific codified law, it was funded through congresses approval of increased funding to the Border Patrol which gave them the ability to follow through on the initiative. *Id.*

[76] *See* Boissoneault, *supra* note 6.

[77] *See* Boissoneault, *supra* note 6; *see also* CRAIG FOX, EVERYDAY KLANSFOLK: WHITE PROTESTANT LIFE AND THE KKK IN 1920S MICHIGAN (Mich. State Univ. Press 2011) (giving a historical account of the KKK and what this time period and geographic location was against). While the KKK was certainly still a racist organization that discriminated against black americans, the KKK of the early 1900s was also focused on anti-catholic and anti-immigrant rhetoric, going so far as to say they were threating the soul of America. *Id.*

[78] Meili, *supra* note 23, at 147–149.

[79] Lucas Kowalczyk & Mila Versteeg, *The Political Economy of the Constitutional Right to Asylum*, 102 CORNELL L. REV. 1219, 1248 (2017).

[80] *See, e.g.*, Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL'Y REV. 303, 316–17, 320–21 (2001).

other countries, such as Italy, where the right to seek asylum is expressly stated in the constitution, the circuits in favor of constitutionalizing the right to asylum have held there is a right to claim asylum found under the Due Process Clause for non-citizens.[81]

Whether non-citizens can claim protection from the government under their Fourteenth Amendment due process right, was first addressed by the Supreme Court in 1886.[82] In *Yick Wo v. Hopkins*, the Court held the Fourteenth Amendment was not limited to citizens because it states, "nor deny to any person within its jurisdiction the equal protection of the laws."[83] However, just six years later the Supreme Court decided *Nishimura Ekiu v. United States*, holding the executive branch has exclusive jurisdiction to examine the facts behind a non-citizen's claim regarding the right to land in the United States.[84] The Court stated administrative review by an executive officer or administrative judge provides sufficient due process.[85] Then, in *Wong Wing v. United States*, the Court made a distinction that, although the executive branch held the power to deny or decline entry to non-citizens, the Fifth Amendment applied to all human beings within the jurisdiction of the country.[86] This created the distinction in the law between "deportable" or "excludable" non-citizens.[87]

While these early cases before the Supreme Court provide guidance on whom the Constitution applies to, it fails to address the rights of asylum-seekers—especially after the Refugee Act of 1980 was enacted.[88] The only statement about the right to asylum in a Supreme Court majority opinion comes from *Landon v. Plasencia*, where the Court states—in dicta—that seeking initial admission into the country is a privilege for a non-citizen.[89]

The Supreme Court had a chance to hold asylum seekers have a right to submit and substantiate their claim to asylum when they decided *Jean v. Nelson* in 1985.[90] However, instead of giving guidance to the split lower courts on whether asylum seekers have a right to seek asylum, the Court decided the case on non-constitutional grounds, leaving the question

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[81] *Id.* at 316.
[82] *Id.* at 307.
[83] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).
[84] Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) ("[T]he final determination of those facts may be in trusted [sic] by congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted.").
[85] *Id.*
[86] Wong Wing v. United States, 163 U.S. 228, 238 (1896).
[87] Coffey, *supra* note 83, at 309.
[88] *Id.* at 314.
[89] *Id.*
[90] *See generally* Jean v. Nelson, 472 U.S. 846 (1985).

unanswered.[91] Since this decision, the Court has yet to guide the increasingly divided circuit courts.

As it stands, the Second, Fourth, Fifth, Ninth, and D.C. Circuits have held an asylum seeker has a constitutional due process right to bring a claim for asylum.[92] The First, Seventh, and Eleventh Circuits have all held there is no due process right to make a claim for asylum.[93] The Third Circuit and, arguably, the Second Circuit, have adopted a standard more "in the middle" by not recognizing a constitutional right to seek asylum, but finding that, in certain situations, the general due process rights that all non-citizens have could apply if they are within the United States jurisdiction.[94] If the Supreme Court were to take the majority of circuits' holdings and apply it to a case, they would essentially be constitutionalizing the right to asylum by recognizing it under the Due Process Clause.

B. Constitutionalizing Through the Interpretation of the Due Process Clause

The Supreme Court should grant certiorari, resolve the issue of whether there is a right to seek asylum under the Due Process Clause of the Fifth Amendment, and hold that such a right does exist. Constitutionalizing the right in this process is much different than how other countries have created a constitutional right to asylum, which has advantages and disadvantages for the United States.

