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ARTICLES

NOTES

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From the late 18th until the early 20th century, emigrants to the United States (men) who returned to their country of origin for what was intended to be a brief visit could find themselves forced into military service. At first, the U.S. reaction was sporadic. However, with mounting calls for the country to take systemic action, after the Civil War the United States finally negotiated a series of treaties. Referred to as the "Bancroft Treaties," they provided that, upon naturalization in one of the treaty countries, an emigrant would lose citizenship of their country of origin and thereby no longer be required to perform military service in that country.

Not all countries were willing to enter a treaty with the United States. An important holdout was Switzerland. The United States criticized Switzerland for its refusal, describing the Swiss position as an "alleged score of owing paramount allegiance to Switzerland" that was "extraordinary and exceptional." However, in reality, Switzerland sought to guard against statelessness and protect Swiss citizenship.

As a result of a series of U.S. Supreme Court decisions adopted in the late 1950s and 1960s, the United States eventually adopted the Swiss position. The treaties that remain in place today allow for immigrants to the United States to be exempt from military service in their country of origin without loss of citizenship in that country.

Ironically—and hypocritically—at the same time that the United States was seeking the release of its immigrants from the figurative clutches of their countries of origin, the United States was developing a tight hold on its emigrants from the United States. It did and still does this today through the taxation of the worldwide income of Americans living in other countries. How the United States taxes its emigrants is highly penalizing as well as incompatible with the tax systems of the countries where the emigrants live. Many American emigrants feel forced to renounce U.S. citizenship as the only means to escape the penalizing policies.

These two emigration stories share profound parallels as well as crucial differences. The first story offers important lessons for today. For over a century immigrants to the United States required protection from their countries of origin. Today, emigrants from the United States require protection from the United States.

Due process guarantees lie at the heart of any legitimate legal system, serving as a critical safeguard against arbitrary state power and as a foundation for the rule of law. Yet their meaning and implementation vary significantly across legal traditions and political contexts.

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This Note analyzes the role of religious exemptions in federal and state child welfare statutes in facilitating abuse within the Troubled Teen Industry (TTI), a loosely defined network of residential treatment programs, wilderness camps, and therapeutic boarding schools. Although religious exemptions were originally intended to safeguard religious liberty and parental rights, their statutory design has produced significant regulatory gaps that permit certain faith-affiliated institutions to operate with minimal oversight. By tracing the historical development of these exemptions and examining their contemporary application across multiple jurisdictions, this Note demonstrates how religious status can function as a shield against meaningful accountability. It argues that comprehensive reform—particularly the elimination of religious exemptions as a condition of federal funding and the establishment of uniform baseline standards—is necessary to ensure consistent child welfare protections for all institutions exercising custodial authority over minors.

This Note examines how current regulatory policies and practices of Pharmacy Benefit Managers (PBMs) have led to increased prescription drug costs and diminished patient access to medications. Notably, *Schmidtknecht v. OptumRx Inc.* illustrates the real-world consequences of current PBM regulation, which allows them to increase medication prices without warning by controlling which pharmacies and insurance plans will cover certain prescription drugs. The Note analyzes existing federal regulations under the Civil Monetary Penalties Law (CMPL), the Patient Right to Know Drug Prices Act (2018), and the Know the Lowest Price Act of 2018, which seek to increase drug pricing transparency and consumer access to medication pricing information. It further evaluates proposed reforms, including the Pharmacy Benefit Manager Reform Act (2023), the Pharmacy Benefit Manager Transparency Act (2023), the Protecting Patients Against PBM Abuses Act (2023), and the Lower Costs, More Transparency Act (2023 House bill), which mandate greater disclosure of reimbursement practices. The Note also analyzes the Illinois Insurance Code § 215 ILCS 5/513b1 as a model for PBM oversight and pharmacy reimbursement protections. Finally, the Note argues that meaningful reform on federal and state levels is needed to enforce pricing transparency, eliminate structural conflicts of interest, and restore competitive equilibrium within the pharmaceutical supply chain.

Misrepresenting a copyright infringement claim when sending a takedown request under 17 U.S.C. § 512(c) is currently the most effective way to protect against the unauthorized use of names, images, and likenesses, or the right of publicity, on the Internet. With the absence of meaningful federal protection, who wins the fight to protect the right of publicity online? This Note examines tolerating the misapplication of § 512(c) for the right of publicity, considers a congressional amendment to the Digital Millenium Copyright Act (DMCA), and then evaluates incorporation of the right of publicity into the proposed NO FAKES Act before recommending a private ordering framework to best protect against online violations of the right of publicity.

A TALE OF TWO EMIGRATIONS: WHY THE POPE NEEDS PROTECTION FROM THE UNITED STATES

Dr. Laura Snyder*

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The story of citizenship [is] a tale not of liberation, dignity, and nationhood but of complacency, hypocrisy, and domination.[1]

I. INTRODUCTION

On May 8, 2025, Robert Francis Prevost became the first U.S.-born pope.[2] A mere two months later, U.S. Representative Jeff Hurd (R.-Colo.) introduced H.R. 4501, the "Holy Sovereignty Protection Act."[3] The dual purposes of the bill are to "protect the citizenship of, and provide tax-exempt status to, any American elected as the Supreme Pontiff of the Roman Catholic Church."[4]

What could be behind such a bill? Why might Pope Leo XIV's U.S. citizenship be in jeopardy? Why could it make sense to grant him—and any future American pope—tax exempt status? From what do they need "protection?" What threats do they face that can and should be addressed with an act of Congress?

President Donald Trump himself might understand what lies behind H.R. 4501. In October 2024, then candidate Trump announced:

> [O]nce and for all I'm going to end double taxation on our overseas citizens. You've been wanting this for years and no one has listened to you. And you deserve it. And I'm going to do it. It's the right thing to do. And no American leader has ever been willing to stand up and commit to you the way that I have.[5]

President Trump's acknowledgement of the problems faced by overseas Americans because of the extraterritorial application of U.S. policies was a first.[6] For decades, overseas Americans and others have tried to gain attention

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1 DIMITRY KOCHENOV, CITIZENSHIP (2019) [hereinafter CITIZENSHIP].

2 *See, e.g.,* Christopher White & James V. Grimaldi, *Habemus Papam: Leo XIV is 1st US Pope Chosen to Lead Catholic Church*, NAT'L CATHOLIC REP. (May 8, 2025), https://www.ncronline.org/vatican/habemus-papam-leo-xiv-1st-american-pope-chosen-lead-catholic-church [https://perma.cc/V8CM-L7V3].

3 H.R. 4501, 119th Cong. (2025).

4 *Id.*; *see also* Jack Figge, *He's a Real American: Bill Aims to Protect Pope's US Citizenship*, THE PILLAR (July 23, 2025), https://www.pillarcatholic.com/p/hes-a-real-american-bill-aims-to [https://perma.cc/2B97-YAQR]. If adopted, the bill would not solve all the Pope's tax and financial reporting problems. *See* Jonathan Curry, *Expats Eye Pope's Tax Woes as Opportunity to Ditch Worldwide Tax*, TAX NOTES (Aug. 13, 2025), https://www.taxnotes.com/featured-news/expats-eye-popes-tax-woes-opportunity-ditch-worldwide-tax/2025/08/11/7sx82?.

5 DONALD J. TRUMP, *I Will End Double Taxation...*, at 00:22–00:41 (YouTube, Oct. 12, 2024), https://www.youtube.com/watch?v=LrQCFZHgQr0&t=25s.

6 Chris Pandolfo & Madison Alworth, *Trump Supports Ending Double Taxation on Americans Living Abroad: 'Let's Put America First*,*'* N.Y. POST (Oct. 14, 2024), https://nypost.com/2024/10/14/business/former-president-donald-trump-supports-ending-double-taxation-on-americans-living-

to the problems.[7] But policymakers have, for the most part, ignored them.[8] On the few occasions when policymakers have paid attention, it has been to stigmatize overseas Americans as wealthy persons who emigrated from the United States to avoid taxation.[9] For this reason, from the perspective of many policymakers, overseas Americans clearly do not deserve and should not get any remedy.[10]

This situation may appear unprecedented, and, in many ways, it is. Only a handful of other countries seek to tax on an ongoing basis the worldwide income of their emigrants (citizens who live in another country). Of those that do, none does so in the highly punitive manner that the United States employs.[11]

However, in other ways, this situation is not at all unprecedented. It bears remarkable similarities to a problem that plagued emigrants from other countries to the United States from the late 18th until the early 20th century. During that period, emigrants to the United States (men) who returned to their country of origin for what was intended to be a brief visit could find themselves either forced into military service for that country or, in some cases, forced to pay a tax in lieu of military service.[12]

Part II of this Article examines immigration to the United States from the late 18th century until the early 20th century. What role did the policies of the immigrants' countries of origin—with a specific focus on Switzerland—play in the lives of immigrants to the United States? What were the consequences? How did the United States react? Part III examines emigration from the United States today. What role does U.S. policy play in the lives of emigrants from the United States, and what are the consequences? How have the new home countries of the American emigrants reacted? Part IV compares the two emigration stories—their profound parallels as well as their crucial differences. Part V explores what the past teaches about today.

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abroad/ [https://perma.cc/A7LF-347D] (quoting Solomon Yu, Vice Chairman and CEO of Republicans Overseas: "We have spoken to many politicians over the years, and while they sympathized with the burden of double taxation, very few have been willing to act.").

7 *See* Laura Snyder, *The Invisibility of the American Emigrant*, 17 DEPAUL J. FOR SOC. JUST. 1, 8–24 (2023) [hereinafter *Invisibility of American Emigrant*].

8 *See, e.g.*, *id.* at 34–37.

9 *See, e.g.*, Laura Snyder, *Taxing the American Emigrant*, 74 TAX LAW. 299, 318–20 (2021) [hereinafter *Taxing American Emigrant*]; *see also Invisibility of American Emigrant*, *supra* note 7, at 37–38.

10 *See* sources cited *supra* note 9.

11 Laura Snyder, *The Unacknowledged Realities of Extraterritorial Taxation*, 47 S. ILL. UNIV. L. J. 243, 246 n.11 (2023) [hereinafter *Unacknowledged Realities*]; *see also infra* notes 314–48 and accompanying text (explaining how the system is so punitive).

12 *See, e.g.,* Henry A. Chaney, *Protection of Naturalized Citizens*, 1 MICH. L. J. 389 (1892).

Ultimately, this article makes clear why not just American popes[13] but *all* emigrants from the United States—present and future—require protection from their country of origin. As dramatically increasing numbers of Americans—especially young adults—seek to live outside the country,[14] it becomes increasingly important—as well as urgent—to understand and address their situation finally and fully.

II. EMIGRATION TO THE UNITED STATES: REFUSING TO LET GO WITH CONSCRIPTION

Practically as soon as the American republic was established in the late 18th century, its European-born citizens—and its men in particular—faced danger from their countries of origin. The danger took the form of compulsory military service.

This Part II describes how this problem manifested and the steps the United States took to address it. Section A provides an overview of the forceable conscription of American men from the early years of the American Republic until the early 20th century. Section B examines the reasons other countries gave for forcibly conscripting American men and the American reaction. Section C examines Switzerland and its successful resistance to the American solution in favor of its own, more targeted approach. Section D explains how the United States eventually rejected its own solution in favor of the Swiss approach and how the problem of the conscription of dual nationals was ultimately resolved.

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13 For discussions specifically about Pope Leo XIV, *see, e.g.,* Lewis J. Greenwald & Eric J. Rietveld, *Why the First U.S. Pope Should Expatriate Immediately*, 187 TAX NOTES FED. 1921 (2025), https://www.taxnotes.com/tax-notes-today-international/expatriate-taxation/why-first-u.s-pope-should-expatriate-immediately/2025/05/19/7s6ry; *see also* Robert Goulder, *The American Pope and Citizenship-Based Taxation*, TAX NOTES (May 30, 2025), https://www.taxnotes.com/featured-analysis/american-pope-and-citizenship-based-taxation/2025/05/29/7sc6w.

14 *See, e.g.*, Patrick Murray, *National: Desire to Move Out of the Country Has Tripled Since 1974*, MONMOUTH UNIV. POLL (Mar. 26, 2024), https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_032624.pdf/ (reporting that approximately one-third of Americans would like to emigrate to another country if they were able to do so. In 1974 just 10% expressed the same desire); *see also* Tim Osiecki et al., *American Expats Survey*, THE HARRIS POLL 10–11, 20 (Feb. 2025), https://theharrispoll.com/wp-content/uploads/2025/02/Americans-Expats-Feb-2025.pdf (explaining that "Gen Z and Millennials lead in wanting to move abroad, with nearly one in five seriously considering it." Further, "Two-thirds of Gen Z and Millennials are interested [in] or already possess dual citizenship, obtained by family, naturalization, or marriage."); Drew Hinshaw & Joe Parkinson, *Americans Are Leaving the U.S. in Record Numbers*, WALL ST. J. (Feb. 25, 2026), https://www.wsj.com/us-news/americans-leaving-the-us-migration-a5795bfa (explaining that the United States is becoming a country of net emigration rather than net immigration).

A. Overview

American men faced the danger of being conscripted by another country from the early years of the American Republic until the early 20th century.

1. Early Years of the American Republic

The problem of forced conscription of American men into the military of another country was first manifested during Britain's conflicts with France from 1793 to 1815.[15] The British navy was desperate for soldiers and sought to obtain them in any way it could.[16] British sailors forcibly boarded American ships—even in American waters[17]—ostensibly looking for deserters.[18] They were looking for considerably more than that, however; they impressed into service anyone on the ship they chose to consider British.[19]

The practice grew large. As many as ten thousand American seamen were reported to have been impressed.[20] American diplomats lodged official protests for many, and sometimes were successful in obtaining their release.[21] Despite the protests, many impressments were never reported, and the victims remained imprisoned in the British navy.[22] The problem was so widespread that many Americans either knew or knew of someone who had been impressed or threatened with impressment.[23]

There was so much ill-will over the practice that it is cited as one of the principal causes of the War of 1812 with Great Britain[24] and an important topic of negotiation to end the war.[25] In his instructions to the negotiators,

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15 *See, e.g.*, Andrew Knowles, *A Quick Guide to the Napoleonic Wars and the Great War against France (1792-1815)*, REGENCY HIST. (Mar. 17, 2023), https://www.regencyhistory.net/blog/quick-guide-to-napoleonic-wars-regency-history-guide [https://perma.cc/742E-EEQE] (explaining that France declared war on Great Britain in 1793. The two countries essentially remained at war until Napolean was defeated in the Battle of Waterloo in 1815).

16 Paul A. Gilje, *"Free Trade and Sailors' Rights": The Rhetoric of the War of 1812*, 30 J. EARLY REP. 1, 10 (2010).

17 CARL SCHURZ, AMERICAN STATESMEN: LIFE OF HENRY CLAY 70 (John T. Morse, Jr. ed., 1915) (1887).

18 HUGH L. KEENLEYSIDE & GERALD S. BROWN, CANADA AND THE UNITED STATES: SOME ASPECTS OF THEIR HISTORICAL RELATIONS 50–51 (1952).

19 SCHURZ, *supra* note 17, at 70.

20 Gilje, *supra* note 16, at 11.

21 *Id.*

22 *Id.*

23 *Id.* at 11–12.

24 HENRY WILLIAM ELSON, HISTORY OF THE UNITED STATES OF AMERICA 414 (1904); *see also* KEENLEYSIDE & BROWN, *supra* note 18, at 51.

25 JAMES FULTON ZIMMERMAN, IMPRESSMENT OF AMERICAN SEAMEN 195–96, 202 (1925).

then Secretary of State (later U.S. President) James Monroe wrote: "[T]his degrading practice must cease; our flag must protect the crew, or the United States cannot consider themselves an independent nation."[26]

Ultimately, however, the United States failed to obtain a commitment from Britain to stop impressing American soldiers, and the treaty that was finally agreed upon did not mention the subject.[27] Nevertheless, Britain discontinued the practice after 1814.[28] This was because the Napoleonic Wars ended, bringing to an end Britain's need for a large navy.[29]

2. After the War of 1812

Even if Britain ceased its practice of impressing American soldiers into the British navy, this did not mean that immigrants to the United States were safe from their countries of origin. While other countries did not board American ships seeking subjects for conscription, they nevertheless took advantage of other opportunities to force into military service those whom they considered liable for it. Typically, the opportunities presented themselves when the American immigrant returned to his country of origin for a visit.[30]

During the mid-1800s, perhaps the most dangerous country to have emigrated from was Prussia. Professor Henry Chaney tells the stories of three men who emigrated from Prussia to the United States as teenagers: Joseph Statz at age 16, Bonifaz Glahn at younger than 16, and Christian Ernst, at age 18.[31] Several years after emigrating and after having been naturalized as U.S. citizens, each returned to Prussia for what was intended to be a temporary visit[32] (for example, in Statz's case, it was to "attend to family business").[33] Three months after his arrival, Statz was arrested at night in Cologne and forced to serve in the infantry.[34] As for Glahn, upon his arrival in Prussia, he presented himself to the local authorities with his U.S. passport and certificate of U.S. citizenship.[35] The authorities stripped him of these documents, arrested him, and arranged for his transfer to an infantry

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26 *Id.* at 210 (quoting then Secretary of State James Monroe).
27 *Id.* at 219–21.
28 *Id.* at 221.
29 *See generally* Martin Wilcox, *'These Peaceable Times Are the Devil': Royal Navy Officers in the Post-War Slump 1815–1825*, 26 INT'L J. MAR. HIST. 471–88 (2014).
30 *See, e.g.*, LUCY E. SALYER, UNDER THE STARRY FLAG: HOW A BAND OF IRISH AMERICANS JOINED THE FENIAN REVOLT AND SPARKED A CRISIS OVER CITIZENSHIP 136–37 (2018); *see also infra* notes 31–51, 68–77 and accompanying text.
31 Chaney, *supra* note 12, at 394–97.
32 *Id.*
33 *Id.* at 394.
34 *Id.*
35 *Id.* at 395.

regiment.[36] For Ernst, the record is sparse. All we know is that when he returned to Prussia nine years after he had left, he was immediately seized for military service.[37]

All three men appealed to American diplomatic authorities to come to their aid and obtain their release.[38] Chaney is scornful of their response. In the case of Statz, Peter Vroom, the American minister to Berlin, corresponded with Prussian authorities but in a manner that was "timid and dilatory,"[39] and he "shrank"[40] from asking for Statz's release. In the case of Glahn, Vroom's successor Joseph A. Wright would not even do that much; he merely expressed sympathy to Glahn but said he could do no more.[41] Ernst fared better: Secretary of State (and former General) Lewis Cass pressed his case to the Hanoverian government.[42] In response, it disputed the right of the United States to make such a request, but as a matter of "grace and favor" discharged Ernst from their army.[43]

Wright wrote to Cass that cases of American emigrants being forced to serve in the Prussian military were numerous and that he expected them to continue to increase.[44] He wanted the U.S. government to take a stand in opposition:[45]

> May not the infant from Prussia . . . raised under our flag from childhood . . . return to his native land, see his relatives, settle up his business . . . . No American consul or minister can shield from impressment a United States citizen who has the misfortune to be born in Prussia. Is it possible that there

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36 *Id.*

37 *Id.* at 396; *see also* Letter from William A. Richardson, Sec'y of the Treasury, to Pres. Ulysses S. Grant (Oct. 20, 1873), *reprinted by* OFF. OF THE HISTORIAN, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, TRANSMITTED TO CONGRESS, WITH THE ANNUAL MESSAGE OF THE PRESIDENT, DECEMBER 1, 1873, PART I, GENERAL CORRESPONDENCE; AND PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, VOLUME II, at 1203, https://history.state.gov/historicaldocuments/frus1873p1v2/d192 [hereinafter 1873 Diplomatic Papers].

38 Chaney, *supra* note 12, at 394–97.

39 *Id.* at 394.

40 *Id.*

41 *Id.* at 395.

42 *Id.* at 396–97.

43 *Id.* at 397.

44 *Id.* at 395.

45 *Id.* (Chaney states that this correspondence took place in 1888, but this is an error. The actual year of this correspondence was 1858); *see* MESSAGES OF THE PRESIDENT OF THE UNITED STATES, COMMUNICATING, IN COMPLIANCE WITH RESOLUTIONS OF THE SENATE, INFORMATION RELATIVE TO THE COMPULSORY ENLISTMENT OF AMERICAN CITIZENS IN THE ARMY OF PRUSSIA 112 (1860), https://ia801307.us.archive.org/4/items/cu31924005222058/cu31924005222058.pdf [hereinafter COMPULSORY ENLISTMENT IN ARMY OF PRUSSIA].

> is no remedy for this state of things? My opinion is that if a decided and firm stand be taken by our government . . . it will lead to good results.[46]

But Cass was resigned to the situation and saw no remedy. He responded to Wright:

> [T]he process by which the necessary supply of men is provided for the military establishments of continental Europe is contrary to our ideas of personal right, but we have no right to ask that it be changed and made to accommodate itself to our standard.[47]

Charles Faulkner, the American Minister to France, was not so defeatist. He was called upon to assist Michael Zeiter.[48] Zeiter was born in France and emigrated to the United States at age 16.[49] At age 29 he returned to France, whereupon he was conscripted into the army despite his protests that he was a naturalized American citizen.[50] Faulkner appealed to the French Minister of Foreign Affairs (Édouard Thouvenel) seeking Zeiter's release.[51] Chaney has high praise for Faulkner's efforts. Chaney describes the contents of a letter from Faulkner to Thouvenel as "stating the doctrine as to naturalized citizens with such force and clearness that his words are [often quoted] as a satisfactory exposition of the American view."[52] Faulkner wrote:

> [O]ur doctrine [is] that the naturalized emigrant cannot be held responsible upon his return to his native country for any military duty, the performance of which had not been actually demanded of him prior to his emigration. *A prospective liability to service in the army is not sufficient*. The obligation of contingent duties, depending for their exaction upon time, sortition or events thereafter to occur, is not recognized. To subject him to such responsibility *it should be a case of actual desertion*, or a refusal to enter the army after having been actually drafted, or called into it, by the government to which he, at the time, owed allegiance.[53]

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46 Chaney, *supra* note 12, at 395; COMPULSORY ENLISTMENT IN ARMY OF PRUSSIA, *supra* note 45, at 113.

47 Chaney, *supra* note 12, at 395; COMPULSORY ENLISTMENT IN ARMY OF PRUSSIA, *supra* note 45, at 120.

48 Chaney, *supra* note 12, at 397.

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

Faulkner was convincing, apparently, because he was able to gain Zeiter's release.[54]

3. After the Civil War

During the U.S. Civil War, Secretary of State William Seward was reluctant to seek to protect emigrants to the United States visiting their countries of origin. He felt that they should "practice some self-denial"[55] and wait until after the war to travel outside the country. That, he wrote to a minister in Berlin, would be a "more favorable season"[56] to "draw this country into a controversy with a foreign power."[57] Once the war was over, however, he pushed forward. He urged Wright to raise the issue again with Prussian authorities. He wrote to Wright:

> The United States have accepted and established a government upon the principle of the rights of men who have committed no crime to choose the state in which they will live, and to incorporate themselves as members of that state, and to enjoy henceforth its privileges and its benefits, among which is included protection. This principle is recommended by sentiments of humanity and abstract justice; it is a principle which we cannot waive.[58]

Accordingly, during his tenure as Minister to Prussia and then Germany from 1867-1874, George Bancroft attempted to find a remedy by initiating a series of treaties with different German states and a handful of other countries.[59] Today, known as the "Bancroft Treaties" or "Bancroft Conventions," the agreements were premised on the assumption that the source of the problem was dual nationality.[60] Stated another way, even though the problem the agreements sought to resolve was a relatively narrow one, conscription of men by countries where they did not live,[61] Bancroft and the other treaty negotiators proposed a solution that was considerably larger

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54 *Id.* at 398.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.* at 398–99; 1873 Diplomatic Papers, *supra* note 37, at 1296.

59 *See, e.g.*, Michael Walter, *The Bancroft Conventions: Second-Class Citizenship for Naturalized Americans*, 12 INT'L LAW. 825, 825–26 (1978).

60 *See, e.g.*, GEORGE H. YEAMAN, ALLEGIANCE AND CITIZENSHIP: AN INQUIRY INTO THE CLAIM OF EUROPEAN GOVERNMENTS TO EXACT MILITARY SERVICE OF NATURALIZED CITIZENS OF THE UNITED STATES 5 (1867) (calling for a solution just prior to the negotiation of the Bancroft Treaties: "Wherever man goes he carries with him the necessity for a Government, and it is thus that he retires from one Government and adopts another."); *see also* Walter, *supra* note 59, at 825–27; BEN HERZOG, REVOKING CITIZENSHIP: EXPATRIATION IN AMERICA FROM THE COLONIAL ERA TO THE WAR ON TERROR 57–58 (2015).

61 YEAMAN, *supra* note 60; *see also* Walter, *supra* note 59, at 832.

in scope. They sought to define when a country would recognize the naturalization of one of its emigrants in another country, with the consequence of loss of the nationality of the emigrant's country of origin.[62] The treaties also defined the conditions under which a naturalized citizen of one country would, upon return to his country of origin, be held to have "renounced his naturalization."[63] These core features of the treaties were based upon a common belief of the period that a person should hold just one nationality at a time.[64] For the treaty negotiators, it seems forcing a person to have just one nationality was the best way to resolve the problem of military conscription. The first several of these treaties did not even mention military service.[65]

The Bancroft Treaties were far from a panacea. One important reason was that they were concluded with only a limited number of countries.[66] Notable examples of countries with which the United States did not have a treaty were Italy and Russia.[67]

Chaney and Davis tell the story of a Mr. Largomarsini.[68] He emigrated from Italy to the United States with his parents when he was two years old.[69] In 1875, as an adult, he traveled to Italy for what was intended to be a temporary visit.[70] Within days of his arrival, he was notified of his conscription into the Italian military.[71] When he refused to obey, asserting his U.S. citizenship, he was arrested as a deserter.[72] A military tribunal did

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62 Walter, *supra* note 59, at 825–27.

63 *See, e.g., id.* at 827 (quoting Naturalization Convention between the United States and Portugal, art. III, May 7, 1908, 35 Stat. 2082, 2083–2084); *see also* HERZOG, *supra* note 60, at 57–58.

64 *See, e.g.* Peter J. Spiro, *Dual Citizenship as Human Right*, 8 INT'L J. CON. L. 111, 114 (2010) [hereinafter *Dual Citizenship as Human Right*]; *see also* COMPULSORY ENLISTMENT IN ARMY OF PRUSSIA, *supra* note 45, at 164 (containing a Jan. 26, 1849 letter from George Bancroft to Lord Palmerston, in which Bancroft states: "The United States, when they receive a man to citizenship, require of him a renunciation of all other allegiance. They would as soon tolerate a man with two wives as a man with two countries; as soon bear with polygamy as that state of double allegiance which common sense so repudiates that it has not even coined a word to express it. A slave cannot have two masters; nor a freeman two lieges."); *see also* HERZOG, *supra* note 60, at 57.

65 *See, e.g*., Treaty on Naturalization, N. Ger. Confed.-U.S., Feb. 22, 1868, 15 Stat. 615; Convention on Naturalization, Belg.-U.S., Nov. 16, 1868, 16 Stat. 747 [hereinafter Belg. Naturalization Convention]; Convention on Naturalization, Den.-U.S., July 20, 1872, 17 Stat. 941 [hereinafter Den. Naturalization Convention].

66 Chaney, *supra* note 12, at 399 ("But there were still several continental governments which had not been brought to acquiesce in the American doctrine").

67 *Id.* at 399–400.

68 *Id*.; *see also* GEORGE B. DAVIS & GORDON E. SHERMAN, ELEMENTS OF INTERNATIONAL LAW WITH AN ACCOUNT OF ITS ORIGIN SOURCES AND HISTORICAL DEVELOPMENT 150 (Harper & Bros, ed., 4th ed. 1916).

69 DAVIS & SHERMAN, *supra* note 68, at 150.

70 *Id.*

71 *Id.*

72 *Id.*

not uphold the charges of desertion, but he was required to serve.[73] Diplomatic efforts to obtain his release failed.[74]

Reinhardt Wagner was an emigrant from Poland living in Philadelphia.[75] In 1882, when he visited Lodz—then under Russian rule—he was charged with evasion of military duty and his U.S. passport was confiscated.[76] While the record is unclear, it appears that he escaped by borrowing another's passport and bribing the police to ensure he was not found when a warrant was issued for his arrest.[77] Commenting on Wagner's case, then Secretary of State Frederick Frelinghuysen observed that it was already quite harsh to require someone to serve out his military service if he had been called to serve it before he emigrated to another country.[78] But, for Frelinghuysen, that was nothing compared to Wagner's situation. Wagner had left Poland four or five years before the age of majority (the age at which he would be required to serve) and had lived in the United States long enough to acquire citizenship there.[79] "There would be no limit," said the Secretary, "to such a pretension; for the taking of a male infant out of Russia, might be regarded […] as an 'evasion' of eventual military service."[80]

Not all claims for U.S. protection were considered meritorious. On occasion, an immigrant was considered to have obtained U.S. citizenship fraudulently, if they had the principal intention not to reside the United States but to use it as a shield from military service in their originating country.[81] Persons who, soon after their naturalization in the United States, returned to their originating country with the intent to reside there on a long-term basis were often considered with suspicion. If diplomatic authorities suspected fraud of this kind, they could refuse to assist.[82] The possibility of fraud by some was not, however, considered a reason to abandon all immigrants to whatever might happen to them when they visited their countries of origin.[83]

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73 *Id.*

74 *Id.*

75 Chaney, *supra* note 12, at 400.

76 *Id.*

77 *Id.*

78 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW: AS EMBODIED IN DIPLOMATIC DISCUSSIONS, TREATIES, AND OTHER INTERNATIONAL AGREEMENTS, INTERNATIONAL AWARDS, THE DECISIONS OF MUNICIPAL COURTS, AND THE WRITINGS OF JURISTS: AND ESPECIALLY IN DOCUMENTS, PUBLISHED AND UNPUBLISHED, ISSUED BY PRESIDENTS AND SECRETARIES OF STATE OF THE UNITED STATES, THE OPINIONS OF THE ATTORNEYS-GENERAL, AND THE DECISIONS OF COURTS, FEDERAL AND STATE 627–28 (1906) (publishing Dec. 22, 1883 letter from Frederick Frelinghuysen, Secretary of State, to William H. Hunt, Minister to Russia); *see also* Chaney, *supra* note 12, at 400.

79 MOORE, *supra* note 78, at 627*; see also* Chaney, *supra* note 12, at 400.

80 MOORE, *supra* note 78, at 627*; see also* Chaney, *supra* note 12, at 400–01.

81 *See, e.g.*, Chaney, *supra* note 12, at 401.

82 *See* Richard W. Flournoy, Jr., *Naturalization and Expatriation*, 31 YALE L. J. 848, 850–55 (1922).

83 *See generally id.* at 850–55 (discussing how to address cases of possible fraud).

When he took office in 1929, President Herbert Hoover himself was, due to his Swiss ancestry, said to be "technically" subject to conscription into the Swiss army.[84] By one count, in 1930 there were as many as three million men born overseas and naturalized in the United States who could be conscripted into the military service of another country.[85] This was without counting the men born in the United States to a naturalized father—many of them were also considered subject to conscription by the countries of origin of their fathers.[86] This actually happened to some—again, persons born and raised in the United States—when they visited their parents' native country.[87]

The incompatibility of regimes meant that the problems extended beyond having to perform military service in a different country (where the emigrant did not live). Immigrants to the United States incurred two additional risks: (i) punishment by their country of origin for having served in the U.S. military,[88] and (ii) loss of U.S. citizenship for having served in a foreign military, even if they did so involuntarily.[89]

Over the decades, the problem of the military conscription of immigrants to the United States by their originating countries grew to be so "obnoxious"[90] that Congress demanded that the President act. On May 28, 1928, Congress adopted this joint resolution:

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84 Joseph Conrad Fehr, *Dual Citizenship an International Problem*, 33 CUR. HIST. 389, 389 (1930) [hereinafter *Dual Citizenship*].

85 *Id.* at 390.

86 *Id.*

87 *See, e.g.*, Letter from Richard Olney to John Peak (Mar. 6, 1897), Letter from John Peak to John Sherman (Apr. 27, 1897) & Letter from John Sherman to John Peak (May 12, 1897), *reprinted by* OFF. OF THE HISTORIAN, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, WITH THE ANNUAL MESSAGE OF THE PRESIDENT TRANSMITTED TO CONGRESS DEC. 6, 1897, at 562–69, https://history.state.gov/historicaldocuments/frus1896/d658 [hereinafter 1897 Diplomatic Papers]; MOORE, *supra* note 78, at 664–68 (both discussing the case of Mr. F. A. Schneider); *see also* H. REP. NO. 70-1482, at 1 (1928) (reporting "It is estimated that between three and four thousand cases of this kind are brought to the attention of the [State] department each year.").

88 *See, e.g.*, Joseph Conrad Fehr, *A Man with Two Countries*, 229 N. AM. REV. 371, 372 (1930) [hereinafter *Two Countries*] (recounting the story of a U.S. emigrant of French origin who was warned by the French Counsel that "upon entering French soil he could be either impressed into the French service or punished for not having reported for military duty, and also punished for having served in the State Militia of Louisiana without permission."); *see also* YEAMAN, *supra* note 60, at 39 (alluding to the problem of other countries punishing emigrants to the United States for having served in the U.S. military).

89 *See, e.g.*, *Two Countries, supra* note 88, at 372; *see also* H. REP. NO. 70-1482, at 2 (1928) (both telling the story of a native-born U.S. citizen of Italian origin who was forcibly conscripted into the Italian army and who, upon return to the United States, was found to have lost his U.S. citizenship and was arrested and ordered to show cause why he should not be deported as an alien).

90 *Dual Citizenship, supra* note 84, at 389; *see* H. REP. NO. 70-1482, at 2–4 (1928) (reporting in 1928 that three to four thousand cases were brought to the attention of the State Department each year. Over half were reported to involve persons of Italian parentage); *see also* HERZOG, *supra* note 60, at 61.

> Resolved [that] the President [is] respectfully requested to endeavor as soon as possible to negotiate treaties with the remaining nations with which we have of no such agreement, providing that persons born in the United States of foreign parentage, and naturalized American citizens, shall not be held liable for military service or any other act of allegiance during a stay in the territory subject to the jurisdiction of any such nation while citizens of the United States of America under the laws thereof.[91]

Three Presidential administrations (Calvin Coolidge, Herbert Hoover, and Franklin Roosevelt) acted on this request.[92] The United States signed treaties with Czechoslovakia,[93] Albania,[94] Norway,[95] Sweden[96] and Lithuania.[97] A multilateral agreement involving the United States and 23 other countries was also signed.[98]

The new treaties were comparable to the treaties Bancroft had initiated several decades earlier. That is, for the most part, they addressed the problem of military conscription only indirectly, through the question of citizenship and naturalization.[99] The treaties were predicated on the assumption that the origin of the conscription problem was that of dual nationality.[100] The treaties' principal function was to limit people—especially persons who have

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91 H.R. Res. 268, 70th Cong. (1928)*; see also* HERZOG, *supra* note 60, at 61–62.

92 *See* Naturalization Treaty, Czech.-U.S., July 16, 1928, 46 Stat. 2424 [hereinafter Czech. Naturalization Treaty]; *see also* Naturalization Treaty, Alb.-U.S., Apr. 5, 1932, 49 Stat 324 [hereinafter Alb. Naturalization Treaty]; Treaty Exempting from Military Service or Other Act of Allegiance Persons Having Dual Nationality, Nor.-U.S., Nov. 1, 1930, 46 Stat. 2904; Convention Exempting from Military Service Persons Having Dual Nationality, Swed.-U.S., Jan. 31,1933, 49 Stat. 3195; Treaty Defining in Certain Cases the Liability for Military Service and Other Acts of Allegiance of Naturalized Persons and Persons Born with Double Nationality, Lith.-U.S., Oct. 18, 1937, 53 Stat. 1569 (treaties concluded during the Presidential Administrations of Coolidge, Hoover, and Franklin Roosevelt).

93 Czech. Naturalization Treaty, *supra* note 92.

94 Alb. Naturalization Treaty, *supra* note 92.

95 Treaty Exempting from Military Service or Other Act of Allegiance Persons Having Dual Nationality, *supra* note 92.

96 Convention Exempting from Military Service Persons Having Dual Nationality, *supra* note 92.

97 Treaty Defining in Certain Cases the Liability for Military Service and Other Acts of Allegiance of Naturalized Persons and Persons Born with Double Nationality, *supra* note 92.

98 Protocol Relating to Military Obligations in Certain Cases of Double Nationality, Apr. 12, 1930, 16 L.N.T.S. 379. The other signatories are Germany, Austria, Belgium, Great Britain, Canada, Ireland, India, Chile, Colombia, Cuba, Denmark, Egypt, Spain, France, Greece, Luxemburg, Mexico, Netherlands, Peru, Portugal, Salvador, Sweden, and Uruguay.

99 *See, e.g.*, Treaty Defining in Certain Cases the Liability for Military Service and Other Acts of Allegiance of Naturalized Persons and Persons Born with Double Nationality, *supra* note 92, at 1570.

100 *Id.*

been naturalized—to just one nationality.[101] By doing that, the problem of military conscription by the "wrong" country should disappear.

B. The Reasoning and the American Reaction

On the eve of the American Revolution, English jurist William Blackstone described English subjecthood as a form of:

> [N]atural allegiance which cannot be forfeited, cancelled, or altered. For it is a principle of universal law that the natural-born subject of one prince cannot, by any act of his own, including swearing allegiance to another, discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other.[102]

In other words, according to Blackstone, once an English subject, always an English subject. Naturalization in another country was irrelevant and should not be recognized by the English state.

England was by no means the only country to have adopted a comparable perspective. As alluded above,[103] multiple countries asserted the same claim over their emigrants: that they could not escape the obligations of citizenship of their country of origin.[104] However, even if the word "obligations" was broad and could, in theory, encompass many different duties and requirements, in truth, only one was at issue: military service.[105]

For example: In 1884 Henry Vignaud, a member of the American diplomatic service in Paris at the time, explained to the U.S. Secretary of State Frederick T. Frelinghuysen the French "grounds of action."[106] In a

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101 *Id.*; *see also* Protocol Relating to Military Obligations in Certain Cases of Double Nationality, *supra* note 98, at 381.

102 Matthew J. Lindsay, *The Right to Migrate*, 27 LEWIS & CLARK L. REV. 95, 103 (2023) (quoting 2 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 368–69 (St. George Tucker ed., 1803)) (ellipses removed).

103 *See, e.g.*, *supra* notes 31–43, 48–51, 68–80 and accompanying text.

104 *See, e.g.*, Clifford S. Walton, *Naturalized Citizens - A Comparative Study*, 3 ANN. BULL. 57, 57–58 (1910).

105 *See, e.g.*, Serhiy Choliy, *Military Desertion as a Counter-Modernization Response in Austro-Hungarian Society, 1868-1914*, 9 REVISTA UNIVERSITARIA DE HISTORIA MILITAR 269, 273 (2020) ("Many countries also made compulsory military service an important element of the complex of civil rights and obligations, emphasizing the correlation of military service and citizenship. Serving in the military became a compulsory component of the citizen's maturity process.").

106 Letter from Henry Vignaud to Fredrick Frelinghuysen (Nov. 13, 1884), *reprinted by* OFF. OF THE HISTORIAN, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, TRANSMITTED TO CONGRESS, WITH THE ANNUAL MESSAGE OF THE PRESIDENT, DECEMBER 1, 1884, at 176, https://history.state.gov/historicaldocuments/frus1884/d112 [hereinafter 1884 Diplomatic Papers].

nutshell, "[n]atural citizenship in France is not incidental to the place of birth but to parentage; it is a privilege obtained by inheritance and transmitted in the same manner. A Frenchman carries with him his nationality wherever he goes, and transmits it to his children wherever they are born."[107] While, Vignaud continued, a Frenchman may be naturalized in another country, no French law recognizes this right.[108] Naturalization in another country can be done lawfully only with the consent of the French government.[109] "A natural-born Frenchman who transfers his allegiance to another country commits an act by which he forfeits his claim to French citizenship and *for which he is made to suffer more or less*."[110] If a Frenchman naturalizes in another country without the permission of the French government, he can be "held to account" for failing to comply with the military laws of France.[111] Indeed, such a person is caught in an impossible situation: The offense of failing to comply, Vignaud explains, "necessarily preceded the change of nationality, which, according to the French theory, is not to be recognized if made before coming of age."[112] Of course, it is the moment when the Frenchman becomes of age that the military service obligation takes effect. Finally, Vignaud explains that particularly harsh treatment is reserved for those who naturalized in another country shortly before coming to France.[113] They are assumed to have left France and acquired citizenship in another country for no purpose other than avoiding French military service.[114]

While Italy's position was described differently as compared to that of France, the outcome was the same: it was essentially impossible for an Italian emigrant to the United States to be released from military service obligations in Italy. On the one hand, for Italian emigrants who naturalized in the United States after reaching the age of majority, their obligation of military service was considered to have accrued while they were still Italian.[115] Their failure to serve was "constructive evasion."[116] On the other hand, for Italian emigrants who naturalized before the age of majority (most likely as a result of the naturalization of their father), the timing of the naturalization was

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107 *Id* at 176–77.
108 *Id* at 177.
109 *Id.*
110 *Id.* (emphasis added).
111 *Id.* at 178.
112 *Id.*
113 *Id* at 179.
114 *Id.*
115 *See, e.g.*, Letter from U.S. Secretary of State Richard Olney to U.S. Ambassador to Italy Wayne MacVeagh (Oct. 22, 1896), *reprinted by* OFF. OF THE HISTORIAN, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES WITH THE ANNUAL MESSAGE OF THE PRESIDENT TRANSMITTED TO CONGRESS, DECEMBER 7, 1896, AND THE ANNUAL REPORT OF THE SECRETARY OF STATE, at 423–24 (explaining this to be Italy's position) [hereinafter 1896 Diplomatic Papers].
116 *Id.* at 424.

ignored, and this emigrant, too, upon returning to Italy for a visit, was in danger of arrest and forcible conscription.[117]

Public opinion was a factor for policymakers in the emigrants' countries of origin. When Wright appealed to Chancellor Otto von Bismarck for a change to German legislation, Bismarck reportedly replied that it would be "almost impossible […] in view of the prejudice among the German peasants that, as all Prussians are subject to military duty, the returning adopted citizens would be exempt."[118] Nor did Bismarck want to be seen as encouraging the emigration of potential soldiers.[119] He did not want to offer an "emigration premium to all able-bodied men who had attained the age when they might be called out for active service in the army."[120]

As noted above,[121] not all U.S. diplomatic authorities were willing to assist naturalized U.S. citizens who found themselves forcibly conscripted by their countries of origin. In 1853, U.S. Secretary of State Edward Everett and United States Envoy to Prussia Daniel Barnard were categorical as well as scathing in their rejection of any duty to assist:

> The Government of the United States considers that the laws of Prussia, which require a certain amount of military service of its subjects, and which prescribe the conditions in reference to this military service on which emigration is permitted, are a matter of domestic policy, in which no foreign government has a right to interfere. It considers also that, if a Prussian subject, born and living under this state of the law, emigrates to a foreign country without a compliance, with those conditions, which alone can discharge him from the obligation of military service, he does so at his own personal risk. Going abroad under the burden of a duty still due to his native sovereign, his unauthorized emigration is in the nature of an escape from that duty and from the laws which prescribe and enforce it, and he remains liable, in spite of any contract he may enter into in the mean time [sic] of new allegiance to a foreign power, to have these laws executed against him whenever he returns within the territorial limits and jurisdiction of his native country.[122]

As noted above,[123] during the U.S. Civil War, there was even less of an inclination to assist naturalized U.S. citizens subject to forcible conscription by their countries of origin. Secretary of State Seward brooked no sympathy.

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117 *Id.*
118 1873 Diplomatic Papers, *supra* note 37, at 1296.
119 *Id.* at 1297.
120 *Id.*
121 *Supra* notes 39–41, 47, 55–57, 82 and accompanying text.
122 1873 Diplomatic Papers, *supra* note 37, at 1294–95.
123 *Supra* notes 55–57, and accompanying text.