From a practical standpoint, finding the right to asylum under the Due Process Clause is the only feasible way to have this right guaranteed in the United States. Where other countries may have somewhat easy amendment procedures, and have even drafted new constitutions throughout their tenure as a country, the United States has one of *the most*, if not the most, difficult procedures to formally change its constitution.[95] Additionally, the mere age of the United States Constitution differentiates it from many other countries, like Italy's, which was drafted after World War II.[96]

Since the United States ratified the Constitution in 1788, there have only been amendments made—no completely new constitution.[97] Even

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[91] *Id*. at 857.

[92] *See* Augustin v. Sava, 735 F.2d 32 (2d Cir. 1984); Selgeka v. Carrol, 184 F.3d 337 (4th Cir. 1999); Haitian Refugee Ctr.v. Smith, 676 F.2d 1023 (5th Cir. 1982); Wong v. United States INS, 373 F.3d 952 (9th Cir. 2004); Maldonado-Perez v. INS, 865 F.2d 328 (1989).

[93] *See* Amanullah v. Nelson, 811 F.2d 1 (1st Cir. 1987); Garcia v. Sessions, 873 F.3d 553 (7th Cir. 2017); Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984).

[94] *See* Yuen Jin v. Mukasey, 538 F.3d 143, 156–57 (2d Cir. 2008) (limiting the holding in *Augustin v. Sava* by stating the due process protection only applies to prevention of deportation or removal to a country where their life is in jeopardy and not considering whether the due process protection applies to discretionary grants of asylum); Marincas v. Lewis, 92 F.3d 195, 203–04 (3d Cir. 1996).

[95] *See* Claude Klein & András Sajó, *Constitution-Making: Process and Substance*, 1 The Oxford Handbook of Comparative Constitutional Law 438–39 (2012).

[96] Lambert, *supra* note 24, at 21.

[97] *See* Klein & Sajó, *supra* note 98, at 439.

passing an amendment is extremely difficult to do, as there is a supermajority needed from both the House and the Senate as well as three-fourths of the states' ratification.[98] This is an extremely limiting barrier for change, especially when comparatively speaking,, France has about one completely new constitution for every two U.S amendments.[99] This shows the difference in difficulty for making changes to what is actually written in the Constitution.

Since it is so difficult to amend the United States Constitution, having the right to asylum read in under the Due Process Clause as a right to "submit and substantiate" their claim to asylum, like the majority of circuits hold, would allow asylum seekers to get constitutional protection without relying on a supermajority of Congress needed for a formal amendment.[100] While reading rights into the Due Process Clause will inevitably raise issues with some judicial approaches—like giving unelected judges the ability to read fundamental rights into the Clause, evidenced by the *Lochner* era of decisions—the difficult amendment process that has favored stability over the ability to reflect the democratic will makes it the only feasible option in the United States.[101]

1. The Constitution Making Dilemma

Constitution making is not the same for every country; Claude Klein and András Sajó have established the two main issues that occur from constitution making.[102] The first is the issue of legitimacy, and the second is the balancing test countries must do in order to create both stability and flexibility in their constitution.[103]

The only way that a constitution can have power is if the constitution is accepted by the people in some way.[104] For many democratic societies, this is accomplished through some form of popular assent.[105] However, constitutions can be reluctantly accepted by other channels too; for instance, wherein the drafters are the controlling military power, or the actual assent by the people is only acquiescence to the controlling elite of the country.[106] Since a constitution is only legitimate because of assent or acquiescence by the people, understanding the various ways constitutional formation takes place

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[98] *See* Brenda Erickson, *Amending the U.S. Constitution* (Aug. 2017), https://www.ncsl.org/research/about-state-legislatures/amending-the-u-s-constitution.aspx.

[99] *See, e.g.*, Charles Apple, *Constitutional Amendments* (May 12, 2020), https://www.spokesman.com/stories/2020/may/12/constitutional-amendments/; *French Legal Research Guide*, GEO. L. LIBR. (Oct. 28, 2020), https://guides.ll.georgetown.edu/francelegalresearch (provides a brief guide to the various constitutions that have been used in France).

[100] Coffey, *supra* note 83, at 316.