He described them as "worthless" because they "fled before the requirements of military service by their adopted Government here, and not only took refuge from such service in their native land, but impertinently demanded that the United States should interpose to procure their exemption from military service exacted [there]."[124]

After the Civil War, U.S. diplomats turned their attention back to the problem and their attitude shifted. In 1867 George Yeaman, then U.S. Ambassador to Denmark, published an "inquiry" into "the claim of European governments to exact military service of naturalized citizens of the United States."[125] The 50-page document was less of an inquiry,[126] however, and more of a treatise on the injustices of the situation and the approach that, in Yeaman's opinion, the United States should adopt. Yeaman's argumentation merits in-depth examination.

Yeaman began by explaining that his work was justified by the frequency of the appeals made to U.S. consular authorities by naturalized U.S. citizens for protection from European governments seeking to extract military service from them.[127] Yeaman staunchly defended the right to emigrate from one country to another, and in doing so, the right to "[retire] from one Government and [adopt] another."[128] He emphasized the right to leave a community: "[s]o far as natural law is concerned the right to leave ones [sic] native community is even stronger and clearer than the right to become a member of another organized community."[129] Citing Hugo Grotius,[130] a 17th century Dutch humanist, Yeaman explained that subsisting and accrued obligations must be discharged at the time of departure.[131] However, continuing or future obligations must not be pursued.[132] If they are, the right of departure would be a "political nullity. It would be a mere privilege of natural locomotion, without imparting or acceding to the [departure], any legal or political effect."[133]

Yeaman acknowledged that some departures may be in bad faith, by, for example, people seeking to not have any obligation at all, either to the United States or to their country of origin ("the rascals [who] in the midst of

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124 1873 Diplomatic Papers, *supra* note 37, at 1296.

125 YEAMAN, *supra* note 60, at 5.

126 Arguably it is not an "inquiry" at all. Yeaman speaks little of specific cases, explaining "It is not deemed necessary to swell the proportions of this essay by numerous and lengthy quotations from laws, state papers, proclamations, and the diplomatic discussions of cases that have arisen." *Id.* at 2.

127 *Id.* at 1.

128 *Id.* at 5.

129 *Id.*

130 *Id.* at 6.

131 *Id.*

132 *Id.*

133 *Id.*

our troubles ran off to Europe to avoid service in the Union army, and in Europe plead their American citizenship to avoid service there").[134] However, that is not a reason to decide to not protect those who depart in good faith. "A bona fide change," Yeaman insisted "*ought to be held beyond doubt or dispute*."[135] In each case, the change should be considered "*a question of fact*."[136]

Yeaman recalled Blackstone's commentary on allegiance. For Blackstone allegiance is, as noted above, a "principal of universal law" that cannot be discharged or divested without the consent of the "prince" to whom it is due.[137] Yeaman noted that for Blackstone, if a person finds themselves in a difficult situation because they "subjected" themselves to another, it is their own fault—they brought it upon themselves. No accommodation should be made for them, and the allegiance owed to the "natural Prince" should remain firmly in place:

> Indeed the natural born subject of one Prince, to whom he owes allegiance, maybe entangled by subjecting himself absolutely to another, but it is his own act that brings him into those straits and difficulties, of owing service to two masters; and it is unreasonable, that by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural Prince.[138]

Yeaman was highly critical of Blackstone's position. To begin, Yeaman argued that Blackstone's position is entirely one-sided: "the rights and

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134 *Id.* at 13. *But see infra* notes 290–296 and accompanying text (explaining that few persons avoided the Civil War draft by traveling to Europe and that most draft evaders remained in the United States).

135 YEAMAN, *supra* note 60, at 13.

136 *Id.* (repeating this point more than once):

> The fact of removal, residence, and the assumption of other allegiance should be held a sufficient dissolution of his obligation of allegiance to our government, without the formality of a previous permission and release. A fraudulent or pretended removal, naturalization and return, by which a native might seek to reside among us as a foreigner to avoid military service or for other purpose would be a question of fact to be determined upon the evidence. *Id.* at 38.
>
> The change must be in good faith and accompanied with corresponding action and residence; and while the effect of such a real change ought to be an admitted rule of law the good or bad faith of the transaction ought to be only a question of fact. There being no room for dispute about the law, self-interest would make it incumbent on each government to avoid carefully the appearance of straining the facts to find a wrongful intention of avoiding a rightful service. If two goverments [sic] differ about the facts, having opposite opinions of what is the truth, it is no more than happens in many other cases. *Id*. at 41–42.

137 *Supra* note 102, and accompanying text.

138 YEAMAN, *supra* note 60, at 37 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 369 (Thomas M. Cooley ed., 1871)).

prerogatives are all on the side of the Prince and nought on the side of the subject."[139] Further, Yeaman argued that Blackstone's position is "intensely feudal"[140], "obsolete"[141], and it is "plainly inconsistent"[142] with "personal liberty"[143] and "constitutional responsible government based upon public opinion."[144]

Yeaman was adamant about the need for a person to be able to change their allegiance:

> [Some] affirm that this duty to the government of one's native allegiance is so innate and permanent that it cannot be dissolved at the option of the subject or citizen, even by permanent removal to another country, and the solemn engagement of loyalty to another government. This is the position or assumption we combat, and it is the point upon which the whole question turns.[145]

For Yeaman, the only question should be what were the emigrant's obligations at the time of emigration? Was the emigrant, at that moment, in default on the delivery of any service or the accomplishment of any task that was due to or demanded by their country of origin? Or, instead, was the emigrant merely the *type* of person who *could* be called upon to perform the service or task?[146]

Yeaman wondered where, among parents and children, the claims to allegiance will end, and what "distinction [or] line of division" can be drawn?"[147] "It is precisely the argument of birth that gives the foreign government the right to claim the allegiance and demand the military service of the American born children of the naturalized citizen of the United States."[148] Yeaman was astounded by the "absurdity and enormity of such a thing, and of the idea that foreign governments have any valid claim to the allegiance and military service of a fourth or a third of the people of the United States."[149]

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139 *Id.* at 37–38.
140 *Id.* at 38.
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.* at 41.
146 *Id.* at 43–44 ("[T]he only pertinent inquiry would be whether he was, at the time of emigration, in default of the rendition of service due or demanded, and not whether, in general terms, he was of an age and physical capacity that made him liable to be called into service, or had not served that term of months or years to which he might be held by his government.").
147 *Id.* at 44.
148 *Id.*
149 *Id.* at 44–45.

Yeaman did not see other countries offering a solution to "this continual source of trouble and of crying hardship."[150] On the contrary, if there was to be a solution, it had to come from the United States.[151]

It did not happen overnight but, ultimately, the solution did come from the United States. As discussed above, the country took the initiative to negotiate multiple treaties, in particular the Bancroft Treaties signed between 1868 and 1937.[152]

C. Switzerland: A Holdout Ahead of Its Time

Between 1868 and 1927 the United States concluded 23 Bancroft Treaties.[153] While the treaties were not identical, they shared at least two important commonalities. They specified: (i) the terms under which each country was to recognize the naturalization of its citizens by the other. Such recognition necessarily entailed concurrent recognition of the loss of citizenship of the emigrant's country of origin;[154] and (ii) the conditions under which a person naturalized in one country and who returned to their country of origin was presumed to have lost the nationality acquired by naturalization[155] (in most cases this was to occur if the person stayed in their country of origin for more than two years).[156] The necessary implication of this was that the person would resume citizenship of their country of origin and thus again be eligible for conscription in that country.

Without having mentioned the question of military service or conscription, these clauses had two principal purposes: (i) to protect bona fide emigrants from forced military conscription by their country of origin when, notably, the emigrant returned to their country of origin for a short visit; [157] but also (ii) to deter abuse of emigration and naturalization for the sole purpose of avoiding conscription in the emigrant's country of origin.[158]

As noted above, the treaties addressed the problem of military conscription only indirectly, through the question of citizenship and naturalization.[159] The treaties were predicated on the assumption that the origin of the conscription problem was dual nationality.[160] The treaties'

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150 *Id.* at 2.
151 *Id.*
152 Walter, *supra* note 59, at 825–26.
153 *Id.*
154 *Id.* at 826.
155 *Id.*
156 *Id.* at 826–27.
157 *Id.*
158 *Id.*
159 *See supra* notes 60–65 and accompanying text.
160 *Id*.

principal function was to limit people—most notably those who had been naturalized—to just one nationality.[161] By doing that, the problem of military conscription by the "wrong" country should disappear.[162]

As also noted above, the initial Bancroft treaties were not a panacea.[163] Despite their existence, by the late 1920s the "annoyances to United States citizens resulting from dual nationality" had grown to be "obnoxious."[164] One important reason for this was that there remained countries with which the United States had not yet concluded a treaty. That is why, in 1928, Congress adopted a joint resolution requesting the President to negotiate more treaties.[165]

Three successive Presidential administrations accordingly did so, negotiating treaties with, as mentioned above, Czechoslovakia,[166]Albania,[167] and Lithuania,[168] as well as the multilateral agreement involving the United States and 23 other countries.[169] In this process, however, there was one important holdout: Switzerland.

As early as 1850 Switzerland had concluded with the United States a "Convention of Friendship, Commerce and Extradition."[170] The treaty included a provision exempting the citizens of one country residing in the other from military service in the country of residence.[171] But Switzerland rejected the U.S. assertion that this clause necessarily exempted from Swiss military service emigrants from Switzerland who naturalized in the United States.[172] While U.S. diplomatic authorities wanted to presume that such persons, upon naturalization in the United States, automatically lost Swiss citizenship,[173] Swiss authorities countered that the Swiss constitution

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161 *Id*.

162 *Id*.

163 *Supra* notes 66–67 and accompanying text.

164 *Dual Citizenship, supra* note 84, at 389.

165 *Supra* note 91 and accompanying text.

166 *Supra* note 93 and accompanying text.

167 *Supra* note 94 and accompanying text.

168 *Supra* note 97 and accompanying text.

169 *Supra* note 98 and accompanying text.

170 Convention of Friendship, Commerce, and Extradition, Switz.-U.S., Nov. 25, 1850, 11 Stat. 587.

171 *Id.* at 589.

172 1897 Diplomatic Papers, *supra* note 87, at 562–64.

173 *See, e.g.*, Letter from James O. Broadhead, U.S. Ambassador to Switz., to Adrien Lachenal, Member of the Fed. Council of Switz., *reprinted by* OFF. OF THE HISTORIAN, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1894, WITH THE ANNUAL MESSAGE OF THE PRESIDENT TRANSMITTED TO CONGRESS, DECEMBER 3, 1894, at 685–86, https://history.state.gov/historicaldocuments/frus1894/d694 [hereinafter 1894 Diplomatic Papers]

> [A]t the time when our treaty with Switzerland was ratified [it was] well known that the United States Government claimed and exercised the right of naturalizing aliens and of exacting from them, as a condition of naturalization, an oath that they renounce forever all allegiance to every foreign prince, potentate, or power, without any condition [and that] when within the limits of the foreign state of which they were previously subject

protected Swiss citizenship.[174] It could not be lost without following a legally prescribed procedure for expatriation.[175] If the procedure was not followed, then no expatriation had occurred.[176] The person in question remained a Swiss citizen regardless of any naturalization that may have been undertaken elsewhere.[177] Upon return to Switzerland, even for a short visit, they could either be forcibly conscripted[178] or required to pay a tax in lieu of military service.[179]

In as early as 1882, U.S. diplomatic authorities first approached the Swiss government seeking a solution to the problem. The United States proposed a "naturalization convention" between the two countries that would resemble the 1872 treaty between the United States and Denmark.[180] That treaty was, as discussed above, among the first Bancroft treaties.[181] Under it, without any mention of military service, Denmark agreed to treat Danish emigrants to the United States as U.S. citizens only, and the United States agrees to treat U.S. emigrants to Denmark as Danish subjects only.[182] Given the manner by which the Swiss constitution protected Swiss citizenship—establishing that it could not be lost without following a legally prescribed

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> they should not be deemed citizens of the United States unless they had ceased to be subjects of such foreign state.

See also id. at 678 ("It will be observed that the treaty refers to citizens in general, which would embrace both native-born and naturalized citizens.").

174 1897 Diplomatic Papers, *supra* note 87, at 560–62 (translation of extract of Johann Jakob Blumer's HANDBOOK OF SWISS FEDERAL LAW); *see infra* notes 191–213 and accompanying text; *see also* Letters between Sec'y of State and Minister in Switz. (1935) & Letters from the Chargé in Switz. to the Sec'y of State (1935), *reprinted by* OFF. OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1935, THE BRITISH COMMONWEALTH; EUROPE, VOLUME II, at 785–87, https://history.state.gov/historicaldocuments/frus1935v02/d649 [hereinafter 1935 Diplomatic Papers].

175 *See, e.g.*, 1897 Diplomatic Papers, *supra* note 87, at 564–66.

176 *See, e.g., id.* at 560–62, 565.

177 *See, e.g.*, DEP'T OF STATE, NOTICE TO AMERICAN CITIZENS FORMERLY CITIZENS OF SWITZERLAND WHO CONTEMPLATE RETURNING TO THAT COUNTRY (1901), *reprinted by* OFF. OF THE HISTORIAN, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, WITH THE ANNUAL MESSAGE OF THE PRESIDENT TRANSMITTED TO CONGRESS DECEMBER 3, 1901, at 499, https://history.state.gov/historicaldocuments/frus1901/papers [hereinafter 1901 Diplomatic Papers] ("Notice to American Citizens Formerly Citizens of Switzerland Who Contemplate Returning to that Country").

178 *See, e.g.*, 1897 Diplomatic Papers, *supra* note 87, at 562–64 (discussing the case of Mr. F. A. Schneider, who was born in the United States of a father of Swiss origin); 1894 Diplomatic Papers, *supra* note 173, at 683–87 (discussing the case of Fred. Tschudy).

179 *See, e.g.*, Letters from Nicholas Fish to Willian Evarts (1878), *reprinted by* OFF. OF THE HISTORIAN, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, TRANSMITTED TO CONGRESS, WITH THE ANNUAL MESSAGE OF THE PRESIDENT, DECEMBER 2, 1878, at 841–45, https://history.state.gov/historicaldocuments/frus1878/d503 (discussing revisions to Swiss law pertaining to the military tax); *see also* 1894 Diplomatic Papers, *supra* note 173, at 678–80.

180 MOORE, *supra* note 78, at 671.

181 *Supra* note 65 and accompanying text.

182 Den. Naturalization Convention, *supra* note 65, at art. I.

procedure for expatriation—Switzerland's rejection of the U.S. proposal was predictable.[183]

Seemingly undeterred, over the following 53 years (between 1882 and 1935) the United States tried no fewer than five more times to conclude a "naturalization convention"[184] with Switzerland.[185] Each time Switzerland either ignored the U.S. proposal or expressly rejected it.[186]

U.S. diplomats derided the Swiss constitution's protection of citizenship as an anachronism—a throwback to another time. In 1879, then Secretary of State William M. Evarts wrote to then U.S. Ambassador to Switzerland, Nicholas Fish, that Switzerland's "doctrine of perpetual allegiance" was an "[extravagant] pretension."[187]

Nearly two decades later, the American derision continued. In his 1896 annual report to Congress, then U.S. Secretary of State Richard Olney stated: "The Helvetian Republic appears to stand by a somewhat notable anomaly, with the minority of modern States in holding to the now generally abandoned doctrine of perpetual allegiance."[188] Olney repeated his critique the next year. Writing in 1897 to then Ambassador to Switzerland John Lee Peak, Olney described the "alleged score of owing paramount allegiance to Switzerland" as "extraordinary and exceptional."[189]

However, in his 1887 *Handbook of Swiss Federal Law* (*Handbuch des schweizerischen Bundesstaatsrechtes*),[190] Swiss statesman Johann Jakob Blumer gives an entirely different explanation that does not mention the word "allegiance," nor allude to the amorphous concept.[191] According to Blumer, the constitutional protection of Swiss citizenship originally was needed for a concrete and highly practical reason: to end the practice by certain Swiss cantons of withdrawing citizenship from persons who, for example, "embraced another religion" or married a person of a different faith.[192]

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183 MOORE, *supra* note 78, at 671–72.

184 *See, e.g., id.* at 671–76.

185 The United States tried in: 1884. *See id.* at 671–72; 1886. *See id.* at 672; 1896. *See id.* at 672; 1931. *See* 1935 Diplomatic Papers, *supra* note 174, at 775–84; and 1935. *See id.* at 785.

186 *See* MOORE, *supra* note 78, at 671–78; 1935 Diplomatic Papers, *supra* note 174, at 783–85.

187 *See* MOORE, *supra* note 78, at 659.

188 *Id.* at 672; *see also* REPORT OF THE SECRETARY OF STATE, 1896 Diplomatic Papers, *supra* note 115, at LXXXVIII.

189 MOORE, *supra* note 78, at 665.

190 JOHANN JAKOB BLUMER, HANDBUCH DES SCHWEIZERISCHEN BUNDESSTAATSRECHTES [HANDBOOK OF SWISS FEDERAL LAW], 2. auf Grundlage der Bundesverfassung von 1874 [2. revised on the basis of the Federal Constitution of 1874] (1877) (Ger.), https://babel.hathitrust.org/cgi/pt?id=hvd.hnifsp&seq=9.

191 *See* 1897 Diplomatic Papers, *supra* note 87, at 560–62.

192 *See generally id.* at 560; *see also* MOORE, *supra* note 78, at 676.

Without such protection, such persons would be stateless, a condition that Swiss lawmakers understood should be avoided.[193]

Blumer further explains that in 1848, a lawmaker from Zurich proposed to the Diet[194] an exception for emigrants from Switzerland who are "uncontested" citizens of another country.[195] If emigrants were, for all time and in all circumstances, considered citizens, then Swiss cantons would have outside their borders a population with no direct connection to the country.[196] They would, it was argued, not "avail themselves of the rights of citizenship" except when it was to their advantage to do so.[197] According to Blumer, the proposal's opponents countered that the right of Swiss citizenship "should be held so sacred that any proscription of it was absolutely inadmissible."[198] The right of Swiss citizenship was highly valuable and important.[199] It was "bound up and linked with the sentiments of the Swiss people."[200] Given this, Swiss citizenship should not be lost absent voluntary renunciation and proof of domicile outside the country.[201] With these arguments, the proposal was rejected.[202]

When the Swiss constitution was revised in 1871 and 1873, an amendment was proposed that would deprive Swiss citizens of their citizenship if they naturalized in another country.[203] Supporters of this amendment complained that Swiss who naturalized in the United States and returned to Switzerland refused to fulfill their duties of Swiss citizenship when it was inconvenient for them, asserting their U.S. citizenship.[204] But, if they were in need of "aid and assistance" they did not hesitate to assert their Swiss citizenship.[205] Their position was so equivocal and could be so easily modified that it "provoked conflicts" and was "contrary to the spirit of the ancient country."[206]

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193 BLUMER, *supra* note 190 (in Peak's translation, he uses the phrase "*heinmat losat*," or "homeless people."); MOORE, *supra* note 78, at 676.

194 *See, e.g.*, Andreas Ladner, *The Swiss Parliament: A Hybrid System Based on the Idea of Changing Majorities*, PSA PARLIAMENTS (May 22, 2014), https://psaparliaments.org/2014/05/22/the-swiss-parliament-a-hybrid-system-based-on-the-idea-of-changing-majorities/ (explaining that the Diet was Switzerland's legislative and executive council until 1848).

195 1897 Diplomatic Papers, *supra* note 87, at 560–61; MOORE, *supra* note 78, at 676–77.

196 1897 Diplomatic Papers, *supra* note 87, at 560–61; MOORE, *supra* note 78, at 676–77.

197 1897 Diplomatic Papers, *supra* note 87, at 560–61; MOORE, *supra* note 78, at 677.

198 1897 Diplomatic Papers, *supra* note 87, at 560–61; MOORE, *supra* note 78, at 677.

199 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 677.

200 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 677.

201 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 677.

202 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 677.

203 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 677.

204 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 677.

205 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 677.

206 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 677.

This time, the proposal was categorically rejected for a litany of reasons: it would again lead to statelessness;[207] it was "in contradiction of Swiss history and the development of its public rights;"[208] it was opposed to public sentiment that Swiss citizenship should not be lost except upon voluntary renunciation;[209] and that sometimes naturalization was beyond the control of the Swiss citizen—that he could be "compelled by circumstances" to become a citizen of another country (for example, in order to own land or to exercise a certain profession).[210] Yes, dual citizenship may give rise to conflicts, but they were "not so great as to discredit a theory widely upheld and deeply imbedded in the hearts of the Swiss people."[211] Ultimately, Blumer observes, "Swiss laws admit the principle of double citizenship."[212] This is the case even if it is prohibited in many other countries.[213]

Blumer's lengthy discussion of the Swiss constitution's protection of citizenship makes clear that, contrary to Secretary Olney's characterization, the protection is not rooted in the anachronistic and "generally abandoned doctrine of perpetual allegiance."[214] Instead, it is rooted in what was then the highly forward-looking concerns of avoiding statelessness and allowing for dual citizenship.[215] In that manner, the constitutional protection certainly was "extraordinary and exceptional,"[216] but not for the reasons imagined by Secretary Olney. Regarding Switzerland's concerns, the country was ahead of its time. It was not until after World War 2 that a more general recognition of the need to prevent statelessness emerged.[217] The recognition of the legitimacy of dual citizenship emerged in the subsequent decades.[218]

It was not until 1936 that the United States finally accepted that Switzerland was not going to enter into any kind of agreement that would

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207 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 677.

208 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 677.

209 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 677.

210 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 677.

211 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 677–78.

212 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 678.

213 1897 Diplomatic Papers, *supra* note 87, at 561; MOORE, *supra* note 78, at 678.

214 *Supra* note 188 and accompanying text.

215 *But see* Dimitry V. Kochenov, *Statelessness: A Radical Rethinking of the Dominant Citizenism Paradigm*, 20 ANN. REV. LAW & SOC. SCI. 117, 118 (2024) (arguing that the problem is not statelessness but the "world's inequitable neo-feudal citizenism arrangement.") [hereinafter *Statelessness*].

216 *Supra* note 189 and accompanying text.

217 *See generally* Michelle Foster, *The 1961 Convention on The Reduction of Statelessness: History, Evolution and Relevance*, 4 STATELESSNESS & CITIZENSHIP REV. 188 (2022); *see also* MIRA L. SIEGELBERG, STATELESSNESS: A MODERN HISTORY (2020); Laura Snyder, *The Myths and Truths of Extraterritorial Taxation*, 32 CORN. J. L. & PUB. POL'Y 185, 257 (2022) [hereinafter *Myths and Truths*].

218 *See, e.g.,* YOSSI HARPAZ, CITIZENSHIP 2.0: DUAL NATIONALITY AS A GLOBAL ASSET (2019); PETER J. SPIRO, AT HOME IN TWO COUNTRIES: THE PAST AND FUTURE OF DUAL CITIZENSHIP (2016).

result in stripping Swiss citizenship from anyone who did not formally renounce it.[219] This, however, did not mean that Switzerland was not willing to do anything. On the contrary, it recognized the problem of requiring military service and/or the payment of a military tax by people who did not reside in the country.[220] Accordingly, Switzerland made a counterproposal to the United States in the form of a treaty that would exempt second-generation Swiss citizens (persons born in the United States) from military service and the military tax, while permitting them to maintain their Swiss citizenship.[221] Even though this did not address the problem for Swiss-born naturalized U.S. citizens, the United States, faced with increasing pressure to do *something*,[222] accepted the Swiss proposal and a treaty was finally signed in 1937.[223]

D. Adoption of the Swiss Approach

The last Bancroft-style treaty was signed in 1937, with Lithuania.[224] "Bancroft-style" means that the treaty was predicated on the assumption that persons who naturalized in their country of immigration necessarily were no longer citizens of their country of origin.[225] As a result, if a person returned to their country of origin for a temporary visit, they should not be required to perform military service or other "act of allegiance."[226] However, if that person returned to their country of origin for an extended period—more than two years—he would be presumed, absent evidence to the contrary, to have "renounced his naturalization" and thereby resume citizenship of his country of origin.[227]

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219 1935 Diplomatic Papers, *supra* note 174, at 789 (U.S. Assistant Secretary of State Wilbur J. Carr writing to U.S. Ambassador to Switzerland Hugh R. Wilson: "Although the Department would much prefer a naturalization treaty along the lines of the one proposed by it, it appears from the position thus taken by the Swiss Government that the completion of such a treaty is impossible.").

220 *Id.* at 786–88.

221 *Id.* at 786–89.

222 The Department of State reported receiving many letters from or on behalf of U.S. citizens of Swiss origin concerning the military taxes assessed against them by the Swiss government and inquiring about the conclusion of a treaty. *See id.* at 775, 784.

223 Convention between the United States of America and Switzerland Relative to Military Obligations of Certain Persons Having Dual Nationality, Switz.-U.S., Aug. 6, 1935, 53 Stat. 1791. The Swiss proposal was accepted with minor modifications. *See* 1935 Diplomatic Papers, *supra* note 174, at 789–90; *see generally* HERZOG, *supra* note 60, at 62 (describing the treaty with Switzerland, as well as treaties with Norway, Sweden, and Finland, as "deal[ing] exclusively with military service and other acts of allegiance for person with dual nationality.").

224 *Supra* note 97 and accompanying text.

225 *Supra* notes 62, 154 and accompanying text.

226 *See, e.g.,* Treaty Exempting from Military Service or Other Act of Allegiance Persons Having Dual Nationality, *supra* note 92.

227 *Supra* note 63 and accompanying text.

After the signature of the treaty with Lithuania in 1937,[228] nineteen Bancroft-style treaties were in effect, including the multilateral agreement involving the United States and 23 other countries.[229] However, three decades later, a series of decisions by the U.S. Supreme Court brought the United States closer to the Swiss approach of protecting citizenship. In doing so, the Bancroft treaties became obsolete.

To understand how that occurred, first it is necessary to explain the U.S. citizenship and nationality laws which existed at that time. The Nationality Act of 1940[230] and the Immigration and Nationality Act of 1952[231] codified the highly fluid nature of U.S. citizenship as something one could have, lose, and, in some cases re-gain[232] depending upon multiple life circumstances. Circumstances for losing U.S. citizenship included: residing outside the United States for an extended period, reaching 16 years of age while residing outside the United States, and the expatriation of a parent. A long list of expatriating acts included: naturalization in another country, making an oath of allegiance to another country, voting in a foreign election, serving in the armed forces of another country, and desertion of the U.S. military.[233] Special expatriating provisions applied to naturalized U.S. citizens: they were considered to have lost U.S. citizenship if they resided in their originating country for three years (in some cases two) or in any other country for five years.[234]

These Acts had a considerable impact. Data covering the period 1945 to 1967 (the year, as discussed below,[235] *Afroyim* was decided), shows that an average of 4,096[236] Americans per year were non-voluntarily expatriated (lost their U.S. citizenship by operation of law).

Patrick Weil tells the story of how U.S. Supreme Court Justice Earl Warren battled for more than a decade to protect U.S. citizenship from forced

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228 *Supra* note 97 and accompanying text.

229 *Supra* note 98 and accompanying text. *See also* HERZOG, *supra* note 60, at 59 (listing Bancroft Treaties).

230 Nationality Act of 1940, Pub. L. No. 76–853, 54 Stat. 1137.

231 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

232 For example, a woman who had lost her U.S. citizenship by reason of a marriage to an alien could, upon the termination of that marriage and subject to certain other conditions, re-gain U.S. citizenship. Nationality Act of 1940 § 317(b), 54 Stat. at 1146–47; Immigration and Nationality Act of 1952, 66 Stat. at 246–47.

233 *See Myths and Truths, supra* note 217, at 196; *see also* HERZOG, *supra* note 60, at 45–50.

234 Expatriation Act of 1907, Pub. L. No. 59-193, § 2, 34 Stat. 1228, 1228–29; Nationality Act of 1940 § 317(b), 54 Stat. at 1170; Immigration and Nationality Act of 1952 § 352, 66 Stat. at 269–70.

235 *Infra* notes 247–48 and accompanying text.

236 *See* PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC 198–99 (2012) [hereinafter SOVEREIGN CITIZEN]. This is calculated after removing from the total count of expatriated persons the number of persons listed as having renounced U.S. citizenship (an average of 265 persons per year from 1945 to 1967). *See also Myths and Truths, supra* note 217, at 196.

expatriation.[237] The highlights of this work include three seminal U.S. Supreme Court decisions:

Trop v. Dulles (1958):[238] In 1944 Private Albert L. Trop escaped from a U.S. Army stockade in Morocco. He was gone less than a day and surrendered when he was walking back towards his base. He was, nevertheless, convicted of desertion. His later application for a passport was denied on the grounds that under the Nationality Act of 1940, he had lost his citizenship due to desertion.[239] Trop was rendered stateless.[240]

The Court ruled the relevant section of the Nationality Act of 1940 violated the 8th Amendment as a cruel and unusual punishment.[241] In the decision, Warren described the gravity of the problem of statelessness and the importance of citizenship for all other rights, stating:

> [With] denationalization […] there may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community […] the expatriate has lost the right to have rights.[242]

Schneider v. Rusk (1964):[243] Angelika L. Schneider was born in Germany. As a child, she moved to the United States and became a naturalized U.S. citizen along with her parents. As an adult, she moved back to Germany. Her 1959 application for a U.S. passport was denied on the grounds that she had lost her U.S. citizenship because she had returned to live in her country of origin for more than three years.[244]

The Court held that the law cannot create a second class of citizens—that since no rule deprived natural-born Americans of their citizenship because of extended or permanent residence overseas, it was unconstitutionally discriminatory and a violation of Fifth Amendment due

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237 Patrick Weil, *Can a Citizen be Sovereign?*, 8 HUMANITY 1, 3–12 (2017) [hereinafter *Can a Citizen be Sovereign?*]; *see also* SOVEREIGN CITIZEN, *supra* note 236, at 111–75; *Myths and Truths, supra* note 217, at 196–97.

238 *See generally* Trop v. Dulles, 356 U.S. 86 (1958).

239 *Id.* at 87; *see also Can a Citizen be Sovereign?*, *supra* note 237, at 4; SOVEREIGN CITIZEN, *supra* note 236, at 146–47; *Myths and Truths, supra* note 217, at 197.

240 *Trop*, 356 U.S. at 87.

241 *Id.* at 99–103.

242 *Id.* at 101–02; *Myths and Truths*, *supra* note 217, at 197.

243 *See generally* Schneider v. Rusk, 377 U.S. 163 (1964).

244 *Id.* at 164; *see also* SOVEREIGN CITIZEN, *supra* note 236, at 169–71; *Myths and Truths, supra* note 217, at 197.

process to apply such a rule only to naturalized citizens.[245] The Court further stated: "Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons."[246]

In *Afroyim v. Rusk*,[247] Beys Afroyim, a naturalized U.S. citizen, moved to Israel where he voted in an election. The U.S. Department of State later refused to renew his passport, claiming he had lost his U.S. citizenship because of his participation in a foreign election.[248] The Court rejected this claim, holding that Congress may not do anything to "shift[],"[249] "cancel[],"[250] dilute[],"[251] "destroy,"[252] or "abridge or affect"[253] citizenship conferred by the Fourteenth Amendment.[254]

The *Afroyim* Court further held:

> The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. [T]he Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.[255]

With *Afroyim*, the U.S. Supreme Court made it clear: U.S. citizenship is safeguarded under the Fourteenth Amendment. Congress may not take it away from a person who does not want to give it up. Nor may Congress take actions that "shift," "cancel," "dilute," "destroy," "abridge," or "affect" citizenship.[256]

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245 *Schneider*, 377 U.S. at 168–69.

246 *Id.* at 169; *see Myths and Truths*, *supra* note 217, at 198; *see also* HERZOG, *supra* note 60, at 58.

247 *See generally* Afroyim v. Rusk, 387 U.S. 253 (1967).

248 *Id.* at 254; *see Can a Citizen be Sovereign?*, *supra* note 237, at 6–7; SOVEREIGN CITIZEN, *supra* note 236, at 173–76; *Myths and Truths, supra* note 217, at 198.

249 *Afroyim*, 387 U.S. at 262.

250 *Id.*

251 *Id.*

252 *Id.* at 263 ("It seems undeniable from the language [the framers of the Fourteenth Amendment] used that they wanted to put citizenship beyond the power of any governmental unit to destroy.").

253 *Id.* at 266.

254 *See Myths and Truths, supra* note 217, at 198.

255 *Afroyim*, 387 U.S. at 268.

256 *Supra* notes 249–54 and accompanying text.

Put another way, *Afroyim* makes clear that U.S. citizenship is immutable. It belongs to the citizen, not to the government.[257] The only exception to the immutability of U.S. citizenship (nationality) is if the American genuinely desires to terminate it. U.S. polices are adopted by "a group of citizens temporarily in office."[258] If the policies treat an American so harshly that they drive the American to renounce their U.S. citizenship when, in the absence of those polices, the American would not have renounced, then there was no genuine desire—no true voluntary[259] will—to stop being a U.S. citizen. *Afroyim* makes clear that, in this case, the policies violate Fourteenth Amendment citizenship. U.S. policies that drive an American to renounce U.S. citizenship—and, again, policies without which the American would not have renounced—unquestionably "shift," "cancel," "dilute," "destroy," "abridge," and "affect" citizenship.[260]

But in 1967—the year *Afroyim* was decided—there remained in place seventeen Bancroft-style treaties, including the multilateral treaty.[261] They still provided for the automatic loss of citizenship of an emigrant's country of origin upon naturalization in the United States.[262] And, even more problematically, considering *Schneider*, they provided for naturalized U.S. citizens to automatically lose U.S. citizenship if they remained in their country of origin for too long.[263] As Michael Walter explained, in contradiction to *Schneider*, the treaties kept in place the second-class citizenship of naturalized Americans.[264] Concluding that, because of *Schneider* and *Afroyim*, the remaining Bancroft treaties had become

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257 *Supra* note 255 ("The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship.").

258 *Afroyim*, 387 U.S. at 268.

259 *See id.; see also Voluntary*, COLLINS ENG. DICTIONARY, https://www.collinsdictionary.com/dictionary/english/voluntary (last visited Oct. 26, 2025) (defining voluntary as an action done not by force but by choice).

260 The immutability of U.S. citizenship (nationality) is discussed further *infra*, notes 435–458 and accompanying text; *see also Myths and Truths, supra* note 217, at 201–03 (analogizing dramatic increases in renunciations of U.S. citizenship to constructive eviction and constructive dismissal).

261 *Supra* note 229 and accompanying text. Brazil terminated its agreement in 1951. Decreto No. 29.200 (Jan. 24, 1951), https://www.planalto.gov.br/ccivil_03/decreto/1950-1969/d29200.htm (stating that Brazil terminated its agreement in 1951). The United Kingdom terminated its agreement in 1953. *Convention between Great Britain and The United States of America, relative to Naturalization*, API.PARLIAMENT.UK, https://treaties.fcdo.gov.uk/awweb/awarchive?type=file&item=74272 (last visited Oct. 26, 2025) (stating the United Kingdom terminated its agreement in 1953).

262 *Supra* notes 62, 154 and accompanying text.

263 *Supra* notes 63, 227 and accompanying text.

264 *See, e.g.*, Walter, *supra* note 59, at 832–33.

unenforceable, in 1980 then President Jimmy Carter terminated most of them.[265]

The three decisions of *Trop*, *Schneider*, and *Afroyim*, together with the termination of the remaining Bancroft-style treaties, made clear that after decades of trying to convince Switzerland to adopt the U.S. position, the United States instead adopted the Swiss position: statelessness should be avoided, and citizenship should be protected from the biases and preconceptions of lawmakers. Citizenship should not be lost in the absence of voluntary relinquishment/renunciation.

Today, the forcible conscription of a country's emigrants is not the problem it was during previous centuries. Fewer countries practice conscription.[266] And in the case of people whose dual citizenship includes a country that does conscript its citizens, there is likely an applicable treaty. Except that rather than stripping away one citizenship, the treaty allows dual citizenship to remain in place.[267] If the dual citizen lives in one of his countries of citizenship and is most closely connected to that country, then he is exempt from military service in the other country.[268] It is a result that took more than a century and countless diplomatic overtures to achieve.

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265 U.S. Dep't of State, 7 FAM 1270 Appendix A (Mar. 6, 2009) (explaining the three treaties that remained in effect after 1980 were those with Albania, Czechoslovakia, and Bulgaria, and they were terminated in 1991, 1997, and 2017, respectively), https://fam.state.gov/FAM/07FAM/07FAM1200apA.html#M1270; *see Bancroft Treaties*, ALCHETRON (Oct. 13, 2024), https://alchetron.com/Bancroft-Treaties; s*ee also* HERZOG, *supra* note 60, at 59.

266 *See, e.g.*, Jan D. Walter, *Europe: Is Compulsory Military Service Coming Back?*, DEUTSCHE WELLE (June 11, 2023), https://www.dw.com/en/europe-is-compulsory-military-service-coming-back/a-65880469 (explaining since the collapse of communism and the end of the Cold War, many countries have abolished compulsory military service); *see also* CITIZENSHIP, *supra* note 1, at 162–63.

267 *Return to the Draft: Postponements, Deferments, Exemptions, Selective Service System*, https://www.sss.gov/about/return-to-draft/#s3 (last visited Oct. 26, 2025) ("Immigrants and dual nationals in some cases may be exempt from U.S. military service depending upon their place of residence and country of citizenship."); *see US Military Service*, AM. CITIZENS ABROAD, https://www.americansabroad.org/us_military_service (last visited Oct. 26, 2025) (linking to an older version of the Selective Service website that no longer exists, which explains the reason for an exemption more clearly: "A dual national whose other country of nationality has an agreement with the US that specifically provides for an exemption, is exempt from induction."); *see also Which Countries Have an Agreement with the US that Specifically Exempts Dual Nationals from Induction into the US Military in the Event of a Draft?*, STACK EXCH. (June 20, 2024), https://law.stackexchange.com/questions/102345/which-countries-have-an-agreement-with-the-us-that-specifically-exempts-dual-nat.

268 *See, e.g.*, Protocol Relating to Military Obligations in Certain Cases of Double Nationality, *supra* note 98; *see also, e.g.*, Org. of Swiss Abroad, *Information for Dual Nationals*, SWISS CMTY., https://www.swisscommunity.org/en/living-abroad/military-service-for-the-swiss-abroad/information-for-dual-nationals (last visited Oct. 26, 2025); HARALD WALDRAUCH, *Rights of Expatriates, Multiple Citizens and Restricted Citizenship for Certain Nationals, in* ACQUISITION AND LOSS OF NATIONALITY: VOLUME 1: COMPARATIVE ANALYSES: POLICIES AND TRENDS IN 15 EUROPEAN COUNTRIES 377–78 (Rainer Bauböck et al., eds. 2006); *Dual Citizenship, supra* note

III. EMIGRATION FROM THE UNITED STATES: REFUSING TO LET GO WITH WORLDWIDE TAXATION

Part II of this article reveals how many countries refused to let go of their emigrants to the United States. This was manifested principally by their forcible conscription even though the emigrants no longer lived in their countries of origin and had established lives in the United States.[269] Part II also describes how the United States was pressured to act to protect these emigrants—immigrants from the U.S. perspective—and how the country finally did act, by negotiating treaties.[270] At first, the treaties assumed that it was not possible to protect the emigrants from forcible conscription without stripping them of citizenship of their country of origin.[271] But eventually, Switzerland demonstrated that military service and citizenship can be separated.[272] That is, Switzerland demonstrated that emigrants can be exempted from military service in their country of origin while preserving citizenship of that country (in essence, preserving their dual citizenship).[273] This is the solution that nearly all countries that still practice conscription apply today.[274] As a result, a problem that plagued the United States during more than the first half of its existence is today barely an issue.[275]

Ironically—and hypocritically—at the same time the United States was seeking the release of its immigrants from the figurative clutches of their countries of origin, the United States was developing a tight hold on its emigrants from the United States. It did this with a form of taxation not practiced by any other country.[276] Section A describes how and why this form

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84, at 117–18 ("[B]ilateral arrangements have resolved duplicative military service obligations for those holding dual citizenship.").

269 *See supra* notes 16–23, 30–45, 48–50, 68–80 and accompanying text.

270 *See supra* notes 44–46, 58–65, 91–101, 125–152 and accompanying text.

271 *See supra* notes 60–65, 99–101 and accompanying text.

272 *See supra* notes 170–223 and accompanying text.

273 *Id*.

274 *Supra* notes 266–68 and accompanying text.

275 It would be wrong to claim that the problem of forced conscription by a country where the conscript does not live has been entirely eradicated, but such a problem is today the rare exception rather than the rule. *See, e.g.*, Michael Tae Woo, *Dual Citizenship and Mandatory Military Service in the Republic of Korea*, 108 IOWA L. REV. 2049 (2023) (discussing the problem of the conscription by South Korea of dual U.S.-Korean citizens living in the United States).

276 *See Unacknowledged Realities*, *supra* note 11, at 246 n.11 (explaining that three other countries—Eritrea, Myanmar, and Hungary—tax the foreign income of their non-resident citizens on an ongoing basis. However, these countries do so in manners that are different and considerably more limited as compared to the United States); *see also* Edward Zelinsky, *Defending U.S. Citizenship-Based Taxation in Theory and in Practice: An Essay on Fiscal Citizenship in a FATCA World*, 46 CARDOZO L. REV. 2361, 2373–82 (2025), https://cardozolawreview.com/wp-content/uploads/2025/09/ZELINSKY.46.6.7_PRINT.pdf [hereinafter *Defending U.S. Citizenship-Based Taxation*] (offering examples where a citizen of Canada, Australia, or the United Kingdom might maintain enough ties to their country of citizenship such that they continue to be treated as a tax

of taxation came into being. Section B explains how it has evolved into the highly penalizing system that exists today. It is a system so penalizing that, like the conscription policies discussed in Part II, it also results in the forcible destruction of citizenship. Section C summarizes the reasoning offered by defenders of the current system. Section D describes the effect of the system on other countries. Section E discusses how other countries have, to date, reacted to the system.

A. The Stubborn Myth of the Wealthy Draft Evader "Skulking Away" to Live "in Luxury" in Paris

The United States first developed a hold on its emigrants as early as the Civil War.[277] In 1861, the United States adopted the first income tax.[278] From the beginning, Americans living outside the United States were included in the tax.[279] But under the Revenue Acts of 1861 and 1862, while all U.S. residents—without distinctions based on citizenship—were taxed based on worldwide income, overseas Americans were taxed only with respect to unearned income that was U.S.-sourced.[280] This changed, however, with the Revenue Act of 1864.[281] For Americans living overseas, the 1864 Act included the taxation of both unearned and earned income, and income sourced both inside and outside the United States (worldwide income).[282]

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resident even if they no longer live in the country.) These examples prove the general rule that it is possible for a citizen of one of these countries to establish tax residency in another country and, in doing so, end their tax residency in the first country. They can do this without having to renounce their citizenship of the first country. This possibility is denied to U.S. citizens. There is nothing they can do to end their U.S. tax residency apart from renouncing U.S. citizenship. This is discussed further *infra*, notes 345–47, 797–827 and accompanying text. *See also infra* note 668 and accompanying text (discussing Zelinsky's express admission that "other nations [other than the United States] define fiscal citizenship by virtue of an individual's residence or domicile [rather than by virtue of citizenship]."). This admission directly contradicts Zelinsky's assertion that other countries tax their overseas citizens' worldwide income in a similar manner to the United States.

277 *See Unacknowledged Realities*, *supra* note 11, at 247; *see also Myths and Truths, supra* note 217. at 226.

278 *See Unacknowledged Realities*, *supra* note 11, at 247; *see also Myths and Truths, supra* note 217. at 226.

279 *See Unacknowledged Realities*, *supra* note 11, at 247; *see also Myths and Truths, supra* note 217. at 226.

280 Revenue Act of 1861, ch. 45, § 49, 12 Stat. 292, 309; Revenue Act of 1862, ch. 119, § 90, 12 Stat. 432, 473 (stating the Acts taxed the worldwide income of "any person residing in the United States," regardless of citizenship. The Acts taxed only U.S.-source income of "citizens of the United States residing abroad."); *see Unacknowledged Realities*, *supra* note 11, at 247; *see also Myths and Truths, supra* note 217, at 270–71.

281 Revenue Act of 1864, ch.173 §116, 13 Stat. 223, 281 (stating the Act taxed the worldwide income of "every person residing in the United States," regardless of citizenship, as well as "any citizen of the United States residing abroad."); *see Unacknowledged Realities*, *supra* note 11, at 247; *see also Myths and Truths, supra* note 217, at 226, 271.

282 Revenue Act of 1864, ch. 173, 13 Stat. at 281.

The explanation for this consequential change has its roots in the North's implementation of its first draft in 1863.[283] By June 1864 (the time of the adoption of the Revenue Act of 1864),[284] two of the North's total of four enrolment periods had taken place.[285] The draft was highly unpopular.[286] Many sought to avoid service by legal means, which included the payment of a $300 "commutation" fee, the payment of a substitute to serve in the conscript's place, or obtaining a physical disability.[287] Others evaded illegally by failing to report.[288]

At least one member of Congress resented this. During Congressional debates in the weeks leading up to the adoption of the Revenue Act of 1864, Senator Jacob Collamer stated:

> We do not desire that our citizens who have incomes in this country, dividends of banks, and incomes from other corporations and from interest on the public debt, should go out of the country, reside in Paris or elsewhere, avoiding the risk of being drafted, or contributing anything personally to the requirements of the country at this time, and get off with as low a tax as anybody else. [. . .] If a man draws his income from our public debt, or from property here, and resides in Paris, skulking away from contributing his personal support to the Government in this day of its extremity, he ought to pay a higher income tax.[289]

Senator Collamer's statement gives the impression that the Civil War draft evaders were wealthy persons who "skulk[ed] away" from their patriotic duties by crossing an ocean. However, this was not what was

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> There shall be levied, collected, and paid annually upon the annual gains, profits, or income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interests, dividends, salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever.

283 Peter Levine, *Draft Evasion in the North during the Civil War, 1863-1865*, 47 J. AM. HIST. 816 (1981).

284 Revenue Act of 1864, ch. 173, 13 Stat. 223 (enacted June 30, 1864).

285 Levine, *supra* note 283, at 819 (showing the four enrolment periods were July, 1863; March, 1864; July, 1864; and December, 1864); see also *Civil War Draft Registrations Records*, 1863-1865, ROOTSWEB, https://sites.rootsweb.com/~belgintheamcivwar/US%20Army/USADraft.htm (last visited Nov. 9, 2025).

286 *See, e.g.*, A. James Fuller, *The Draft and the Draft Riots of 1863*, BILL OF RTS. INST., https://billofrightsinstitute.org/essays/the-draft-and-the-draft-riots-of-1863 (last visited Nov. 9, 2025).

287 James W. Geary, *Yankee Recruits, Conscripts, and Illegal Evaders*, *in* THE CIVIL WAR SOLDIER: A HISTORICAL READER 57 (Michael Barton & Larry M. Logue, eds. 2002); Levine, *supra* note 283, at 825.

288 *See, e.g.*, Levine, *supra* note 283, at 826.

289 CONG. GLOBE, 38th Cong., 1st Sess. 2661 (June 2, 1864) (statement of Sen. Jacob Collamer), https://babel.hathitrust.org/cgi/pt?id=chi.12995370&seq=785.

happening. According to an extensive study conducted by Peter Levine, most of those who illegally evaded the first enrolment period were "relatively poor."[290] This is logical given that the wealthy did not need to illegally evade—they could afford to pay either the commutation fee or for a substitute.[291] Further, Levine explains that the "border" states contained especially high numbers of draft evaders, especially during the latter enrollment periods.[292] This included not only states close to Canada—"inaccessible to army patrols because of wilderness and weather"[293]—but also states on the southern border (West Virginia, Missouri, Kentucky, Maryland, and Washington, D.C.).[294] In the latter case, Levine surmises that they were able to evade the draft because of "Southern sympathy[ies]."[295] Nothing in Levine's or others' research indicates that the illegal evaders were travelling to Europe – or to other countries beyond Canada—in significant numbers.[296]

Even if Collamer's stereotype of the wealthy draft evader crossing an ocean to avoid military service did not reflect reality, the stereotype nevertheless had staying power. It was reiterated— with more detail—a full thirty years later, when the United States attempted to reinstate the income tax. Insisting, in 1894, that the tax again encompass the worldwide income of overseas Americans, Senator George Hoar revived the misconceptions of the Civil War:

> If an American citizen [goes] abroad and [carries] the protection of his country, of his citizenship, with him, he [should not] escape its burdens. There are a great many people, I am sorry to say, who go abroad for that very purpose, and some of them went abroad during the late war. They lived in luxury, at the same time at less cost, in a foreign capital; they had none

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290 Levine, *supra* note 283, at 828; *see also* Geary, *supra* note 287, at 62 ("[O]vert draft resistance emerged among populations that were predominantly Democratic, foreign-born, Catholic, and poor.").

291 *See* Melissa Traub, "$300 or Your Life": Recruitment and the Draft in the Civil War 7 (2015) (Honors Scholar Theses, University of Connecticut), https://digitalcommons.lib.uconn.edu/cgi/viewcontent.cgi?article=1470&context=srhonors_theses (discussing the commutation fee and the effect of its repeal on the price of a substitute).

292 Levine, *supra* note 283, at 828–29.

293 *Id.* at 829.

294 *Id.* at 828.

295 *Id.* at 828.

296 *Id.* at 828–29; *see also, e.g.*, Geary, *supra* note 287, at 63–65 (discussing draft dodgers traveling to Canada). This does not mean, however, that no one sought to escape the draft by traveling to Europe. Many of those subject to the draft were foreign-born and an unknown number did return to their home countries seeking to escape the U.S. draft. Predictably, however, this backfired for some, who found themselves conscripted in their country of origin. *See also* Chaney, *supra* note 12, at 398 (quoting Seward complaining about naturalized citizens fleeing the Civil War draft by returning to their home countries).

> of the voluntary obligations which rest upon citizens, of charity, or contributions, or supporting churches, or anything of that sort, and they escaped taxation.
>
> That class of persons, in my judgment, ought to pay taxes on all their property, at home or abroad, wherever it may be. If they remain American citizens [. . .] we have something to do with their property abroad. If [an American] has invested in a Mexican railroad or a South American or Cuban mine or in the English funds, he has to report it and pay a tax on his investment, and he ought to.
>
> If a citizen goes abroad under the circumstances I have stated, he ought to do that exact thing. He is the one human being we ought to tax. If there is any good in an income tax that would be the good thing if it did that.[297]

It is clear from this statement that Hoar struggles to see the good in income taxation as a general principle.[298] At the same time, however, his resentment of Americans living outside the United States is palpable. For Hoar, Americans go abroad for the purpose of "escap[ing]" the "burdens" of their American citizenship.[299] This includes "escap[ing] taxation."[300] Further, it is clear he does not perceive overseas Americans as ordinary people. On the contrary, they are necessarily wealthy given that they have the means and the opportunity to invest "in a Mexican railroad or a South American or Cuban mine or in the English funds."[301] Because of their indefensible purpose for living overseas (to escape the burdens of citizenship) combined with their necessarily illegitimate wealth (it was gained from investing not inside but outside the United States), for Hoar, of course overseas Americans should be taxed by the United States not just on their U.S.-source but also on their worldwide income: "*he is the one human being we ought to tax*.". [302]

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297 26 CONG. REC. S6632–33 (daily ed. June 21, 1894) (statement of Sen. George Hoar).

298 *See Myths and Truths, supra* note 217, at 227.

299 *Supra* note 297.

300 *Id.*

301 *Id.*

302 *Id.* Zelinsky asserts that "both as a matter of text and a matter of logic, it is a straightforward understanding of U.S. law that the U.S. taxes the worldwide incomes of all of its citizens wherever they live." *Defending U.S. Citizenship-Based Taxation*, *supra* note 276, at 2427. While it is true that today the United States taxes the worldwide income of all U.S. citizens, this is by no means the case either "as a matter of text" or as a "matter of logic." Firstly, as discussed *supra* note 280 and accompanying text, as a "matter of text," the first two Revenue Acts adopted by the United States in 1861 and 1862 taxed the worldwide income of "any person residing in the United States," regardless of citizenship. They taxed only U.S.-source income of "citizens of the United States residing abroad." The Revenue Act of 1864 taxed the worldwide income "of every person residing in the United States, or of any citizen of the United States residing abroad." Revenue Act of 1864, §116, *supra* note 281 and accompanying text. When Congress sought to bring back the income tax in 1894, the bill the House sent to the Senate "made every person dwelling in the United States,

Given these highly prejudicial attitudes towards overseas Americans, it is no surprise that the Underwood-Simmons Tariff Act of 1913,[303] enacted immediately upon the adoption of the Sixteenth Amendment establishing Congress's right to impose Federal income taxation, again included the taxation of overseas Americans based on their worldwide income.[304] This taxation has remained in place since.

B. Evolution into a Highly Penalizing System That Results in the Destruction of Citizenship

It is well understood that for all Americans, U.S. federal income taxation has evolved considerably since the enactment of the Underwood-Simmons Tariff Act of 1913 (also referred to as the Revenue Act of 1913).[305] In 1913, the system was relatively simple – the portion of the Act pertaining to income tax was just 15 pages[306] and its implementing Regulations No. 33 a mere 12 pages.[307] The filing thresholds were so high that fewer than

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whether a citizen or not, pay an income tax. Then it added to that the incomes of citizens residing abroad." 26 CONG. REC. S6632–33 (statement of Sen. Hoar). Similarly, the initial version of the Senate bill sought to tax the worldwide income "every person residing in the United States" – again, regardless of citizenship – but only the U.S.-source income of "any citizen of the United States residing abroad." It was only after Senator Hoar complained – without foundation – that "a great many people [go abroad to escape the burdens of citizenship]," including some that went during the Civil War, that the bill was revised to read "every citizen of the United States, whether residing at home or abroad, and […] every person residing in the United States though not a citizen thereof." It is clear from the "matter of text" as well as the "matter of logic" of the legislative history that the lawmakers responsible for the bill sought first to tax all residents regardless of citizenship, and then, in addition, they sought to tax citizens "residing abroad." *Id*. The language the lawmakers ultimately settled on was what they felt best reflected this "matter of logic" with the least confusion. *See id*. (discussion among Hoar and other Senators about how to modify the text to reflect Hoar's desire for the United States to tax not just the U.S.-source but the entire worldwide income of overseas Americans). It is also clear that the reasons for this change had nothing to do with, as Zelinsky argues, overseas Americans expressing any kind of "political allegiance" or being members of any kind of "political community." *See infra* notes 357, 365, 387, 631, 672. On the contrary, it was for the same reasons some Swiss lawmakers argued that Swiss emigrants should be deprived of their citizenship: because they were perceived to be "availing themselves of the rights of citizenship" only when it was to their advantage to do so. *See supra* note 197 and accompanying text. And, as this cited U.S. Congressional legislative history makes clear, overseas Americans should be punished for this with worldwide taxation.

303 Underwood-Simmons Tariff Act of 1913, Pub. L. No. 63-16, 38 Stat. 114, 166.

304 *See Myths and Truths, supra* note 217, at 273–74.

305 Underwood-Simmons Tariff Act of 1913, 38 Stat. at 166.

306 *Id.* at 166–81.

307 T.D. 1944, 16 Treas. Dec. Int. Rev. 29 (1914).

370,000 returns were filed for 1913,[308] affecting only 2% of the U.S. population.[309]

In stark contrast, today the Internal Revenue Code and its accompanying regulations are so long that it is difficult to measure their precise length. In 2012, the National Taxpayer Advocate estimated the combined Code and Regulations at approximately 4 million words, or 9,000 pages.[310] The filing thresholds are so low that the income tax affects nearly every adult in the United States, with as many as one-third of U.S. households filing *more* than one federal income tax return.[311] Professional income tax preparation has become a big business: for tax year 2023, 56% of the 151.8 million e-filed returns were submitted by a tax professional,[312] each for an average cost of $220 to $323.[313]

What is much less understood is how U.S. federal income taxation has evolved specifically with respect to overseas Americans. In 1913, there were no information-only reporting requirements, and thus no penalties connected with failure to file purely informational forms.[314] Nothing in the Revenue Act of 1913 specifically targeted non-U.S. source income with taxation more penalizing than that applied to U.S. source income.[315] Foreign trusts were not taxed, and foreign corporations were taxed based only upon their U.S. source income.[316]

Today the U.S. tax system contains multiple provisions that penalize—if not highly penalize —non-U.S. source income and assets.[317] This may not pose a significant problem for most who reside in the United States as most will not have any non-U.S. source income or assets.[318] In stark contrast, however, Americans living in other countries have many reasons to have

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308 David Paris & Cecelia Hilgert, *70th Year of Individual Income and Tax Statistics, 1913-1982*, I.R.S., at 1, https://www.irs.gov/pub/irs-soi/13-82inintrd70yrs.pdf (last visited Nov. 9, 2025).

309 Michael Levy, *Underwood-Simmons Tariff Act*, BRITANNICA, https://www.britannica.com/event/Underwood-Simmons-Tariff-Act (last visited Nov. 9, 2025).

310 *See* Joseph Bishop-Henchman, *How Many Words are in the Tax Code?*, TAX FOUND. (Apr. 15, 2014), https://taxfoundation.org/how-many-words-are-tax-code/.

311 *See, e.g.*, *Myths and Truths, supra* note 217, at 191.

312 *Filing Season Statistics for Week Ending Dec. 27, 2024*, IRS (last updated May 29, 2025), https://www.irs.gov/newsroom/filing-season-statistics-for-week-ending-dec-27-2024 (showing 151,781,000 returns e-filed for 2023, of which 85,642,000 were received from tax professionals).

313 *See* Barbara Weltman, *What Will I Pay for Tax Preparation Fees?*, INVESTOPEDIA (last updated July 11, 2025), https://www.investopedia.com/articles/taxes/021717/what-will-i-pay-tax-preparation-fees.asp.

314 *See, e.g.*, *Myths and Truths, supra* note 217, at 192.

315 *See, e.g.*, *id.*

316 *See, e.g.*, *id.*

317 *See, e.g.*, *id.*; *see also Unacknowledged Realities*, *supra* note 11, at 263–66; Laura Snyder, *The Criminalization of the American Emigrant*, 167 TAX NOTES FED. 2279, 2281–82, 2285–86 (June 29, 2020) [hereinafter *Criminalization*].

318 An important exception to this is immigrants to the United States who retain or inherit assets outside the country.

non-U.S. source income and assets. They are a normal and necessary part of living, having a family, working, and planning for retirement in the country where one lives. However, the U.S. federal income tax system ignores this reality. It penalizes non-U.S. source income and assets for overseas Americans in the same manner that it penalizes them for U.S. residents.[319]

This has severe consequences for Americans who live in other countries. As a result of the penalizing provisions, they face this long list of problems:

> (i) Difficulties participating in tax-advantaged retirement savings plans that are not recognized under U.S. tax rules, with the risk that, upon retirement, they become public charges (burdens) in the countries in which they live;[320]
>
> (ii) Difficulties making many other kinds of investments as U.S. tax rules heavily penalize non-U.S. (so-called "foreign") investments, regardless of where the investor lives;[321]
>
> (iii) Difficulties creating and owning a small business outside the United States as U.S. tax rules heavily penalize ownership by an American of any business located outside the United States;[322]
>
> (iv) Difficulties holding title to real estate and other family assets outside the United States because of penalizing U.S. taxation, including taxation resulting solely from fluctuations in the value of the currency of the country or region in which the American lives as compared to the U.S. dollar;[323]
>
> (v) The taxation by the United States of social welfare benefits that overseas Americans receive from their countries of residence, such as unemployment, maternity, and disability payments;[324]
>
> (vi) The need to expend considerable time and money to complete U.S. tax declarations, often made overly complex because of U.S. tax rules' inherent distrust for anything "foreign" (again, anything

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319 *See, e.g.*, *Unacknowledged Realities, supra* note 11, at 266; *see also* Laura Snyder, *Can Extraterritorial Taxation Be Rationalized?,* 76 TAX L. 535, 584–85 (2023) [hereinafter *Rationalized?*]; *see, e.g.*, *Taxing American Emigrant*, *supra* note 9, at 306 n.22.

320 *Unacknowledged Realities, supra* note 11, at 263; *see Rationalized?, supra* note 319, at 582.

321 *Unacknowledged Realities, supra* note 11, at 264; *see Rationalized?, supra* note 319, at 582.

322 *Unacknowledged Realities, supra* note 11, at 264; *see Rationalized?, supra* note 319, at 582.

323 *Unacknowledged Realities, supra* note 11, at 264; *see Rationalized?, supra* note 319, at 584.

324 *Unacknowledged Realities, supra* note 11, at 264; *see Rationalized?, supra* note 319, at 583.

> outside the United States, regardless of where the taxpayer lives, is "foreign"), with errors resulting in severe penalties when, in most cases, no U.S. tax is owed;[325]
>
> (vii) Difficulties opening or keeping bank and other financial accounts in the country in which they live: Many financial institutions outside the United States, fearing draconian penalties for failure to comply with FATCA, find it easier to simply refuse U.S. citizens as clients;[326]
>
> (viii) Removal as a joint account holder with the overseas American's non-U.S. citizen spouse: Because many spouses of overseas Americans do not want their accounts to be reported to the United States, they refuse to hold joint accounts;[327]
>
> (ix) The inability to hold certain jobs: Many non-U.S. employers refuse to hire U.S. citizens in jobs that include bank account authority because this would trigger the need to report the employer's accounts to the United States. Overseas Americans are refused entrepreneurial opportunities for the same reason;[328]
>
> (x) The inability to volunteer as an executive officer or in another position with signature authority for a non-U.S. not-for-profit organization (including the local equivalent of a scout group or Parent Teacher Association);[329]
>
> (xi) The inability to serve as trustee or hold power of attorney for a family member or to serve as executor for a family member's estate;[330] and
>
> (xii) The inability to obtain a mortgage either entirely or without having to pay a higher rate.[331]

In essence, while double taxation does sometimes occur,[332] the more consequential and far-reaching problem is that the U.S. federal tax system

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325 *Unacknowledged Realities, supra* note 11, at 264–65; *see Rationalized?, supra* note 319, at 583.
326 *Unacknowledged Realities, supra* note 11, at 265; *see Rationalized?, supra* note 319, at 583.
327 *Unacknowledged Realities, supra* note 11, at 265; *see Rationalized?, supra* note 319, at 583–84.
328 *Unacknowledged Realities, supra* note 11, at 265; *see Rationalized?, supra* note 319, at 584.
329 *Unacknowledged Realities, supra* note 11, at 265; *see Rationalized?, supra* note 319, at 584.
330 *Unacknowledged Realities, supra* note 11, at 265; *see Rationalized?, supra* note 319, at 584.
331 *Unacknowledged Realities, supra* note 11, at 265; *see Rationalized?, supra* note 319, at 584.
332 *Unacknowledged Realities, supra* note 11, at 266; *see Rationalized?, supra* note 319, at 584–85.

expects Americans living in other countries to carry out their financial lives as if they were living in the United States. For most, this is impossible, especially for those living outside the United States on a long-term basis.[333] As a result, Americans living in other countries are heavily penalized financially and are prevented from fully integrating into their families and into the communities in which they reside.[334] All this occurs even though most overseas Americans have no U.S. tax liability.[335]

Exacerbating the problem of the U.S. tax system's highly penalizing nature is its incompatibility with the tax systems of the countries where overseas Americans live. As residents of other countries, overseas Americans are subject to not just U.S. income taxation but also all other forms of taxation imposed by the country where the American resides. Living subject to two tax systems means that the American will pay the higher of the two tax rates applicable under each system.[336] If, for any given income, the applicable tax in the American's country of residence is higher than that of the United States, then the American pays that higher amount in their country of residence and claims a tax credit for U.S. tax purposes; in many (but not all) cases, no tax will then be due to the United States with respect to that income.[337] The inverse, however, does not occur. That is, if the tax rate of the American's country of residence is higher than the U.S. tax rate, the American may not elect to pay tax at the lower U.S. rate. Instead, the American must pay the higher taxes in the country of residence at the same rate as other residents of that country, even when the applicable rate exceeds the U.S. tax rate.[338]

If, however, for any given income, the applicable tax rate in the American's country of residence is lower than that of the United States, or if that country does not tax the income at all, then the American will still be liable to the United States for the difference between the lower foreign rate

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333 *Unacknowledged Realities, supra* note 11, at 264; *see Rationalized?, supra* note 319, at 584–85.

334 *Unacknowledged Realities, supra* note 11, at 264; *see Rationalized?, supra* note 319, at 584–85.

335 *See, e.g.,* Amalia Colbert et al., *Most Serious Problem #9 – Compliance Challenges For Taxpayers Abroad: Taxpayers Abroad Continue to Be Underserved and Face Significant Challenges in Meeting Their U.S. Tax Obligations*, TAXPAYER ADVOC. SERV. 122 (2024), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/01/ARC23_MSP_09_Compliance-Abroad.pdf (showing that approximately 60 percent of all returns filed from outside the United States show no U.S. tax liability); *see also* Laura Snyder, *Does the Federal Budget Trump Constitutional Rights?*, 52 HOFSTRA L. REV. 389, 411–13 (2024) [hereinafter *Federal Budget*].

336 *Unacknowledged Realities, supra* note 11, at 303–04; *see also Taxing American Emigrant*, *supra* note 9, at 341–44.

337 *Unacknowledged Realities, supra* note 11, at 303; *see also Taxing American Emigrant*, *supra* note 9, at 341–42.

338 *Unacknowledged Realities, supra* note 11, at 303; *see also Taxing American Emigrant*, *supra* note 9, at 342.

and the U.S. rate.[339] A foreign tax credit will not alleviate this taxation discrepancy as the credit is limited to the amount of foreign tax that is actually paid.[340]

It is at this stage that many persons who consider themselves knowledgeable with respect to U.S. taxation contend that the Foreign Earned Income Exclusion (FEIE, which allows Americans living overseas to exclude from U.S. taxation a maximum amount each year—$132,900 for 2026), would solve the problem.[341] However, the FEIE applies only to earned income and not to interest, capital gains, insurance proceeds, or many forms of pension income or welfare benefits, such as unemployment, maternity, and disability.[342] That is, the FEIE does not apply to the types of income that overseas Americans are likely to have the longer they live—and grow their families, grow ill, and grow old—outside of the United States. At the same time, many countries either tax many of those forms of income at low rates or do not tax them at all.[343]

If the purpose of federal taxation is, as many assert,[344] to obtain tax revenue, then the U.S. federal income tax system subjects overseas Americans to the problems described above gratuitously. This is because the amount of federal tax revenue owed by overseas Americans is insignificant compared both to total U.S. individual income tax liability and total spending by the U.S. federal government.[345] Stated another way, the amount overseas Americans pay in federal taxation makes no difference, either to federal tax revenue or to federal spending.

For Americans living in other countries, there is only one way to escape the problems posed by the U.S. federal tax system: renounce U.S. citizenship.[346] Given how harshly the system penalizes, it is not a surprise that thousands of Americans living outside the United States renounce their

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339 *Unacknowledged Realities, supra* note 11, at 303; *see also Taxing American Emigrant*, *supra* note 9, at 342.

340 *Unacknowledged Realities, supra* note 11, at 303; *see also Taxing American Emigrant*, *supra* note 9, at 342.

341 *Unacknowledged Realities, supra* note 11, at 303–04; *see also Taxing American Emigrant*, *supra* note 9, at 342.

342 *Unacknowledged Realities, supra* note 11, at 303–04; *see also Taxing American Emigrant*, *supra* note 9, at 342.

343 *Unacknowledged Realities, supra* note 11, at 304; *see also Taxing American Emigrant*, *supra* note 9, at 342.

344 *See Federal Budget, supra* note 335, at 399. *But see id.* at 399–418 (explaining that the purpose of U.S. federal income taxation is not to obtain revenue).

345 *Id.* at 413–14 (demonstrating that the amount collected in federal income tax from persons living overseas is 0.50% of income tax revenue from all individuals and 0.18% of government spending).

346 *See Criminalization, supra* note 317, at 2280; *see also Federal Budget, supra* note 335, at 430.

U.S. citizenship each year.[347] For the most part, they do not want to renounce, but feel forced to do so.[348]

C. The Reasoning

Over the course of more than a century, the United States' taxation of the worldwide income of its citizens living in other countries has been defended in a variety of ways.[349] Distilled to its essence, the most commonly used defense is that taxation is an obligation of citizenship. This defense is expressed with various terminology. The terminology includes references to "allegiance,"[350] "permanent allegiance,"[351] "political allegiance,"[352] "fiscal citizenship,"[353] "membership in U.S. society,"[354] and membership in "the U.S. political community."[355]

The commonly offered defense that taxation is an obligation of citizenship harkens back to Blackstone and to Edward Coke before him.[356]

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347 *See, e.g.*, Andreas Kluth, *U.S. Expats Can't Renounce Their Citizenship Fast Enough*, BLOOMBERG (Aug. 30, 2020), https://www.bloomberg.com/view/articles/2020-08-31/why-thousands-of-u-s-expats-are-renouncing-their-citizenship?embedded-checkout=true [https://perma.cc/P7AU-AE3Z]; *see also* James Hickman, *Thousands of Americans Renounced Their Citizenship. Again*, SCHIFF SOVEREIGN (Nov. 3, 2017), https://www.schiffsovereign.com/trends/thousands-of-americans-renounced-their-citizenship-again-22579/ [https://perma.cc/36D8-T98W]; *see The Rise in U.S. Citizenship Renunciations: What's Driving It?*, BOUNDLESS, https://www.boundless.com/research/rise-in-us-citizenship-renunciations-2025/ [https://web.archive.org/web/20250731114031/https://www.boundless.com/research/rise-in-us-citizenship-renunciations-2025/#expand] (last visited Nov. 11, 2025).

348 *See Unacknowledged Realities*, *supra* note 11, at 266-68; *Rationalized?*, *supra* note 319, at 585-58.

349 *See generally Rationalized?, supra* note 319.

350 Albert Lévitt, *Income Tax Predicated upon Citizenship:* Cook v. Tait, 11 VA. L. REV. 607, 609–14 (1925).

351 Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1291, 1293, 1322, 1324–25, 1329 (2011) [hereinafter *Citizenship and Worldwide Taxation*].

352 *Id.* at 1350.

353 *Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2363, 2365–67, 2368–70, 2408–17.

354 Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 483 (2007) [hereinafter *Taxing Citizens*]; *see also* Michael Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 126 (2014) [hereinafter *Revisiting Tax Treatment*].

355 Reuven S. Avi-Yonah, *Taxing Nomads: Reviving Citizenship-Based Taxation for the 21st Century* 15 (U. Mich. L. Sch. Law & Econ. Working Paper, Paper No. 22-035, 2022), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1348&context=law_econ_current [hereinafter *Taxing Nomads*]; *see also* Reuven S. Avi-Yonah, *Should the United States Abandon Citizenship-Based Taxation?* 4 (U. Mich. L. Sch. Law & Econ. Working Paper, Paper No. 24-048, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5130868 [hereinafter *Abandon Citizenship-Based Taxation?*].

356 In his 1608 opinion in *Calvin's Case*, English jurist Edward Coke described allegiance as the:

> …true and faithful obedience of the subject due to his sovereign. This ligeance and obedience is an incident inseparable to every subject: for as soon as he is born, he oweth by birth-right ligeance and obedience to his sovereign.

For Blackstone and Coke, regardless of where a subject may live in the world, their obligations to their prince cannot change. For today's defenders of U.S. extraterritorial taxation, regardless of where a U.S. citizen may live in the world, their tax obligations to the United States cannot change.

As long ago as 1925 Albert Levitt, then a professor at Washington and Lee University School of Law and later a candidate for the U.S. Senate, explained that it was an "elemental principle of International Law," that every citizen of a country owes allegiance to that country: "Allegiance means that he is under the duty to support, protect and defend his country."[357] For Levitt, it was "rationally inconceivable"[358] that a citizen not be subject to "supporting the government through the payment of such taxes as are imposed upon him."[359]

More recent defenses of the U.S. extraterritorial tax system are barely distinguishable from Levitt's:

Writing in 2011, Zelinsky expressly equates citizenship with "permanent allegiance" as well as "political allegiance."[360] Because of this equivalence Zelinsky explains, domicile in the country of citizenship—the United States—can and should be assumed, regardless of actual residence or even any physical presence at all.[361] And domicile necessarily equates with worldwide taxation.[362] Zelinsky further argues that this is the most

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See JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608-1870, at 17–18 (Univ. N.C. Press 1984) (1978) (describing allegiance as "true and faithful obedience of the subject due to his sovereign. This ligeance and obedience is an incident inseparable to every subject: for as soon as he is born, he oweth by birth-right ligeance and obedience to his sovereign."). Calvin's Case, 77 Eng. Rep. 377, 382; 7 Co. Rep. 4b (1608).

357 Lévitt, *supra* note 350, at 609.

358 *Id.* at 610.

359 *Id.*

360 *Citizenship and Worldwide Taxation, supra* note 351, at 1295, 1297 (asserting that "the United States defines the political allegiance for tax jurisdiction in terms of an individual's citizenship, regardless of his residence."). Zelinsky offers no support for this statement other than citing Treasury Regulation § 1.1-1(b), which neither mentions nor defines the concept of allegiance. *See* 6 DANIEL WEBSTER, WORKS OF DANIEL WEBSTER 526–27 (1851) https://books.google.fr/books?id=OucDDMna8g8C&printsec=frontcover&hl=pt-PT&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (according to Daniel Webster, "allegiance" is little more than the obligation to obey a country's laws, and this obligation falls upon those who find themselves within a country's borders, regardless of citizenship).

361 *Citizenship and Worldwide Taxation, supra* note 351, at 1289, 1291, 1293, 1323–25 (asserting that, for example, "citizenship and domicile resemble each other by embodying permanent allegiance to a particular nation even in the absence of immediate physical presence in that nation.").

362 *Id*. at 1293 ("[W]hen residence for tax purposes is defined as domicile, residence-based and citizenship-based taxation converge.").

"efficient[]"[363] and "administrable"[364] result because it eliminates the need for "factually intensive determinations" of a person's actual home.[365]

Zelinsky further argued, in 2025, that the "notion"[366] of "fiscal citizenship"[367] is the reason for taxing an individual's worldwide income when they are living in another country. For Zelinsky, "fiscal citizenship" is an individual's "obligation to support the national political community of which she is a member even if living outside the borders of that nation."[368] Zelinsky cites several court opinions[369] as well as commentators,[370] all linking citizenship with a "social obligation and ethical duty"[371] to "pay tax"[372] and to "share the burden of financing the modern American state."[373] For Zelinsky it is simple: overseas Americans are "fiscal citizens" of the United States[374] and "the duty to pay tax […] follows from the concept of fiscal citizenship."[375]

Kirsch and Avi-Yonah simplify the argument even more. For Kirsch, U.S. citizenship represents "membership in U.S. society"[376] and this membership alone justifies the obligation "to help support that society."[377] Avi-Yonah makes essentially the same argument, using the slightly different phrase "membership in the U.S. political community."[378] For Avi-Yonah, "worldwide taxation is an important responsibility"[379] of citizenship.

Mehrotra is even more reductive. He sees no need, as Kirsch and Avi-Yonah do, to situate overseas Americans in a "society"[380] or a "community."[381] For Mehrotra, the fact of U.S. citizenship is enough. To

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363 *Id.* at 1323, 1325, 1339, 1341.
364 *Id.* at 1291, 1293.
365 *Id.* at 1325.
366 *Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2363.
367 *Id.*
368 *Id.*
369 *Id.* at 2408–10.
370 *Id.* at 2410–14.
371 *Id.* at 2409 n.289 (quoting AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877-1929, at 129 (2013)).
372 *Id.* at 2409 (citing Couts v. Cornell, 82 P. 194, 195 (1905)); *see also id.* at 2410 (quoting LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 24 (2013)).
373 *Id.* at 2409 n.289 (quoting AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877-1929 (2013)).
374 *Id.* at 2416 ("U.S. tax law uses an objective marker – legal citizenship – to determine fiscal citizenship in the American polity.").
375 *Id.* at 2417.
376 *Revisiting Tax Treatment, supra* note 354, at 126.
377 *Id.*
378 *Abandon Citizenship-Based Taxation?, supra* note 355, at 4.
379 *Id.* at 5.
380 *Supra* notes 354, 376–77 and accompanying text.
381 *Supra* notes 355, 368, 378 and accompanying text.

him, it is self-evident that "all American citizens – no matter where they live[] – [have] a social obligation and ethical duty to pay their fair share of U.S. tax burdens."[382] No further rationalization is needed.

Mehrotra's stance is virtually indistinguishable from Blackstone's and Coke's. According to them, a citizen owes "true and faithful obedience"[383] to their sovereign. As "a principal of universal law,"[384] the obligations of "ligeance and obedience"[385] are "inseparable"[386] from the citizen and cannot be discharged.[387] "Ligeance" is an archaic word that Merriam-Webster defines as "allegiance."[388] What is allegiance, if not "social obligation and ethical duty?"[389]

If an overseas American is unhappy with the U.S. taxation of their worldwide income, the solution is simple. They can renounce their U.S. citizenship. When an overseas American does not renounce, according to Zelinsky, they are "express[ing] political allegiance to the United States."[390] For Kirsch, since an overseas American can renounce U.S. citizenship "if he desires," then "it is reasonable to conclude that the retention of U.S. citizenship reflects a self-identification with the population of the United States (or the belief that the benefits of citizenship are worth the tax cost)."[391] This attitude has found its way into popular opinion, with persons expressing on social media sentiments such as "Your voluntarily remaining a US citizen is your consent to the terms of the contract detailing your responsibilities ie taxes and the benefits you receive […] You are free to renounce your citizenship at any time."[392] For these commentators, the choice is clear and stark: an overseas American should either accept the United States' taxation of their worldwide income or give up U.S. citizenship. It is all or nothing

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382 AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877-1929, at 280 (2013) [hereinafter AMERICAN FISCAL STATE].

383 *See* KETTNER, *supra* note 354, at 17–18 (quoting Sir Edward Coke, *Calvin's Case*, 7 Co. Rep. 4b (1608)).

384 *Supra* notes 102, 137 and accompanying text.

385 *See* KETTNER, *supra* note 356, at 17–18 (quoting Sir Edward Coke, *Calvin's Case*, 7 Co. Rep. 4b (1608)).

386 *See id.*

387 *Supra* note 137 and accompanying text.

388 *Ligeance*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/ligeance (last visited Nov. 4, 2025).

389 *Allegiance*, MERRIAM-WEBSTER (defining as "devotion or loyalty to a person, group, or cause.") https://www.merriam-webster.com/dictionary/allegiance (last visited Nov. 4, 2025).

390 *Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2428.

391 *Taxing Citizens, supra* note 354, at 483, 493 ("A citizen living abroad might decide that the privilege of returning to the United States, as well as the other benefits of citizenship, do not justify the 'price' of that citizenship in the form of taxes. If so, he could obtain another nationality and subsequently renounce or otherwise terminate his U.S. citizenship.").

392 Edmuenede Broewne (@theoctobear), Twitter (May 1, 2021), https://twitter.com/theoctobear/status/1388598034800521216 [https://perma.cc/9RXK-MHKR].

because, for them, citizenship and worldwide taxation are inseparable. The problem cannot be with the taxation; the problem can only be with the overseas American who has the audacity to "choose" to retain their constitutionally (*not Congressionally*)[393]-established U.S. citizenship. Further, for these commentators, what drives the overseas Americans' so-called "choice" are amorphous and theoretical concepts like "allegiance,"[394] "society,"[395] and "community."[396] The so-called "choice" couldn't possibly be driven, instead, by considerations as concrete and pressing as statelessness[397] and their human right to return to the United States.[398]

D. The Effect on Other Countries

Considered on a superficial level, the fact that the United States taxes the worldwide income of its overseas citizens may appear to have nothing to do with the countries where overseas Americans live. What business could it be of theirs, one may ask, what the United States does with its own citizens?

Each country has the right to define who its tax residents are. But should this right extend to a country claiming as its own tax residents, persons who live and work in other countries and who, in many cases, are permanent residents and citizens of the countries where they live?[399] Considered from this perspective, what the United States "does" with its overseas citizens is very much the business of other countries.

Most countries use their laws to further public policy goals. For example, laws are used to incentivize retirement planning[400] and other saving

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393 *Supra* notes 247–56 and accompanying text.

394 *Supra* notes 350–51, 357, 360–61, 385–90, and accompanying text.

395 *Taxing Citizens, supra* note 354, at 483; *Revisiting Tax Treatment, supra* note 355, at 126; *see also Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2363.

396 *Supra* notes 355, 368, 378 and accompanying text. *Taxing Nomads supra* note 353, at 2–3; *Abandon Citizenship-Based Taxation?*, *supra* note 353, at 4.; *Defending U.S. Citizenship-Based Taxation*, *supra* note 276, at 2363; *Rationalized?, supra* note 319, at 574–75.

397 *Rationalized?, supra* note 319, at 574–75; LAURA SNYDER, "BEING AN AMERICAN OUTSIDE OF AMERICA IS NO LONGER SAFE." SURVEY REPORT: EFFECTS OF THE EXTRATERRITORIAL APPLICATION OF U.S. TAXATION AND BANKING: DATA PART 1, at 4 (2021), https://seatnow.org/wp-content/uploads/2021/05/SEAT-Survey-May-2021-Data-Part-1-of-2.pdf [hereinafter SEAT SURVEY DATA PART 1] (explaining that in a survey of Americans living outside of the United States, 39% did not have dual citizenship, they were U.S. citizens only.).

398 *Myths and Truths, supra* note 217, at 257–58.

399 *See, e.g.*, John Richardson, *The Issue Is Not @CitizenshipTax. The Issue Is Whether the U.S. Can Claim the Tax Residents of Other Countries as U.S. Tax Residents!*, CITIZENSHIP SOLS. (Mar. 1, 2023), https://citizenshipsolutions.ca/2023/03/01/the-issue-is-not-citizenshiptax-the-issue-is-whether-the-us-can-claim-the-tax-residents-of-other-countries-as-us-tax-residents/.

400 *See* Laura Snyder, *Extraterritorial Taxation #13: Other Countries Have a Duty To Act* 9 (SEAT Working Paper Series #2023/13) (June 5, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466153 [hereinafter *Extraterritorial Taxation #13*]; *see generally* OECD, ANNUAL SURVEY ON FINANCIAL INCENTIVES FOR RETIREMENT SAVINGS: COUNTRY PROFILES

and investment,[401] succession planning,[402] homeownership,[403] and business ownership and entrepreneurship.[404] The U.S. extraterritorial tax system obstructs such public policies by using penalizing taxation[405] as well as highly complex and penalizing informational reporting requirements[406] to, instead, disincentivize persons living in other countries from engaging in those activities in the countries where they live.[407] This has both economic and societal impacts for those countries, all contrary to the intentions of the countries' policymakers. For example:

- Because U.S. rules prevent them from taking advantage of retirement and other investment incentives in their countries of residence, when they retire, such persons are more likely to utilize means-tested government benefits in those countries, and thus become public charges;[408]
- Because of onerous and penalizing rules pertaining to non-U.S. mutual funds and other forms of investment, such persons do not participate in tax-favored plans intended to encourage savings and succession planning in their countries of residence.[409] This reduces economic investment and

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2024 (Dec. 2024), https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/asset-backed-pensions/Annual-survey-financial-incentives-retirement-savings-2024-web.pdf.

401 *See Extraterritorial Taxation #13, supra* note 400, at 9. An example is the UK's Individual Savings Account (ISA)*; see A Beginner's Guide to ISAs*, TAX ASSIST, https://www.taxassistfinancialplanning.co.uk/articles/a-beginner-s-guide-to-isas (last visited Nov. 6, 2025).

402 *See Extraterritorial Taxation #13, supra* note 400, at 9. An example is France's assurance vie. *See, e.g.,* Paul Flintham, *Why the Assurance Vie? Explanation of the Benefits of Assurance Vie in France*, BEACON GLOB. WEALTH, https://www.beaconglobalwealth.com/blog/why-the-assurance-vie (last visited Nov. 6, 2025).

403 *See Extraterritorial Taxation #13, supra* note 400, at 9. An example is France's *plan épargne logement* (House Saving Plan). *See* Eddie Sammon, *The French Plan Épargne Logement (PEL) in 2025*, AISA INT'L (Mar. 27, 2025), https://aisainternational.fr/investments/the-french-plan-epargne-logement-pel-in-2025/.

404 *See Extraterritorial Taxation #13, supra* note 400, at 9; *see also* Paolo Dotta, *10 European Countries with the Best Tax Reliefs for Startups*, ALTAR.IO, https://altar.io/incorporating-startup-eu-overview-tax-reliefs-country/#sweden (last visited Nov. 6, 2025).

405 *Supra* notes 320–24 and accompanying text.

406 *Supra* notes 325–31 and accompanying text. *See also, e.g.*, Mike Wallace, *U.S. Citizen with a Foreign Business: Tax Reporting Requirements*, GREENBACK TAX SERVS. (Feb. 4, 2025), https://www.greenbacktaxservices.com/knowledge-center/foreign-business-tax-reporting/ (explaining the complicated and penalty-laden filing requirements for overseas Americans who own a small business outside the United States).

407 *See Extraterritorial Taxation #13, supra* note 400, at 23–26 (explaining how U.S. taxation prevents them from engaging in otherwise ordinary activities like investing, saving for retirement, and owning a home or business, overseas Americans living in 33 countries share their experiences).

408 *See id.* at 9; *see also supra* note 320 and accompanying text.

409 *See Extraterritorial Taxation #13, supra* note 400, at 10.

activity in those countries and, depending upon the country, can unnecessarily complicate the distribution of assets upon death (thus requiring the resources of that country's legal system to resolve)

- Because of onerous and penalizing U.S. rules pertaining to non-U.S. businesses, such persons either decline to pursue entrepreneurship or business ownership in their countries of residence, are excluded from them (by others), or they purposely keep their businesses small.[410] This reduces economic activity and employment in those countries.

In addition, the U.S. extraterritorial tax system operates to siphon capital from the countries where such persons live to the United States. This happens in two ways: (1) because they are unable to invest in their countries of residence, such persons seek to invest, instead, in the United States (which may come with tax disadvantages in their country of residence),[411] and (2) via the payment of tax to the United States – the funds to pay the tax were generated in such persons' countries of residence and using the resources of those countries. The tax payments are the transfer of resources from those countries to the United States.

Further, the payments to the United States erode the tax bases of the other countries. The United States is often described as "the richest country in the world."[412] Assuming that is the case, the U.S. extraterritorial tax system exacerbates this inequality by moving capital to the United States from other countries that are, by definition, poorer. This effect is aggravated by lack of reciprocity in financial account reporting.[413] Because of this, investors outside of the United States (regardless of citizenship) are encouraged to move their investments to the United States—today considered one of the

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410 *Id.*

411 *See id.*

412 Jack Ewing, *United States is the Richest Country in the World, and It Has the Biggest Wealth Gap*, N.Y. TIMES, (Sep. 23, 2020), https://www.nytimes.com/2020/09/23/business/united-states-is-the-richest-country-in-the-world-and-it-has-the-biggest-wealth-gap.html.

413 *See Extraterritorial Taxation #13, supra* note 400, at 10–11; *see also* JANE G. GRAVELLE & DONALD J. MARPLES, CONG. RSCH. SERV., IF12166, THE FOREIGN ACCOUNT TAX COMPLIANCE ACT (FATCA) 2 (July 15, 2022), https://crsreports.congress.gov/product/pdf/IF/IF12166/2#:~:text=Reciprocity%2C%20Joining%20the%20CRS,foreign%20owners%20of%20U.S.%20accounts.

world's largest tax havens[414]—thereby increasing the U.S. tax base while simultaneously eroding the tax bases of investors' countries of residence.[415]

One of the more egregious aspects of the U.S. extraterritorial tax system concerns government welfare benefits, such as unemployment, maternity, and disability benefits. Depending on the country and benefit structure, it may trigger the payment of U.S. tax.[416] This occurs when the person's country of residence has made the policy choice to not tax such income (or to tax it at a low rate),[417] presumably to enable the beneficiary to conserve assets during a vulnerable time in their lives. In this case, the U.S. Foreign Earned Income Exclusion (FEIE) does not apply because the income was not earned. Nor is a U.S. foreign tax credit available, because no (or little) tax was paid on the income in the person's country of residence. Consequently, U.S. tax is owed in relation to the non-U.S. government welfare benefit.[418] This shocking result not only mocks the public policy goals of the person's country of residence but also effects a near-direct transfer of funds from the treasury of that country to the Treasury of the United States.