[101] Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause*, https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/701#:~ (last visited Sept. 29, 2022).

[102] *See generally* Klein & Sajó, *supra* note 98.

[103] *See generally id.*

[104] *See id.* at 424–25.

[105] *See id.* at 436.

[106] *See id.* at 422–25.

is essential.[107]

There are two main models for constitution formation. One is *ex nihilo* and the other is "by the rules."[108] *Ex nihilo* creation means the creation is formed from nothing.[109] The *ex nihilo* process starts with the decision to deny a previous constitution, and "as a people" legitimize a newly created constitution.[110] "By the rules" creation is where a constitution is either amended or created under the rules of the current constitution.[111] This solves one legitimacy issue—the change is no longer from nothing, but instead from the already established legal order.[112] However, this method creates another issue— who exactly is it that has the power to make these amendments, and how is that power vested in them?[113] If there is not a system in place to combat corruption in the making of amendments, then this process can be taken advantage of in order to solidify long-term power in a nation through a 'democratic' process.[114]

Amendments under the "by the rules" process create another issue that must be addressed. The ability to amend the constitution must balance the competing interests of allowing for needed changes, with the need to create enough stability to prevent constant turnover.[115] Usually, a constitution will set the rules for making changes in the constitution and, in some cases with an "eternity clause," which sets the rules for the provisions that cannot be changed.[116] If it is too difficult to amend the constitution, then it could become unworkable in the current society that has evolved since the initial drafting; furthermore, drafters of the United States Constitution battled with the idea of stability and the idea "the earth belongs to the living."[117] Contrarily, if it is too easy to make amendments, this could lead to significant constitutional turnover and, therefore, miss the benefits that stability provides a nation.[118]

The United States has an extremely stable constitution, because there has not been a wholesale redraft since its ratification in the 18th century.[119] Presumably, this stability is created through having a difficult process to make

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[107] *See id.*
[108] *Id.* at 426–34.
[109] *Id.* at 421.
[110] *Id.* at 426.
[111] *Id.* at 433.
[112] *Id.*
[113] *Id.*
[114] *Id.* at 434.
[115] *Id.* at 438.
[116] *Id.* at 439.
[117] *Id.* at 438 n.79 (internal quotations omitted). "A static system of laws is the worst tyranny that any constitution can impose upon a country. An unamendable Constitution [sic] means that all reform and progress are at a stand-still." *Id.* at 438 (internal citation omitted).
[118] *Id.*at 439.
[119] *See generally* Apple, *supra* note 102.

an amendment.[120] Yet, there are many instances where, in an attempt to bring the Constitution closer to where society has evolved, the political leaders have found ways to circumvent this inflexible system of change, creating changes in substance, if not the form.[121] This can be shown through the ways the civil rights amendments were enacted, and through decisions by the Supreme Court that have the effect of informally changing the Constitution.[122] The people, the source of legitimacy this model claims, are not truly represented as they are supposed to be because the nine Justices of the Supreme Court have a better chance at amending the Constitution than the people do.

However, a model that changes by generation would create too much instability, corrupt power, and risk too much alteration by short-term political pressures.[123] To address all of these issues, it would be best practice for the various branches of government to listen to the people and attempt to amend, or reluctantly quasi-amend when necessary, but do so without any wholesale redrafting that could create instability.

Here, it is necessary to quasi-amend the Constitution so it reflects the state of international law, as well as ensures basic human rights for migrants that are desperately in need of a safe haven. Using the quasi-amendment process to accomplish this goal is not the best, or most legitimate way to amend the Constitution, but the inability to formally amend the Constitution makes it the best practical decision. The rhetoric of people like Jeff Sessions, saying that asylum is a loophole undocumented migrants attempt to use to sneak into the country, has led many to distrust the process; however, the truth of the matter is, the process is already difficult and extra barriers are inhumane and unjust.[124] Migrants fleeing persecution need to at least have the right to bring their claim in a consistent and predictable process.

Having the right to asylum constitutionalized in this manner would successfully limit the executive branch's power over the asylum process. The executive would have to ensure there are procedures in place where applicants truly can have a fair and full hearing for their claim of asylum. Furthermore,

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[120] *See id.*

[121] Klein & Sajó, *supra* note 98, at 438.