Finally, a crucial duty of the government of a democratic nation is to protect its people's human rights. If a government is not willing to act to protect a human right, then the right is meaningless.[419] This includes the duty to protect its people from discrimination on the grounds of nationality/country of origin. This duty is included, as examples, in the Charter of Fundamental Rights of the European Union,[420] the Canadian Charter of Rights and Freedoms,[421] and Australia's Racial Discrimination Act 1975.[422] This duty also appears in no fewer than three international human rights instruments, which many countries have signed or ratified: The

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414 *See Extraterritorial Taxation #13, supra* note 400, at 10–11; *see also* Jake Johnson, *'A Shameful Distinction': US Ranked World's Biggest Perpetrator of Financial Secrecy*, COMMON DREAMS (May 17, 2022), https://www.commondreams.org/news/2022/05/17/shameful-distinction-us-ranked-worlds-biggest-perpetrator-financial-secrecy (citing Tax Justice Network's 2022 Financial Secrecy Index, placing the United States at the top of a list of jurisdictions the "most complicit in helping individuals to hide their finances from the rule of law").

415 *See Extraterritorial Taxation #13, supra* note 400, at 10–11; *see also* LUKAS HAKELBERG, THE HYPOCRITICAL HEGEMON: HOW THE UNITED STATES SHAPES GLOBAL RULES AGAINST TAX EVASION AND AVOIDANCE 131–32 (2020).

416 *See Extraterritorial Taxation #13, supra* note 400, at 11.

417 *See id.*

418 *See Extraterritorial Taxation #13, supra* note 400, at 11; *see also*, *Taxing American Emigrant*, *supra* note 9, at 305.

419 *See Extraterritorial Taxation #13, supra* note 400, at 17; *see infra* notes 426–28 and accompanying text.

420 Charter of Fundamental Rights of the European Union, art. 21 ¶ 2, 2010 O.J. (C83) 389, 396.

421 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.), Sec. 15(1), https://laws-lois.justice.gc.ca/eng/const/page-12.html.

422 Racial Discrimination Act, 1975 (Austl.), https://www.legislation.gov.au/Details/C2004A00274.

Universal Declaration of Human Rights,[423] the International Covenant on Civil and Political Rights,[424] and the International Convention on the Elimination of All Forms of Racial Discrimination.[425] These rights were developed in direct response to Europe's experience of the holocaust before and during World War Two,[426] another period in history when persons of a particular nationality were singled out for economic and social exclusion from the places where they lived.[427]

The United Nations High Commissioner for Human Rights explains that "[i]nternational human rights law lays down obligations which States are bound to respect."[428] When a country becomes a party to an international treaty, its government assumes obligations and duties under international law to respect, to protect, and to fulfil human rights. The obligation to respect means that the country must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires the country to protect individuals and groups against human rights abuses. The obligation to fulfil means that the country must take positive action to facilitate the enjoyment of basic human rights.[429]

The Council of Europe similarly explains:

> A right is meaningless without a corresponding responsibility or duty on someone else's part. [Y]our government, in signing up to international agreements, has not just a moral duty but also a legal duty [to protect the human rights of its people].[430]

Of all persons living outside the United States, the U.S. extraterritorial tax system singles out for differential, more penalizing treatment those whose

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423 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at arts. 2, 7 (Dec. 10, 1948), https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_217 (III).pdf [https://perma.cc/L2FG-KG7J] ("UDHR").

424 G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, at art. 26, ¶ 2 (Dec. 16, 1966), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights [https://perma.cc/HHR5-4TJX] ("ICCPR").

425 G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, at art. 5, (d)(ii) (Dec. 21, 1965), https://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx [https://perma.cc/UN5U-XS9S] ("ICERD").

426 MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 21–22 (2003). *See Extraterritorial Taxation #13, supra* note 400, at 17.

427 *See Extraterritorial Taxation #13, supra* note 400, at 17.

428 *International Human Rights Law*, U.N. HIGH COMM. HUM. RTS., https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law#:~:text=The%20obligation%20to%20protect%20requires,enjoyment%20of%20basic%20human%20rights (last visited Nov. 8, 2025).

429 *Id.*; *see Extraterritorial Taxation #13, supra* note 400, at 17.

430 *Questions and Answers About Human Rights*, COUNCIL OF EUR., https://www.coe.int/en/web/compass/questions-and-answers-about-human-rights#:~:text=Question%3A%20Does%20anyone%20have%20a,duty%20on%20someone%20else's%20part (last visited Nov. 8, 2025).

nationality/country of origin is the United States[431] (regardless of their connections to the country where they live, including permanent residence and citizenship). This violates the charters, statutes, and international human rights instruments mentioned above,[432] as well as comparable provisions applicable in other countries. When government officials of other countries fail to oppose the U.S. extraterritorial tax system—let alone when they further entrench it[433]—they are failing in their duties to respect, protect, and fulfill the human rights of *their own people*. In doing so, they render meaningless the right to be free from discrimination based upon nationality/country of origin.[434]

Zelinsky denies any duty of the state to protect its population from discrimination based on nationality or country of origin as opposed to race.[435] This is because, according to him, citizenship, rather than being "immutable,"[436] is merely a "legal status"[437] that can be easily changed. Citizenship is nothing more than an expression of "political allegiance"[438] that anyone can easily "elect to surrender."[439] Citizenship is something that one can both be dealt and subsequently discard as easily as a playing card. For Zelinsky, U.S. citizenship as nationality[440] and the United States as a country of origin are—even though the terminology is identical— entirely unrelated to "nationality/country of origin" as a protected status.[441]

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431 *Myths and Truths, supra* note 217, at 205–18; *see also Extraterritorial Taxation #13, supra* note 400, at 18.

432 *Supra* notes 420–25 and accompanying text.

433 *See infra* notes 465–72, 500–02 and accompanying text.

434 *Extraterritorial Taxation #13, supra* note 400, at 17; *International Human Rights Law*, *supra* note 428; *Questions and Answers About Human Rights*, *supra* note 430.

435 *Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2428.

436 *Id. But see supra*, notes 256–260 and accompanying text (explaining how *Afroyim* makes clear that U.S. citizenship (nationality) is immutable. The only exception is if the American genuinely desires to terminate their U.S. citizenship and is not driven to it by harsh U.S. policies.).

437 *Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2428.

438 *Id.*

439 *Id.*

440 The terms "national" and "nationality" are often used synonymously with the terms "citizen" and "citizenship," including in U.S. federal laws. *See, e.g.,* Nationality Act of 1940, Pub. L. No. 76–853, 54 Stat. 1137 (1940) (defining "national of the United States" to mean "a citizen of the United States."); Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (again defining "national of the United States" to mean "a citizen of the United States."). Further, Merriam-Webster defines "nationality" in terms that closely resemble Zelinsky's definition of "citizenship:" "a *legal* relationship involving *allegiance* on the part of an individual" (emphasis added). *Nationality*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/nationality (last visited Nov. 8, 2025).

441 *See Myths and Truths, supra* note 217, at 205–18 (explaining how the U.S. extraterritorial tax system violates Fourteenth Amendment equal protection because it discriminates based on nationality/country of origin. A series of decisions by the U.S. Supreme Court make clear that not only laws that discriminate based on race, but also laws that discriminate based on nationality or country of origin are subject to strict scrutiny). *See generally* Laura Snyder*, What a Decision on*

Zelinsky's argumentation is an open admission that U.S. tax policies forcibly destroy U.S. citizenship, in violation of *Afroyim* and the Fourteenth Amendment,[442] because the policies rightfully (for Zelinsky) cause people to "surrender" citizenship.[443] Indeed, this line of reasoning approves, encourages, and gleefully celebrates the destruction of citizenship—for Zelinsky, it is so easy for an American to "elect"[444] to stop being American. Whether the American would be left stateless is not Zelinsky's concern.[445] Whether, because of the destruction of their citizenship, the American would "punch, kick and scream,"[446] "burst into tears,"[447] vomit,[448] live with "depression [and] sadness,"[449] vacillate between "homicidal rage and indescribable sorrow,"[450] feel "hit over the head with a baseball bat,"[451] or feel as if they had died[452] is not Zelinsky's concern.[453] Zelinsky's remarkably unidimensional conception of citizenship (nationality) as mere "political allegiance" flouts the plain meaning of words.[454] Further, his conception is

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Affirmative Action Teaches About Taxation, 51 RUTGERS L. REC. 102 (2023) (explaining how a 2023 U.S. Supreme Court decision makes clear that race and nationality are inextricably linked and that distinctions based on either are to be treated with "antipathy." Such distinctions are inherently suspect and thus subject to strict scrutiny under Fourteenth Amendment equal protection.).

442 *See supra* notes 247–256 and accompanying text.

443 *See Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2428. The direct causal relationship is unequivocal. It is confirmed by IRS data. *See* Paul R. Organ, *Citizenship and Taxes: Evaluating the Effects of the U.S. Tax System on Individuals' Citizenship Decisions*, IRS (Aug. 23, 2021), https://www.irs.gov/pub/irs-soi/21rpcitizenshipandtaxes.pdf; *see generally* SEAT SURVEY DATA PART 1, *supra* note 397; *see, e.g.,* Lewis J. Greenwald & Eric J. Rietveld, *Why the First U.S. Pope Should Expatriate Immediately*, 187 TAX NOTES FED. 1923 (2025) (the authors urge Pope Leo XIV, the first American pope, to "surrender his U.S. passport and cease being an American immediately." They give this urgent advice not because of the Pope's U.S. citizenship per se, but because – and only because – of "all the questions and uncertainty of being both absolute monarch of a foreign country and subject to the U.S. federal income tax regime." In stark contrast, the Pope's (dual) Peruvian citizenship poses no such problem; thus, it can be maintained).

444 *See Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2428.

445 *See* SEAT SURVEY DATA PART 1*, supra* note 397, at 4 (in a survey of Americans living outside the United States, 39% did not have dual citizenship; they were U.S. citizens only).

446 *See Myths and Truths, supra* note 217, at 259.

447 *See, e.g.*, *Taxing American Emigrant*, *supra* note 9, at 312.

448 *See, e.g.*, *id.*

449 *See, e.g.*, *Rationalized?, supra* note 319, at 587.

450 *See, e.g.*, *id.*

451 *See, e.g.*, *id.*

452 *See, e.g.*, *id.*

453 Further, each of these psychological as well as physical reactions to renunciation of U.S. citizenship demonstrate that in no way could the renunciations be considered "voluntary" or unforced. *See supra*, notes 255–60 and accompanying text (discussing the necessity for renunciation to be voluntary).

454 Zelinsky states "in Equal Protection terms, a U.S. citizen is not taxed because of an 'immutable characteristic' like race but is instead taxed because of a legal status which she can change." *See Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2428 (this statement conveniently omits to mention that the U.S. Supreme Court has clearly stated on several occasions that classifications based on nationality or country of origin (as well as based on alienage) are inherently

highly singular, and he offers no citation demonstrating that it is shared by anyone.[455] Certainly, his conception is not shared by overseas Americans: many describe their U.S. citizenship as an important part of their identity,[456] while none describe it as bearing any relation to "political allegiance."[457] Nor is Zelinsky's conception shared by the European Court of Human Rights: it has underscored the importance of nationality as an inherent part of a person's social identity and, as such, determined that it is a protected element of private life.[458] This (the Court's) view has nothing to do with a conception of citizenship (nationality) as a mere "legal status" or "political allegiance" that can easily be changed or ended. In insisting that overseas Americans can simply "elect to surrender" U.S. citizenship if they do not want to be subject to penalizing U.S. taxation, Zelinsky is insisting that overseas Americans, at a minimum, give up their very identity and, for many, also become stateless. This is without mentioning, again, that the Fourteenth Amendment elevated U.S. citizenship to a constitutional right.[459] It is a right that, under *Afroyim*,

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suspect and subject to close judicial scrutiny in the same manner as classifications based on race); *see Myths and Truths*, *supra* note 217, at 127–55 (in one decision the Court described "national origin" as an "immutable characteristic determined solely by the accident of birth."); *see id.* at 207 (citing Frontiero v. Richardson, 411 U.S. 677, 686 (1973)) (this single use by the Court does not transform the word "immutable" into the sole operative criteria for the application of strict scrutiny. And if it did, as regards those born in the United States, if their U.S. nationality is not determined by an "accident of birth" then by what else is it determined? In sum, Zelinsky simply ignores the Court's inclusion of "nationality" and "country of origin" in its test of strict scrutiny. Zelinsky does this by pretending that in the context of equal protection these terms mean only "race" and that "race" has only one dimension, which is physical appearance (skin pigmentation). Zelinsky also ignores the fact that, for many, race is not "immutable."); *see, e.g.,* Laura Snyder, *What Is the Best Way to Deal with Bad Laws? (Is Passing a Sin?)*, STOP EXTRATERRITORIAL AM. TAX'N (Jan. 24, 2025), https://seatnow.org/2025/01/24/what-is-the-best-way-to-deal-with-bad-laws/ (describing examples of African-Americans who, during the Black Codes and Jim Crow, "passed" as white, Mexican, or Native American).

455 *See Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2428.

456 *See* LAURA SNYDER, "I FEEL THREATENED BY MY VERY IDENTITY:" REPORT ON US TAXATION AND FATCA SURVEY—PART 2 COMMENTS 6, 9, 75 (2019), http://www.citizenship solutions.ca/wp-content/uploads/2019/10 /Part-2-Comments.pdf [https://perma.cc/9BTA-CQ8U] [hereinafter THREATENED BY IDENTITY]; LAURA SNYDER, "BEING AN AMERICAN OUTSIDE OF AMERICA IS NO LONGER SAFE." SURVEY REPORT: EFFECTS OF THE EXTRATERRITORIAL APPLICATION OF U.S. TAXATION AND BANKING POLICIES: PARTICIPANT COMMENTS VERSION 1, at 46, 399, 631 (May 4, 2021), https://seatnow.org/wp-content/uploads/2021/05/Comments-by-topic.pdf [hereinafter SEAT SURVEY PARTICIPANT COMMENTS VERSION 1].

457 *See, e.g.,* THREATENED BY IDENTITY, *supra* note 456, at 6, 9, 75; SEAT SURVEY PARTICIPANT COMMENTS VERSION 1, *supra* note 456, at 46, 399, 631 (in a combined 790 pages of reports of two surveys of overseas Americans, not a single overseas American used the word "allegiance" in discussing their U.S. citizenship).

458 *See Myths and Truths, supra* note 217, at 257 (citing HÉLÈNE LAMBERT, REFUGEE STATUS, ARBITRARY DEPRIVATION OF NATIONALITY, AND STATELESSNESS WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 27 (2014), http://dx.doi.org/10.2139/ssrn.2521076).

459 U.S. CONST. amend XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

Congress may not do anything to "shift," "cancel," "dilute," "destroy," "abridge," or "affect."[460]

In sum, the U.S. extraterritorial tax system violates the sovereignty of the countries where overseas Americans live. It does this by overriding the retirement, investment, business ownership, homeownership, succession planning, welfare, and other policies of those countries.[461] The policies were presumably determined by democratic processes and were intended to apply to *all* the country's residents, not just some. Further, through both investments in and the payment of tax to the United States, the system erodes the tax bases of other countries.[462] It does this by siphoning capital from other countries to the United States—capital generated in those countries and with the resources of those countries.[463] Finally, the U.S. extraterritorial tax system violates the charters, statutes, and human rights instruments of other countries by singling out for differential and more penalizing treatment persons of a particular nationality/country of origin (American/the United States).[464]

E. The Reaction of Other Countries

Section D above describes the considerable nefarious effects the U.S. extraterritorial tax system has on the residents—including citizens—of other countries and on the countries themselves.[465] By overriding the policies of other countries, the system violates their sovereignty.[466] Nevertheless, to date, other countries have taken no action to protect either their residents—including citizens—or their sovereignty. On the contrary, they have taken actions to entrench U.S. taxation in their countries.

The most obvious actions of entrenchment are the intergovernmental agreements that approximately 100 countries have signed with the United States to implement the Foreign Account Tax Compliance Act (FATCA).[467]

FATCA requires all non-U.S. financial institutions to identify their clients who are "suspected U.S. persons"[468] and to disclose detailed financial

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460 *Supra* notes 249–54, 256, 260 and accompanying text. *See also, generally,* Laura Snyder, *Taxation Affects 14th Amendment Citizenship: A Critical Lesson*, 191 TAX NOTES FED. 771 (2026).

461 *See supra* notes 400–410 and accompanying text.

462 *Supra* notes 412–15 and accompanying text.

463 *Supra* note 411 and accompanying text.

464 *See supra* notes 419–58 and accompanying text.

465 *See supra* notes 399–464 and accompanying text.

466 *See supra* notes 399–464 and accompanying text.

467 *Foreign Account Tax Compliance Act*, U.S. DEP'T OF THE TREAS., https://home.treasury.gov/policy-issues/tax-policy/foreign-account-tax-compliance-act (last visited Nov. 7, 2025).

468 *See Taxing American Emigrant*, *supra* note 9, at 308 (citing IRS, IRS DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE FOREIGN ACCOUNT TAX COMPLIANCE ACT

information about each of those persons to U.S. tax authorities. FATCA was adopted in response to a report issued by Senator Carl Levin claiming that the United States lost an estimated $100 billion in tax revenues due to offshore tax abuses.[469] The figure of $100 billion was justified with references to studies of offshore accounts held by U.S. residents and of multinational companies engaged in fraudulent transfer pricing arrangements involving intellectual property.[470] Neither Levin's report nor any of the studies it cited addressed overseas Americans who bank and otherwise carry out their financial affairs in the countries where they live. At no point was it asserted, much less demonstrated, that overseas Americans engage in U.S. tax evasion or that their accounts are used for that purpose.[471]

Nevertheless, FATCA was drafted to apply to all U.S. citizens regardless of where they live in the world, and to encompass all financial accounts held by U.S. citizens outside the United States, including the accounts held by overseas Americans in the countries where they live, which have no connection to the United States besides the account owner's U.S. citizenship (stated another way: for the account owners, the accounts are domestic).[472]

At the time of its adoption in 2010, it was quickly understood that FATCA's disclosure requirements, if enforced, would violate the data privacy and other laws of many countries.[473] The solution was for the United States to enter "intergovernmental agreements" with different countries. Under the agreements, each country agrees to remove any legal impediments to the enforcement of FATCA in that country and, depending upon the agreement,[474] to act as an intermediary in the collection of the relevant data from the country's financial institutions and to transmit it to the United States.

FATCA and its implementing intergovernmental agreements have been devastating for overseas Americans. Because of the agreements, banks,

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INTERNATIONAL COMPLIANCE MANAGEMENT MODEL (ICMM) FATCA 4.1 REPORT NOTIFICATION TECHNICAL SUPPORT GUIDE (2016), https://perma.cc/J6FJ-692Z).

469 *Taxing American Emigrant*, *supra* note 9, at 307–08; *see, e.g., Rationalized?, supra* note 319, at 592–93.

470 *Taxing American Emigrant*, *supra* note 9, at 308; *see, e.g., Rationalized?, supra* note 319, at 592–93.

471 *Taxing American Emigrant*, *supra* note 9, at 308; *see, e.g., Rationalized?, supra* note 319, at 592–93.

472 *Taxing American Emigrant*, *supra* note 9, at 308; *see, e.g., Rationalized?, supra* note 319, at 593.

473 *See, e.g.*, Peter Nelson, *Conflicts of Interest: Resolving Legal Barriers to the Implementation of the Foreign Account Tax Compliance Act*, 32 VA. TAX REV. 387, 389 (2012); Thomas D. Ciz, *What Is a "W-8BEN-E" and Why Should I Care?*, 82 ADVOCATE (Vancouver) 517, 518 (2024).

474 There are two kinds of FATCA agreements, Model 1 and Model 2. For a description of each, *see, e.g.*, *FATCA Information for Governments,* IRS (updated Feb. 20, 2025), https://www.irs.gov/ businesses /corporations/fatca-governments.

fearing draconian penalties for failing to comply with FATCA, find it easier to simply refuse to serve U.S. citizens.[475] Non-U.S. citizen spouses of overseas Americans do not want their financial assets to be reported to the United States, so they refuse to hold joint accounts.[476] Non-U.S. employers refuse to hire U.S. citizens in jobs that include bank account authority because this would trigger the need to report the employer's accounts to the United States.[477] American emigrants are refused entrepreneurial opportunities for the same reason.[478] In sum, FATCA and its implementing intergovernmental agreements are an important[479] reason why, as discussed above, overseas Americans experience the denial of banking and other financial services, of ownership of family assets, of mortgages, and of employment, entrepreneurial, and community service opportunities.[480]

Residents and citizens of several European Union countries have complained to their national governments and to the European Union about the effects of FATCA.[481] Their complaints have prompted representatives of the European Union to send tepid letters to U.S. authorities. Their letters do not challenge FATCA, much less the underlying U.S. extraterritorial tax system. On the contrary, these residents seek to improve FATCA enforcement by asking the United States to make it easier for residents—including citizens—of European Union countries to obtain a U.S. tax identification number,[482] regardless of whether they have U.S.-source income, and to postpone the implementation of penalties against financial institutions because they struggle to provide their clients' U.S. tax identification numbers.[483] Rather than argue that bona fide residents—

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475 *Taxing American Emigrant*, *supra* note 9, at 309–10; *Unacknowledged Realities, supra* note 11, at 265.

476 *Taxing American Emigrant*, *supra* note 9, at 309–10; *Unacknowledged Realities, supra* note 11, at 265.

477 *Taxing American Emigrant*, *supra* note 9, at 309–10; *Unacknowledged Realities, supra* note 11, at 265.

478 *Taxing American Emigrant*, *supra* note 9, at 309–10; *Unacknowledged Realities, supra* note 11, at 265.

479 The underlying tax policies also contribute to many of these problems.

480 *See supra* notes 320–31 and accompanying text.

481 *See Unacknowledged Realities, supra* note 11, at 275–85; EUR. PARLIAMENT COMM. ON PETITIONS (PETI), MISSION REPORT 3 (Mar. 24, 2023), https://www.europarl.europa.eu/doceo/document/PETI-CR-740659_EN.pdf [hereinafter PETI Report]. Regarding a resident of the United Kingdom, *see* Charlotte Sallabank & Christy Wilson Katten, *Tax Transparency and Data Privacy — Which Wins?*, NAT'L L. REV. (Mar. 7, 2025), https://natlawreview.com/article/tax-transparency-and-data-privacy-which-wins#google_vignette.

482 Letter from Martin Kreienbaum, Ger. Presidency of the Council of the E.U., to Charles P. Rettig, IRS Comm'r, at 2 (Dec. 8, 2020), https://data.consilium.europa.eu/doc/document/ST-13977-2020-INIT/en/pdf [hereinafter Kreienbaum-Rettig Letter].

483 Letter from Terhi Järvikare, Fin. Presidency of the Council of the E.U., to Steve Mnuchin, Sec'y of the Treas., at 2–3 (Dec. 3, 2019), https://data.consilium.europa.eu/doc/document/ST-15021-2019-INIT/en/pdf [hereinafter Järvikare-Mnuchin Letter].

including citizens—of E.U. countries should not be subject to FATCA (much less to U.S. taxation on worldwide income), the E.U. representatives implore that something must be done to stop the closure of their residents'—and citizens'—bank accounts in the countries where they live.[484] Further, if solutions to these problems cannot be found, E.U. representatives offer up their residents as candidates for loss of U.S. citizenship, pleading only that it be made less expensive and less complex to carry out.[485]

At least one E.U. representative denied that FATCA imposed any significant problems for E.U. residents, and certainly not any problems that required action on the part of the European Union.[486] In 2020, then European Commissioner for Economy Paolo Gentiloni wrote to then member of the European Parliament Sophie in 't Veld that members of the European Banking Authority received only a limited number of complaints about FATCA.[487] Further, he asserted there is little that the European Union can do.[488] Strongly echoing 19th century U.S. Secretary of State Everett and U.S Envoy to Prussia Barnard,[489] Gentiloni saw no problem with the United States applying its laws extraterritorially to E.U. residents and citizens. Even though, he stated, "E.U. citizenship […] takes precedence over any additional third country nationality, […] this does not prevent third countries from applying their own laws on individuals holding their nationality, even if they also hold the nationality of a Member State and thus E.U. citizenship. This is a natural consequence of dual nationality."[490]

In sum, for Gentiloni, the United States can do what it likes with E.U. residents and citizens if they are also U.S. citizens. It has nothing to do with the European Union or its Member States. Neither the European Union nor its Member States have any obligation to protect their residents who are citizens of another country from that outside power. Gentiloni further opined that "one of the positive outcomes" of dialogue between the European Union

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484 Kreienbaum-Rettig Letter, *supra* note 482, at 2–3.

485 *Id.* at 3; Järvikare-Mnuchin Letter, *supra* note 483, at 3.

486 Letter from Paolo Gentiloni to Sophie in 't Veld at 1, 2 (July 29, 2020) https://ellentimmer.com/wp-content/uploads/2021/05/2020-07-29-gentiloni-letter.pdf [hereinafter Gentiloni-Veld Letter] (denying that FATCA violated either the E.U. Payment Accounts Directive or data protection laws). *But see* PETI REPORT, *supra* note 481, at 2 (stating that FATCA both "can cause breaches to" the Payment Accounts Directive and "[raises questions] about compliance with E.U. privacy regulations."); Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the Comparability of Fees Related to Payment Accounts, Payment Account Switching and Access to Payment Accounts with Basic Features, 2014 O.J. (L 257) 214.

487 Gentiloni-Veld Letter, *supra* note 486, at 1.

488 *Id.*; *see also* Cristian Angeloni, *EU Hiding Behind 'Bureaucratic Excuses' on Fatca* [sic], INT'L ADVISOR (Apr. 14, 2020), https://international-adviser.com/eu-hiding-behind-bureaucratic-excuses-on-fatca/.

489 *Supra* note 122 and accompanying text (Everett and Barnard categorically and scathingly rejected that the United States had any obligation to assist dual U.S.-Prussian citizens).

490 Gentiloni-Veld Letter, *supra* note 486, at 2.

and its Member States with the United States was the adoption by the United States of "relief procedures" for persons seeking to relinquish U.S. citizenship.[491] So, for Gentiloni, if a U.S. citizen residing in the European Union is unhappy with the reach of U.S. policies into the European Union, instead of looking to the European Union or any Member State for help, they should just give up U.S. citizenship.[492]

In July 2022, the European Parliament's Committee on Petitions (PETI) conducted a "fact-finding visit" to Washington D.C. to discuss the impact of FATCA on E.U. citizens.[493] PETI's 2023 report on the visit expressly acknowledges that U.S. tax laws apply in the European Union "extraterritorial[ly]."[494] Yes, the Committee continues, FATCA is implemented through intergovernmental agreements.[495] But mentioning the agreements does not change the Committee's matter of fact and unquestioning acceptance of the application in the European Union of the laws of an outside power.

Those laws apply to more than just residents and dual citizens. They also apply to corporate entities—financial institutions that may or may not have a connection, however tenuous, to the United States.[496] Further, the Committee describes FATCA as "oblig[ing] *European and other foreign* financial institutions to report all holdings of their customers who have or had links to the USA to the U.S. tax authorities."[497] In the context of this sentence, "foreign" necessarily means not American. By describing European financial institutions as "foreign," the European Committee makes manifest that it conducted its mission *from the perspective of the United States*, not the European Union or any of its Member States. Stated another way, it is—or, at least, it should be—shocking that a committee of the European Parliament describes European Union institutions as "foreign." The first draft of this report may have inadvertently included this terminology. But reports of this kind undergo review before they are released, and, if this terminology—appearing at the top of the report's second

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491 *Id.*

492 *See infra* notes 798–827 and accompanying text for a discussion of why renunciation of citizenship is not the solution.

493 *See* COMMITTEE ON PETITIONS (PETI), ACTIVITY REPORT 2019-2024, at 8, 17 (n.d.), https://www.europarl.europa.eu/cmsdata/282096/PETI%202019_2024%20Activity%20Report_FINAL.pdf.

494 PETI REPORT, *supra* note 481, at 1.

495 *Id.* at 2.

496 *See Taxing American Emigrant*, *supra* note 9, at 318–20. For a discussion of the challenges FATCA presents for non-U.S. financial institutions, *see, e.g.*, Eva Li, *Navigating FATCA and CRS Compliance: A Guide for Banking Professionals*, GLOB. COMPLIANCE INST. (Dec. 11, 2024), https://www.gci-ccm.org/insight/2024/12/navigating-fatca-and-crs-compliance-guide-banking-professionals.

497 PETI REPORT, *supra* note 481, at 2 (emphasis added).

page[498]—was at first inadvertent, it was neither noticed nor corrected in subsequent reviews. The terminology and the failure to notice and correct it demonstrate how the United States' perspective has permeated world consciousness to the point that it is expressly adopted by a group whose entire purpose is to represent persons who live outside the United States.[499]

As stated,[500] the purpose of the PETI committee's 2022 "fact-finding visit" was ostensibly limited to an examination of FATCA rather than the entire U.S. extraterritorial tax system. This, however, did not stop the committee from discussing the system as a whole.[501] But the discussion did not include any recommendation that the United States stop claiming tax residents of Member States of the European Union as its own. On the contrary, the Committee seemed to want to purposely distance itself from any such idea, stating "Throughout the meetings, the PETI delegation stressed that it did not advocate in any way enabling tax avoidance or tax evasion by U.S. citizens."[502]

Further, the report includes recommendations that, if implemented, would further entrench the U.S. extraterritorial tax system in the European Union. Specifically, the Committee recommended that the competent authorities "provide assistance to E.U. citizens and financial institutions on tax compliance, including by re-establishing tax attachés in U.S. embassies and consulates and improving the availability of hotlines and online resources."[503] In other words, the Committee's report invites the United States to do more to enforce U.S. taxation within the borders of the European Union. Most strikingly, this invitation seeks to entrench in the European Union the taxation by the United States not of U.S. citizens or of dual citizens, but of, as the recommendation expressly states, "E.U. citizens!"[504]

To date, other countries have taken no actions to protect their residents, including their citizens—or even to protect the countries themselves—from the extraterritorial application of U.S. tax laws. Instead, they prioritize not appearing to "advocate" for "tax avoidance or tax evasion"[505] by their own residents and citizens, not in their own country but in another one. They do

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498 *Id.* (emphasis added).

499 It is difficult to imagine that PETI would describe the laws of a country other than the United States in the same manner. For example, it is difficult to imagine that PETI would describe the laws of India or of China as applying "extraterritorially" in the European Union in such an unquestioning manner, or that PETI would describe European financial institutions as "foreign" from the perspective of India or China.

500 *Supra* note 493 and accompanying text.

501 PETI REPORT, *supra* note 481, at 9–12, 18–19.

502 *Id* at 18.

503 *Id.* at 19.

504 *Id.*

505 *Supra* note 501 and accompanying text.

this even though no such tax avoidance or evasion has been demonstrated.[506] Instead of protecting their own tax bases,[507] the countries welcome and encourage a foreign power to enforce within their borders the taxation of their own residents' and citizens' worldwide income.[508] Also, they do so with full knowledge of the nefarious[509] and discriminatory[510] effects on the people whose human rights they have the duty to protect.[511] They also do so in blatant disregard of their duty to protect their countries' sovereignty.[512] Their actions and failures to act call to mind the words of James Monroe reflecting on Great Britain's forced conscription of Americans: given that other countries do nothing to end the "degrading practice" of U.S. worldwide taxation *in their own countries*, can they consider themselves independent nations?[513]

IV. PROFOUND PARALLELS AND CRUCIAL DIFFERENCES

At first glance, the two stories of emigration recounted above—first to and then from the United States—may appear to have little to do with each other. Conscription necessarily entails the risks of physical injury and death. Taxation certainly entails risks, including divorce,[514] depression,[515] and contemplation of suicide,[516] but the risks of taxation are typically not a matter of life or death. For most countries, conscription involves only males of a limited age range. Income taxation today involves nearly every adult. In the first emigration story, except during the War of 1812,[517] only men who dared to visit their (or their father's) country of origin—usually by crossing an ocean—found themselves subject to forcible conscription by a country where they did not live.[518] In contrast, in the second emigration story, thanks to modern means of communication, data collection, and surveillance, persons who haven't set foot in the United States in decades—and possibly never

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506 *Supra* notes 470–71 and accompanying text.
507 *Supra* notes 412–15, 462 and accompanying text.
508 *Supra* notes 503–04 and accompanying text.
509 *Supra* notes 317–343 and accompanying text.
510 *Supra* notes 419–34 and accompanying text.
511 *Supra* notes 419–34 and accompanying text.
512 *Supra* notes 461–64 and accompanying text.
513 ZIMMERMAN, *supra* note 25, at 195–96, 210 (quoting then Secretary of State James Monroe).
514 *See* SEAT SURVEY PARTICIPANT COMMENTS VERSION 1*, supra* note 456, at 88, 89, 90, 576; *see also Invisibility of American Emigrant*, *supra* note 7, at 40.
515 SEAT SURVEY PARTICIPANT COMMENTS VERSION 1*, supra* note 456, at 19, 30, 39, 56, 61, 77, 156, 169, 182, 229, 235, 251, 295, 345–46, 396, 412, 491–92, 500, 535, 542, 603.
516 *Id.* at 3, 7–8, 11, 39, 385, 491–92, 602; *see also Unacknowledged Realities, supra* note 11, at 267; *Rationalized?, supra* note 319, at 585–86.
517 *Supra* notes 16–28 and accompanying text.
518 *Supra* notes 31–37, 48–50, 68–79 and accompanying text.

have—and who have no U.S.-source income, find themselves subject to U.S. income taxation.[519]

Despite these differences, these two stories have important parallels that merit examination. The parallels relate to: (A) suspicion of emigrants' motives for emigration; (B) conscription as a form of taxation; (C) incompatibility of regimes; (D) forcible destruction of citizenship; (E) the obligations of citizenship; and (F) the refusal to let go. This examination will demonstrate that the commonalities in the two stories are profound. At the same time, there are also some crucial differences.

A. Unfounded Suspicion of Motives for Emigration

In the first story, policymakers and the public at large were often suspicious of the emigrants' motives for emigration.[520] They assumed that people emigrated to avoid military service in their country of origin.[521] In the second story, U.S. policymakers and the U.S. public at large were and continue to be suspicious of American emigrants' motives for emigrating.[522] At first, they assumed Americans emigrated to avoid the Civil War draft.[523] Today, they assume Americans emigrate to avoid taxation.[524]

From the late 18th century to the early 20th century, some men did emigrate to the United States to avoid conscription in their countries of origin.[525] Ryan McMaken writes approvingly of this, explaining that most of those who emigrated for that reason were members of ethnic and cultural

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519 *Supra* notes 317–49 and accompanying text.

520 *Supra* notes 81–82, 113–114, 118–20 and accompanying text. *See also* correspondence between United Staes Ambassador to Germany Andrew D. White and U.S. Secretary of State John Hay, about Mr. Max Friedrich Schaaf, a naturalized American citizen who emigrated to the United States with his family in 1882 at the age of ten. The correspondence explains that from the German perspective, any person who emigrated from Germany during minority was imputed to have done so for the purpose of avoiding military service, regardless of their age at the time of emigration. 1901 Diplomatic Papers, *supra* note 177, at 158–60.

521 *Supra* notes 277–304 and accompanying text.

522 *See, e.g.*, *Taxing American Emigrant*, *supra* note 9, at 314–26.

523 *Supra* notes 277–304 and accompanying text.

524 *See, e.g.*, *Taxing American Emigrant*, *supra* note 9, at 314–26; *see also, e.g.*, *Moore than Meets the I.R.C.? The Apportionment Rule's Originalist Backstop for I.R.C. § 877A*, 137 HARV. L. REV. 1204 (2024) (claiming that most Americans who expatriate do so to avoid "paying a tax bill from the IRS."). *But see* Laura Snyder, *Of Losing Citizenship, Tropes, and Missed Opportunity* 6–11 (SEAT Working Paper Series #2024/1, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4873340 [https://perma.cc/XQ8Y-SGX5] (explaining that most overseas Americans have no U.S. tax liability; they renounce U.S. citizenship because of the compliance burdens); *see also supra* notes 347–49.

525 Ryan McMaken, *America Has Long Been a Haven for Draft Dodgers from Foreign Lands*, MISES WIRE (Mar. 11, 2022), https://mises.org/mises-wire/america-has-long-been-haven-draft-dodgers-foreign-lands [https://perma.cc/AE76-YK48].

minorities.[526] As examples, he cites Jews from Central and Eastern Europe who were denied legal rights in their countries of origin, yet were nevertheless required to provide military service,[527] and Christian Armenians who were required, in World War 1, to fight for the Muslim-controlled Ottoman Empire—an empire that a few years later would subject Armenians to genocide.[528]

McMaken asks:

> Should the Jews of eastern Europe have stuck around to make good on their "duty" to the anti-Semitic local princes? Did the young men of the Ottoman Empire owe a debt for the "benefits" they allegedly received from their government? Precisely because so many of these regimes and their wars proved to be so petty, futile, immoral, and ultimately forgettable, many are surely inclined to conclude no.[529]

Regardless of whether such emigrants were justified in their motive for emigration (to avoid conscription), their numbers were, as a percentage of all emigrants to the United States, relatively small. From the late 18th century to the early 20th century, most people who emigrated to the United States, and particularly those who emigrated from the countries that sought to forcibly conscript them when they returned for a visit (Prussia/Germany,[530] partitioned Poland,[531] and Italy,[532] as examples), were motivated by land and

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526 *Id.*

527 *Id.*

528 *Id.*

529 *Id.*

530 *See, e.g.*, F. Burgdorfer, *Migration Across the Frontiers of Germany*, INT'L MIGRATIONS, VOL. II: INTERPRETATIONS 313, 341–46 (1931), https://www.nber.org/system/files/chapters/c5114/c5114.pdf [https://perma.cc/Q46N-LQFZ] (explaining that 19th century emigration from Germany was principally motivated by land shortages, economic, social, and political disturbances, and crop failures and famine); *see also, e.g.*, Thomas K. Bauer & Kathrin Schulze, *International Migration from and to Prussia: 1862–1871*, RUHR ECON. PAPERS, NO. 1022 (May, 2023), https://www.econstor.eu/bitstream/10419/277743/1/1860060706.pdf [https://perma.cc/4ZKN-FPAS].

531 *See, e.g.*, Sister Lucille, *The Causes of Polish Immigration to the United States*, 8 POLISH AM. STUD. 85 (1951) (explaining that emigration from Poland in the late 19th and early 20th centuries was principally motivated by land shortages, revolutionary and labor disturbances, religious oppression, and underemployment); *see also, e.g.*, Victor R. Greene, *Pre-World War I Polish Emigration to the United States: Motives and Statistics*, 6 POLISH REV. 45 (1961).

532 Giuseppe Piccoli, Italian Immigration in the United States 8–10 (Dec. 2014) (Master's thesis, Duquesne University), https://dsc.duq.edu/cgi/viewcontent.cgi?article=2060&context=etd [https://perma.cc/JPB7-U269] (explaining that emigration from Italy in the late 19th and early 20th centuries was principally motivated by overpopulation, agricultural and industrial crises, and privatization of common lands).

job shortages, crop failure and famine, political instability, and religious oppression.[533]

As discussed above, during the Civil War and the late 19th century, members of Congress perceived draft evaders as wealthy persons who crossed an ocean to avoid military service in the United States.[534] If anyone should be subject to income taxation, Senator George Hoar exclaimed, "he [the overseas draft evader] is the one human being we ought to tax."[535] As discussed, this stereotype did not reflect reality.[536] Research demonstrates that at the time of the Civil War, most draft evaders were poor.[537] Contrary to Hoar's claim that they evaded the draft by "living in luxury […] in a foreign capital,"[538] in fact, they hid in places in the United States that either were too remote for army patrols to access or were on the southern border and populated by persons with "Southern sympathies."[539]

Today, the myth of the wealthy American expat who left the United States to avoid taxation persists.[540] For example, to justify the expansion of tax penalties for expatriation (renunciation of U.S. citizenship), U.S. Representative Charles Rangel declared, "I would hope that one day we will just publish the names of people that America has given so much to and that they care so little about that citizenship that they would flee in order to avoid taxes."[541]

But the reality is that most Americans who live outside the United States do so for love or marriage (to join a romantic partner), for professional opportunities, to accompany their spouse who moves overseas, to fulfill family obligations, or to retire.[542] Many (one survey indicates 10%) left the United States as children with their families.[543]

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533 *See, e.g.*, *Immigration to the United States, 1851–1900*, LIBR. CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/immigration-to-united-states-1851-1900/#:~:text=In%20the%20late%201800s%2C%20people,the%20land%20of%20economic%20opportunity [https://perma.cc/ZWL9-8MW3] (last visited Nov. 12, 2025); *see also* Timothy J. Hatton & Jeffrey G. Williamson, *What Drove the Mass Migrations from Europe in the Late Nineteenth Century?*, 30 POP. & DEV. REV. 533 (1994); Thomas Walker Page, *The Causes of Earlier European Immigration to the United States*, 19 J. POL. ECON. 676 (1911).

534 *Supra* notes 276–303 and accompanying text.

535 *Supra* notes 296, 301 and accompanying text.

536 *Supra* notes 289–95 and accompanying text.

537 *Supra* notes 289–95 and accompanying text.

538 *Supra* note 296 and accompanying text.

539 *Supra* notes 291–95 and accompanying text.

540 *See Taxing American Emigrant*, *supra* note 9, at 314–26.

541 *Id.* at 319 (quoting Representative Charles Rangel); *see also* 141 CONG. REC. H3996 (daily ed. Mar. 30, 1995), https://www.congress.gov/congressional-record/1995/03/30/house-section/article/H3996-1 [https://perma.cc/HR85-XA8G].

542 SEAT SURVEY DATA PART 1, *supra* note 397, at 10.

543 *Id.*

Almost no one lives outside the United States to avoid taxation.[544] This fact is reflected in the countries where most U.S. citizens live. They include Mexico, Canada, the United Kingdom, Germany, France, Australia, South Korea, Japan, Spain, and Israel.[545] These are not tax haven countries.[546] They are countries with ordinary tax systems.[547] No one moves to these countries to avoid taxation.

In both stories recounted in this article, emigrants were/are the subject of unfounded suspicions about their reasons for emigrating. The misconceptions and prejudices were and, in the case of the second story, are still today a considerable barrier to reform.[548]

B. Conscription Is Taxation / Taxation is Conscription

As mentioned,[549] taxation and conscription may, on a superficial level, appear to be different, if not entirely unrelated. So, the two stories told in Parts II and III of this article could appear on its face to be about two different things entirely. The historical record, however, indicates otherwise. It demonstrates that in many ways, conscription and taxation are substitutes for one another.

To begin, as mentioned, U.S. Civil War draftees could avoid service by paying a $300 "commutation fee" to the Federal Government.[550] The Swiss use more direct terminology. In Switzerland today, and as was also the case

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544 *See, e.g.*, *id.* at 2, 10 (in a survey of 1285 overseas Americans, just three reported that they left the United States to avoid U.S. taxation).

545 *See, e.g., American Expats by Country 2025*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/american-expats-by-country (last visited Nov. 13, 2025); *see also* Doris L. Speer, *How Many Americans Live Abroad?*, ASS'N AM. RESIDENT OVERSEAS (Oct. 2024), https://www.aaro.org/living-abroad/how-many-americans-live-abroad.

546 *See, e.g.*, *World's Best Tax Havens,* SMART SEARCH, https://www.smartsearch.com/resources/blog/the-worlds-best-tax-havens (last visited Nov. 8, 2025) (listing the top tax havens for individuals as Bahamas, Anguilla, Jersey, Turks & Caicos, British Virgin Islands, Liechtenstein, Lebanon, Singapore, Isle of Man, and Bermuda); *see also* Josh Maunder, *The Best Tax Haven Countries for Expats in 2025 (and Why Financial Advice Is Crucial)*, HARRISON BROOK (June 11, 2025), https://harrisonbrook.com/the-best-tax-haven-countries-for-expats-in-2025-and-why-financial-advice-is-crucial/.

547 *See, e.g.*, *Highest Taxed Countries 2025*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/highest-taxed-countries (last visited Nov. 12, 2025) (listing the tax rates for individuals in Mexico, Canada, United Kingdom, Germany, France, Australia, South Korea, Japan, Spain, and Israel as roughly comparable to that of the United States. Some of the rates are higher, and in certain cases considerably so).

548 *See supra* notes 81–82, 113–14, 118–20 and accompanying text.

549 *Supra* notes 514–21 and accompanying text.

550 *Supra* note 287 and accompanying text.

in the 19th and 20th centuries,[551] those who are subject to conscription but do not serve are subject to a "military service exemption tax."[552] Swiss citizens who have resided outside Switzerland for at least three years are neither required to serve nor subject to the tax.[553]

Further, the historical record is replete with members of Congress and others comparing conscription and taxation and finding scant difference between them. Some describe conscription as taxation, while others describe taxation as conscription.

Shortly after the Civil War, Representative Philadelph Van Trump of Ohio argued:

> [The mass of people] know that the Constitution, while it confers its benefits like the dews of heaven alike upon all, also imposes an equal obligation upon all to sustain by arms or means the integrity and existence of the Government. They know and feel that there is just as much power in that Constitution to draft money or property as there is to draft men to sustain, support, and defend the Government under which they live. They know and feel that there is just as much power in the Government under a rightful interpretation of the Constitution to break open the strong boxes of the capitalist and seize upon his money-bags to aid the Government in its struggle with the power which assails it as there is to enter the lowly cabin of the poor man and drag him by a provost marshal from his frightened, helpless, and dependent family and compel him to risk life and limb the defense of that Government.[554]

At the time the United States entered World War 1, many members of Congress equated taxation and conscription. Examples include:

> [W]e may not only conscript the blood of this Nation but we may conscript the part of the wealth of this Nation that is coined out of its blood […] With a boundless enthusiasm, Senators, we conscripted, in a very brief period, the youth of this land. With an enthusiasm that would brook no delay on the part of any Senator upon this floor or of any man in all this Nation we took our youth and sent that youth forth to fight for this Nation and to die, if necessary, upon a foreign soil. 1 ask that you have the same enthusiasm for

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551 *Supra* note 221 and accompanying text; *see also Military Service Exemption Tax,* SWISS CMTY., https://www.swisscommunity.org/en/living-abroad/military-service-for-the-swiss-abroad/military-service-exemption-tax (last visited Nov. 13, 2025).

552 *See Military Service Exemption Tax, supra* note 551.

553 *See id.*

554 CONG. GLOBE, 40th Cong., 3rd Sess. 232 (Feb. 24, 1869) (statement of Rep. Philadelph Van Trump).

> conscripting the wealth of the Nation today to stand behind the lads that have gone forth to fight our battle over the seas[555]

> [T]here is but one way for a nation to wage war with the greatest efficiency. It must pool its resources: like one great family having a single larder and a common purse […] We need millions of men […] But we need more than men. We need billions of dollars. These also we must draft resolutely, impartially, relentlessly, no matter whose dollars they are, no matter how lovingly their owner clings to them. We must take them wherever we find them; preferably in large quantities at a time, and we must turn them to the common good.[556]

> [I]f it is right to draft men, why is it not right to draft money? That is exactly what we do when we impose taxes.[557]

After World War 1, members of Congress and others continued to make similar comparisons:

> If conscription of men is just and right, conscription of income is more so; conscription of both is just and right when the Nation's life and honor are at stake.[558]

> I shall vote for selective draft, provided, however, the bill carries with it the conscription-of-wealth amendment. I do not want defense millionaires created at the expense of drafting our men. I will vote for conscription of wealth so that the industrialists shall be made to sacrifice financially for their country as well as the men who will be trained to defend her.[559]

> Taxation is the drafting of the people's money, the money for which the taxed people have labored. […] Suppose that, instead of taxing the people's money, which is indirectly taking part of the citizen's labor, the Government took the labor itself. Suppose that, instead of having to set aside for taxes part of what we earn, each of us gave the equivalent in work.[560]

> Conscription is a tax […] The power to conscript is the power to tax.[561]

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555 55 CONG. REC. S6183-84 (Aug. 20, 1917) (statement of Sen. Hiram Johnson).

556 55 CONG. REC. S6187 (Aug. 20, 1917) (statement of Sen. Henry F. Hollis).

557 55 CONG. REC. S6217 (Aug. 21, 1917) (Statement of Sen. John Weeks).

558 75 CONG. REC. 1303 (Jan. 5, 1932) (Statement of Rep. C. William Ramseyer).

559 86 CONG. REC. 11707 (Sep. 7, 1940) (Statement of Rep. Leon Sacks).

560 96 CONG. REC. S4188 (Mar. 28, 1950) (Sen. Wayne Morse quoting an article sent to him by Mr. Cape Grant of Lexington, Kentucky).

561 THOMAS GATES ET AL., THE REPORT OF THE PRESIDENT'S COMMISSION ON AN ALL-VOLUNTEER ARMED FORCE 23, 122 (Feb. 1970).

> [W]e have two kinds of taxes. We have taxes that you and I pay in money, and we have taxes that the young men who are forced to serve pay in compulsory service. . . . This is no less a tax because you exact it in the form of service than if you exact it in the form of money.[562]

> [A] draft is a tax-in-kind. That is what the kings of Europe extracted from their subjects.[563]

> [C]onscription itself is an economic institution. The draft is a tax. Indeed, that is the central reality of conscription. It takes the labor of 19-year-olds at less than competitive wages to relieve the rest of us of a few dollars' tax burden.[564]

> A draft or selective service is coercive, is a tax on those who serve.[565]

In summary, since at least the mid-19th century, members of Congress and others have repeatedly, as well as emphatically, equated taxation with conscription.[566] While there are differences between taxation and conscription, they share fundamental characteristics. Both entail the state (the government) extracting resources from a given population, subject to penalty (fine and/or imprisonment) in the event of noncompliance.

C. Incompatibility of Regimes

An important commonality of the two emigration stories recounted above is the incompatibility of regimes.

In the first story, emigrants to the United States were subject to the citizenship and military service policies of two different countries: that of their country of origin and that of the United States. This was the case even though the policies were incompatible with each other. The rules of one country forbade military service in another country, whereas the rules of the other country required that very service.[567] As a result, emigrants to the United States risked both punishment by their country of origin for having

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562 BERNARD ROSTKER, I WANT YOU!: THE EVOLUTION OF THE ALL-VOLUNTEER FORCE 36 n.52 (2006), https://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG265.pdf (quoting Milton Friedman).

563 117 CONG. REC. 17619 (June 2, 1971) (statement of Sen. Mark Hatfield of Oregon).

564 123 CONG. REC. 11284 (Apr. 19, 1977) (statement of Rep. William A. Steiger).

565 125 CONG. REC. 35022 (Dec. 6, 1979) (statement of Rep. Fortney H. "Pete" Stark of California, citing Christopher Jehn).

566 *Supra* notes 554–65 and accompanying text; *see also* Jay A. Soled, *Book Review: Learning to Love Form 1040: Two Cheers for the Return-Based Mass Income Tax, by Lawrence Zelenak*, 87 TEMPLE L. REV. 101 (2014) (describing taxation as "akin to military service").

567 *Supra* notes 88–89 and accompanying text.

served in the U.S. military and loss of U.S. citizenship for having served in a foreign military, even if they did so involuntarily.[568]

In the second story told in this article, emigrants from the United States are subject to the taxation policies of two countries: that of the United States and of their country of residence.[569] This is the case even though the policies are incompatible with each other.[570] Due to the incompatibility, for any given tax, the American emigrant pays the higher of the two tax rates applicable under each system.[571] Further, many forms of investment and other economic activities that are encouraged by the American emigrant's country of residence are penalized by the United States.[572] This includes many forms of retirement plans and other financial investments, as well as small business ownership.[573] As a result, many American emigrants eschew investing, planning for retirement, entrepreneurship, and small business ownership in the countries where they live, as the only means to avoid the penalizing taxation.[574]

The fact that the two stories share the commonality of incompatible regimes should not be surprising. Each of the regimes in question was developed without regard to the existence of other regimes, and without regard to the possibility that a person might be subject to two regimes at the same time.

While the two stories do share this important commonality, there is also a critical difference between the two. In the first story, the United States finally acted to find a solution.[575] In stark contrast, in the second story, as of now, neither the United States nor the countries where American emigrants live accept any responsibility to find a solution.[576] The problem is left squarely on the shoulders of American emigrants. Each must try to find their own solution that may—or may not—work depending on their specific circumstances.[577]

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568 *Supra* notes 88–89 and accompanying text.

569 *Supra* notes 336–38 and accompanying text.

570 *Supra* notes 336–38 and accompanying text.

571 *Supra* notes 336–38 and accompanying text.

572 *Supra* notes 401–11 and accompanying text; *see also Taxing American Emigrant*, *supra* note 9, at 334–41.

573 *Supra* notes 401–11 and accompanying text.

574 *Supra* notes 401–11 and accompanying text.

575 *Supra* notes 59–65, 222–223 and accompanying text.

576 *Supra* notes 349–461 and accompanying text.

577 To understand the extent to which many overseas Americans struggle to find their own solutions, *see generally* LAURA SNYDER, "BEING AN AMERICAN OUTSIDE OF AMERICA IS NO LONGER SAFE." SURVEY REPORT: EFFECTS OF THE EXTRATERRITORIAL APPLICATION OF U.S. TAXATION AND BANKING (2021), https://seatnow.org/survey_report_intro_page/. *Unacknowledged Realities, supra* note 11, at 303–04; *see also* Organ, *supra* note 443.

Most immigrants to the United States no longer need to fear conscription by their countries of origin.[578] Emigrants from the United States still must fear taxation by the United States.

D. Forcible Destruction of Citizenship

Another important commonality of the two emigration stories recounted above is the forcible destruction of citizenship.

In the first story, the United States' solution to the problem of conscription by a country where an emigrant did not live was to have emigrants lose the citizenship of their country of origin.[579] Accordingly, the treaties that the United States negotiated provided for exactly that to happen. Under the treaties, as soon as an immigrant to the United States was naturalized, he was considered to have lost citizenship of his country of origin.[580] The very first treaties that the United States negotiated did not even mention conscription or military service.[581] The treaties were entirely focused on ensuring loss of citizenship, regardless of the motivating factors.[582]

This pattern continued for decades until it was challenged by Switzerland. Switzerland refused to conclude a treaty with the United States that would result in Swiss emigrants losing their Swiss citizenship automatically upon naturalization in the United States.[583] Any such treaty, Swiss diplomats explained, would violate the Swiss constitution.[584] The Swiss constitution protected Swiss citizenship.[585] Regardless of naturalization in another country, Swiss citizenship could not be lost without the emigrant following the legally prescribed procedure for expatriation.[586]

The United States, under pressure to find some kind of solution to the problem of Swiss emigrants to the United States being forcibly conscripted by Switzerland, finally gave in to Switzerland and agreed to a treaty that, while only offering a partial solution, complied with the Swiss constitution.[587] Under the treaty, second-generation Swiss citizens born in the

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578 *Supra* notes 266–268 and accompanying text. *But see supra* note 275, noting the problem of conscription by South Korea of dual U.S.-Korean citizens living in the United States.

579 *Supra* notes 60–65, 153–158 and accompanying text.

580 *Supra* notes 60–65, 153–158 and accompanying text.

581 *Supra* notes 60–65, 153–158 and accompanying text.

582 *Supra* notes 60–65, 153–158 and accompanying text.

583 *Supra* notes 170–218 and accompanying text.

584 *Supra* notes 170–218 and accompanying text.

585 *Supra* notes 170–218 and accompanying text.

586 *Supra* notes 170–218 and accompanying text.

587 *Supra* notes 219–23 and accompanying text.

United States are exempted from military service and the Swiss military tax but are permitted to maintain their Swiss citizenship.[588]

Eventually, the United States had no choice but to terminate the prior treaties—the ones that provided for the automatic loss of citizenship upon naturalization in another country. The treaties had become obsolete because of a series of U.S. Supreme Court decisions that, in essence, adopted the Swiss approach.[589] The U.S. Supreme Court has made clear that U.S. citizenship is safeguarded under the Fourteenth Amendment.[590] Congress may not take it away from a person who does not want to give it up. Nor may Congress take actions that "shift," "cancel," "dilute," "destroy," "abridge," or "affect" citizenship.[591]

The second story starts like the first. For many commentators, the solution to the worldwide taxation problem for American emigrants is the loss of U.S. citizenship.[592] This position is cloaked in the veneer of the loss being the emigrant's "choice."[593] It cannot, after all, happen automatically as it could under the conscription treaties; the American emigrant must take the active step to renounce.[594] But this does not mean that the loss is any less forced. The very same commentators acknowledge, albeit implicitly, that the only "choice" an American emigrant has is to renounce U.S. citizenship.[595] No other viable solution is offered.[596] When there is only one solution to a serious problem, that solution can hardly be described as a "choice." If anything, it is forced. Further, not every American emigrant is able to renounce U.S. citizenship, for a variety of reasons, including resulting statelessness. The avoidance of statelessness is hardly a "choice."[597]

While the second story starts like the first, it does not end like it. Or, at least, not yet. American emigrants do not (yet?) have their Yeaman[598] or their Bancroft[599]—statespersons who are understanding of the situation and willing to fight for their protection. As explained above, to date, other countries have taken no action to protect their residents, including their

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588 *Supra* notes 219–23 and accompanying text.
589 *Supra* notes 237–65 and accompanying text.
590 *Supra* notes 247–60 and accompanying text.
591 *Supra* notes 247–60 and accompanying text.
592 *Supra* notes 390–92 and accompanying text.
593 *Supra* notes 390–92 and accompanying text; *Defending U.S. Citizenship-Based Taxation, supra* note 276, at 40, 40 n.99, 48–49, 126–27; *Citizenship and Worldwide Taxation, supra* note 351, at 1312, 1317, 1345; *Taxing Citizens, supra* note 354, at 494; *Revisiting Tax Treatment, supra* note 354, at 187.
594 *See, e.g., Myths and Truths, supra* note 217, at 199–203, 292–93.
595 *See* sources cited *supra* note 593.
596 *See* sources cited *supra* note 593.
597 *See Rationalized?, supra* note 319, at 574–75.
598 *Supra* notes 125–151 and accompanying text.
599 *Supra* notes 59–65, 152 and accompanying text.

citizens, much less the countries themselves, from the extraterritorial application of U.S. tax laws.[600] As a result, each year thousands of Americans emigrants feel they must give up their U.S. citizenship.[601] This occurs in violation of the U.S. Constitution, which, the U.S. Supreme Court has held, protects the forcible destruction of citizenship.[602] U.S. federal tax laws are acts of Congress that "shift," "cancel," "dilute," "destroy," "abridge," and "affect" citizenship in violation of the Fourteenth Amendment.[603]

E. Obligations of Citizenship

Both stories recounted above raise the question of the duties, or the obligations, of citizenship: In the first story, the emigrants' countries of origin considered military service to be a duty of citizenship, and[604] in the second story, many consider that U.S. taxation is an obligation of citizenship.[605]

1. Is Military Service Really an Obligation of Citizenship?

For much of the first story, the United States considered military service to be an obligation of citizenship. Statespersons like Yeaman[606] and Everett[607] wrote as much. The disagreement between the emigrants' countries of origin and the United States was over the citizenship of the emigrants: upon their naturalization in the United States, were they only U.S. citizens or did they nevertheless retain citizenship of their countries of origin?[608] From the perspective of Yeaman,[609] Bancroft,[610] and other American diplomats and negotiators,[611] an American immigrant could be freed from the duty of military service to their country of origin only if they could be freed of the citizenship of that country.

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600 *Supra* notes 465–512 and accompanying text.
601 *Supra* notes 346–48 and accompanying text.
602 *Supra* notes 247–256 and accompanying text.
603 *Supra* notes 458– 59 and accompanying text. *See also Myths and Truths*, *supra* note 217, at 199–203.
604 *Supra* notes 103–120 and accompanying text.
605 *Supra* notes 349–92 and accompanying text.
606 *See, e.g.*, YEAMAN, *supra* note 60, at 41, 43.
607 *Supra* note 122 and accompanying text.
608 *Supra* notes 45–46, 52–53, 90–91, 187–189 and accompanying text.
609 *Supra* notes 125–151 and accompanying text.
610 *Supra* notes 59–65 and accompanying text.
611 *Supra* notes 180–189 and accompanying text.

Even though the United States ended conscription in 1973,[612] military service is still described by some as an obligation of citizenship.[613]

Kestnbaum writes:

> Stripped to its core, the principle of citizen service is built on a single idea: the military service obligations of citizenship. Military service is a responsibility incurred solely because of one's membership in the political community of citizens; and precisely because of this duty, the state may legitimately compel military service from its citizens.[614]

Barno and Bensahel write: "[R]isking life and limb [in] the defense of the republic [is] the deepest obligation of citizenship. . . . U.S. citizenship requires serving and defending the nation when called."[615]

And Coleman asserts: "One of the foremost responsibilities of United States citizenship is to 'defend the country if the need should arise.'"[616]

Despite these affirmations that military service is an obligation of citizenship, we know from the end of the first story[617] that military service is not, in fact, an obligation of all U.S. citizens. Setting aside the question of

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612 *See, e.g.*, Bernard Rostker, *50 Years Without the Draft: Behind the Bold Move That Ended Conscription, and What's Next for the All-Volunteer Force*, ASS'N U.S. ARMY (June 21, 2023), https://www.ausa.org/articles/50-years-without-draft-behind-bold-move-ended-conscription-and-whats-next-all-volunteer#:~:text=On%20Sept.,of%20the%20draft%20has%20ended.%E2%80%9D.

613 *See, e.g.*, JUD. ADVOC. GEN.'S SCH., THE MILITARY COMMANDER AND THE LAW 323 (2015), https://www.afjag.af.mil/Portals/77/documents/AFD-151102-022.pdf ("[M]ilitary service is an obligation of citizenship."); ASS'N U.S. ARMY, DR-83-26, MILITARY SERVICE – A RESPONSIBILITY OF CITIZENSHIP (1983), https://www.ausa.org/sites/default/files/DR-83-26-Military-Service-A-Responsibility-of-Citizenship.pdf.

614 Meyer Kestnbaum, *Citizenship and Compulsory Military Service: The Revolutionary Origins of Conscription in the United States*, 27 ARMED FORCES & SOC'Y 7 (2000) (Kestnbaum's terminology is identical to the terminology used by those who defend the U.S. extraterritorial tax system: both military service and taxation are, they assert, responsibilities incurred due to the citizen's membership in a "political community."); *see supra* notes 355, 368, 378; *see infra* notes 634, 675 and accompanying text.

615 David Barno & Nora Bensahel, *The Deepest Obligation of Citizenship: Looking Beyond the Warrior Caste*, WAR ON THE ROCKS (May 15, 2018), https://warontherocks.com/2018/05/the-deepest-obligation-of-citizenship-looking-beyond-the-warrior-caste/.

616 Ryan P. Coleman, *A Truer Concept of Service for Citizenship: Reimagining Military Naturalization*, 54 CONN. L. REV. 243, 245 (Mar. 2022) (quoting U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., M-76, THE CITIZEN'S ALMANAC 8 (2014), https://www.uscis.gov/sites/default/files/document/guides/M-76.pdf) (brackets removed).

617 *Supra* notes 265–67 and accompanying text.

women[618] and others[619] not otherwise subject to conscription, we know that the United States is party to treaties with multiple countries pursuant to which a U.S. citizen who is also a citizen of another country, and who is most closely connected to that other country, is exempt from military service in the United States, and vice-versa.[620] This fact alone demonstrates that obligations which appear inextricable from citizenship can be and are, in fact, extricated.

Further, the United States has not confined conscription to citizens. On the contrary, during the Civil War, the United States conscripted, alongside citizens, resident aliens who had declared the intention to become a citizen.[621] Resident aliens continued to be conscripted in both World Wars as well as the Korean and Vietnam Wars.[622] Today, essentially all males aged 18 to 25 residing in the United States must register for the Selective Service.[623] The only exception applies to those in the United States on current non-immigrant visas.[624] This means that not only citizens and legal permanent residents must register, but also "undocumented immigrants, . . . asylum seekers, [and] refugees."[625]

It is because conscription and registration for the Selective Service is so inclusive that scholars acknowledge that military service is not an obligation of citizenship. In the 1942 article, *The Drafting of Neutral Aliens by the United States*, military service was described as the "price for the privilege of *residence*."[626] More recently, Spiro has explained, "[m]ost obligations to the state, including . . . military service, are based on residence rather than

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618 *See, e.g.*, Francis Henry Morrison, *The Draft: Will, and Should, Women Have the Duty to Register?*, AM. BAR ASS'N (May 10, 2024), https://www.americanbar.org/groups/senior_lawyers/resources/experience/2024-april-may/draft-will-should-women-have-duty-register/.

619 *See Who Needs to Register*, SELECTIVE SERV. SYS., https://www.sss.gov/register/who-needs-to-register/#p3 (last visited Oct. 26, 2025) (explaining the conditions under which hospitalized and incarcerated men are not required to register).

620 *Supra* notes 265–67 and accompanying text.

621 *See, e.g.*, Laurence W. Mazzeno, *Military Conscription of Immigrants*, EBSCO (2023), https://www.ebsco.com/research-starters/social-sciences-and-humanities/military-conscription-immigrants; *see also* Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL RTS. J. 899, 913 (2013) [hereinafter *Dwindling Rights*] ("Most obligations to the state, including taxes and military service, are based on residence rather than citizenship status.").

622 *See, e.g.*, Mazzeno, *supra* note 621.

623 *See Who Needs to Register*, *supra* note 619; *Selective Service - Who Must Register,* SELECTIVE SERV. SYS., https://www.sss.gov/wp-content/uploads/2025/01/WhoMustRegisterChart_1-28-25-2.pdf (last visited Nov. 10, 2025).

624 *See Who Needs to Register*, *supra* note 619 (explaining the conditions under which hospitalized and incarcerated men are not required to register).

625 *Supra* note 623.

626 William W. Fitzhugh, Jr. & Charles Cheney Hyde, *The Drafting of Neutral Aliens by the United States*, 36 AM. J. INT'L L. 369, 374 (1942) (emphasis added).

citizenship status."[627] Joppke concurs: "Military service [is not a specific obligation of citizenship because it is] imposable on resident aliens."[628]

There is, however, one caveat to the observation that military service is not an obligation of citizenship: depending on their circumstances, some non-citizens who have served in the U.S. military are eligible for naturalization through a streamlined process.[629] Provided this remains a real—and not illusory[630]—opportunity for immigrants to the United States, there remains some link between citizenship and military service.

2. Is Taxation Really an Obligation of Citizenship?

In the second story, the taxation of American emigrants based on their worldwide income is also defended as an obligation of citizenship.[631] As explained, this defense is expressed with various terminology, including references to "allegiance," "fiscal citizenship," "membership in U.S. society," and membership in "the U.S. political community."[632]

Taking one of these terms as an example, and as also discussed above, Zelinsky argues that American emigrants should be subject to U.S. taxation based on their worldwide income because of the "notion" of "fiscal citizenship:"[633]

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627 *See Dwindling Rights, supra* note 621, at 913 ("Most obligations to the state, including taxes and military service, are based on residence rather than citizenship status."); *see also, e.g.*, *Dual Citizenship as Human Right*, *supra* note 64, at 127 ("The primary historical obligation of citizenship – military service – has been abandoned by many states and in others is based on residence rather than citizenship status.").

628 Christian Joppke, *The Inevitable Lightening of Citizenship*, 51 EUR. J. SOCIO. 9, 11 (2010) [hereinafter *Inevitable Lightening*].

629 *Naturalization Through Military Service,* U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/military/naturalization-through-military-service (last visited Oct. 26, 2025) (the service member's family may also be eligible); *see Citizenship for Military Family Members*, U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/military/citizenship-for-military-family-members (last visited Oct. 26, 2025); *see generally* Cara Wong & Jonathan Bonaguro, *The Value of Citizenship and Service to the Nation*, RUSSELL SAGE FOUND. J. SOC. SCI. 96 (2020).

630 Coleman is highly critical of the current process, describing it as "riddled with complexity, excessive and arbitrary vetting practices, misinformation, and an ever-growing backlog of naturalization applications that have precipitated processing delays. These flaws result in veteran deportations, which precipitate family separations and the deprivation of healthcare for veterans." Coleman, *supra* note 616, at 243; *see generally* Zachary R. New, *Ending Citizenship for Service in the Forever Wars*, 129 YALE L. J. F. 552 (2020), https://www.yalelawjournal.org/forum/ending-citizenship-for-service-in-the-forever-wars (arguing that "recently enacted Department of Defense policies are erecting obstacles to, and effectively ending, this centuries-old pathway to citizenship.").

631 *See supra* notes 349–92 and accompanying text.

632 *See supra* notes 350–55 and accompanying text.

633 *Supra* notes 366–67 and accompanying text.

> This tradition, increasingly labeled today in the tax context as "fiscal citizenship", holds that the members of a political community have, by virtue of that membership, an obligation to support the community through tax payments even if such members live outside the geographic borders of that community.[634]

Zelinsky is practically alone in defining "fiscal citizenship" in this remarkably precise and narrow manner, focused specifically on American emigrants. On the contrary, the many other definitions and usages of "fiscal citizen" or "fiscal citizenship" are considerably more expansive and amorphous than Zelinsky's definition.[635]

Richard Musgrave is credited with coining the term "fiscal citizenship" in his 1996 article *Clarifying Tax Reform*.[636] Musgrave, however, did not offer a definition. He merely used it in a discussion of moving from a progressive to a flat rate tax system. Musgrave advised against this because "[m]oving to a wholly depersonalized system would reduce taxpayer awareness of the fiscal process and thereby dilute responsible fiscal citizenship."[637]

Sparrow did not define the term, but he entitled his 2008 article about the sale of bonds during World War II, "*Buying Our Boys Back:" The Mass Foundations of Fiscal Citizenship in World War II*.[638]

In his book, *Learning to Love Form 1040: Two Cheers for The Return-Based Mass Income Tax*, Lawrence Zelenak defines fiscal citizenship as "the important civic purpose of recognizing and formalizing the financial responsibilities of citizenship."[639] As Soled describes in his review of the book, Zelenak divides fiscal citizenship into two parts: The first part is a recognition that "being a societal member requires shared sacrifice."[640] The

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634 *Defending U.S. Citizenship-Based Taxation*, *supra* note 276, at 2369.

635 *See infra* notes 636–49 and accompanying text.

636 *See* Ajay K. Mehrotra, *Reviving Fiscal Citizenship*, 113 MICH. L. REV. 943, 946 n.17 (2015) [hereinafter *Reviving Fiscal Citizenship*] (citing Richard A. Musgrave, *Clarifying Tax Reform*, 70 TAX NOTES 731, 732 (1996)).

637 Richard A. Musgrave, *Clarifying Tax Reform*, 70 TAX NOTES 731, 732 (1996).

638 James T. Sparrow, *"Buying Our Boys Back": The Mass Foundations of Fiscal Citizenship in World War II*, 20 J. POL'Y HIST. 263 (2008).

639 *Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2409 (citing Couts v. Cornell, 82 P. 194, 194 (1905)); *see also id*. at 2410 (quoting LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 24 (2013)).

640 Soled, *supra* note 566, at 104 (citing LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 17 (2013)); *see also Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2410 (quoting LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 24 (2013)).

second part is "an illumination of the tax collection and expenditure processes and the interrelatedness between the two."[641]

In his article *Revving Fiscal Citizenship* (also a review of Zelenak's book), Mehrotra defines the term as "describe[ing] a broader relationship between citizens and the state."[642] Mehrotra describes World War II as the "golden age" of fiscal citizenship.[643]

Schmidt et al. define "fiscal citizenship" as "compris[ing] behaviors, attitudes, and identifications of citizens towards the state and fellow citizens that arise through the payment of taxes and are based on the idea of reciprocity."[644] The concept, they continue, allows for an "analysis of the interconnection between taxes and citizenship and its meaning for social cohesion."[645]

Zhang suggests that "fiscal citizenship" be defined as the "conceptualiz[ation of] taxpayers' political and civic engagement with the state as they self-assess their tax liabilities."[646]

Finally, Thorndike explains that in the past he has defined "fiscal citizenship" as "the web of reciprocal rights and responsibilities that binds the individual to the state—and the state to the individual."[647] However, he describes this formulation as "fall[ing] short."[648] In fact, he explains, "[t]he meaning of fiscal citizenship is not self-evident. It sounds like a plausible notion derived from a mashup of other concepts, including tax morale, tax compliance, and plain old nonfiscal forms of citizenship."[649]

While each of the above definitions of "fiscal citizenship" is different, they do have this commonality: none has anything to do with Zelinsky's definition. His was formulated with a singular and precise objective in mind: to defend the U.S. taxation of the worldwide income of American emigrants. In contrast, the other definitions are situated in the context of a country's entire population.

Ultimately, and as Mehrotra explains, the concept of "fiscal citizenship" was developed and is used to encourage—or rather to

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641 Soled, *supra* note 566, at 104 (citing LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 17 (2013)); *see also Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2410 (quoting LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 24 (2013)).

642 *Reviving Fiscal Citizenship*, *supra* note 636, at 946 n.17.

643 *Id.* at 962–63.

644 Charlotte Schmidt, Eva Matthaei & Hans-Joachim Lauth, *Conceptualizing Fiscal Citizenship* 2 (The Fiscal Citizenship Project, Working Paper No. 2, 2023).

645 *Id.*

646 Alex Zhang, *Fiscal Citizenship and Taxpayer Privacy*, 125 COLUM. L. REV. 235, 244 (2025).

647 Jospeh J. Thorndike, *Fiscal Citizenship Gives You a Stake in Other People's Taxes*, 182 TAX NOTES FED. 418, 418 (2024).

648 *Id.*

649 *Id.*

coerce[650]—a country's population to accept taxation and, in particular, to accept income taxation. The concept is an attempt to make income taxation palatable—as a "moral and patriotic duty"[651] that one should be proud to perform rather than viewing it as "theft"[652] by the government.

With this understanding of the term "fiscal citizenship," it becomes evident that the argument that overseas Americans should be subject to U.S. taxation on their worldwide income because they are "fiscal citizens" is circular.[653] The argument, stated another way, is this: because of "fiscal citizenship," overseas Americans should be subject to worldwide taxation by the United States. They should be subject to worldwide taxation by the United States because of fiscal citizenship.[654] Stated even more simply:

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650 AMERICAN FISCAL STATE, *supra* note 382, at 323 (referencing "the mix of patriotism and coercion that was at the heart of the wartime state.").

651 *Id.* at 322 ("For many social critics and policymakers […f]iscal citizenship meant that all members of the political community – as taxpayers, creditors, and consumers – had a moral and patriotic duty to make the necessary wartime sacrifices to support the state.").

652 *See, e.g.*, David Gordon, *Yes, Taxation Is Theft*, MISES WIRE (Nov. 15, 2019), https://mises.org/mises-wire/yes-taxation-theft.

653 Merriam-Webster explains the concept of "circular argument" as "an argument that assumes the conclusion as one of its premises." *Vicious Circle*, MERRIAM-WEBSTER (Nov. 29, 2014), https://www.merriam-webster.com/word-of-the-day/vicious%20circle-2014-11-29; stated another way, a circular argument is a logical fallacy in which the reasoner begins with what they are trying to end with. Bradley Dowden, *Fallacies*, INTERNET ENCYC. OF PHIL., https://iep.utm.edu/fallacy/#CircularReasoning (last visited Nov. 9, 2025); *see also* Bo Bennett, *Circular Reasoning*, LOGICALLY FALLACIOUS, https://www.logicallyfallacious.com/logical fallacies/Circular-Reasoning (last visited Nov. 9, 2025) (explaining "circular reasoning" as "[a] type of reasoning in which the proposition is supported by the premises, which is supported by the proposition, creating a circle in reasoning where no useful information is being shared.").

654 One article repeats this circular argument multiple times:

> "[F]iscal citizenship justifies citizenship-based taxation." *Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2366;
>
> "Fiscal citizenship provides a compelling premise for the United States' taxation of the worldwide incomes of its citizens including its overseas citizens." *Id.* at 2361;
>
> "[F]iscal citizenship justifies citizenship-based taxation including the taxation of offshore U.S. citizens' worldwide incomes." *Id.* at 2369;
>
> "The U.S. taxation of overseas citizens' worldwide incomes is ultimately justified as a matter of fiscal citizenship." *Id.* at 2371;
>
> "As a matter of theory, the principle of 'fiscal citizenship' justifies the United States' income taxation of U.S. citizens who live abroad." *Id.* at 2408;
>
> "[T]he notion of fiscal citizenship supports citizenship-based taxation including U.S. income taxation of its offshore citizens." *Id.*;
>
> "The citizen is a member of the U.S. political community with the obligations of fiscal citizenship, i.e., the duty to support the community in accordance with his ability to pay as measured by his worldwide income." *Id.* at 2428.

overseas Americans should be subject to worldwide taxation by the United States because they should be.

"Citizen" has a legal meaning. Who qualifies as a U.S. citizen is defined by law.[655] Indeed, "citizen" is more than a legal term. It is a constitutional one, as the Fourteenth Amendment establishes a category of U.S. citizens—those born and those naturalized in the United States.[656] In very stark contrast, "fiscal citizen" is not a legal term. It does not have a legal meaning, much less a constitutional one. Who does or does not qualify as a "fiscal citizen" is not defined in any law, regulation, or court decision. The term does not appear in an opinion issued by either the U.S. Tax Court or the U.S. Supreme Court. The terms "fiscal citizen" and "fiscal citizenship" have no legal or constitutional significance whatsoever. They are terms invented by tax commentators and as explored above,[657] they have a variety of definitions assigned to them by those commentators (each definition crafted to serve the commentator's own purposes).

Further, and like military service of the first story,[658] the United States does not confine worldwide taxation to U.S. citizens. On the contrary, every person who meets the "substantial presence test,"[659] and is not subject to an exemption,[660] is subject to U.S. taxation on their worldwide income. Thus, not only permanent residents are subject to taxation on their worldwide income, but also Aliens in Temporary Protected Status, refugees, asylum seekers, and undocumented immigrants.[661] Nonresident aliens are also subject to U.S. taxation; in their case, it is limited to their U.S.-source income.[662]

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655 *See, e.g.*, *Obtaining U.S. Citizenship for a Child Born Abroad,* U.S. DEP'T. OF STATE BUREAU CONSULAR AFF. (Nov. 26, 2024), https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Acquisition-US-Citizenship-Child-Born-Abroad.html#ExternalPopup (citing Sections 301 and 309 of the Immigration and Nationality Act, 8 U.S.C. §§ 1401, 1409).

656 U.S. CONST. amend. XIV, § 1.

657 *See supra* notes 632–52 and accompanying text.

658 *See supra* notes 617–30 and accompanying text.

659 *Substantial Presence Test*, IRS (Mar. 14, 2025), https://www.irs.gov/individuals/international-taxpayers/substantial-presence-test.

660 Exempt persons include: "foreign government-related individuals," and teachers, trainees, and students temporarily present in the country. *Id.*

661 *See, e.g.*, *Dwindling Rights, supra* note 621, at 899 ("Tax and military service obligations fall equally on citizens and noncitizens. All persons physically present are required to pay taxes. Mandatory military service is of historical significance only, and in any case applies equally to citizens and permanent residents alike. Americans are required to do nothing for their country that they would not be required to do as mere legal residents.").

662 *Taxation of Nonresident Aliens*, IRS (May 27, 2025), https://www.irs.gov/individuals/international-taxpayers/taxation-of-nonresident-aliens.

Most countries determine who is subject to worldwide taxation based on residence or domicile.[663] They do not tax their non-resident citizens in a manner comparable to the United States.[664] In defending the practice of the United States to tax the worldwide taxation of persons who do not live in the country, Zelinsky asserts that "legal citizenship [is] an objective proxy for domicile"[665] and that "[u]sing legal citizenship to assess . . . fiscal citizenship is more efficient than using fact-intensive assessments of domicile and residence to establish fiscal citizenship."[666] But Zelinsky applies these assertions selectively to only some people (to U.S. citizens living outside the United States), rather than to everyone on a consistent basis. If these assertions were applied consistently to everyone, then, again, non-citizens, regardless of where they live, would not be subject to U.S. income tax. This would be because they do not meet the proxy standard of legal citizenship. (They should, instead, be taxed based on their worldwide income only by their country(ies) of citizenship, but Zelinsky makes no such suggestion). If Zelinsky's assertions were applied consistently to everyone, then it would not just be overseas citizens who should not be subject to a test of residence or domicile—on the contrary, *no one should be subject to it*. Further, Zelinsky is clear that such tests are to be avoided because they require "engaging in . . . fact-intensive inquiries."[667]

According to Zelinsky, "[w]hile other nations define fiscal citizenship by virtue of an individual's continuing residence or domicile, the [United States] principally defines fiscal citizenship in terms of legal citizenship."[668] This statement is extraordinary. It does not just embrace citizenship as a test

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663 *Supra* note 275 and accompanying text.

664 *Supra* note 275 and accompanying text.

665 *Defending U.S. Citizenship-Based Taxation*, *supra* note 276, at 2416.

666 *Id.* at 2366–67. This approach starkly contrasts with Yeaman's, who forcefully and repeatedly argued that each case of emigration to the United States and subsequent naturalization should be "held a sufficient dissolution of obligation," and any "fraudulent or pretended removal … [should] be a question of fact to be determined upon the evidence." YEAMAN, *supra* note 60, at 13. Yeaman repeats this point more than once: The fact of removal, residence, and the assumption of other allegiance should be held a sufficient dissolution of his obligation of allegiance to our government, without the formality of a previous permission and release. A fraudulent or pretended removal, naturalization and return, by which a native might seek to reside among us as a foreigner to avoid military service or for other purpose would be a question of fact to be determined upon the evidence. *Id.* at 38. The change must be in good faith and accompanied with corresponding action and residence; and while the effect of such a real change ought to be an admitted rule of law the good or bad faith of the transaction ought to be only a question of fact. There being no room for dispute about the law, self-interest would make it incumbent on each government to avoid carefully the appearance of straining the facts to find a wrongful intention of avoiding a rightful service. If two gover[n]ments differ about the facts, having opposite opinions of what is the truth, it is no more than happens in many other cases. *Id.* at 41–42.

667 *Defending U.S. Citizenship-Based Taxation*, *supra* note 276, at 2363; *see also id.*, at 2366–67, 2373, 2382, 2406–07.

668 *Id.* at 2369.

for taxation; *it expressly rejects residence as a test for taxation*.[669] The inescapable conclusion of this remarkably narrow "principal definition"[670] is that U.S. residents who are not citizens are not concerned by fiscal citizenship—their lack of legal citizenship excludes them from fiscal citizenship. If, as Zelinsky asserts, fiscal citizenship rather than residence is the justification for taxation,[671] then non-citizen U.S. residents—by virtue of their exclusion from both legal and fiscal citizenship—should not be subject to U.S. taxation. This result is absurd, of course. And it is a result that Zelinsky has rejected.[672]

Presumably, Zelinsky would not suggest that different tests should apply to different people merely because of ease of application. That would violate a fundamental tenet of equal protection under the Fourteenth Amendment, which holds that similarly situated persons should not be treated differently.[673] Zelinsky's entire premise is that overseas Americans should be taxed like U.S. citizens residing in the United States because they are not different from them.[674] It is precisely because, Zelinsky argues, overseas Americans are part of the same "political community"[675] that they should not be treated differently from other U.S citizens. Yet other residents of the United States—those who are not citizens—should be subject to a

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669 *See id.* at 2413 (2025) (Zelinsky again rejects residence as a test for taxation stating "[The tax systems of other nations] implement their version of 'fiscal citizenship' by imposing legal tax liability on the basis of domicile or residence. The [United States] more efficiently imposes the tax obligation of fiscal citizenship through the marker of legal citizenship.").

670 *Id.* at 2369.

671 *Id.*

672 *Citizenship and Worldwide Taxation*, *supra* note 351, at 1295 n.9 (in this earlier article Zelinsky states "In limited fashion, the United States deploys the residence principle for tax purposes, taxing on a worldwide basis aliens who reside in the United States. Such taxation of resident aliens is not controversial."). Zelinsky also states "The [U.S. Tax Code] encourages noncitizen residents to embrace citizenship by taxing them on their worldwide income as if they were citizens." *Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2415. Zelinsky cites no support for this statement. *Id.* at 2415. This was never a Congressional purpose or intent for taxing noncitizen residents – the Congressional purpose and intent was first to simply tax all residents regardless of citizenship and then, in addition, to also tax citizens "residing abroad." *See, e.g.*, Revenue Act of 1864, §116, 13 Stat. 223, 281. The only reason to tax them on their worldwide rather than just U.S. source income was because, as discussed *supra* notes 277–87 and accompanying text, they were wrongly perceived to have escaped the draft by "skulking away" to Paris during the Civil War. Further, worldwide taxation does not offer non-citizens a fast track or any other facilitation to citizenship; it does not even offer a fast track or other facilitation to legal or permanent residence. On the contrary, today noncitizens who file a U.S. tax return are in greater danger of deportation as compared to noncitizens who do not file. *See infra* notes 678–81 and accompanying text. For this reason, they have ever-greater incentives to not file a U.S. tax return.

673 *See generally* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581 (2011).

674 *Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2366, 2440 ("[an] overseas citizen (like a citizen living at home).").

675 *Id.* at 2369, 2408.

different test, one that *is* based on residence[676] (and the very test that Zelinsky has rejected as being fact-intensive)?[677] It is quite convenient—apparently different tests can be picked and chosen, depending upon which test will give the desired result.[678] The desired result is—seemingly—to subject as many people as possible to U.S. taxation based on worldwide income.

Considered in this manner, it becomes evident that while U.S. citizens may be subject to U.S. taxation, taxation is not an obligation of citizenship. It is not an obligation of U.S. citizenship any more than other so-called obligations of citizenship, such as the obligation to obey the law[679] or the obligation to respect others.[680] While those are also often described as

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676 *Supra* note 672 and accompanying text.

677 *Supra* note 665–66, 667 and accompanying text. *Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2363; *see also id.* at 2366–67, 2373, 2382, 2406–67.

678 Zelinsky confirms his right to freely pick and choose the appliable test depending upon which test will achieve the desired result, when he states:

> [T]concept of fiscal citizenship does not require taxation based on legal citizenship since domicile and residence can be (and typically are) used instead to determine membership in the national political community for tax purposes. But fiscal citizenship justifies U.S. citizenship-based taxation as legal citizenship is traditionally viewed as the sign that an individual is a member of the U.S. national community with the attendant obligation to support that community through tax payments assessed on the citizen's worldwide ability to pay.

Defending U.S. Citizenship-Based Taxation, supra note 276, at 2417; in this passage, Zelinsky confirms his right to apply a residency test when he wants to (that is, when – and only when – it gives the desired result) even though a few pages earlier he expressly rejects that the United States applies a residency test because the country "more efficiently imposes the tax obligation of fiscal citizenship through the marker of legal citizenship." *Id.* at 2413 (rejecting again residence as a test for taxation stating "[The tax systems of other nations] implement their version of 'fiscal citizenship' by imposing legal tax liability on the basis of domicile or residence. The [United States] more efficiently imposes the tax obligation of fiscal citizenship through the marker of legal citizenship."). To make it even more confusing, Zelensky cites "fiscal citizenship" as the authority for both patently contradictory positions.

679 *See, e.g.*, WEBSTER, *supra* note 360, at 526–27 (explaining: "every foreigner born, residing in a country, owes to that country allegiance and obedience to its laws so long as he remains in it, as a duty imposed upon him by the mere fact of his residence, and the temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country."); *see also* Carlisle v. U.S., 83 U.S. 147, 148 (1872) ("Aliens domiciled in the United States owe a local and temporary allegiance to the government of the United States; they are bound to obey all the laws of the country not immediately relating to citizenship during their residence in it, and are equally amenable with citizens for any infraction of those laws.").