[122] *See Landmark Civil Rights Legislation,* U.S.S., https://www.senate.gov/artandhistory/history/common/generic/Feature_Homepage_CivilRightsLandmarkLeg.htm (last visited Oct. 2, 2022). While the Civil Rights Amendments (13, 14, & 15) are essential in creating equality among all American people, passing the amendments were somewhat different than most others. *See id.* As a condition to reenter the Union after the Confederacy lost, each of the Confederate states were required to ratify the three amendments. *The Civil War: The Senate's Story,* U.S.S., https://www.senate.gov/artandhistory/history/common/generic/Civil_War_AdmissionReadmission.htm (last visited Oct. 2, 2022). Considering the polarity of views between the Union and the Confederacy, if it were not for this condition, getting three-fourths of the states to ratify the amendments would not have been possible. *Id.*

[123] *See* Klein & Sajó, *supra* note 98, at 438–39.

[124] *See* Julia Fair, *Attorney General Jeff Sessions Pushes Congress to Close 'Loophole' for Asylum-Seekers,* U.S.A. TODAY (Oct. 12, 2017, 4:38 PM), https://www.usatoday.com/story/news/politics/2017/10/12/attorney-general-jeff-sessions-pushes-congress-close-loophole-asylum-seekers/758034001/.

it would limit the branch's ability to create new executive orders that create potential limits, like the "metering" policy, where the executive created strong barriers to applicants being able to litigate their claim for asylum successfully.[125] Thus, more stability is accomplished when there are transitions of power, and clearer guidelines are given to the lower courts as to whether applicants have a right to asylum.

Moreover, it does not shift the balance of power too much in the other direction and give the legislative or judicial branch power they should not have. The system is currently dominated by executive administrative agencies; therefore, if power were to shift too much in the opposite direction, it could cripple the system in place, which ultimately makes it harder to actually get any remedy.[126] The goal would be to ensure stability in the right to claim asylum and the basic procedure it involves, so that the right to asylum is no longer dominated by political sway. Politicians should not be making decisions on how they support asylum seekers fleeing violence based on whether it will get them votes in the next election.

2. The Jean v. Nelson Non-Constitutional Grounds Dilemma

The next issue with constitutionalizing the right to asylum under the Due Process Clause of the Fifth Amendment is getting the Supreme Court to circumvent the maxim suggesting that decisions based on non-constitutional grounds shall be preferred. The Supreme Court already had one opportunity to give guidance about whether asylum seekers are protected by the Fifth Amendment when it decided *Jean v. Nelson* in 1985.[127] The Court opted not to consider the constitutional question and provided a holding solely on non-constitutional grounds.[128] The majority opinion, written by Justice Rehnquist, stated as a fundamental principle of judicial restraint, the Supreme Court should avoid answering a constitutional question when there is a statutory remedy.[129] Any case taken before the Court to inform the split lower circuits would have to contend with this issue as well, given Congress's codification of asylum law. However, in the 36 years since *Jean v. Nelson*, the divide has only grown, creating inconsistent, location-dependent rulings, indicating that the Court should answer this constitutional question.[130]

Justice Rehnquist argues the Supreme Court is required to consider non-constitutional grounds before reaching any constitutional questions as a "fundamental rule of judicial restraint."[131] Justice Marshall, in his dissenting opinion, does not assert the above proposition is inappropriate; rather, he

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[125] Pierce & Bolter, *supra* note 2, at 68.
[126] *See* Landau, *supra* note 8, at 1187–92.
[127] *See generally* Jean v. Nelson, 472 U.S. 846 (1985).
[128] *Id.* at 854.
[129] *Id.*
[130] *See id.*
[131] Three Affiliated Tribes of Berthold Rsrv. v. World Eng'g, 467 U.S. 138, 157 (1984).

claims it is inappropriate to the case at hand because the Court "press[ed] a regulatory construction well beyond 'the point of disingenuous evasion.'"[132]

Justice Marshall further attacks the majority holding by stating, "the Court creates out of whole cloth nonconstitutional [sic] constraints on the Attorney General's discretion to parole aliens into this country . . . ."[133] Justice Marshall calls this a flagrant violation of the maxim of amending not constructing, as stated in *Yu Cong Eng v. Trinidad* by Chief Justice Taft.[134] Finding no reason to avoid the constitutional question, Justice Marshall states the Court should decide the case on constitutional grounds, and further, the Court should hold the Fifth Amendment gives noncitizens a "right to parole decisions free from invidious discrimination."[135]

Though the Supreme Court should not regularly decide a case on constitutional grounds where a non-constitutional remedy can be used, affirming the majority of circuits' decision to grant due process rights to seek asylum would be judicially economical and would create a more just system. Asylum seekers are currently in a situation where they are afforded different rights simply on the geographical location of their lawsuit. Furthermore, a clear holding granting this right would eliminate the need for the split circuits to further entrench themselves in this debate. For these reasons, the deference to non-constitutional answers should not prevent the Supreme Court from deciding this issue.