680 *See, e.g.*, Meerabelle Dey, *How to Meet Your Ethical Obligations: Your 6 Responsibilities Toward Others*, MEERABELLE DEY (Dec. 26, 2023), https://meerabelledey.com/your-ethical-obligations/.

obligations of citizenship,[681] they are, in fact, obligations that everyone has regardless of citizenship.[682]

If worldwide taxation was truly an obligation of citizenship, then *only* U.S. citizens would be subject to it. This is the case, for example, with respect to jury duty; it is an obligation that is limited to citizens only[683] (scholars point out that it is the only remaining duty of citizenship).[684] Further, if citizenship and taxation were indeed inseparable, then non-citizen U.S. taxpayers would be eligible for U.S. citizenship as a matter of right. Or, at a minimum, they would be eligible for an expedited naturalization process in a manner comparable to non-citizen service members.[685] But no such eligibility exists. Indeed, the opposite is the case: for undocumented immigrants, the fact that they are subject to U.S. taxation has no bearing on rights to legal residency.[686] Nor do undocumented taxpayers have other rights granted to documented taxpayers, such as eligibility for Social Security and Medicare.[687]

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681 *See, e.g.*, Robert W. Maloy & Torrey Trust, *Standard 4.2: Rights and Responsibilities of Citizens and Non-Citizens*, LIBRETEXTS, https://socialsci.libretexts.org/Bookshelves/Political_Science_and_Civics/Building_Democracy_for_All%3A_Interactive_Explorations_of_Government_and_Civic_Life_(Maloy_and_Trust)/04%3A_Rights_and_Responsibilities_of_Citizens/4.02%3A_Rights_and_Responsibilities_of_Citizens_and_Non-Citizens (last visited Nov. 9, 2025).

682 *See, e.g.*, IANS KELSEN, GENERAL THEORY OF LAW AND STATE 235 (Anders Weberg trans., 1949) (1945) ("Allegiance is usually cited as one of the specific duties of citizens. [However, this] concept does not have any definite legal significance but is rather of a moral and political nature. There is no specific legal obligation covered by the term allegiance. Legally, allegiance means no more than the general obligation of obeying the legal order, an obligation that aliens also have."); Merriam-Webster includes in its definition of "allegiance" "the obligation of an alien to the government under which the alien resides." *Allegiance*, *supra* note 389 (defining allegiance as "devotion or loyalty to a person, group, or cause.").

683 *See, e.g.*, Amy R. Motomura, *The American Jury: Can Noncitizens Still Be Excluded?*, 64 STAN. L. REV. 1503, 1504 n.1 (2012).

684 *Dwindling Rights, supra* note 621, at 899, 913–14; *see also infra* note 720 and accompanying text (citing Joppke asserting that "[l]iberal citizenship is duty-free"). Jury duty is discussed in additional detail *infra* notes 724–30 and accompanying text.

685 *Supra* notes 629–30 and accompanying text.

686 On the contrary, undocumented immigrants who have been filing U.S. tax returns are today subject to *increased* risk of deportation. *See, e.g.*, Steven Hubbard & Micaela McConnell, *Ahead of Tax Day, Fear of Filing Taxes Rises Among Undocumented Immigrants*, AM. IMMIGR. COUNCIL (Apr. 1, 2025), https://www.americanimmigrationcouncil.org/blog/undocumented-immigrants-tax-filing-fear/; Marshall Cohen & Rene Marsh, *IRS Reaches Data-Sharing Deal with DHS to Help Find Undocumented Immigrants for Deportation*, CNN (Apr. 8, 2025), https://edition.cnn.com/2025/04/08/politics/irs-dhs-sign-data-deal-undocumented-immigrants/index.html; Mary Katherine Browne, *Treasury Agrees to Share Tax Data For Immigration Enforcement*, 187 TAX NOTES FED. 413 (2025); *see also supra* note 672 and accompanying text.

687 *See, e.g.*, Francine Lipman, *The "ILLEGAL" Tax*; 11 CONN. PUB. INT. L. J. 93, 104–05 (2011); Francine J. Lipman, *Taxing Undocumented Immigrants Redux*, 21 PITT. TAX REV. 153, 153–54 (2024).

Put another way, if, as Zelinsky argues,[688] legal citizenship necessarily entails "fiscal citizenship," then shouldn't it work both ways? What would justify it only working in one direction?[689] That is, shouldn't the "fiscal citizenship" of taxpaying non-citizen residents of the United States necessarily entail legal citizenship? This is, of course, not what occurs. It is thus evident that baked into U.S. policy is a clear and stark separation between citizenship and taxation, with taxation conferring neither eligibility for, nor any benefits of, citizenship.[690]

F. Refusing to Let Go

Another parallel between the two stories is the refusal to let go.

In the first story, while other countries did not stop their citizens from emigrating to the United States, they refused to allow for their emigration to have any effect on their duty to perform military service in their country of origin.[691]

This refusal was implemented in a physical, bodily way. During the War of 1812, Britain abducted emigrants to the United States and forced them to serve in the British navy.[692] After the War of 1812, emigrants to the United States who visited their country of origin were either summoned or arrested and then prevented from leaving the country until they had fulfilled the prescribed military service.[693] Their experiences taught other emigrants to the United States that it was unsafe for them to return to their country of origin, however briefly.[694] As a result, they could not visit family or friends left behind, nor take care of any business in their countries of origin.

In the second story, while the United States does not stop its citizens from emigrating to other countries, it refuses to allow for their emigration to

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688 *See supra* notes 366–77 and accompanying text.

689 As discussed *supra* notes 674–78 and accompanying text, Zelinsky assumes the prerogative to pick and choose among different tests, depending upon which one will produce the desired result, which is to subject as many people as possible to U.S. taxation based on worldwide income regardless of the patent contradictions.

690 The eligibility requirements for a lawful permanent resident to become a naturalized U.S. citizen do not mention taxation. If taxation was inseparable from citizenship, surely it would be mentioned alongside requirements such as "[d]emonstrate an attachment to the principles and ideals of the U.S. Constitution" and "[h]ave knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States?" *See I Am a Lawful Permanent Resident of 5 Years,* U.S. CITIZENSHIP & IMMIGR. SERV. (Jan. 24, 2025), https://www.uscis.gov/citizenship/learn-about-citizenship/citizenship-and-naturalization/i-am-a-lawful-permanent-resident-of-5-years.

691 *See supra* notes 102–20 and accompanying text.

692 *See supra* notes 16–29 and accompanying text.

693 *See supra* notes 30–43, 48–50, 68–77 and accompanying text.

694 *See, e.g.,* 1901 Diplomatic Papers, *supra* note 177, at 499.

have any effect on their U.S. tax obligations.[695] The United States continues to tax emigrants from the United States as if they still lived in the United States.[696] It does this even though U.S. tax policy penalizes non-U.S. income and assets.[697] Persons who live and work, raise their families, and subsequently retire outside the United States are, as compared to U.S. residents, considerably more likely to have non-U.S. income and assets.[698] The United States' refusal to let American emigrants go is not bodily, as it was in the first story. But it is no less tangible. American emigrants have limited abilities to save for retirement and otherwise invest, to own a home or a business, and to have bank accounts.[699] That is, U.S. tax policies deny emigrants from the United States the ability to engage in basic financial activities that are essential for sustaining life in the modern world. U.S. tax policies prevent American emigrants from living normal lives.[700]

In the 18th-century words of George Yeaman, for Americans today, any right of departure from the United States is a "political nullity."[701] It is a "mere privilege of natural locomotion, without imparting or acceding to the [departure] any legal or political effect."[702]

V. LESSONS: WHAT THE PAST TEACHES ABOUT TODAY

The first story offers many lessons for the second story. Those lessons include: (A) The U.S. position on the taxation of American emigrants is hypocritical; (B) If citizenship has obligations, they are not immutable; (C) Taxation can—and must—be separated from citizenship; (D) The separation of taxation and citizenship need not be complicated—on the contrary, it can be quite simple; (E) Renunciation of citizenship is not the solution; and (F) Emigrants are not safe from their countries of origin without the intervention of their new countries.

A. The U.S. Position on the Taxation of Emigrants is Hypocritical

The first story recounts how the United States repeatedly protested the forcible conscription of emigrants by their countries of origin.[703]

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695 *See supra* notes 281–304 and accompanying text.
696 *Supra* notes 330–35 and accompanying text.
697 *Supra* notes 317–19 and accompanying text.
698 *Supra* notes 317–19 and accompanying text.
699 *See supra* notes 320–32 and accompanying text.
700 *See, e.g.*, *Unacknowledged Realities, supra* note 11, at 269; *see also supra* notes 314–48.
701 *Supra* note 133 and accompanying text.
702 *Supra* note 133 and accompanying text.
703 *See supra* notes 42, 51, 59–65, 91–101 and accompanying text.

Charles Faulkner was described as having best expressed the American view on the topic.[704] In his letter to Édouard Thouvenel, Faulkner explained that while it is normal for an emigrant from a country to be held responsible for liabilities actually incurred before they left and for which performance had been demanded, the emigrant cannot and should not be held responsible for prospective liabilities—liabilities dependent upon the passage of time or on events to occur later.[705] For Faulkner, this meant that an emigrant to the United States should not be held responsible for military service in their country of origin unless, prior to emigrating, they either deserted or were called to serve and refused to do so.[706]

Yeaman was no less eloquent. According to him, subsisting and accrued obligations must be discharged at the time of departure from a country.[707] However, continuing or future obligations must not be pursued.[708] If they are, the right of departure would be a "political nullity. It would be a mere privilege of natural locomotion, without imparting or acceding to the [departure], of any legal or political effect."[709]

The first story revealed how American diplomats worked for decades essentially to implement Faulkner's and Yeaman's views. That is, they worked to protect immigrants who came to the United States from prospective liabilities from their country of origin—liabilities incurred (well) after the emigrants' departures from their countries of origin.[710]

In the second story, we see the United States take the diametrically opposed position. That is, with respect to emigrants from the United States, the country does not limit itself to taxing only the emigrants' worldwide income while they lived in the country, together with any U.S.-source income while they lived outside.[711] No—the United States does exactly what it long criticized other countries for doing, which is assert liabilities prospectively—liabilities dependent upon the passage of time and upon income earned, and assets accumulated, while living outside the United States, and from sources outside the United States.[712] The hypocrisy of this position is manifest. As demonstrated above,[713] the hypocrisy cannot be justified by the argument that taxation (the conscription of money)[714] is in any relevant manner different

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704 *Supra* note 52 and accompanying text.
705 *Supra* note 53 and accompanying text.
706 *Supra* note 53 and accompanying text.
707 *Supra* notes 130–31 and accompanying text.
708 *Supra* note 132 and accompanying text.
709 *Supra* note 133 and accompanying text.
710 *See supra* notes 59–65, 91–98, 180–86 and accompanying text.
711 *See supra* note 275 and accompanying text.
712 *See supra* notes 320–43 and accompanying text.
713 *See supra* notes 549–66 and accompanying text.
714 *Supra* notes 557, 560 and accompanying text.

from conscription (the taxation of labor)[715] and thus the two different approaches – diametrically opposed to each other—are merited.

B. If Citizenship Has Obligations, They Are Not Immutable

It is an often-repeated maxim that citizenship entails both rights and responsibilities.[716] But, as citizenship scholars explain, that is "empty rhetoric."[717] As Kochenov elucidates:

> While the stories of a correlation between rights and duties abound, duties are rarely a part of the definition of citizenship in law – beyond the proclamation of the possible existence of duties in theory . . . . Duties of citizenship historically have played a central role in helping rationalize the irrational.[718]

Kochenov continues, "Citizenship duties are in strong decline worldwide, and the pace of the abolition of conscription is a good illustration of this one-way development."[719] Joppke concurs, stating that in the United States, "except for jury duty, there are no specific obligations of citizenship, because taxes and even military service are also imposed or imposable on resident aliens."[720]

Joppke further explains:

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715 *Supra* notes 560, 564, 565 and accompanying text.

716 *See, e.g.*, Maloy & Trust, *supra* note 680; John H. Stout, *Reflections on Citizenship's Obligations*, AM. BAR ASSOC. (Sep. 20, 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-september/reflections-on-citizenship-obligations/; *see also Defending U.S. Citizenship-Based Taxation*, *supra* note 276, at 2408–09.

717 *Inevitable Lightening*, *supra* note 628, at 16.

718 CITIZENSHIP, *supra* note 1, at 167*; see also* Dimitry Kochenov, *EU Citizenship without Duties*, 20 EUR. L.J. 482, 491 (July 2014) ("[T]here is no correlation between duties and citizenship.") [hereinafter *EU Citizenship*].

719 CITIZENSHIP, *supra* note 1, at 167. Kochenov is scornful of obligations to vote. *Id.* at 160, 164. Today approximately 26 countries require their citizens to vote, in most cases subject to administrative fine. *See, e.g., Countries with Mandatory Voting 2025,* WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/countries-with-mandatory-voting (last visited Nov. 8, 2025). For example, the failure to vote in Australia is subject to an "administrative penalty" of AUS$20 (approximately US$13). *See* AUSTL. ELECTORAL COMM'N, *Electoral Backgrounder: Compulsory Voting* (updated Mar. 3, 2025), https://www.aec.gov.au/about_aec/publications/backgrounders/compulsory-voting.htm.

720 *Inevitable Lightening*, *supra* note 628, at 11; *see also Dwindling Rights, supra* note 621, at 913 ("With the exception of jury duty, citizenship imposes no additional societal burdens not also shouldered by noncitizen residents. Tax and military service obligations fall equally on citizens and noncitizens. All persons physically present are required to pay taxes. Mandatory military service is of historical significance only, and in any case applies equally to citizens and permanent residents alike. Americans are required to do nothing for their country that they would not be required to do as mere legal residents.").

> Liberal citizenship is duty-free, in a legal (not moral!) sense . . . . A citizenship that imposed hard legal duties was the 'citizenship' of communist states, today also that of Islamic states, which arrogate to themselves a strong formatting of the preferences and beliefs of their members. This is not a model to follow, because it impairs liberty.[721]

Joppke's observation that a citizenship that imposes legal duties "impairs liberty" is prescient. It anticipates what is happening in both stories told in this article. In refusing to let their emigrants go, the countries of origin, including the United States, "impair[] liberty."

Echoing Joppke, Kochenov does not mince words:

> [C]ommonly invoked duties [of citizenship] obstruct lives, rather than 'creating citizens' . . . . All the blindly accepted 'theory' of rights and duties implying the constant correlation between the two is in fact nothing more than an unconvincing justification of the repugnant roles the duties played.[722]

Kochenov's words ring true in the context of the U.S. taxation of American emigrants. As explained above,[723] the policies obstruct lives. Zelinsky's defense of their taxation as "[a]mong the most important of [the] 'correlative obligations' of citizenship"[724] is an attempt to justify the repugnant role the taxation plays in the lives of American emigrants.

Even jury service is not an absolute duty of citizenship. Reasons for excusal abound. Just some examples include: advanced age;[725] breastfeeding mothers;[726] persons who serve as volunteer firefighters or members of a rescue squad or ambulance crew;[727] members of the armed forces on active duty;[728] and "public officers" of federal, state, or local governments.[729] Of

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721 Christian Joppke, *Liberal Citizenship Is Duty-Free* (2018), *in* DEBATING EUROPEAN CITIZENSHIP 202–03 (Rainer Bauböck, ed., 2019).

722 *EU Citizenship, supra* note 718, at 490, 493.

723 *See supra* notes 318–44 and accompanying text.

724 *Defending U.S. Citizenship-Based Taxation*, *supra* note 276, at 2419.

725 Over 70 or 80 years of age, as examples. *See Juror Qualifications, Exemptions and Excuses,* U.S. CTS., https://www.uscourts.gov/court-programs/jury-service/juror-qualifications-exemptions-and-excuses#:~:text=Such%20groups%20may%20include%20persons,rescue%20squad%20or%20ambulance%20crew [https://perma.cc/2A6U-ML99] (last visited Nov. 6, 2025); *Jury Service Frequently Asked Questions,* HAW. ST. JUD., https://www.courts.state.hi.us/general_information/jury/jury_service_faqs#Q7 [https://perma.cc/ L4FP-44TF] (last visited Nov. 6, 2025).

726 *See, e.g.*, *id.*

727 *See, e.g.*, *Juror Qualifications, Exemptions and Excuses, supra* note 725.

728 *See, e.g.*, *Jury Service: Qualifications, Exemptions and Excuses* U.S. DIST. CT., DIST. N.H., https://www.nhd.uscourts.gov/excuse-from-jury-service [https://perma.cc/RF2U-TLK2] (last visited Nov. 6, 2025).

729 *Id.*

particular note: persons who live outside the United States, as a general matter, are excused from jury service.[730] In fact, simply living a minimum distance from the court that issued the juror summons, even if it's in the United States, will garner an excusal.[731]

Even if one clings to the "empty rhetoric"[732] that citizenship entails obligations, such obligations are not immutable. The first story offers an example of this. At the beginning of the story, military service was considered an obligation of citizenship.[733] The only way to escape the obligation was to terminate the citizenship.[734] By the end of the first story, however, this was no longer the case. Because of *Trop v. Dulles*, desertion no longer results in the loss of U.S. citizenship.[735] Further, dual citizens who live in one of their countries of citizenship today are excused from military service in the other country.[736] Clearly, then, there are circumstances when military service is not an obligation of citizenship.[737] One of those circumstances is living abroad as a dual citizen.

There is no reason why this circumstance or one comparable to it cannot apply with respect to other so-called obligations of citizenship, such as taxation on worldwide income. This is especially the case given that income taxation has not always existed in the United States.[738] Thus, necessarily, there have been long periods in U.S. history when income taxation could not have been considered an "obligation of citizenship" by anyone.[739] The so-called obligations of citizenship can and do change.

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730 *See, e.g.*, Ellen, *How to Get Out of Jury Duty as an American Abroad*, AMÉRICAINE IN FR. (Sep. 5, 2024), https://www.americaineinfrance.com/2022/07/11/how-to-get-out-of-jury-duty-while-abroad/.

731 *See, e.g.*, *Jury Service Frequently Asked Questions*, *supra* note 725 (excusing in this case, living more than 70 miles from the courthouse); *see also* Minn. Jud. Branch, *Jury Service*, MINN. CTS., https://www.mncourts.gov/jurors.aspx (last visited Nov. 6, 2025) (excusing jurors who live outside the county).

732 *Supra* note 717 and accompanying text.

733 *See supra* notes 104–120 and accompanying text.

734 *See supra* notes 153–162 and accompanying text.

735 *See supra* notes 238–242 and accompanying text.

736 *Supra* notes 266–67 and accompanying text.

737 *See* MORRIS JANOWITZ, THE LAST HALF-CENTURY: SOCIETAL CHANGE AND POLITICS IN AMERICA 215–16 (1978) (observing that with the emergence of an all-volunteer military, "the significance of military service for defining citizenship has been fundamentally undermined.").

738 *See supra* notes 277–304 and accompanying text.

739 This supports the argument that the concept of "fiscal citizenship" was invented to encourage the American public to accept this new and, eventually, highly intrusive, form of taxation. *See supra* notes 650–52 and accompanying text.

C. Taxation Can—and Must—Be Separated from Citizenship

At the beginning of the first story, citizenship and military service were considered inseparable.[740] Neither the United States nor the American immigrants' countries of origin could conceive of citizenship separated from military service.[741] One was so integral to the other that the only way to not have one was to also not have the other. This is why the United States assumed that the solution to forcible conscription was not simply for the forcible conscription to end, but for the American emigrant to forcibly lose the citizenship of the country in question.[742]

As we know, however, Switzerland challenged that assumption.[743] It did so because the Swiss Constitution protected Swiss citizenship.[744] Switzerland was unwilling to negotiate a treaty that would strip Swiss emigrants to the United States of their Swiss citizenship.[745] This was because the Swiss constitution provided that Swiss citizenship could be lost only if the emigrant followed a legally prescribed procedure for expatriation.[746] Contrary to the assertions of U.S. diplomats, the reason for this protection did not lie in the anachronistic "doctrine of perpetual allegiance."[747] In fact, the reasons were highly forward-looking: the desire to avoid statelessness and to allow for dual citizenship.[748]

As we also know, the United States came around to Switzerland's position. A series of decisions of the U.S. Supreme Court adopted in the late 1950s and 1960s had the effect of ending the forcible destruction of U.S. citizenship for a variety of reasons.[749] The reasons included desertion from the U.S. military.[750] As a result of these decisions, the Bancroft-style treaties that the United States entered, which, upon naturalization in another country, forcibly stripped emigrants' citizenship in their country of origin—became unenforceable and they were terminated.[751] The treaties that remain in place today allow emigrants to retain citizenship of their country of origin while being exempted from that country's military service.[752]

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740 *See supra* notes 104–120 and accompanying text.
741 *See supra* notes 104–162 and accompanying text.
742 *See supra* notes 153–162 and accompanying text.
743 *See supra* notes 180–223 and accompanying text.
744 *Supra* notes 174–77 and accompanying text.
745 *See supra* notes 180–184 and accompanying text.
746 *Supra* notes 175–76 and accompanying text.
747 *Supra* notes 187–88 and accompanying text.
748 *Supra* notes 216–19 and accompanying text.
749 *Supra* notes 238–65 and accompanying text.
750 *Supra* notes 239–43 and accompanying text.
751 *See supra* notes 261–265 and accompanying text.
752 *Supra* notes 267–68 and accompanying text.

In essence, the first story shows that the United States separated citizenship and military service. However slowly and reluctantly it happened, it nevertheless had to happen to protect U.S. citizenship. Today this outcome is accepted with little challenge.[753] Most would likely agree that it makes little sense to oblige someone to perform military service in a country where they do not live.[754] Many would also agree that obtaining an exemption from military service should not entail loss of citizenship.[755]

The first story teaches that even if a particular "duty" or "obligation" appears inseparable from citizenship, it can, nevertheless, be separated. And not only can it be, but also, to protect citizenship, it must be.

This is a very important lesson with respect to the second story. Today there are some who have difficulty conceiving of taxation separated from citizenship.[756] They have this difficulty, at least, with respect to the taxation of emigrants from the United States (strangely, they easily conceive of the separation in the case of the taxation of non-citizens).[757] They see taxation and citizenship as being so integral to each other that the only way to not have one is to also not have the other. If an emigrant from the United States does not want to be subjected to highly penalizing U.S. taxation, they say, there is a simple—and solitary—solution available to them: renounce U.S. citizenship![758] Accordingly, today thousands of people are forced give up their U.S. citizenship.[759]

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753 *See, e.g.*, Woo, *supra* note 275, at 2058 (quoting T. Alexander Aleinikoff & Douglas Klusmeyer, *Plural Nationality: Facing the Future in a Migratory World* (2001), *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES PRACTICES 63, 79 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001) ("After centuries of international tension and diplomatic conflict, some scholars of international law now declare that "[m]ilitary service for dual nationals [as a diplomatic issue] . . . is not even on today's radar screen.").

754 *See, e.g.*, Lior Yohanani, *High-Risk Transnationalism: Why Do Israeli-Americans Volunteer in the Israeli Military?*, 37 SOCIO. F. 533, 536 (2022) (explaining that Israeli citizens who live outside Israel are largely exempt from military service in Israel).

755 *See, e.g.,* Max Margulies, *The Greatest Sacrifice: Why Military Service Should Not Be an Obligation of Citizenship*, WAR ON THE ROCKS (May 31, 2018), https://warontherocks.com/2018/05/the-greatest-sacrifice-why-military-service-should-not-be-an-obligation-of-citizenship/ (asserting "[t]he rights associated with citizenship should not be contingent on mandatory military service.").

756 *See supra* notes 349–89 and accompanying text.

757 *See, e.g.*, *Citizenship and Worldwide Taxation, supra* note 351, at 1295 n.9 (stating "the United States deploys the residence principle for tax purposes, taxing on a worldwide basis aliens who reside in the United States. Such taxation of resident aliens is not controversial."); *see also Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2417 ("[Even if fiscal citizenship justifies U.S. citizenship-based taxation], fiscal citizenship does not require taxation based on legal citizenship since domicile and residence can be (and typically are) used instead to determine membership in the national political community for tax purposes.").

758 *See supra* notes 390–92, 592–97 and accompanying text.

759 *See supra* notes 345–47 and accompanying text.

It should not be difficult to conceive of taxation separated from citizenship. The first story, which is about military service, provides a template. Also, as U.S. lawmakers have repeatedly said over the decades, there is no reason to treat the "conscription of wealth" differently from the "conscription of men."[760] Further, nearly every country in the world demonstrates how to separate taxation from citizenship.[761] Until the current American poverty of imagination is overcome and the separation is fully[762] implemented in U.S. tax policy, U.S. citizenship will remain in peril.

D. Separating Taxation from Citizenship Can Be Simple

U.S. income taxation is notoriously complicated.[763] While this is the case for everyone, it is, as discussed, especially the case for American emigrants.[764] It appears that for some at least, the solution to the problem for American emigrants also needs to be complicated. An example is a bill introduced by Representative Darin LaHood (R-Illinois) in December 2024 at the end of the 118th Congress. The bill, entitled the "Residence-Based Taxation for Americans Abroad Act"[765] (the "LaHood Bill") is twenty pages long. The bill essentially: (i) provides a rough description of the circumstances under which some, but not all, American emigrants might be able to exempt their non-U.S. source income from U.S. taxation,[766] and (ii) establishes a departure tax (not to be confused with the current exit tax)[767] that would apply in the case of high net-worth individuals who leave the United States.[768] The bill is incomplete because it delegates to the Secretary of the Treasury near total discretion in deciding how and when the bill will

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760 *See supra* note 554–66 and accompanying text.

761 *See supra* note 276 (explaining that in addition to the United States, just three other countries tax the foreign income of their non-resident citizens on an ongoing basis); s*ee, e.g.*, Debbie Jennings, *What to Know About Residence-Based Taxation*, NAT'L TAXPAYERS UNION FOUND. (Oct. 10, 2024), https://www.ntu.org/foundation/detail/what-to-know-about-residence-based-taxation (explaining that "nearly every other country has adopted a tax system that is residence-based rather than citizenship-based.").

762 The most recent proposal purporting to implement residence-based taxation does not do so fully. *See infra* notes 765–73 and accompanying text; Laura Snyder, *SEAT's Response to Rep LaHood's Request for Feedback*, STOP EXTRATERRITORIAL AM. TAX. (Dec. 22, 2024), https://seatnow.org/2024/12/22/seats-response-to-rep-lahoods-request-for-feedback/ [hereinafter *SEAT's Response*].

763 *Supra* notes 305–13 and accompanying text.

764 *Supra* notes 314–43 and accompanying text.

765 Residence-Based Taxation for Americans Abroad Act, H. R. 10468, 118th Cong. (2024), https://www.congress.gov/bill/118th-congress/house-bill/10468.

766 *Id.* at § 2 (adding IRC §899) (an "electing individual" must certify U.S. tax compliance for the preceding five years. Further, they cannot be employed by the U.S. Federal Government).

767 *See Rationalized?, supra* note 319, at 595–601 (discussing the current exit tax).

768 H. R. 10468 § 2 (adding IRC § 899A).

be implemented.[769] In sum, no one would describe the bill as simple. Even if it were implemented in good faith and in a timely manner by the Secretary of the Treasury it would, at best, offer a solution to only some American emigrants, not all.[770]

In the first story, separating military service from taxation was not nearly as complicated. On the contrary, it was remarkably simple. In the "Protocol relating to Military Obligations in Certain Cases of Double Nationality"[771] (drafted in 1930), the separation was (and today still is) delineated in one simple paragraph:

> A person possessing two or more nationalities who habitually resides in one of the countries whose nationality he possesses, and who is in fact most closely connected with that country, shall be exempt from all military obligations in the other country or countries.[772]

More recently drafted examples can be found in the agreements that Switzerland, which still practices conscription, has with several countries. They are more complex than the 1930 Protocol but still relatively simple, particularly as compared to the LaHood Bill. For example, the relevant provisions of Switzerland's agreement with France, signed in 1995,[773] state:

> Art. 3 Principles
>
> 1. The dual citizen is obliged to fulfil his military duties only towards one of the two states.
> 2. The dual citizen shall perform his military duties in the State in which he has his permanent residence on 1 January of the year in which he turns 18 years of age.[774]
> 3. The dual national shall provide evidence of his or her permanent residence by presenting a certificate conforming to Model A annexed to this Agreement. This document shall be issued by the authorities designated by the two States and delivered by the dual national to the consular representative

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769 *See, e.g.*, *id.* (adding IRC § 899(c)(1)) (an individual may opt into the new regime only "at such time and in such manner as the Secretary may provide")*; see also id.* (adding IRC § 899(d)) (an individual may make an election "at such time and in such manner as the Secretary may provide.").

770 *SEAT's Response, supra* note 762.

771 Protocol Relating to Military Obligations in Certain Cases of Double Nationality, *supra* note 98.

772 *Id.* at art.1.

773 Convention entre le Conseil fédéral suisse et le Gouvernement de la République française relative au service militaire des double-nationaux, Switz.-Fr., Nov. 16, 1995, RS 0.141.134.92, https:// www.fedlex.admin.ch/eli/cc/ 1998/89_89_89/fr.

774 *Id.* at art. 3.

> of the State in which he or she is released from military duties.[775]
>
> Art. 6 Permanent residence
>
> Permanent residence shall be determined by taking into account the place where the dual national has the center of his main interests.[776]
>
> Art. 9 Legal status of dual citizens
>
> The provisions of this Agreement shall in no way affect the legal position of the persons concerned with regard to nationality.[777]
>
> Art. 10 Abuse
>
> A dual national who evades his legal military obligations shall be excluded from the benefits of this Convention at the request of the State in which he is required to perform them.[778]

The above example from the agreement between Switzerland and Austria can be used to inspire what could be contained in treaties between the United States and each of the countries where American emigrants live and/or in a multilateral convention. The most pertinent provisions could read, for example:

> Article 1 Principles
>
> 1. The residents of each Contracting State shall be tax resident in one Contracting State at a time.
> The term "tax resident" means any person that, under the laws of the Contracting State, is liable to tax therein based on their worldwide income by reason of that person's domicile or residence.
> 2. The resident shall be a tax resident in the Contracting State in which they have permanent residence during the taxable year. If the resident changes their permanent residence during the taxable year, their tax residency will change as of the date of the change of their permanent residence.

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775 *Id.*
776 I*d.* at art. 6.
777 *Id.* at art. 9.
778 *Id.* at art. 10.

3. The resident who changes their permanent residence from one Contracting State to the other shall provide evidence of their new permanent residence by presenting a certificate conforming to Model A annexed to this Agreement. This document shall be issued by the authorities designated by the two States, establish the date upon which the resident's permanent residence changed, and be delivered by the resident to the tax authorities of the State in which they are released from tax residence.
4. A change of permanent residence from one Contracting State to the other may be subject to a departure tax imposed by the Contracting State of departure.

Article 2 Permanent residence[779]

1. Permanent residence shall be determined by taking into account the place where the resident has the center of their vital interests.
2. If the Contracting State in which they have their center of vital interests cannot be determined, they shall be deemed to be a resident of the Contracting State in which they have a habitual abode;
3. If the resident has a habitual abode in both States or in neither State, they shall be deemed to be a resident of the Contracting State of which they are a citizen; and
4. If the resident is a citizen of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

Article 3 Legal status of residents

The provisions of this Agreement shall in no way affect the legal position of the persons concerned regarding citizenship or nationality.

Article 4 Abuse

A resident who evades their legal tax obligations shall be excluded from the benefits of this Convention at the request

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[779] This article is inspired by both the agreement between Switzerland and France and the tax treaty between the United States and Canada. *Id.* at art. 6; Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital, U.S.-Can., Sep. 26, 1980, https://www.canada.ca/ en/department-finance/programs/tax-policy/tax-treaties/country/united-states-america-convention-consolidated-1980-1983-1984-1995-1997.html.

> of the Contracting State in which they are required to perform them.

Critics of this simple and relatively short proposal might argue that it does not eliminate the need for "fact-intensive inquiries necessary to determine a taxpayer's residence or domicile."[780] For those critics, citizenship is a better basis for taxation because, as an "administrable proxy"[781] for residence, it eliminates the need for factual inquiries. This argument ignores the fact that the United States also taxes based on residence,[782] thus the need for fact-intensive inquiries cannot be eliminated, anyway.[783] Setting aside that incoherence, this critique assumes that all "fact-intensive inquiries"[784]—no matter how few may be required—should be eliminated regardless of the cost.[785] This includes the cost of the harm that the current system, based on citizenship, inflicts not just on a few but on the entire population of American emigrants.[786] Further, this critique implies that, for many if not for most people, it is not clear in which country they live. There is no evidence that this is the case.[787] For most people, the country where they live is clear.[788] This critique further implies that fact-intensive inquiries are a big problem for tax authorities in other countries, where taxation is solely based on residence. That is, this critique implies that tax authorities in other countries are overwhelmed by the non-stop need to engage in inquiry after inquiry. There is no evidence that this is the case.[789]

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780 *Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2363.

781 *Id.*; *Citizenship and Worldwide Taxation, supra* note 351, at 1291, 1293, 1322, 1324–25, 1329.

782 26 C.F.R. § 1.1-1(a) (2008) (stating "Section 1 of the [Internal Revenue Code] imposes an income tax on the income of every individual who is a citizen or resident of the United States.").

783 *See, e.g.*, *Substantial Presence Test, supra* note 659.

784 *Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2363.

785 *See generally Citizenship and Worldwide Taxation*, *supra* note 351, at 1291, 1293, 1322, 1324–25, 1329; *see also Defending U.S. Citizenship-Based Taxation, supra* note 276, at 2363, 2365–67, 2382, 2406–07, 2439.

786 *See generally Myths and Truths, supra* note 217, at 257 (explaining in detail how the U.S. extraterritorial tax system violates multiple constitutional and human rights).

787 *See, e.g.*, Simon van Teutem, *Less than 4% of the world's population are international migrants*, OUR WORLD IN DATA (Oct. 21, 2024), https://ourworldindata.org/data-insights/less-than-4-of-the-worlds-population-are-international-migrants ("The vast majority of people in the world — over 96% — live in the country where they were born.").

788 *See, e.g.*, *Total Population by Country 2025,* WORLD POPULATION REV., https://worldpopulation review.com /countries (last visited Nov. 4, 2025); Katharina Buchholz, *The World's Biggest Diasporas*, STATISTA (Nov. 22, 2022), https://www.statista.com/chart/4237/the-countries-with-the-most-people-living-overseas/ (neither of these discussions about the populations of different countries mentions difficulties determining the country where a person lives).

789 *See, e.g.*, PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON TAX AND REVENUE, TAXPAYER ENGAGEMENT WITH THE TAX SYSTEM 167–99 (2018); THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, SHELL GAME: HOW OFFSHORE HAVENS, LOOPHOLES, AND FEDERAL COST-CUTTING UNDERMINE TAX FAIRNESS,

There is, however, overwhelming evidence that the IRS cannot administer the current citizenship-based system.[790] Finally, this critique ignores the fact that treaties potentially requiring "fact-intensive inquiries" have existed for decades, with respect to both military service[791] and taxation.[792] Countries are not clamoring to have these provisions revised – neither with respect to military service nor to taxation.[793] This suggests that, exceptional cases aside, the provisions work satisfactorily. In sum, this is a critique in search of a genuine problem.

Critics of this proposal might also argue that it does not sufficiently address the question of abuse. The first response to this critique is that the proposal allows a country to impose a departure tax when a resident leaves one country for another.[794] A departure tax is the principal manner by which other countries maintain the ability to tax the capital gains of a departing resident that were accumulated during the time the person was a resident of that country.[795] In this way, a departure tax discourages emigration from a country for tax reasons.[796] The second response to this critique is that the proposal also contains a clause that allows a person who engages in abuse to be excluded from the agreement's benefits. As noted above, this clause was inspired by the agreement between Switzerland and Austria regarding military service. Both countries currently practice military conscription.[797]

A SURVEY (2018), https://pipsc.ca/sites/default/files/comms/Report.pdf (discussing in detail the challenges faced by the Australian and the Canadian tax systems do not mention determinations of taxpayer residence).

790 *See generally* Snyder et al., *Mission Impossible: Extraterritorial Taxation and the IRS*, 170 TAX NOTES FED. 1827 (Mar. 22, 2021). *See also* Laura Snyder, *Taxpayer Advocate to IRS: Your Task Is to Administer a Worldwide Tax System. Do It.*, 190 TAX NOTES FED. 1281 (2026).

791 *Supra* notes 266–67.

792 *See, e.g.*, LB&I INTERNATIONAL PRACTICE SERVICE PROCESS UNIT – AUDIT, DOC. CONTROL NO. JTO/9431.06_14(2015), BONA FIDE RESIDENCE TEST FOR PURPOSES OF QUALIFYING FOR IRC § 911 TAX BENEFITS (2015), https://www.irs.gov/pub/fatca/int_practice_units/JTO9431_06_14.pdf (explaining "the bona fide residence status of an individual is a factual determination with a case by case analysis."); *Canadian government's response to international income tax issues raised by COVID-19*, BDO GLOB. (June, 2020), https://www.bdo.global/en-gb/microsites/tax-newsletters /corporate-tax-news/issue-55-june-2020/canada-canadian-government%E2%80%99s-response-to-international-income-tax-issues-raised-by-covid-19 (explaining Canada's factual test of residency).

793 *See* sources cited *supra* note 790.

794 *Supra* notes 778–80.

795 *See, e.g.*, Laura Snyder, *Extraterritorial Taxation #15: Taxing in Respect of Rights* 7–9 (SEAT WORKING PAPER SERIES #2023/15, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract _id=4466241 (explaining the departure taxes imposed by Canada, Norway, France and Australia).

796 *See, e.g.*, *Myths and Truths*, *supra* note 217, at 240–41 (2022).

797 *Military Service,* SWISSINFO (June 3, 2017), https://www.swissinfo.ch/eng/swiss-politics/military-service/29288612; *Military Service and Civilian Service*, OESTERREICH, (updated Apr. 9, 2025), https://www.oesterreich.gv. at/en/themen/gesetze_und_recht/wehrpflicht-und-zivildienst.

There is no evidence that this clause has proven insufficient to address abuse in the context of the conscription "tax."[798]

In sum, the first story offers valuable lessons on how the separation of taxation from citizenship can be accomplished in a relatively simple manner.

E. Renunciation of Citizenship Is Not the Solution

As noted above,[799] proponents of the current U.S. extraterritorial tax system are dismissive of calls for reform. They argue that American emigrants who are not happy with the system can simply renounce their U.S. citizenship.[800] Those who do not make this so-called choice are "express[ing] political allegiance to the United States,"[801] and "consenting to the terms of the contract."[802] Consequently, they should remain subject to U.S. taxation, regardless of how penalizing the taxation is and of how much it limits their lives.

The problems with this argument have been discussed in detail elsewhere.[803] For the purposes of this discussion, it is important to point out that, regardless of what they might like to do, many American emigrants are not able to renounce U.S. citizenship. This can be for a variety of reasons. Some have—or expect to have—family members in the United States, such as elderly parents, who cannot travel.[804] The emigrants need to be able to return to the United States not just for short visits but also, potentially, for extended visits to care for those family members.[805] Loss of U.S. citizenship would mean losing the right to return to the United States.[806]

Returning to one's country is a human right.[807] Even if it is a human right, however, in today's world, it does not exist independently of citizenship. Citizenship is required in order to exercise this right.[808] The imposition of penalizing taxation as a "duty" in counterpart to that right negates the right.[809] Human rights exist—or, at least, they should exist—

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798 *Supra* notes 549–66 and accompanying text.
799 *Supra* notes 349–94 and accompanying text.
800 *Supra* notes 390–92 and accompanying text.
801 *Supra* note 390 and accompanying text.
802 *Supra* note 392 and accompanying text.
803 *See Rationalized?, supra* note 319, at 572–75; *see also supra* notes 390–98, 435–58 and accompanying text.
804 *See, e.g.*, SEAT SURVEY PARTICIPANT COMMENTS VERSION 1, *supra* note 456, at 30, 55–56, 73, 87, 91, 294, 625.
805 *Id.*
806 *Myths and Truths, supra* note 217, at 257–58.
807 *Id.*
808 *Id.*
809 *Invisibility of the American Emigrant, supra* note 7, at 48–50.

entirely independently of duties.[810] A human right is something a person has—or, at least, should have— merely because they exist as a human being.[811] Requiring that some duty—any duty—be fulfilled as a condition to having a human right is barbaric.[812] Understood in this context, flippant references to renunciation as the solution to an American emigrant's problems are barbaric.

Many American emigrants cannot renounce U.S. citizenship because doing so would leave them stateless. Not all American emigrants are citizens of another country.[813] Suggestions for unhappy emigrants to merely renounce are based either on the (false) assumption that all emigrants hold at least one other citizenship, or an indifference as to whether the renunciations would result in (potentially widespread) statelessness.

This callous—present day—attitude towards American emigrants demonstrates just how forward thinking the 19th century Swiss position on citizenship and statelessness was. As discussed,[814] over a century ago Switzerland understood that not only should statelessness be avoided, but also that citizenship is "sacred."[815] Even in the presence of dual citizenship, citizenship should not be lost if the person in question does not genuinely desire to lose it.[816] At first, American diplomats described Switzerland's position as an "[extravagant] pretension"[817] and "extraordinary and exceptional."[818] But, decades later, and as also discussed above, the United States came around to the Swiss position.[819] At least, it did so with respect to issues other than taxation. This included issues that, at the time, were considered inseparable from citizenship. One issue, as discussed in detail in this article, was that of military service: the United States finally understood

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[810] *Myths and Truths, supra* note 217, at 233; *Invisibility of the American Emigrant*, *supra* note 7, at 49–50.

[811] *See* Kate Gilmore, U.N. Deputy High Comm'r for Hum. Rts., Welcoming Remarks at Side Event of Protecting Human Rights in Large Movements of Migrants and Refugees (Sep. 20, 2016), https://www.ohchr.org/en/2016/09/side-event-protecting-human-rights-large-movements-migrants-and-refugees-20-september-10.

Rights are not gifts to be dispensed according to our preferences – they cannot be removed, suspended or denied. They are innate dignities - birthrights. Inalienable. They do not exist separately from the fact of our existence – they rather are our very best - and internationally agreed, tried and tested - definition of what it is to exist as a human being! *Id.*

[812] G.A. Res. 217 (III) A, *supra* note 423, at Preamble ("[D]isregard and contempt for human rights have resulted in barbarous acts.").

[813] SEAT SURVEY DATA PART 1, *supra* note 397, at 10 (explaining that in a survey of Americans living outside of the United States, 39% did not have dual citizenship, they were U.S. Citizens only).

[814] *Supra* notes 174–218 and accompanying text.

[815] *Supra* note 198 and accompanying text.

[816] *Supra* notes 212–215 and accompanying text.

[817] *Supra* note 187 and accompanying text.

[818] *Supra* note 189, 390 and accompanying text.

[819] *Supra* notes 224–67 and accompanying text.

that not just exemption from military service but even desertion should not result in the loss of citizenship.[820] Another issue was a woman's marriage—the United States finally understood that marriage to a non-citizen should not result in the loss of U.S. citizenship.[821] Another issue was something as fundamental as residence. The United States finally understood that residence outside the United States, however lengthy, also should not result in the loss of U.S. citizenship.[822]

But the United States still has not learned this lesson with respect to taxation. Indeed, the situation is worse than that. Not only do commentators flippantly declare that an unhappy American emigrant can just renounce U.S. citizenship,[823] but, when they do renounce, the result is worse than just the loss of U.S. citizenship. To further punish the very thing that commentators argue is the answer to the American emigrant's tax problems—the loss of U.S. citizenship—in 1996 the United States adopted the "Reed Amendment."[824] Modifying the Immigration and Nationality Act of 1952, the Reed Amendment seeks to bar former U.S. citizens entry into the United States who are determined to have renounced for the "purpose of avoiding taxation by the United States."[825] While the Reed Amendment appears to be rarely enforced,[826] its mere existence is enough to cause fear among American emigrants.[827] In sum, American emigrants are damned if they do (renounce) and damned if they don't (renounce).

Nineteenth century Switzerland still offers these two vital lessons for twenty first-century United States: (i) statelessness is a condition to be avoided;[828] and (ii) citizenship is "so sacred"[829] that its preservation should be enabled and encouraged. At a minimum, its destruction should not be considered a solution to any problem.

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820 *Supra* notes 238–42 and accompanying text.

821 *Myths and Truths, supra* note 217, at 193, 272–73, 275.

822 *Supra* notes 243–46 and accompanying text.

823 *Supra* notes 390-392, 799–802 and accompanying text.

824 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208 § 352, 110 Stat. 3009, 3009–641.

825 8 U.S.C. § 1182(a)(10)(E).

826 *See, e.g.,* Patrick W. Martin, *The 1996 Reed Amendment – The Immigration Law with 'No Teeth' and 'No Bite*,' TAX-EXPATRIATION (Apr. 8, 2014), https://tax-expatriation.com/the-1996-reed-amendment-the-immigration-law-with-no-teeth-and-no-bite/; Virginia La Torre Jeker, *Expatriation Numbers Skyrocket! Giving up US Citizenship – Will I be Banned from Re-entering the USA?* U.S. TAX TALK (Aug. 12, 2020), https://us-tax.org/2020/08/12/expatriation-giving-up-us-citizenship-will-i-be-banned-from-re-entering-the-usa/.

827 *Myths and Truths*, *supra* note 217, at 201–02.

828 *Supra* notes 811–12 and accompanying text.

829 *Supra* notes 198, 812 and accompanying text.

F. Emigrants Are Not Safe from Their Countries of Origin Without the Intervention of Their New Countries

In the first story, when emigrants to the United States protested to their countries of origin that they should not be forcibly conscripted, their protests fell on deaf ears.[830] The countries had no incentive to act differently. It wasn't until U.S. consular authorities intervened on their behalf that they were able to obtain some relief.[831] At first, the relief was sporadic and random – it depended upon how forcefully a U.S. diplomat in a given country was willing to press the case for a given emigrant, and how magnanimous the diplomat's interlocutors in that country happened to be.[832] Sometimes the diplomat succeeded in obtaining the emigrant's release, and sometimes he didn't.[833]

Systemic relief did not occur until the United States took the initiative to negotiate treaties with individual countries[834] as well as, eventually, a multilateral agreement involving 41 countries.[835] The United States took these actions because it grew to understand that it had a duty to protect its immigrants from their countries of origin.[836] Yeaman observed in his inquiry on the problem:

> It seems sufficiently certain that no effectual remedy for this continual source of trouble and of crying hardship will proceed from European Governments, but must proceed from our own and be accepted by them.[837]

In the second story, for decades, emigrants from the United States and others have appealed to U.S. policymakers for relief from highly penalizing extraterritorial tax laws.[838] Their appeals, for the most part, fall on deaf

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830 *Supra* notes 24–27, 102–20 and accompanying text.

831 *Supra* notes 42–43, 48–54 and accompanying text.

832 *Supra* notes 42–43, 48–54 and accompanying text.

833 *Supra* notes 42–43, 48–54 and accompanying text.

834 *Supra* notes 55–65, 92–101 and accompanying text.

835 Protocol Relating to Military Obligations in Certain Cases of Double Nationality, *supra* note 98. The other signatories are Germany, Austria, Belgium, Great Britain, Canada, Ireland, India, Chile, Colombia, Cuba, Denmark, Egypt, Spain, France, Greece, Luxemburg, Mexico, Netherlands, Peru, Portugal, Salvador, Sweden, and Uruguay.

836 Indeed, its previous failures to protect them were decried as a "scandal." Chaney, *supra* note 12, at 396. Calling for the United States to act, Chaney protested: "A naturalization that does not protect one from the only power that is likely to meddle with him, is about as much of a safeguard as the freedom of a city." *Id*. at 390.

837 YEAMAN, *supra* note 60, at 2.

838 *See Unacknowledged Realities*, *supra* note 11, at 275–96.

ears.[839] The United States does not perceive that it has any incentive to change how it treats its emigrants.[840]

In stark contrast to the United States of the first story, in the second story, the countries where American emigrants live have, to date, proven unwilling to take any significant action to defend their American immigrants from the United States. On the contrary, at best, they have acquiesced to the situation.[841] At worst, they have expressed their support for U.S. taxation of the residents of their countries.[842]

The first story teaches that unless and until the countries stand up to the United States and defend their immigrants from their country of origin, relief from penalizing U.S. taxation is unlikely.

VI. CONCLUSION

This article tells two stories about emigration, the first from the past and the second from the present day. While the two stories may, at first glance, appear to be unrelated, they share important commonalities. The story from the past offers many lessons for the present day.

From the late 18th until the early 20th century, men (emigrants leaving their home for the United States) who returned to their country of origin for what was intended to be a brief visit could find themselves either forced into military service for that country or, in some cases, forced to pay a tax in lieu of military service.[843] The emigrants called upon the United States to protect them from their countries of origin.[844] The problem of the impressment by Great Britain of American soldiers is cited as one of the principal causes of the War of 1812.[845] However, after the war, U.S. diplomats reacted sporadically, with some attempting—sometimes successfully—to negotiate releases of specific individuals[846] while others declared there was little they

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839 *Supra* notes 349–92 and accompanying text; *see also Unacknowledged Realities*, *supra* note 11, at 309–20.

840 This does not mean, however, that it does not actually have any incentive. *See Myths and Truths, supra* note 217, at 210–16 (explaining why the United States does not have any compelling interest in maintaining the U.S. extraterritorial tax system).

841 *See, e.g.*, Letter from Jesse Norman, U.K. Fin. Sec'y to the Treas. & Member of Parliament, to Sharon Hodgson, U.K. Member of Parliament (Oct. 8, 2019) (on file with author) ("It is a matter for the U.S. government to determine how U.S. tax obligations are calculated, including whether these obligations apply to [people born in the United States].").

842 *See, e.g., supra* note 501–02 and accompanying text (European Parliament's Commission on Petitions "stress[ing] that it did not advocate in any way enabling tax avoidance or tax evasion by U.S. citizens [living in the European Union].").

843 *Supra* notes 16–89, 178–79 and accompanying text.

844 *Supra* notes 21, 38, 48, 55–57, 74, 81–83 and accompanying text.

845 *Supra* note 24 and accompanying text.

846 *Supra* notes 21, 38, 48, 55–57, 74, 81–83 and accompanying text.

could do.[847] With mounting calls for the country to take systemic action, the United States finally negotiated a series of treaties with other countries.[848] Referred to as the "Bancroft Treaties," they provided that upon naturalization in one of the treaty countries, an emigrant would lose citizenship of their country of origin. As a result of losing that citizenship, they would no longer be required to perform military service in that country.[849]

Not all countries were willing to enter a treaty with the United States.[850] An important holdout was Switzerland.[851] The United States criticized Switzerland for its refusal, describing the Swiss position as an "alleged score of owing paramount allegiance to Switzerland"[852] that was "extraordinary and exceptional."[853] But the actual reason for the Swiss position was its desire to guard against statelessness and protect Swiss citizenship.[854] Switzerland did not believe that naturalization in another country should automatically result in the loss of Swiss citizenship.[855] The United States and Switzerland ultimately concluded a treaty that allowed for some Swiss citizens living in the United States to be exempt from Swiss military service without loss of Swiss citizenship.[856]

As a result of a series of U.S. Supreme Court decisions adopted in the late 1950s and 1960s, the United States eventually came around to the Swiss position.[857] Decisions like *Trop*, *Schneider*, and *Afroyim* operated to guard against statelessness and to protect U.S. citizenship.[858] Because of those decisions, the Bancroft treaties were rendered obsolete and eventually terminated.[859] The treaties that remain in place today—including a multilateral treaty involving 41 countries—allow for emigrants from a country to be exempt from military service in that country without losing citizenship of that country.[860]

Ironically—and hypocritically—at the same time the United States was seeking the release of its immigrants from the figurative clutches of their countries of origin, the United States was developing a tight hold on its

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847 *Supra* notes 39–41, 47 and accompanying text.
848 *Supra* notes 59–65 and accompanying text.
849 *Supra* notes 59–65 and accompanying text.
850 *Supra* notes 66–67, 90 and accompanying text.
851 *Supra* notes 170–223 and accompanying text.
852 *Supra* note 189 and accompanying text.
853 *Supra* note 189 and accompanying text.
854 *Supra* notes 190–218 and accompanying text.
855 *Supra* notes 209–13 and accompanying text.
856 *Supra* notes 219–223 and accompanying text.
857 *Supra* notes 231–67 and accompanying text.
858 *Supra* notes 237–54 and accompanying text.
859 *Supra* notes 260–64 and accompanying text.
860 *Supra* notes 265–67 and accompanying text.

emigrants *from* the United States.[861] It did and today still does this through the taxation of the worldwide income of Americans who live in other countries.[862] This means that emigrants from the United States must live subject to two tax systems.[863] The systems are rarely, if ever, compatible, with the result that for any given tax, the emigrant pays the higher of the two rates applied by each country, respectively.[864] Further, the United States imposes highly penalizing taxation on non-U.S. source income and assets.[865] While Americans living in the United States typically do not have such income or assets, persons living outside the United States typically do.[866] As a result of this situation, many American emigrants feel forced to renounce U.S. citizenship as the only means to escape the penalizing policies.[867] Each year, thousands of Americans living abroad renounce U.S. citizenship.[868]

These two emigration stories share profound parallels as well as crucial differences:

- In both stories, policymakers as well as the public at large in the emigrants' countries of origin hold (held) unfounded suspicions about the emigrants' motives for emigration;[869]
- Taxation and conscription share fundamental characteristics. Both entail the state's (the government's) extraction of resources from a given population, subject to penalty (fine and/or imprisonment) in the event of noncompliance;[870]
- In both stories, the emigrants suffer(ed) from the incompatibility of regimes, leaving them worse off as compared to persons who did not emigrate;[871]
- Both stories result(ed) in the forcible destruction of citizenship;[872]

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861 *Supra* notes 277–304 and accompanying text.
862 *Supra* notes 305–31 and accompanying text.
863 *Supra* notes 332–43 and accompanying text.
864 *Supra* notes 332–43 and accompanying text
865 *Supra* notes 317–43 and accompanying text.
866 *See, e.g.*, *Analysis of Revenue Effects of Residents-Based Taxation*, AM. CITIZENS ABROAD, https://www.americansabroad.org/aca_deg_analysis_of_revenue_effects_of_residents_based_taxation (last visited Nov. 9, 2025) (estimating the adjusted gross income of overseas Americans in the aggregate to be approximately 74% non-U.S-source and 26% U.S.-source).
867 *See supra* notes 345–47 and accompanying text.
868 *See, e.g.*, *supra* note 346 and accompanying text.
869 *Supra* notes 520–48 and accompanying text.
870 *Supra* notes 549–66 and accompanying text.
871 *Supra* notes 567–78 and accompanying text.
872 *Supra* notes 579–603 and accompanying text.

- Both stories raise the question of what, if any, are the obligations of citizenship;[873]
- In both stories, the emigrants' countries of origin refuse(d) to let their emigrants go.[874]

The first story offers important lessons for the second story:

- The position of the United States with respect to the taxation of American emigrants is manifestly hypocritical. In the first story, the United States argued that other countries should not impose prospective liabilities on their emigrants – liabilities incurred after their departure from the country. But in taxing the worldwide income of American emigrants on an ongoing basis, the United States does exactly that to its own emigrants;[875]
- If citizenship has "hard legal"[876] responsibilities—it is not clear that it does[877]—they are not immutable. As seen in the first story, military service was once considered an obligation of citizenship, but this is no longer the case;[878]
- Taxation can and must be separated from citizenship. It is the only way to protect U.S. citizenship;[879]
- Separating taxation from citizenship can be simple. The many treaties addressing military service for dual citizens provide examples;[880]
- Renunciation of citizenship is not the solution to the problem of U.S. taxation of the worldwide income of American emigrants. On the contrary, citizenship is "so sacred" that its preservation should be enabled and encouraged;[881]
- Emigrants are not safe from their country of origin if their new country does not intervene to protect them.[882]
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873 *Supra* notes 604–90 and accompanying text.
874 *Supra* notes 691–700 and accompanying text.
875 *Supra* notes 703–12 and accompanying text.
876 *Supra* note 721 and accompanying text.
877 *Supra* notes 716–32 and accompanying text.
878 *Supra* notes 733–39 and accompanying text.
879 *Supra* notes 740–62 and accompanying text.
880 *Supra* notes 763–98 and accompanying text.
881 *Supra* notes 799–829 and accompanying text.
882 *Supra* notes 830–42 and accompanying text.

It took more than a century for other countries to finally let go of their emigrants to the United States. After more than a century of citizenship-based taxation, it is high time for the United States to do the same – to finally let go of its emigrants—not just its popes[883] but *all* its emigrants—so they can live full lives in the places where they live.

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[883] *See, e.g., supra* notes 2–4 and accompanying text; *see* Goulder, *supra* note 13 ("The real issue is not how the U.S. government chooses to tax the pope but how it taxes the scores of other U.S. citizens living overseas who are unable to rely on diplomatic immunity.").

WHEN THE TAIL WAGS THE DOG: THE GAME OF JUSTICE AND THE ELUSIVE QUEST FOR DUE PROCESS IN THE MIDDLE EAST

Dr. Mohamed 'Arafa*

INTRODUCTION

The spread of COVID-19 led governments across the Middle East and North Africa (MENA) region to adopt significant—and in many cases unprecedented—preventive and protective measures. Tackling this discrepancy might not avert further conflict, but not doing so will undoubtedly make hostilities more likely.[1] In many Middle Eastern countries, weak institutions, vague/broad legislation, privileges, and discrimination mean that social, political, and ethno-religious fault lines are only strengthening.[2]

In some places, the Arab Spring has come and gone. In others, it never arrived. Either way, there is limited justice for citizens. Court systems are not clean, impartial, or transparent. Little due process is anticipated or bestowed. What rights exist were suddenly granted and thus capable of sudden revocation. Corruption, including bribery and influence peddling, is rampant.[3] Establishing the rule of law in the Middle East will be the sum of several projects rather than one big-bang job. The international community of multilateral organizations, NGOs, donor governments, and in-country allies must seek to inspire those Arab populations and target those aspects of life that may act as rule-of-law multipliers.[4]

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1 *See generally* Hossein H. Esmaeili, *The Rule of Law in The Middle East*, *in* The Legal Doctrines of the Rule of Law and the Legal State (RECHTSSTAAT) (James R. Silkenat, James E. Hickey Jr. & Peter D. Barenboim eds., Vol. 38, Springer 2014) [hereinafter *The Rule of Law in The Middle East*].

2 *See generally id.*

3 Hossein Esmaeili, *The Nature and Development of Law in Islam and The Rule of Law Challenge in The Middle East and The Muslim World*, 26 CONN. J. INT'L. L. REV. 329, 332–33 (2011) [hereinafter *The Nature and Development of Law*].

4 For further details of the role of *shura* (consultation) in Islamic governance, see ANN BLACK, HOSSEIN ESMAEILI, & NADIRSYAH HOSEN, MODERN PERSPECTIVES ON ISLAMIC LAW 43–44 (2013).

Courts must be strengthened, and judges need to be trained. Conflict-of-interest legislation and resource management systems are crucial mechanisms for clarifying legal rights and facilitating responsible governance. In short, Arab leaders must *prioritize governance over government*.[5] Some scholars blame Islamic political culture for the absence of democratic institutions and the rule of law. For instance, Samuel Huntington argued that "the Islamic concept of politics differs from, and contradicts, the premise of democratic politics."[6] Sexism and the role of women in Muslim societies have also been mentioned as justifications for the underdevelopment and failure of civil society institutions in the Middle Eastern nations.[7] It should be noted that calls for the rule of law to be created in the Middle East and the rest of the Arab world are becoming more forceful. Nevertheless, attitudes differ regarding the nature of a rule of law system, and which model will best serve the transition from totalitarian structures to rule of law systems.[8] The views vary as to how to administer the transition from tyranny to the rule of law.[9]

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5 Agnieszka Klich, *Bribery in Economies in Transition*: *The Foreign Corrupt Practices Act*, 32 STAN. J. INT'L. L. 121 (1996).

6 SAMUEL HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 307 (1991).

7 *See* Michael Steven Fish, *Islam and Authoritarianism*, 55 WORLD POL. 4, 4–37 (2002).

8 Mohamed 'Arafa, *The Imam and The Pope*: *Remembering The Medina Constitution*, HUM. TR. (Nov. 3, 2020), https://www.humantrustees.org/blogs/muslim-christian-dialog/item/196-imam-pope-medina-charter.

Based on this notion of political theology, we can see three categories of regimes. First, the "religiously free" Muslim-majority states (approximately 11 out of 47, concentered in West Africa) with "low" restrictions on freedom of religion, meaning that they advocate, endorse, and protect the freedom of individuals and communities to practice their creed. Despite the strong Muslim majority population, they are striking for their robust levels of respect for Christian and other minorities, and remarkably, religiosity levels are high in these countries. [...] On the other hand, the 36 Muslim-majority states that are not religiously free can be described as having "moderate," "high," or "very high" levels of restriction on religious freedom. Further, they can be divided into "secular repressive" and "religiously oppressive" nations. The former (around 15 countries) exemplify a political theology of Western secularism, holding that the public inspiration of Islam ought to be muted so as to make way for nationalism, economic liberalization, and modernization. The standard bearer of this model is Turkey, created in 1923 by M. K. Atatürk on secular values. Egypt followed suit under Gamal Abd al-Nasser in the early 1950's and after the 1971 adoption of the constitutional (religious) clause "*the principles of Islamic law*" by President Sadat, as did other Arab nations. This only goes to show that "Islam" (however interpreted) is not the cause of religious repression. Those other states – 21 nations – that restrain freedom of religion display a political theology of "radical Islamism" that imagines law and government rule as a vehicle for applying a rigidly traditional form of Islam in all aspects of life – personal status and family law, economy, culture, human rights, religious exercise, education, dress, among many others. *Id.*

9 *See* Hossein Esmaeili, *On a Slow Boat Towards the Rule of Law*: *The Nature of Law in the Saudi Arabian Legal System*, 26 ARIZ. J. INT'L & COMP. L. 1, 1–47 (2009) (showing several practical models exist: For example, countries such as Saudi Arabia, the United Arab Emirates, and Qatar have traditional systems; those in Turkey, and to some extent, Tunisia are secular; Iran is based on

According to the United Nations (UN) Code of Conduct, public officials, including leaders and Heads of State, shall guarantee that they accomplish their obligations and functions competently, creditably, with integrity, and in accordance with legal values and reasonable administrative policies.[10] They shall at all times strive to ensure that public resources and government funds, for which they are accountable, are managed in the most efficient and well-organized way.[11] Additionally, they shall be attentive, fair, and impartial in performing their tasks, particularly in their relations with the general public, as they shall not afford any extreme favored behavior to any group, entity, or individual, or improperly discriminate against anybody, or otherwise abuse the power and authority conferred to them.[12] Therefore, an inclusive attitude to transparency, accountability, and executing a range of responsibilities, activists, democratic, judicial, media, and civil society are invited.[13]

In addition, the Organization for Economic Co-operation and Development (OECD) has a long history of endorsing good governance and due process. The OECD approved a proposal to advance ethical conduct in the public service that encompasses "*Principles for Managing Ethics in the Public Service*," as these norms are intended to be a reference point for state members when merging the fundamentals of an active ethics management system in line with their personal political, managerial, due process, and cultural settings.[14] Ethical laws and codes of conduct are comprehensively

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Islamic theocratic principles in combination with some contemporary institutions as parliamentary elections and law making; and a mixed model is evolving in Egypt).

10 *See generally* Charlotte Durrant, *What Are The Advantages and Disadvantages of Codes of Conduct in Regulating Moral Behavior in Business*? (2008) (unpublished student paper, 2008 Institute of Business Ethics essay competition postgraduate category winner) (on file with author).

11 *See* generally Kathleen Clark, *Do We Have Enough Ethics in Government*? *An Answer From Fiduciary Theory*, 57 ILL. L. REV. 58 (1996); *see also* Colin Leys, *What is The Problem About Corruption*?, 3 J. MOD. AFR. STUD. 2 (1965); *see also* David Hess & Thomas W. Dunfee, *Fighting Corruption*: *A Principled Approach*; *The C Principles* (*Combating Corruption*), 33 CORN. INT'L L.J. 594 (2000).

12 Edgardo Buscaglia, *Judicial Corruption in Developing Countries*: *Its Causes and Economic Consequences*, HOOVER INST. (1999), https://biblioteca.cejamericas.org/bitstream/handle/2015/2253/buscaglia-jud-corrupcion.pdf?sequence=1&isAllowed=y; *see generally* Cathy Cassell, Phil Johnson & Ken Smith, *Opening the Black Box*: *Corporate Codes of Ethics in their Organizational Context*, 16 J. BUS. ETHICS 1077 (1997).

13 Brian C. Harms, *Holding Public Officials Accountable in the International Realm*: *A New Multi-Layered Strategy to Combat Corruption*, 33 CORN. INT'L L.J. 159, 183 (2000); *see also* David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT'L L. 455, 456, 464 (1999).

14 Harms, supra note 13, at 183; *see also* Kennedy, *supra* note 13, at 456, 464; *see also* OECD, COMMENTARIES ON THE CONVENTION ON COMBATING BRIBERY OF OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (1998) (on file with SIU Law Journal) (asserting that the decision-making process should be transparent and open to scrutiny, as public citizens have a right to know how government institutions apply the authority and public funds entrusted to them (freedom of information)).

used apparatuses in the common moral values supervisor's toolbox.[15] In this regard, ethical codes and rulings are not, of course, adequate implements to verify moral and proper governance, especially to the rule of law and due process guarantees. In 1999, Mike Nelson stated:

> [T]he problem with Codes of Conduct is that it is easy to stick them on the wall, but hard to make them stick in practice . . . without an effective development and implementation strategy which is integrated and engages with the heart and bowels issues of concern to the organization, the net result seems consistently the same: that the Code of Conduct remains a mere piece of paper, displayed or appealed to when convenient, but ignored the rest of the time . . . [16]

By the same token, regarding the evaluating role of the moral and ethical codes in the European Union (EU) countries, Bossaert and Demmke stated:

> Despite their popularity, codes of ethics make little sense unless they are accepted by the personnel, and maintained, cultivated, and implemented with vigor . . . codes are useless if staff are not reminded of them on a regular basis and given continuous training on ethics. Codes are only effective if they are impressed upon the hearts and minds of employees.[17]

Whistleblowing laws vary immensely around the World. The United States has legal norms that boost and protect people and entities who blow the whistle on those who are involved in white-collar crimes, particularly corruption, embezzlement, misappropriation of public funds, fraud, peddling

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15 For example, in Brazil, the Public Ethics Committee was established in 1999 to endorse ethical behavior in the federal executive branch. It is responsible for the implementation of Ethics Management Internationally. The Federal Code of Conduct of High Administration coordinates decentralized ethics measures to guarantee the adequacy of the Brazilian administration's moral values. Also, New Zealand enacted a nationwide code of conduct in 1998 that emphasizes duties expected of public officials in their professional tasks. In 1998, the UK Committee on Standards in Public Life (Nolan Committee) issued the 'Seven Principles of Public' as well.

16 *See* Mike Nelson, *Codes of Ethics in Transitional Democracies*: *A Comparative Perspective*, 8 PALIDAUSKAITE J. PUB. INTEGRITY 35–48 (2006).

17 DANIELLE BOSSAERT & CHRISTOPHE DEMMKE, MAIN CHALLENGES IN THE FIELD OF ETHICS AND INTEGRITY IN THE EU MEMBER STATES (2005); COMM. ON STANDARDS IN PUB. LIFE, GETTING THE BALANCE RIGHT: IMPLEMENTING STANDARDS OF CONDUCT IN PUBLIC LIFE (2005), https://assets.publishing.service.gov.uk/media/5a7ec1bfed915d74e33f2399/10thFullReport.pdf; *see also* TIMO MOILANEN & ARI SALMINEN, HUM. RES. WORKING GRP., COMPARATIVE STUDY ON THE PUBLIC-SERVICE ETHICS OF THE EU MEMBER STATES (2006), http://vm.fi/documents/10623/307711/Comparative_Study_on_the_Public_Service_Ethics_of_the_EU_Member_States_publication+131206.pdf/524e908b-5388-4d1c-9199-59b4f3e567a9.

in influence (power's abuse), and ensure they have access to due process.[18] Unlike the United States, India's anti-corruption laws do not offer the all-encompassing defense (due process guarantees) for whistleblowers.[19] Due to widespread corruption and misconduct among public servants and politicians, citizens are increasingly aware of the prominence of integrity and ethical management.[20] Ethical codes of conduct, deterrence (preventative) procedures, whistleblower protection, and other practices of firming the virtuous dimension of politics and management have stretched an unexpected status on the agenda in several countries, especially the MENA region.[21]

Launching and promoting the rule of law, particularly due process, in the Middle East has become an essential and complicated issue in the region and internationally. It is an exceptionally complex dilemma given the region's diversity, history, religion, tribal structures, and the development of modern institutions, mainly since the Arab Spring. Generally, the region is gradually moving toward the rule of law, but most Middle Eastern nations still lack efficient autonomous and self-governing judicial systems with authority under the state. Notwithstanding the gradual movement toward the creation of rule of law systems, an active rule of law system is inaccessible in most Arab nations.

Against this succinct backdrop, this article examines theoretical discussions on the concept of the rule of law and due process in the Muslim nations, discusses the causes behind the absence of it in the region by *gaming* laws, and underscores various perspectives towards the establishment of a practical rule of law and its institutions in the Middle East. This article concludes that due process should be a priority for practitioners/specialists in combating unethical and unfair behavior and in promoting clean litigation practices globally, particularly in the MENA region, to support a democratic transition.

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18 Christopher J. Duncan, *The 1998 Foreign Corrupt Practices Act Amendments*: *Moral Empiricism or Moral Imperialism*? 14 ASIAN–PAC. L. & POL'Y J. 14 (2000); Dana Milbank & Marcus W. Brauchli, *Greasing Wheels: How U.S. Concerns Compete in Countries Where Bribes Flourish*, WALL ST. J., Sep. 29, 1995.

19 *See generally* Roberta Ann Johnson & Michael E. Kraft, *Bureaucratic Whistleblowing and Policy Change*, 43 W. POL. Q. 4 (1990).

20 Duane Windsor & Kathleen A. Getz, *Multilateral Co-operation to Combat Corruption*: *Normative Regimes Despite Mixed Motives and Diverse Values*, 33 CORN. INT'L L.J. 731, 750 (2000).

21 *See generally* Edward C. Banfield, *Corruption as a Feature of Governmental Organization*, 18 J. L. & ECON. 587 (1975).

I. JUSTICE UNDER SIEGE: NAVIGATING RULE OF LAW IN THE MIDDLE EAST

These actions have a crucial impact on due process, especially the right to counsel, *habeas corpus*, and a fair, impartial trial. Across the region, attorneys and defense lawyers have been forbidden from meeting with their clients, and individuals have been kept in confinement (custody) even as pretrial detention hearings have been canceled or cruelly delayed.[22] Courts have also significantly reduced their operations.[23] While some countries have taken measures to reduce these issues, serious, long-term questions surrounding due process remain. As countries move beyond the pandemic, it is vital that governments recognize that the primary challenge now lies in the lack of rule of law and that the domestic and international legal commitments incumbent upon them remain in full force.[24]

A. Access to Counsel, Habeas Corpus, and Judicial Bodies (the courts)

When countries in the MENA region suspended prison visits at the onset of the COVID-19 outbreak, many of these measures also limited attorneys' ability to meet with their clients in person, denying detainees the opportunity to consult on legal strategy, prepare their defense, and seek recourse for detention-related abuses.[25] In Egypt, for example, the suspension of prison visits applied to family members and lawyers.[26] In the same vein, the Israeli rules and policies issued on March 15, 2020, likewise prohibited Palestinian prisoners from meeting with their lawyers in person,

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22 *See* MENA RIGHTS GROUP, REPORT SUBMITTED TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE IN THE CONTEXT OF THE INITIAL REVIEW OF THE UNITED ARAB EMIRATES 10 (2022); *see* MENA RIGHTS GROUP, UPR PRE-SESSIONS STATEMENT 2 (2022).

23 Rabah Arezki et al., *Reaching New Heights: Promoting Fair Competition in the Middle East and North Africa*, 2019 WORLD BANK MIDDLE E. & N. AFR. REGION MENA ECON. UPDATE 1, 10.

24 *See*, *e.g.*, AMRIT SINGH, OPEN SOC'Y JUST. INITIATIVE, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 8 (David Berry ed., 2013) (on file with SIU Law Journal), https://www.justiceinitiative.org/uploads/655bbd41-082b-4df3-940c-18a3bd9ed956/globalizing-torture-20120205.pdf (last visited Aug. 31, 2025).

25 *See generally*, *e.g.*, Dan E. Stigall, *Iraqi Civil Law*: *Its Sources*, *Substance*, *and Sundering*, 16 FLA. ST. UNIV. J. TRANSNAT'L L. & POL'Y 1 (2006). For further details on solitary confinement and how it can legally be used only for a short period of time in the US, see Alexandra Harrington et al., *Regulating Restrictive Housing*: *State and Federal Legislation on Solitary Confinement as of July 1*, *2019*, *A Research Brief*, LIMAN CTR. YALE L. SCH. 1 (2019) (on file with SIU Law Journal), https://law.yale.ed/ite/efaul/ile/re/ente/ima/ocumen/estrictive_housing_legislation_research_brief.pdf.

26 BUREAU DEMOCRACY, HUM. RTS., & LAB., U.S. DEP'T STATE, EGYPT 2024 HUMAN RIGHTS REPORT 14 (2024) https://www.state.gov/wp-content/uploads/2025/08/624521_EGYPT-2024-HUMAN-RIGHTS-REPORT.pdf [https://perma.cc/SA5H-NS2F].

permitting only phone calls between attorneys and clients made ahead of scheduled court hearings.[27]

In response to the COVID-19 pandemic, most states significantly slowed—and in some cases temporarily halted—court operations and hearings.[28] In Iran, for instance, pending criminal and civil cases continued to be heard, but new trials (hearings) were adjourned; cases concerning violent (aggression/hate) crimes, corruption, crimes against public security, and crimes related to COVID-19 were prioritized.[29] Egypt halted court operations, including pretrial detention renewals, for several months, resulting in illicit detention under domestic law and bringing about pervasive *habeas corpus* abuses.[30] When courts resumed operations, they evaluated and reviewed thousands of detentions on paper in the absence of trial lawyers and failed to physically bring defendants to the courthouse.[31] All the while, the recent arbitrary arrests and practices that brutally disrupt due process, involving enforced disappearance, have continued region-wide, placing strain on court systems—that are either reserved or completely stalled—and incriminating access to justice for all detainees.[32] Even beyond the pandemic, these practices have further overcrowded prisons, exacerbating ongoing public health risks for detainees, prison officials, and the broader population.[33]

After the preliminary suspensions and delays, some countries in the region announced that they would transition to remote, virtual court hearings and the videoconferencing technique to comply with social distancing (hygiene) measures and health protocols. For example, Bahrain's criminal courts began hearing pretrial detention renewals remotely.[34] Further, the

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27 *See generally* NATHAN BROWN, THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF (Cambridge Univ. Press 1997).

28 *See generally id.*

29 In the same vein, Libya ordered the closure of courts at the beginning of the outbreak and extended the recess for several months; However, the decision did permit "urgent cases"— a concept that was left undefined — to continue to be heard on a limited basis.

30 *See* BUREAU DEMOCRACY, *supra* note 26.

31 *See Egypt: Pretrial Detention Renewals by Video People Remain Locked Up Without Recourse*, HUM. RTS. WATCH (May 26, 2023, at 12:00AM ET), https://www.hrw.org/news/2023/05/26/egypt-pretrial-detention-renewals-video [https://perma.cc/Z2LC-2NA7].

32 *See* BUREAU DEMOCRACY, *supra* note 26.

33 *See* AMNESTY INT'L, "WHAT DO I CARE IF YOU DIE?" NEGLIGENCE AND DENIAL OF HEALTH CARE IN EGYPTIAN PRISONS (2021), https://www.amnesty.nl/content/uploads/2021/01/210121-Egypt-prisons-report-Final.pdf?x89281 [https://perma.cc/ZB8L-QELA].

34 *See Digital Justice Collaboration Digitizing Justice: Bahrain's Leap Forward*, GOV'T BAHRAIN (last updated Nov. 17, 2025), https://bahrain.bh/wps/portal/en/BNP/HomeNationalPortal/ContentDetailsPage/!ut/p/z0/fZDNbsIwEIRfxRxy9pJAoEcoEqEShfbQgi9o7SzBxLFNYlAfv2kVVVV_clztaL6Z4YLvuLB40wUG7Sya9t6L9DBcjSGb3gNsF6MYnl7untP5egjrZcIfuPguyB63C0g32XQSTbJaBl_OOjz5SJmXChnA70FvpPWH7COAKW7BhZOxEpti9xVEUg81agtiyGBCGoyGChnwXmtmggCYdUp-smbuJ9MHuuglfafRVvjDkBHolyiKr-Q3hnT_IT93uE_GNk_a-a60AENO1-bNgYx1VJaWd3F6X1zXwo5NrfqdTYYvAPJc5uB/ [https://perma.cc/4SC3-67LQ].

Tunisian government passed a decree permitting virtual trials via audiovisual communications during infectious disease outbreaks.[35] Moreover, in the United Arab Emirates, circuits within Abu Dhabi's criminal court(s) and commercial court(s) systems began to hold remote trials; in Dubai, hearings for pressing urgent matters, criminal cases, and appeals are being held virtually as well.[36] However, legal scholars have said it is too early to assess how this new administration of virtual trials is proceeding from a due process perspective.[37] Little reporting is accessible on how extensively remote trials are being conducted—precisely, in which types of cases, in which geographical sites, and for what sorts of defendants—and whether the decision to offer virtual trials is being made according to non-discriminatory and transparent guidelines.[38] Furthermore, it is not yet obvious if trials are set up in a way conducive to private communication and consultation between attorneys and clients before, during, and after hearings, as the key to the right to counsel.[39] For instance, during an in-person trial, attorneys can request that

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35 *See*, *e.g.*, *Egypt's Ministry Working on Digitizing Litigation System*, EGYPT TODAY, (Nov. 29, 2020), https://www.egypttoday.com/Article/1/94764/Egypt%E2%80%99s-Ministry-working-on-digitizing-litigation-system (on file with SIU law journal).
An Alexandria court held the first online hearing session, in a bid by the Ministry to upgrade the courts with digital transformation and reduce face-to-face interaction amid the coronavirus pandemic (COVID-19). This move aims at facilitating the judiciary services for the citizens, and reducing the congestion in the corridors of courts, in light of the preventive and precautionary measures to curb the virus spread. The […] court has equipped 30 halls allocated for misdemeanor cases with digital devices, and 6 other halls for the pretrial detention. *Id.*

36 Andrés Ring, *United Arab Emirates*: *A Look at the Current State of Litigation in the UAE and Related Strategic Considerations*, MONDAQ, (Apr. 21, 2020), https://www.mondaq.com/litigation-contracts-and-force-majeure/921116/a-look-at-the-current-state-of-litigation-in-the-uae-and-related-strategic-considerations (on file with SIU law journal).
The move came as a precautionary measure to contain the spread of the COVID-19, pursuant to Dubai Resolution No. 30 of 2020, whereby it was decided that all judicial hearings of the Dubai Courts (including the Court of First Instance, Court of Appeal and Court of Cassation) will be suspended . . . The Resolution specifically excludes urgent matters, criminal cases and appeals that include detainees and inmates. Similarly, the smart services (online requests) of the Courts remain fully operational. […], pursuant to an order issued by the President of the Dubai Courts, all court hearings are set to resume via remote proceedings...The Dubai Courts have already adjourned those hearings initially…However, for those cases that are reserved for judgment, the Courts seem to be issuing the judgments without the parties' attendance with the judgments available online through the Dubai Courts' system. *Id.*

37 *See* Devika Hovell, *Due Process in the United Nations*, 110 AM. J. INT'L L. 1, 5–45 (2016).

38 *See id.*

39 Caitlin Fennessy, *Virtual Justice and Privacy*: *What Does COVID-19 Mean for Due Process*?, IAPP (May 5, 2020), https://iapp.org/news/a/virtual-justice-and-privacy-what-does-covid-19-mean-for-due-process/ (on file with SIU Law Journal).
New York City's Criminal Court announced, 'All parties will participate in court proceedings by videoconferencing.' Due to the COVID-19 pandemic, the court news release explained that all 'arraignments will be virtual, with the Judge, prosecution and defense attorney and defendant all from remote locations.' But what does virtual justice look like in practice? Does it provide our Constitutional rights to due process and effective assistance of counsel? Are privileged consultations possible when the defendant is incarcerated and visits by counsel are prohibited? Is it

proceedings stop to consult with their clients;[40] thus, it is doubtful whether technology will be leveraged to protect the process in this way and others.

B. Right to Due Process in the MENA Region: Rule of Law, International Law Standards, and Best Practices

Concerns and Anxieties? On paper, most domestic laws and constitutions in the region highly protect the right to due process, involving access to counsel, *habeas corpus*, and impartial trial. Many countries have invoked the epidemic to justify due process constraints in a manner that infringes upon unquestionably established domestic and international law. In this respect, the 2014 Egyptian Constitution reads:

> All those who are apprehended, detained, or have their freedom restricted shall be treated in a way that preserves their dignity. They may not be tortured, terrorized, or coerced. They may not be physically or mentally harmed or arrested and confined in designated locations that are appropriate according to humanitarian and health standards. The state shall provide means of access for those with disabilities. Any violation of the above is a crime and the perpetrator shall be punished under the law. The accused possesses the right to remain silent. Any statement that is proven to have been given by the detainee under pressure of any of that which is stated above, or the threat of such, shall be considered null and void.[41]

While the International Covenant on Civil and Political Rights (ICCPR) permits nations to adopt exceptional and temporary limitations on certain rights—"in times of public emergency which threatens the life of the nation,"—these boundaries must be provided by law. They must be necessary, proportional, and non-discriminatory.[42] The Human Rights

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worth considering the practical implications of virtual court proceedings, for privacy and other rights, across society? *Id.*

40 *Id*.

41 *See* CONSTITUTION OF ARAB REPUBLIC OF EGYPT, Jan. 18, 2014, art. 55, https://adsdatabase.ohchr.org/IssueLibrary/EGYPT_Constitution_EN.pdf; *see also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 15 (Dec. 10, 1948), https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RE (on file with SIU Law Journal).

42 International Covenant on Civil and Political. Rights., art. 9, Dec. 16, 1966, 999 U.N.T.S. 171, https://www.refworld.org/docid/3ae6b3aa0.html (on file with SIU Law Journal).

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law; 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him; 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a

Committee, which interprets the ICCPR, has said: "The principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency."[43] Some related rights, comprising the right to life, proscription from torture, and the principle of legality in criminal law, cannot be constrained, even in the emergency status.[44] By contrast, derogations are exceptional means permitted *inter alia* under Article 4(1) of the ICCPR, by which a human right can be temporarily halted or impeded in response to a public emergency.[45] In the same vein, under Article 4(2) ICCPR, some human rights enjoy absolute legal protection.[46] These are the right to life, the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment (death penalty and other corporal punishments), the ban of slavery and servitude, the proscription of imprisonment for incapability of fulfilling a contractual duty, the prevention against the retrospective operation of criminal statutes, and the right to recognition before the law (the rule of law).[47]

Considering the logistical difficulty of balancing between public safety and respecting citizen rights during a pandemic, there are various global legal commitments and best practices that MENA governments and Muslim administrations can adhere to and apply to guarantee the right to due process. First, countries must guarantee that detained individuals continue to enjoy timely and confidential access to legal counsel, even with the postponement or cancellation of in-person visits. The WHO-OHCHR Interim Guidance on COVID-19 states that the "ability [of detainees] to meet with legal counsel must be maintained, and prison or detention authorities should ensure that lawyers can speak with their client confidentially."[48] The World

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reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement; 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful, [and] 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. *Id.*

43 *Id.*

44 *Id.*

45 *See*, *e.g.*, *id.* It should be noted that though various universal international human rights commitments may be relevant, this vision will focus on derogations under the ICCPR and some restrictions under the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is not anticipated to present a thorough indication of all rights that emergency derogations may influence.

46 *Id.*

47 *Id.*

48 *See Preventing COVID-19 Outbreak in Prisons*: *A Challenging but Essential Task for Authorities*, WHO REG'L OFF. FOR EUR. (Mar. 23, 2020), https://www.theioi.org/downloads/5qnfs/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf (on file with SIU Law Journal).
…on how to deal with the coronavirus disease (COVID-19) in prisons and other places of detention, entitled 'Preparedness, prevention and control of COVID-19 in prisons and other places of

Organization Against Torture (OMCT) adds: "Prison authorities should permit secure video conferencing and other tools to enable lawyers to communicate with their clients as a key alternative to in-person visits. . . . The communication should be free and frequent."[49] When attorneys and their clients correspond, these alternative systems must afford them the right to communicate confidentially.

Second, countries cannot terminate the right to *habeas corpus* and the right to a fair trial. As the OMCT states, "there can be . . . limited, timebound and proportionate modifications in the operation of courts, the scheduling of hearings," it iterates that judicial services are "absolutely, necessary, even during a pandemic."[50] States cannot keep a detained person in custody if their detention is not properly and regularly reviewed. Although the introduction of remote court hearings for detained and non-detained persons is a positive application of technology, states must guarantee that the fundamental requirements for reasonable and impartial trial guarantees continue to be respected, even at this critical moment and in these new circumstances. Whether it is through virtual hearings, the scheduling of spaced-out appointments, or the provision of protective gear for limited face-to-face procedures, countries should guarantee that judicial bodies, a vital pillar of an operative system of governance, can continue to function even in the midst of a pandemic.

II. VAGUE LAWS, SPARSE JUSTICE: THE MIDDLE EAST'S LEGAL CHALLENGES

Mass trials, politicized death punishments, civilian trials in military courts, protracted pretrial detention, and forced disappearances are all mutual abuses of due process that ensue in the Middle East.[51] After the Arab Spring, the governments have been conspicuously inspired in their transgression on due process, with the willingness of the people to change their future democracy, discriminatory detention, and trials of high-profile activists, politicians, researchers, and journalists, along with individuals who were

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detention,' […] To effectively tackle a COVID-19 disease outbreak in prisons, state authorities need to establish an up-to-date coordination system that brings together health and justice sectors, keeps prison staff well-informed, and guarantees that all human rights in the facilities are respected. A public health emergency of international concern requires a global response that includes measures taken inside prisons and other closed settings. *Id.*

49 *See generally id.*

50 *See generally id.*

51 *TIMEP Brief: Right to Due Process in Egypt*, THE TAHRIR INST. FOR MIDDLE E. POL'Y (May 25, 2018), https://timep.org/2018/05/25/timep-brief-right-to-due-process-in-egypt/ (on file with SIU Law Journal) [hereinafter *Right to Due Process in Egypt*].

forcibly disappeared.[52] Such strategies destabilize the rule of law, judicial independence, and integrity, as well as the transition to real democracy.

A. Egypt and Saudi Arabia: Whither the Due Process?

1. Overall Situation, Background, and Areas of Concerns

The most frequent breaches of the right to due process in the MENA region are civilian trials in military courts, mass trials, massive application of death penalties, the extensive use of extended pretrial detention, and forced disappearances.[53] Often, though not always, these abuses occur in combination, and at times they seem to be politicized, raising significant queries about the political and legal independence of the MENA's judiciary.[54]

2. Emergency Status and the Exceptional Courts

Some abuses of due process committed after the Arab Spring are similar in nature (if not in intensity) to what occurred under the former autocrats, such as the late Hosni Mubarak, Mu'mmar Gaddafi, Bin 'Ali, among many others with the use of the emergency law(s) and security exceptional courts, which were in place for decades.[55] The emergency status allowed security services to arrest and detain individuals indefinitely without charges. Although in Egypt, the duration of the emergency status is constitutionally limited to three (3) months, this provision has been avoided by allowing the state of emergency to "expire" for a brief period and for a new state of emergency to be declared immediately after, effectively allowing it to remain continually in place.[56] The Egyptian Constitution reads:

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52 *See generally id.*

53 *See generally Human Rights in the Middle East and North Africa: A Review of 2018*, AMNESTY INT'L (Feb. 26, 2019), https://www.amnestyusa.org/reports/human-rights-in-the-middle-east-and-north-africa-a-review-of-2018/ (on file with SIU Law Journal).