C. *The Judiciary Acting as a Slightly Stronger "Secondary Enforcer"*

Because the judicial branch would be addressing whether the due process right of the applicant was violated for not having the right to "submit and substantiate" their case, instead of an express right to asylum itself, the judiciary can act more like a "secondary enforcer," leaving much of the power still distributed between the legislative and executive branches. This type of ruling can be beneficial when it comes to enforcing constitutional socio-economic rights, which are analogous to the right to seek asylum; otherwise, the judiciary could create other issues.

Socio-economic rights are usually positive rights that a citizen, or in some cases non-citizens residing in the country, can demand of their government.[136] This is different from the rights enumerated in the Bill of Rights, known as negative rights, which are things that the government cannot

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[132] *Nelson*, 472 U.S. at 858 (Marshall J. dissenting) (quoting United States v. Locke, 471 U.S. 84, 96 (1985)).

[133] *Id.*

[134] *Id.*; *see also* Yu Cong Eng v. Trinidad, 271 U.S. 500, 518 (1926).

[135] *Nelson*, 472 U.S. at 858 (Marshall J. dissenting); *Jean v. Nelson* did not directly question an asylum-seekers right to claim asylum, but the case is similar in nature enough that it is regularly considered a part of the due process right to asylum jurisprudence. *See* Coffey, *supra* note 83, at 318.

[136] *See* D.M. Davis, *Socio-Economic Rights*, 1 The Oxford Handbook of Comparative Constitutional Law 1020, 1021 (2012).

do to its citizens.[137] Socio-economic rights have been growing in popularity, especially after the end of World War II, but the enforcement of these rights has led to much controversy. [138]

Having constitutional socio-economic rights creates two problems. First, it increases the chance that the constitutional court, or the Supreme Court in the United States, will make a decision that does not actually lead to a remedy.[139] This increased chance comes because certain socio-economic rights are limited in resources, and even if the court was to rule that person X is entitled to Y amount, if Y amount is not available for the government to give to person X then the court's ruling is not going to actually solve the problem.[140] The only value a decision has in this situation is symbolic—eroding away the legitimacy of the court.

Minister of Health and Others v. Treatment Action Campaign and Others, from South Africa, demonstrates a strong ruling, but no true remedy..[141] Here, there is a strong directive given by the Constitutional Court, which overruled the decision that was made by the Government.[142] The Government decided, practically speaking, they could not afford to give out free medicine to everyone in the state that needed it, but the Court subsequently made a ruling the medicine must be free for five years.[143] This exemplifies a ruling that should not be emulated, as it creates a scenario where the judicial branch would be overreaching and subverting the democratically decided initiatives by forcing them to use limited financial resources in a specific way.

The second problem that could arise is the unelected judges of the constitutional courts may end up making policy decisions, which would violate the separation of powers.[144] When a court gives a remedy stating that person X must be given Y amount of a resource, the legislature is deprived of necessary flexibility when trying to create the best laws to help everyone in the country.[145] Because they must give Y amount to person X, they may no longer be able to give resources to others. Even if the legislature made this decision after debating what best represented the democratic will of the people, an overbearing directive from the Court could forbid that result.[146]

One case in which a strong remedy overruled policy is *Khosa v.*

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[137] *Id.* at 1020–21.
[138] *Id.* at 1021.
[139] *Id.* at 1023.
[140] *See id.*
[141] *See generally* Minister of Health and Others v. Treatment Action Campaign and Others 2002 (5) SA 721 (CC) (S. Afr.).
[142] *Id.* at 78–81 para. 135.
[143] *Id.* at 14–15, 79–80 para. 19, 135.
[144] Davis, *supra* note 139, at 1023.
[145] *Id.* at 1024.
[146] See *id.* at 1023–24.

Minister of Social Development.[147] Here, the South African Constitutional Court overruled a decision made by the legislature on whether non-citizen residents were allowed to access public benefits.[148] The legislature decided that non-citizens could not access public benefits, but the Court ruled that policy unconstitutional; as a result, the Court decided and created policy that was, according to the legislature, against the will of the people.[149] If this were to happen in the United States, that would mean unelected judges were making policy decisions. This strips the will of the people of any representation.

The opposite of this could be true as well. If the Court provides too weak of a review/remedy, then it would not be effective in protecting the right at all. This would create a situation in which constitutional rights would not be protected, setting an irrational precedent. An example of this is the *Dandridge v. Williams* decision in 1970.[150] In *Dandridge*, the legislators only had to have a rational basis to survive the Court's scrutiny.[151] The state offered a questionable rationale, stating by not giving more federal aid to bigger families, it was incentivizing family planning in low-income families and also ensuring it could help the maximum number of families.[152] Further, the state acknowledged this was not a complete solution to the problem it was supposed to address, but the Court held it was not their place to review state officials' division of the wealth, but instead to maintain certain procedural safeguards to the welfare system.[153]

The *Dandridge* amount of deference to the legislative body would work well in situations where the populace is active in the democratic process and the legislative decisions actually represent the will of the people. However, if the populace is not active it would then leave the people in a precarious situation, as their rights are not being protected or represented by any branch.

These problems need to be addressed when discussing the creation of the positive constitutional right to asylum. While the right to asylum does not necessarily have a fixed number of resources, like the right to medicine does, there is still a limit on what the government can afford to do in terms of administering this right.[154] This could then create the scenario where there is a strong remedy that is given by the court, but there are no funds or resources available to enforce the remedy given. If the same were to happen with the

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[147] *See generally* Khosa v. Minister of Social Development and Others, Mahlaule and Another v. Minister of Social Development 2004 (6) SA 505 (CC) (S. Afr.).
[148] *Id.* at 55 para. 89.
[149] *See id.* at 37–38, 51,53 para. 60–62,82–84, 86.
[150] *See generally* Dandridge v. Williams, 397 U.S. 471 (1970).
[151] *Id.* at 485.
[152] *Id.* at 483–84.
[153] *Id.* at 487.
[154] *See* Davis, *supra* note 139, at 1024.

constitutional right to asylum it would be symbolic more than anything else, eventually succumbing to the same fate of the constitutional right to asylum in Italy.

However, the United States must do more than only provide a weak level of remedy. The excessive power of lobbyists is too strong to conclude that the populace is adequately engaged and represented in the legislative process. Not having any type of review would lead to a scenario where the power is still in the hands of an unelected few, but, instead of them being Supreme Court Justices, they are whoever can lobby the best or with the most money.

For asylum, as the right would be found under the Due Process Clause, the remedy is not truly different than having to create other adjudicative and administrative bodies that ensure the government is not taking away life, liberty, or property without providing due process under the law. As this is not much, if at all, different from the requirements that the rights in the Constitution have always created, the weight of the first critique is exceedingly small because there is always a degree of risk when a court gives a remedy, but no more so in this case.

As to the second problem with having constitutional socio-economic rights, the right to asylum through the Due Process Clause could also circumnavigate many issues. The main reason the Court can do so is by ruling as a "secondary enforcer," as opposed to giving strong directives. The "secondary enforcer" role is a weaker form of review by the Court, and it does not usually lead to strong or precise directives given to the legislature or executive agencies; However, it would still ensure that there is some accountability as the legislators would be subject to review, ensuring they have a *truly rational*, rational basis for the decision.[155]

This tension that is created, wanting to provide socio-economic rights but doing so without infringing on the democratic process, is something the courts have to constantly wrestle with when adjudicating cases. There is no clear answer on how the balance must be struck, but it does seem the stronger the remedy the constitutional court gives, the more likely it will create a situation that takes political power out of the hands of the people. It follows then that the role of the courts is best left as a "secondary enforcer," giving some deference to the legislative body but still holding open the possibility of demanding it do more.

The deference to the legislative body only works when there is an active and engaged populace. The reason deference is being given is because legislators are elected and are, in theory at least, better representatives of what the people want. If the populace is not active in casting votes, nor engaged

[155] Davis, *supra* note 139, at 1024.

enough so they can vote out those who are not representing the populace, then this deference would be improperly given.

One main objection that suggests the populace is not active and engaged enough, at least in the United States, is there are lobbyists that can donate their way into political power. If the legislators are being influenced by the lobbyists and not the populace, then it could be argued that a strong remedy by the courts could be the most advantageous to the populace; the strong remedy would be the only way that the populace could get the socio-economic rights that the democratic will desires.

It is thus apparent from this tension why there are clear differences in the way the socio-economic right cases are adjudicated, even within the same constitutional court. There is not a clear answer to the multiple factors that can cause tension when adjudicating these matters. Therefore, it seems best to allow the constitutional court to have a fact-dependent review process where they can take into consideration how and why the legislative body came to their decision and ensure that it was rational/reasonable.

This fact-dependent review process would only be a small degree stronger of a process than what is done when courts adjudicate as the "secondary enforcer." The only real change is there is more scrutiny in how the legislators reach their decision. If there is evidence it was heavily influenced by lobbyists, or it comes from a state where there is a large, disenfranchised populace, then it would still allow the courts to step in to create more specific directives and provide a stronger remedy. That said, there is still a vast amount of power a rule like this would give to the courts. This should weigh on the justices' minds, so they do not find themselves overruling another branch's decision unless absolutely necessary.

While this may not result in as strong of a remedy in individual cases, it could accomplish one of the keys to succeeding, which is not simply transferring the imbalance of power that currently favors the executive branch to the judicial branch. Acting as a slightly stronger "secondary enforcer" may not be a perfect solution, but it can strengthen accountability in the agencies where, currently, the executive branch has too much power. Furthermore, it does not simply transfer the surplus of power that the executive branch has, in terms of control over the asylum process, to the judicial branch. Successfully constitutionalizing the right to asylum requires the judicial branch to have more power than currently held, but also it does not end up with too much control because that would possibly subvert the democratic will of the people even more. The people can vote out a president who runs the executive branch but, in many cases, judges are unelected and have long or even life-term appointments. Understanding and creating that balance will be an ongoing process that is essential to achieve longevity in protecting both asylee and citizen rights.

CONCLUSION

Currently, the asylum process is largely controlled through various executive agencies and, as such, the executive branch holds a tremendous amount of power over the process. These agencies are subject to change with each new administration, which causes too much instability for migrants fleeing for their lives. Constitutionalizing the right to seek asylum provides a solution to the instability issue, which allows the judicial branch to ensure refugees get the opportunity to submit and substantiate their claims to asylum. Recognizing this right to seek asylum through the Due Process Clause differentiates the United States from other countries, like Italy. Doing so would align the growing division over this issue in the circuit courts and ensure that one of the main reasons for being able to bring a claim is not the geographical location of where the claim is.

Where Italy wrote a provision in its Constitution that provides the actual right to asylum, the United States would only be constitutionalizing the right to seek an asylum claim. This will allow the judicial branch to ensure the executive branch does not change the process of bringing an asylum claim. It also ensures the legislative branch cannot take away the right to seek asylum if the cultural shifts of the past, where it became politically popular to create anti-immigrant legislation, happens again. Thus, the judicial branch would hold significant power in ensuring the right to seek asylum, but they would hold it without violating the separation of powers because they would be acting as a slightly stronger "secondary enforcer."

This differs from the model of constitutional asylum that Italy has because its constitutional asylum system was a wholly separate system burdened by overbroad language that was never supported by a robust system to manage the claims it purported to allow. As the United States would not be creating a new system of review, but instead ensuring they have the chance to submit and substantiate a claim under the conventional asylum system, they can better act as the slightly stronger "secondary enforcer," mitigating many of the issues socio-economic rights usually encounter.

After the right is constitutionalized, the question will be whether the Supreme Court can state the slightly stronger "secondary enforcer" role clearly enough that lower courts can successfully follow it. Furthermore, with growing sentiment and perception that there has been a politicization of the Supreme Court, can the Justices, both now and in the future, provide the longevity this solution desires? Constitutionalizing the right to seek asylum under the Due Process Clause allows the United States to capture many of the benefits this right creates, and successfully does so by mitigating many of the issues other countries, like Italy, have faced.