54 It should be noted that the international community, including the United States and the European Union governments, have expressed deep concern and disappointment over the MENA's politicized judiciary, opinions which the United Nations Office of the High Commissioner for Human Rights and the U.N. Secretary-general have echoed.

55 For further details on the lack of the rule of law and emergency status in Egypt, see Yussef Auf, *The State of Emergency in Egypt*: *An Exception or Rule?*, ATL. COUNCIL (Feb. 2, 2018), https://www.atlanticcouncil.org/blogs/menasource/the-state-of-emergency-in-egypt-an-exception-or-rule/ (on file with SIU Law Journal) ("Egypt has always witnessed large-scale implementations of the emergency law. It is worth mentioning that the existence of the emergency law itself is not problematic. This law can be enforced by declaring state of emergency when needed, for example when a country confronts a public disaster or large security disturbance.").

56 *See id*.

> The President of the Republic declares, after consultation with the Cabinet, a state of emergency in the manner regulated by law. Such proclamation must be submitted to the House of Representatives within the following seven days to consider it. . . . In all cases, the declaration of a state of emergency must be approved by a majority of members of the House of Representatives. The declaration is for a specified period not exceeding three months, which can only be extended by another similar period upon the approval of two-thirds of House members. . . .[57]

The prominent legal powers of this statute grant extensive privileges to law enforcement officers (security apparatuses, whether military or police), including the authority to detain, arrest, or imprison individuals for extended periods.[58] Also, emergency state-security courts can be established in every first-instance court and appellate court across Egypt.[59] These courts are composed of judges; the presiding judge may appoint military officers to them, and the verdicts of these courts cannot be appealed.[60] The presiding judge has the authority to appoint all judges of the emergency state-security courts, whether civil or military.[61] Regarding the sweeping executive powers, the president (or whomever he authorizes) can refer any of the public law crimes to the state security courts, comprising criminalized criminal acts in national laws such as the criminal law and other statutes that include criminal punishments (the Protest Law and Terrorism Law are examples).[62] Also, the president can censor any messages, including various correspondences, publications, newspapers, images, and all forms of expression and announcements before they are published, and maintains the right to restrain the press, confiscate its materials, and close its outlets.[63]

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57 *See id.*; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Jan. 18, 2014, art. 154.

58 *See*, *e.g.*, Law No. 136 of 2014 (Law for the Securing and Protecting of Public and Vital Facilities) *al-Jarīdah al-Rasmīyah*, 27 Oct. 2014.

59 *See*, *e.g.*, Law No. 162 of 1958 (Law Concerning the State of Emergency) *al-Jarīdah al-Rasmīyah*, 27 Sep. 1958.

60 *See*, *e.g.*, *id.*

61 *See id.*

62 Mohamed 'Arafa, *Middle East Legislative Insight: Egyptian Antiterrorism Laws, Egypt Law No.22/2018, Egypt Law No.8/2015, Egypt Law No.94/2015*, LEXISNEXIS MIDDLE EAST COMMENTARY (2019) [hereinafter *Legislative Insight*]; *see*, *e.g.*, Law No. 107 of 2013 (Law for Organizing the Right to Public Meetings, Processions and Peaceful Demonstrations) *al-Jarīdah al-Rasmīyah*, 24 Nov. 2013 (Also, the president ratifies the verdicts of the emergency state-security courts, and this authority gives him the power to approve or terminate a verdict, reduce a penalty (pardon it) or transfer a trial to another court.).

63 *See*, *e.g.*, *Egypt: Covid-19 Cover for New Repressive Powers Amendments Could Curb Rights in Name of* '*Public Order*', HUM. RTS. WATCH (May 7, 2020), https://www.hrw.org/news/2020/05/07/egypt-covid-19-cover-new-repressive-powers (on file with SIU Law Journal) ("[...]government is using the pandemic to expand, not reform, Egypt's abusive Emergency Law, […] Egyptian authorities should address real public health concerns without putting in place additional tools of repression. The government said that the Covid-19 outbreak revealed a 'vacuum'

3. Civilians Before Military Trials

The Egyptian Constitution allows for civilians to be tried before military tribunals under exceptional circumstances of "direct assault" against military facilities; when facing military tribunals, civilians have limited access to lawyers, are unable to call upon witnesses, and have no opportunity to be tried before their natural, civil judge or for appeal.[64] The government justified these trials based on a decree enacted on October 27, 2014, that considered criminal acts committed against the state's public and "vital" facilities as offenses that may be tried before a military judiciary.[65]

4. Pretrial Detention and Mass Sentencing

Protracted pretrial detentions violate legal norms of the international legal order set up by the ICCPR, to which Egypt is a party.[66] It has been reported that pretrial detention has been used against several individuals who were being held in custody beyond the legally mandated two-year limit as a

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in national laws that needed to be addressed."); *see generally Legislative Insight*, *supra* note 62; *see* Law No. 175 of 2018 (Law for Anti-Cyber and Information Technology Crimes) *al-Jarīdah al-Rasmīyah*, 14 Aug. 2018, arts. 7, 14(2), 20(3), 9; *see also* Mohamed 'Arafa, *The Archeology of Freedom of Information Laws: Egypt and Fake-News Laws*, 20 FLA. COASTAL L. REV.73, (2020) [hereinafter *Archeology of Freedom*].

64 Article 204 of the Constitution explicitly reads:

> The Military Judiciary is an independent judiciary that adjudicates exclusively in all crimes related to the armed forces, its officers, personnel, and their equals, and in the crimes committed by general intelligence personnel during and because of the service. Civilians cannot stand trial before military courts except for crimes that represent a direct assault against military facilities, military barracks, or whatever falls under their authority; stipulated military or border zones; its equipment, vehicles, weapons, ammunition, documents, military secrets, public funds, or military factories; crimes related to conscription; or crimes that represent a direct assault against its officers or personnel because of the performance of their duties. The law defines such crimes and determines the other competencies of the Military Judiciary. Members of the Military Judiciary are autonomous and cannot be dismissed. They share the securities, rights and duties stipulated for members of other judiciaries.
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> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Jan. 18, 2014, art. 204.

65 *See id*.; *see also Right to Due Process in Egypt, supra note* 51. Also, "Freedom of press and printing, along with paper, visual, audio and digital distribution is guaranteed…" "It is prohibited to censor, confiscate, suspend or shut down Egyptian newspapers and media outlets in any way. Exception may be made for limited censorship in time of war or general mobilization…" *See* Mostafa Essam Shaat*, Media Law in Egypt and the Universal Principles of Freedom of Expression,* ARAB MEDIA & SOC'Y (2015), https://www.arabmediasociety.com/wp-content/uploads/2017/12/20150701124313_Shaat_Spring2015_Final.pdf (on file with SIU Law Journal); *see also* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Jan. 18, 2014, arts. 70–71 (showing that many notable Egyptian activists, reporters, bloggers, among many others, have been arrested because of their critics of the government and for protesting military trials for civilians.).

66 *See* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Jan. 18, 2014, arts. 70–71; *see also* International Covenant on Civil and Political Rights, *supra* note 42.

"tool for political punishment (silence)."[67] In 2014, the practice of mass sentences within Egypt's judiciary came under scrutiny. Legal scholars argued that mass sentences "expose how arbitrary and selective Egypt's criminal justice system has become."[68] The executions were performed so regularly that human rights and NGO activists began referring to the day of some decided cases as the "*Execution Day*."[69]

5. Forced Disappearance(s)

A spate of high-profile arrests and disappearances has drawn attention to the practice of forced disappearance, which has been on the rise in the Middle East since the Arab Spring revolutions. Amnesty International (AI) called the movement "unprecedented" for its use of violence, the extensive number of cases, and the crackdown by security forces.[70] It has been reported by international organizations that documented cases reveal how Egyptian citizens are being abducted, tortured, and held for months without access to an attorney or the ability to contact their families.[71] This pressure is often used to coerce the victims into confessing to crimes they did not commit.[72]

Since 2011, the politicized Egyptian judiciary has worked together with the government to curb and stifle political dissent and exert control over the population and public space, implementing justice arbitrarily and submitting to the influence rather than protecting citizens' rights and freedoms.[73] The

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67 International Covenant on Civil and Political Rights, *supra* note 42; *see also Right to Due Process in Egypt*, *supra* note 51.

68 *Right to Due Process in Egypt*, *supra* note 51 (noting that the Egyptian Foreign Ministry hit back against criticism from the United States and European Union on the massive life sentences issued recently, calling such condemnation "unacceptable" and consider that as a non-reasonable intervention in the internal and domestic affairs of a foreign nation).

69 *Id.*; *see also* BROWN, *supra* note 27.

70 *See Egypt*: *Hundreds Disappeared and Tortured Amid Wave of Brutal Repression*, AMNESTY INT'L (July 13, 2016), https://www.amnesty.org/en/latest/news/2016/07/egypt-hundreds-disappeared-and-tortured-amid-wave-of-brutal-repression/ (on file with SIU Law Journal).
Egypt's National Security Agency (NSA) is abducting, torturing and forcibly disappearing people in an effort to intimidate opponents and wipe out peaceful dissent. This report reveals the shocking and ruthless tactics that the Egyptian authorities are prepared to employ in their efforts to terrify protesters and dissidents into silence, […] Enforced disappearance has become a key instrument of state policy in Egypt. Anyone who dares to speak out is at risk, with counterterrorism being used as an excuse to abduct, interrogate and torture people who challenge the authorities. *Id.*

71 *Id.*

72 *Id.* (noting that notwithstanding these reports, the government has shown no significant steps to control the practice and argued that claims of forced disappearances are false and spread by the opposition).

73 Sahar Aziz, *Independence without Accountability*: *The Judicial Paradox of Egypt's Failed Transition to Democracy*, 120 PENN ST. L. REV. 667, 669 (2016) (explaining cautiously proceeds to examine why the Egyptian judiciary, despite its liberal rulings in the 1990s that facilitated the lead up to the January 25th revolution, ultimately obstructed the populist demands for revolutionary

punishing of civilians before military tribunals, mass sentences, mass death penalties, and lengthy pretrial detention have operated as devices to this end.[74] The recent increase in forced disappearances, along with other tools, is mainly worrying and indicates that the practice is used as a routine issue by Egyptian Homeland Security and the military.[75] Through a series of tactics, including harsh sentences, the government has indicated poor progress in enhancing the rule of law and the lack of respect for due process guarantees, and that no amount of global renown can safeguard an individual from the state.[76] Such abuses of due process are deepened with the escalating number of executions, which several rights groups have called for halting until improvement is seen in the respect of due process rights and the rule of law.[77] The use of these strategies weakens the transition to a democratic rule of law in the region as well as trust in the impartiality and truthfulness of the judicial process, and the progressively escalating web of counterterrorism acts and other provisions supporting such activities are used in a worrying mixture with blanket state denial of the existence of such problems.

Recently, Saudi Arabia's mass arrest of princes, current and former public (government) officials, and prominent businessmen over corruption allegations raises human rights and due process concerns.[78] Saudi authorities should instantly reveal the legal and evidentiary basis for everyone's detention and ensure that each person detained can exercise their due process rights.[79] The governmental Saudi Press Agency (SPA) declared a royal

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change and referring to literature on the rule of law in societies undergoing political transitions, and more specifically the role of judiciaries).

74 *Id.*

75 *Id.* (noting that additionally, the return of the state of emergency has enabled the security apparatus to work without checks on its authority).

76 Sahar Aziz, *Egypt's Judiciary*, *Coopted*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Aug. 20, 2014), https://carnegieendowment.org/sada/2014/08/egypts-judiciary-coopted?lang=en (on file with SIU Law Journal).

When Egyptian courts sentenced over 1,000 defendants to death in the spring of 2014, and when former President Hosni Mubarak was months earlier acquitted of human rights violations despite decades of documented torture, serious questions about the independence of the judiciary arose. Of all institutions, Egypt's judiciary was believed to be the least likely to partake in such affronts to individual rights. A closer look, however, reveals that Mubarak's efforts to dismantle judicial independence successfully produced a conservative body whose top echelon supported the pro-stability narrative that invited the generals back to rule. As a result, legal reforms are unlikely to come from within the judiciary. *Id.*

77 *Right to Due Process in Egypt*, *supra* note 51.

78 *Saudi Arabia: Corruption Arrests Raise Due Process Concerns*, HUM. RTS. WATCH (Nov. 8, 2017), https://www.hrw.org/news/2017/11/08/saudi-arabia-corruption-arrests-raise-due-process-concerns (on file with SIU Law Journal).

79 Simon Henderson, *Implications of the Saudi Corruption Arrests*, THE WASH. INST. FOR NEAR E. POL'Y, (Mar. 16, 2020), https://www.washingtoninstitute.org/policy-analysis/implications-saudi-corruption-arrests.

decree establishing a high-level anti-corruption committee headed by Crown Prince Mohammad bin Salman, reporting on the detentions and arrests for three years.[80] Those detained included Prince Al-Waleed bin Talal, a prominent businessman who is chairman of *Kingdom Holding Corporation*.[81] The arrests come in the wake of a wave of other recent arrests, including clerics, human rights activists, and academics/intellects.[82]

The November 4th royal decree states that King Salman formed the anti-corruption committee in response to the exploitation of some weaklings who prioritized their private interests over the public interest or the community's common good, and who attacked public funds.[83] The decree reported that the committee had extensive powers to investigate cases, order arrests, search places, impose travel bans, and seize assets, ostensibly without judicial review.[84]

In this regard, the Saudi Attorney General said that the committee had "initiated a number of investigations" without illuminating the legal basis for detaining the suspects before the investigations were completed.[85] As is well-known, international human rights law protects basic rights, including the right not to be arbitrarily detained.[86] Any criminal charges authorities bring

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According to Saudi media and the government's anti-corruption body, the arrests followed criminal investigations during which 674 individuals were questioned. The total sum embezzled is over $100 million, making these latest cases much smaller in scale than those seen in late 2017, when more than 300 businessmen and princes were detained in the Riyadh Ritz-Carlton on corruption charges. Most of those individuals were subsequently released, but only after paying a reported total of $100 billion to make up for years of exploiting their positions. […], among those implicated in the latest announcement are eight officers from the Defense Ministry 'suspected of bribery and money laundering in relation to government contracts during the years 2005-2015.'

80 *Saudi Arabia: Corruption Arrests Raise Due Process Concerns*, *supra* note 78.

81 *Id.* (explaining that "in addition to the crown prince, the committee consists of head of the Control and Investigation Board, the head of the National Anti-Corruption Commission, the head of the General Auditing Bureau, the attorney general, and the Head of the Presidency of State Security.").

82 *Id.* (Sarah Leah Whitson, the Middle East Director at Human Rights Watch explaining that "[t]he middle-of-the-night simultaneous establishment of a new corruption body and mass arrests over corruption raise concerns that Saudi authorities detained people end masse and without outlining the basis of the detentions[.] While Saudi media are framing these measures as Mohammad bin Salman's move against corruption, the mass arrests suggest this may be more about internal power politics.").

83 *Id.*

84 David D. Kirkpatrick, *Saudi Arabia Arrests 11 Princes, Including Billionaire Alwaleed bin Talal*, N.Y. TIMES (Nov. 4, 2017), https://www.nytimes.com/2017/11/04/world/middleeast/saudi-arabia-waleed-bin-talal.html.

The sweeping campaign of arrests appears to be the latest move to consolidate the power of Crown Prince Mohammed bin Salman, […]. The king had decreed the creation of a powerful new anti-corruption committee, headed by the crown prince, only hours before the committee ordered the arrests. […] the anticorruption committee has the right to investigate, arrest, ban from travel, or freeze the assets of anyone it deems corrupt. *Id.*

85 *Saudi Arabia: Corruption Arrests Raise Due Process Concerns*, *supra* note 78.

86 *See generally* International Covenant on Civil and Political Rights, *supra* note 42.

must resemble recognizable crimes.[87] At a minimum, those detained should be informed of the precise "reasonable" grounds for their arrest, be able to contest their detention before an autonomous and impartial judge, have access to an attorney and family members, and have their case periodically reviewed.[88] Holding prisoners at unofficial jail centers violates international standards.[89] The United Nations Human Rights Committee, in its general comment, stated, "provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends."[90]

Notably, Saudi authorities have not revealed the exact reasons for the detention—without judicial review—of the dozens of other individuals. However, the detentions fit a pattern of human rights abuses against peaceful advocates and dissidents, comprising harassment, intimidation, smear campaigns, travel bans, confinement, and prosecution.[91] Several individuals faced sentences as long as ten to fifteen years in jail, and most faced broad, catch-all charges intended to criminalize peaceful dissent, including "breaking allegiance with the ruler," "sowing discord," "inciting public opinion," "setting up an unlicensed organization," and vague provisions from the 2007 cybercrime law [and others]."[92] While it is noble that the Saudi authorities proclaim that they want to take on the menace of corruption, the right way to do that is through thorough and diligent judicial investigations against genuine and real offender(s) (beyond reasonable doubt), not scandalmongering mass arrests at a luxury hotel.

III. ANXIETIES OF JUSTICE: DUE PROCESS IN A CORRUPT SYSTEM: "GAMING" THE LAWS, AND INSTITUTIONAL CORRUPTION

"Gaming" in its numerous forms includes the use of technically legal instruments to undermine the intent of the law to gain advantages over competitors, maximize reported earnings, preserve high credit scores, reap superior personal rewards, and preserve access to capital on favorable terms,

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87 *Id.*

88 *Id.*

89 *Id.*

90 Hum. Rts. Comm, Gen. Comment 20, Art. 7 (Forty-Fourth Session, 1992), Comp. of Gen. Comments and Gen. Recommendations Adopted by Hum. Rts. Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

91 Kirkpatrick, *supra* note 84.

92 *Id.*

to name a few.[93] It is one of the most vicious forms of institutional corruption in politics today.[94] "Institutional corruption" refers to institutionally-sanctioned behavior and relationships that may be legitimate but either harms the public interest or undermines the capacity of an institution to achieve its professed objectives by destabilizing its legitimate procedures and core values.[95] The most visible consequence of institutional corruption is diminished public trust in the governance of the institution in question.[96] While institutional changes promoting integrity, transparency, and accountability in the state institutions are necessary parts of any litigation affairs strategy, a long-term social foundation is vital, mainly where judicial corruption is systemic.[97]

Social empowerment, which means expanding and protecting the variety of political and judicial resources and options open to ordinary citizens, is one path to address this task.[98] Social empowerment entails reinforcing civil society to enhance its political vitality, providing more orderly methods of access and rules of cooperation between state and society, and escalating legal and political opportunities.[99] Developmental legal policies intended particularly for disempowered people and regions within a country are of unique significance.[100] It does not involve wholly new

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93 *See generally* M. Patrick Yingling, *Conventional and Unconventional Corruption*, 51 DUQ. L. REV. 263, 264–71 (2013).

94 *Id.*; *see generally* JEROLD H. ISRAEL ET AL, WHITE COLLAR CRIME: LAW AND PRACTICE (5th ed. 2003).

95 Carla Miller, *The Tail Wagging the Dog*: *Institutional Corruption and the Federal Sentencing Guidelines for Organizations* (FSGO), EDEMAND J. SAFRA, RSCH. LAB FOR ETHICS, (Aug. 20, 2013), https://www.ethics.harvard.edu/sites/g/files/omnuum9911/files/2013_spring_lab_dispatches_vol2.pdf#:~:text=Those%20government%20employees%20intimately%20familiar%20with%20the,the%20private%20sector%2C%20the%20"ethics%20industry."%20In (on file with SIU Law Journal) ("In fact, there is an ethics revolving-door phenomena. Those government employees intimately familiar with the complex ethics regulations are highly sought after in the private sector, the "ethics industry.").

96 *Id.*

There must be monitoring and auditing to detect crimes and to evaluate the program. There may be anonymous ways to report crimes without fear of retaliation . . . Gaming the system is at the heart of institutional corruption. If the FSGO program maintains its focus on criminal conduct alone, then it can be used as a joystick for a very large game [...] Institutional corruption should be seen as the overarching construct that can be utilized to repair institutions, including local governments. By narrowing the scope of 'ethics' programs to the prevention of crimes and legalistic regulations, we have the 'tail wagging the dog." *Id.*

97 *See generally* Michael Johnston, *Fighting Systemic Corruption*: *Social Foundations for Institutional Reform*, 10 EUR. J. DEV. RES. 85 (1998).

98 *See*, *e.g.*, M. Patrick Yingling & Mohamed A. 'Arafa, *After the Revolution*: *Egypt's Changing Forms of Corruption*, 2 U. BALT. J. INT'L L. 23, 28–34 (2014).

99 *Id.*

100 Gerald F. Cavanagh, Dennis J. Moberg & Manual Velasquez, *The Ethics of Organizational Politics*, 6 ACAD. MGMT. REV. 336, 367 (1981), https://www.jstor.org/stable/257372?seq=1 (on file with

remedies, but rather the practical coordination of a range of familiar development and litigation programs.[101] Social empowerment will not entirely eliminate judicial corruption; however, it can provide crucial sustenance for institutional reforms, weaken the combination of bias, discretion, and lack of accountability that creates systemic judicial corruption, and help institutionalize reform for the long term.[102] On the other hand, corruption does *not* necessarily involve violation of legal rules or principles. Rather, the relevant standards for defining institutional corruption include public interest and procedural standards.[103] In this regard, Jack Knight said: "These twin standards show how corrosive institutional corruption can be: it involves both social injury ('*corruption by the institution*'), whether illegal or not, and institutional injury ('*corruption of the institution*')."[104]

Persistent institutional corruption — including corruption stemming from gaming the law — certainly shapes democracy, including how Congress, courts, and regulatory agencies monitor and control the administration and government operations.[105] This is because few institutions in a democratic society—especially in the public sector—can survive in the long run in the absence of public trust.[106] Thus, gaming and institutional corruption look like a massive phenomenon. The legislative bodies have various ways to structure and design the law (many of society's rules) that may foster institutional corruption given the strong temptation for the executive to manipulate the law that impacts due process.[107]

These ways may include extensive congressional lobbying by political interest groups seeking to minimize regulatory constraints and preserve

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SIU Law Journal); *see generally* Gregory P. Noone, An Analysis of Transnational Corruption (2007) (PH.D. dissertation, West Virginia University) (on file with West Virginia University).

101 Ibrahim F.I. Shihata, *Corruption*: *A General Review with an Emphasis on the Role of the World Bank*, 15 DICKINSON J. INT'L L. 451, 453 (1997) ("Societies may differ in their views as to what constitutes corruption, although the concept finds universal manifestations. Experts have different perspectives on the meaning, causes, and effects of this universal phenomenon. While a few take an interdisciplinary approach, positions are more often influenced by the respective discipline.").

102 *Id.*

103 *Id.*; *see* Yingling & 'Arafa, *supra* note 98.

104 *See* JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT (Cambridge Univ. Press 1992); *see also* John McMillan & Zoido Pablo, *How to Subvert Democracy*: *Montesinos in Peru*, 18 J. OF ECON. PERSP. 69, 92 (2004).

105 Cavanagh, Moberg & Velasquez, *supra* note 100; *see generally* Jennifer Daehler, *Professional versus Moral Responsibility in the Developing World*, 9 GEO. J. LEGAL ETHICS 229 (1995).

106 JOHAN JOSEPH WALLIS, THE CONCEPT OF SYSTEMATIC CORRUPTION IN AMERICAN HISTORY (2005); *see* Arvind K. Jain, ECONOMICS OF CORRUPTION 81–109 (1998).

107 *See generally id.*; *see also* Yingling & 'Arafa, *supra* note 98 ("This form of corruption is to be contrasted with "unconventional corruption," a form of corruption that has (thus far) been absent in Egypt. Unconventional corruption occurs when elected officials put personal campaign finances ahead of the public interest without engaging in a *quid pro quo* transaction.").

opportunities to game or legally subvert the intent of those rules for private personal interest.[108] Additionally, the purposeful gaming of society's rules by politicians and lobbyists is fueled by the short-term decision-making of the executive, whose behavior is often acclimatized and reinforced by perverse incentives embedded in their policies.[109] Furthermore, this theme acknowledges the influence of professional advisors, such as lawyers and legal consultants, as these advisors often support their clients' gaming of community rules.[110] In this respect, scholars and experts interested in law, public policy, and political philosophy have long been working to develop a set of notions that amply define corruption in public life and its relation to (or impact on) due process.[111]

Professor Dennis Thompson argued that institutional corruption is a form of corruption in which an institution or its agent receives a benefit that is directly useful to the institution, and systematically provides a service to the benefactor under conditions that tend to undermine legitimate procedures of the institution.[112] In Thompson's paradigm, corruption is defined by institutional behavior that damages an institution's central "legitimate" procedures.[113] Legitimate procedures refer to processes "necessary to protect the institution against interests that undermine its effectiveness in pursuing its primary purposes, and the confidence of the relevant publics that it is doing so."[114] Additionally, Professor Lawrence Lessig has also initiated a study of institutional corruption, primarily focused on the *public sector*. Lessig said,

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108 Miller, *supra* note 95, at 138–39.

109 *See generally* Dennis F. Thompson, *Theories of Institutional Corruption,* 21 THEORIES OF INST. CORRUPTION 496 (2018).

110 *See generally id.*

111 *See generally id*.

112 *See generally* Dennis F. Thompson, *Two Concepts of Corruption*: *Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036 (2005)*; see also* DENNIS F. THOMPSON, ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION (1995) [hereinafter ETHICS IN CONGRESS]. Thompson distinguishes between "individual" corruption and "institutional" corruption. It is a subtle, but important one. When an executive takes a bribe, for example, in return for some favor, and assuming the favor relates in no way to the executive's job description, we can say that the exchange serves no institutional purpose and is, therefore, a matter of straightforward individual corruption. Nevertheless, when an executive accepts a bribe to further the corporation's interests, and in doing so, undermines the corporation's espoused values and frustrates its primary purposes, then that executive becomes an agent of institutional corruption. *See* Yingling & 'Arafa, *supra* note 98.

113 *See generally* Thompson, *supra* note 112; *see also* ETHICS IN CONGRESS, *supra* note 112; s*ee* Yingling & 'Arafa, *supra* note 98.

114 *See generally* Thompson, *supra* note 112; *see also* ETHICS IN CONGRESS, *supra* note 112; s*ee* Yingling & 'Arafa, *supra* note 98; *see generally* M. Patrick Yingling, *Civil Disobedience to Overcome Corruption*: *The Case of Occupy Wall Street*, IND. J. L. & SOC. EQUAL. 21 (2016).

> [t]he seeds of institutional corruption are planted when an entity's behavior becomes rooted in dependent relationships with outside parties that conflict with the institution's intended purpose. Institutional corruption also occurs when an organization's internal "economy of 0 influence"— such as performance measurement and reward systems, and leaders' directives — leads people to act in ways that compromise that organization's essential processes, espoused values, and intended purpose[115]

Lessig's study of Congress is a prime example of institutional corruption in the public sector. He shows how persistent fundraising, for instance, members of Congress have debased the legislative process, as powerful interests have become increasingly active in "purchasing public policy."[116] "The corruption of a hard disk on a computer may serve as an illustrative metaphor. If the disk becomes corrupted, the computer will no longer serve its purpose — to reliably store and permit the retrieval of data."[117] The analogy's language of corruption does *not* point to the blameworthiness of any individual; rather, it emphasizes the implication of loss (or damage to) the data. If the data happens to be the only copy of a first novel or a patient's medical records, the corruption of the disk will be of great consequence.[118] Institutional corruption in context is clearly intended to do some work in the world by signifying the importance of a particular institution (*e.g.*, judiciary) and the way that institution is operating. It is a *call for attention and action* (although it does not prescribe the kind of attention or action that should follow). The term is also useful in that it includes issues and concerns that other terms, such as "conflict of interest," might not.[119]

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[115] Institutional corruption is confirmed, according to Lessig, when public trust falls in response to a collective perception that the institution and its leadership no longer behave according to society's understanding of its espoused purpose. The greater the perceived dependence of an institution on external and internal sources of influence that detract from its espoused purpose and compromise its essential processes, the higher the level of public distrust in the conduct and governance of that institution. *See* Lawrence Lessig, *Lessig in the Nation*: *How to Get Our Democracy Back*, HARV. L. TODAY, (Feb. 12, 2009), https://today.law.harvard.edu/lessig-in-the-nation-how-to-get-our-democracy-back/ (on file with SIU Law Journal) ("For this, democracy pivots. It will either spin to restore integrity or it will spin further out of control.").

[116] Lessig, *supra* note 115; *see generally* Mohamed 'Arafa, *Battling Corruption within a Corporate Social Responsibility Strategy*, 21 IND. INT'L. & COMP. L. REV. 397, 411–12 (2011) (providing further details concerning codes of ethics and genuine leadership).

[117] *Institutional Corruption*, LESSIG WIKI, (Oct. 30, 2014, 18:07 UTC), http://www.wiki.lessig.org/Institutional_Corruption (on file with SIU Law Journal) (quoting Professor Jonathan H. Marks).

[118] *Id.*; *see* Mark Jorgensen Farrales, *What is Corruption*? *A History of Corruption Studies and the Great Definitions Debate,* SSRN (June 2005), https://doi.org/10.2139/ssrn.1739962 (on file with SIU Law Journal).

[119] *See generally* EDWARD C. BANFIELD, THE MORAL BASIS OF BACKWARD SOCIETY (Free Press 1958); Edward C. Banfield, *supra* note 21; David. H. Bayley, *The Effects of Corruption in a Developing Nation*, 19 W. POL. Q. 719, 719–32 (1966).

In contrast to work addressing illegal conduct, it is vital to focus on the socially destructive corruption's aspects, as it should be noted that the three of four most common forms of trust-destroying public sector behavior; as documented by scholars and practitioners, are: (a) violating norms of fairness; (b) tolerating conflicts of interest, and (c) exploiting cronyism in government/citizen partnerships (social contract).[120] Further, another key form of institutional corruption in the public sector is the gaming of the law by politicians, often supported by their external legal and political advisors.[121] This increasingly ubiquitous behavior is perhaps the least visible variant of institutional corruption and has, therefore, received much less systematic analysis than the first two.[122] Hence, the fundamental strategies suggested for curbing gaming and institutional corruption as much more work remains to mitigate such behavior.

This work includes, and should focus on, confronting rulemaking issues, as lobbying and bias in due process is at the center of most rulemaking activities.[123] However, in thinking about lobbying remedies that lead to diminished public trust, it is critical to distinguish between lobbying aimed at securing new rules and regulations that place adverse restraints on productive invention and lobbying intended to conserve gaming opportunities.[124] Moreover, addressing rule-following ("gaming") problems in due process should be considered. Potential remedies for the time horizon problem are less scary than those for the rulemaking problem but will also require extreme patience and steady commitment.[125] It is a deep commitment to "*quality*" objectives, meaning compliance not only with the law and the principles underlying it, but also with ethical ideals that promote public trust.[126] When governments and their delegated agents fail to build sustained

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120 *See generally* MARK TURNER & DAVID HULME, GOVERNANCE, ADMINISTRATION, AND DEVELOPMENT (1997).

121 *See generally* Nathaniel Leff, *Economic Development through Bureaucratic Corruption*, 8 AM. BEHAV. SCIENTIST 2, 8─14 (1964); *see also* Colin Leys, *What is the Problem about Corruption*? 3 J. MODERN AFR. STUD. 2, 215─24 (1965).

122 SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (Cambridge Univ. Press 1999).

123 *Id.*; *see also* Mohamed 'Arafa, *Legitimacy versus Illegitimacy–Transparency*, *Integrity of Financial Markets and Corporate Governance*: *Whither Corruption*? 3 KUWAIT INT'L L. J. SHARIE'A STUD. & RSCH. 12, 20 (2016).

124 Moreover, lobbyists serving as public policy advocates and counselors for their client lobbyists' participation in rulemaking are potentially a productive aspect of the political process. But when politicians publicly support a rule because lobbyists have preserved ways of subverting it, that duplicity — when discovered, as it inevitably is — becomes a major driver of public distrust and institutional corruption. *See* SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN (2010).

125 *See*, *e.g.*, Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 5 (2012).

126 *See generally* Pierre-Guillaume Méon & Khalid Sekkat, *Does Corruption Grease or Sand the Wheels of Growth*? 122 PUB. CHOICE (2005).

obligations to such values or neglect to provide clear guidelines for responsible action, they put the institution's reputation and its very future at risk.[127] The key to achieving quality objectives and preserving public trust lies in three organizational commitments: qualitative attention, balanced incentives, and active monitoring.

Qualitative Attention.[128] Through political and legal stories, it is obvious that without persistent attention to the qualitative aspects of individual and group performance, the chances of developing an organizational environment conducive to thoughtful social and ethical deliberation are minimal.[129] For this reason, negotiation and review of personal and legal plans must include attention to the ethical standards, such as the protection of personal integrity and reputation, truth-telling, formal performance management,[130]compliance with the intent of society's rules and regulations, and a host of other possible goals in addition to whatever standard, quantitative measures the plans may require.[131]

Well-adjusted Incentives and Monitoring (*Efficient Auditing*). A commitment to the qualitative aspects of organizational performance requires a disciplined approach to incentives. Audits of critical decisions by public officials are as important as internal audits by judicial administration in building a strong organizational commitment to quality objectives and high-performance standards.[132] Control of litigant affairs and board oversight is essential. Additionally, extensive and expensive documentation of internal controls by management, and an annual review of these controls by outside attorneys or consultants is required for a practical, robust due process.[133]

CONCLUSION: LEADERSHIP AND THE FUTURE OF DUE PROCESS IN THE MENA

Corruption is a significant and thoughtful deficiency to reducing poverty, accomplishing development regarding due process objectives, and growth evolution. Given that corruption is remarkably ubiquitous in less developed (Third World) countries without a robust tradition of democracy,

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127 Oliver E. Williamson, *Transaction-Cost Economics*: *The Governance of Contractual Relations*, 22 L. & ECON. J. 2, 233─261 (1979).

128 KENNETH R. ANDREWS, ETHICS IN PRACTICE 263 (1989).

129 *Id.*

130 *Id.*

131 *Id.* (qualitative performance measures also help individual managers see the full nature of their jobs more clearly).

132 *See generally* Steven R. Salbu, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century*?, 24 YALE J. INT'L L. 224, 247 (1999).

133 *See generally* SARBANES-OXLEY ACT of 2002, Pub. L. 107─204, 116 Stat. 745 § 404; For further details on this act, *see* Peter Iliev, *The Effect of SOX Section 404*: *Costs*, *Earnings Quality*, *and Stock Prices*, 3 J. FIN. 1163, 1187 (2010).

transparency, and human rights' respectability, it was not surprising that the former Head of the United Nations Anti-Crime Agency (UNACA) said: "[T]his . . . uprisings in the Arab world highlighted the anger within societies at this scourge." Furthermore, the former Executive Director of the United Nations Office on Drugs and Crime (UNODC), Yury Fedotov, declared that: [T]he Arab Spring was "an emphatic rejection of corruption and a cry for integrity," . . . "At the movement's center was a deep-seated anger at the poverty and injustice suffered by [e]ntire societies due to systemic corruption."

One of the most fundamental and important rights that all of us have, "due process," has been in the news recently. If you are charged with a criminal offense, all the rights that protect you—the right to counsel, the right to remain silent, the right to a jury—all fall under the umbrella of "due process." It is "due process" that is intended to defend and protect defendants from passion and prejudice (discrimination) and ensure that every person who faces prosecution by the state has the ability to mount a full and complete defense. Due process is enshrined all over the globe within countries' domestic laws and constitution(s), which provides that no person shall "be deprived of life, liberty, or property, without due process of law." That includes the right to a speedy and public trial; right to an unbiased tribunal (impartial jury); right to full notice and description of the charges being brought (the grounds for bringing such charges); right to counsel; right to confront and cross-examine adverse witnesses; and the right to have the court compel favorable witnesses to appear. Furthermore, it comprises a right to receive exculpatory (opposing) evidence from prosecutors; right to call witnesses and present evidence; right to make a record that can be reviewed on appeal and have a decision based merely on the evidence presented, and right to review (appeal) of a judge or jury's decision.

If You Lose Your Rights, *You Could Gain Your Freedom*: Due process in legal matters has several aspects and nuances, and the practices in which defendants can be deprived of due process are various. When any element of due process is missing during a litigation process, the impartiality, fairness, and constitutionality of the state's attempt to deprive an individual of their freedom have been compromised. A defendant whose due process rights have been violated may challenge the prosecution on those grounds and pot potentially have the charges dismissed. Having an experienced defense lawyer who understands the complexities of litigation and the technicalities of due process and who will forcefully protect your constitutional rights can be of vital importance when you have been charged with a crime.

The key difference between a country of laws and a police state is just this. It is the imposition of an independent individual, a judge, to decide if the police officer got it right. Indeed, because the judge exists, the police officer is more likely to try harder to get it right. However, when persuaded

to cheat, people are afraid of getting caught. If the policeman becomes the judge, his power increases massively. Authoritarian regimes follow different processes that ignore the notion that an equally fair process will render a fair and just result. Autocratic systems start with an end result in mind. Then, with that result always in view, a process is used to ensure that the desired outcome is achieved. Any proceeding where the outcome is predetermined is basically a "show trial." In fact, the proceeding is not genuine or real. It is a dramatic production to accomplish results irrespective of the truth. The easy test is to ask, "Is the matter process-driven or result-driven?" If the matter pursues a set process with no preference for how it will end, then due process is the focus. If the matter has a set result in mind and prefers processes to guarantee that outcome, it lacks the ideal of fundamental due process.

Courts in democratic regimes strive to uphold due process, as they have written rules that apply in every case, no matter who files or brings the lawsuit. The rules are instantly available so that everyone can know them in advance. Rules regulate which evidence is admissible, when cases will be heard, when a judge or jury decides a case, how court hearings will be conducted (including when and where to stand), and a myriad of other policies to ensure fairness to both sides. It is anticipated that ample executive, legal, and judicial communities will monitor and follow these strategies along with the political will, hence, contributing to sousing the firestorms of political corruption, especially the judicial one. The struggle should be stopped at this point. This ambition would be fulfilled by abandoning neoliberal prescriptions and putting realistic, reasonable, and robust legal policies into play.

Due process in the Middle East stands at a critical juncture. Across the region, constitutional texts and international commitments formally guarantee core protections—access to counsel, judicial oversight of detention, and the right to a fair and timely hearing. Yet the persistent gap between law on books and law in practice remains the defining challenge. Prolonged pretrial detention, limits on attorney access, and the expansive use of emergency or security frameworks continue to erode these guarantees. The issue is no longer a temporary response to crisis conditions, but a deeper structural problem rooted in weak institutional accountability and uneven adherence to the rule of law. Bridging this gap requires more than formal compliance; it demands sustained investment in judicial independence, transparency, and enforceable remedies.

At the same time, the region is not static. Incremental reforms, growing professionalization within legal communities, and increased scrutiny—both domestic and international—offer meaningful points of progress. Strengthening due process protections is not only a legal obligation but also a practical necessity for stability, economic confidence, and public trust in state institutions. Ensuring timely judicial review, safeguarding access to

counsel, and limiting the misuse of detention powers are achievable steps that can produce immediate impact. Ultimately, the credibility of legal systems in the Middle East will be measured not by the breadth of their formal guarantees, but by their consistent and equal application in practice. As the proverb said, "Bees that have honey in their mouths have stings in their tails, and honey is sweet, but bees sting . . .!"

PREJUDICIAL IMPACT VS. HUMAN PSYCHOLOGY: THE COURT SYSTEM'S FOREVER BATTLE

Harrison Boyd*

INTRODUCTION

A. Background

The legal system aims to provide all parties with impartiality and fairness through procedural safeguards such as actions taken by counsel and subsequent jury instructions. However, psychological tendencies impact these efforts, inadvertently disrupting protections and leading to unintended prejudicial consequences.

The clash between procedural safeguards and human psychology amplifies the harm caused by prejudicial evidence. The failure to prevent impartiality and ensure fairness arises not only from inconsistencies in judicial discretion but also from the inherent human tendency to retain and amplify information deemed inadmissible.

B. Objectives

The legal system supplies doctrinal foundations, such as the Federal Rules of Evidence (FRE), to guard against prejudicial impact. FRE 403, in particular, remains central to addressing and authorizing the exclusion of evidence based on a balancing test which weighs the probative value of the evidence against its prejudicial effect.[1]

Regardless of such protections, residual effects of prejudicial evidence within the courtroom, whether through emotional appeals, improper questioning, or biased testimony, can still improperly influence jury deliberations.[2] Films further explore this issue, with cinematic portrayals in

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1 FED. R. EVID. 403.

2 *See generally* Dae Ho Lee, Daniel A. Krauss & Joel Lieberman, *The Effects of Judicial Admonitions on Hearsay Evidence*, 28 INT'L J. L. & PSYCHIATRY 589 (2005).

A Time to Kill,[3] *Philadelphia*,[4] and *Anatomy of a Murder*,[5] serving as cultural touchstones that highlight the complexities of managing prejudicial information within the courtroom.

This paper investigates the interplay between human psychological limitations and the effectiveness of judicial safeguards, specifically those prescribed by the court and FRE, with a focus on mitigating prejudicial impacts and influences through recommended remedies. By integrating legal doctrine with psychological theories, such as Reactance Theory, Spotlight Theory, Ironic Process Theory, and the Zeigarnik Effect, this paper highlights grave shortcomings in current practices and outlines actionable reforms that incorporate legal and psychological insights.

Ultimately, the overarching goal remains: Ensure judicial fairness prevails.

C. Scope

The analysis spans three primary areas: (1) legal definitions and the scope of protections against unfair prejudice, emphasizing FRE 403 and its state equivalents; (2) psychological theories explaining juror behavior, including Reactance Theory, Spotlight Theory, Ironic Process Theory, and the Zeigarnik Effect; and (3) practical applications and case studies, supported by cinematic examples, to illustrate real-world implications and potential solutions. While the focus is predominantly on the U.S. legal system, the paper briefly considers comparative perspectives from other jurisdictions where applicable.

I. THE POWER OF PREJUDICE

A. "Unfair Prejudice" Defined

FRE 403[6] highlights unfair prejudice—"'Unfair prejudice' within its context means an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one."[7] The court in *United States v. Flores* held that such unfair prejudice "must not merely outweigh the probative value of the evidence, but substantially outweigh it."[8]

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3 A TIME TO KILL, Amazon Prime (Warner Brothers & New Regency Productions 1996).

4 PHILADELPHIA, Amazon Prime (Clinica Estetico & TriStar Pictures 1993).

5 ANATOMY OF A MURDER, Amazon Prime (Otto Preminger Films 1959).

6 FED. R. EVID. 403.

7 Cohn v. Papke, 655 F.2d 191, 194 (9th Cir. 1981) (quoting FED. R. EVID. 403 advisory committee's notes to 1972 proposed rules).

8 United States v. Flores, No. 23-4002, 2024 U.S. App. LEXIS 13240, at *2 (9th Cir. May 16, 2024).

For evidence and information the court deems "unfair[ly] prejudic[ial]," protections exist for the purpose of combating such evidence.[9]

B. Relevant But Prejudicial -- Protections

The famous Supreme Court case, *Old Chief v. United States*,[10] outlines the protections the legal system provides against prejudicial impact, specifically through FRE 403. FRE 403 establishes a balancing test to determine whether information, statements, testimony, or questions qualify as unfairly prejudicial.[11] It authorizes the exclusion of relevant evidence when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[12] While FRE 403 is a federal standard, many states adopt language closely mirroring it and apply it during both criminal and civil cases.[13]

C. The Residual Problem & Prejudice

It is the responsibility of the court and judges to eliminate unfair prejudice within the confines of the courtroom; however, this does not always occur.[14] Information stated by the defendant, plaintiff, witness, and attorney can all yield unfairly prejudicial information. What happens when such information is stated in front of the jury? The court's attempts to shield the jury only ingrains information within the jurors.[15] There remains no assurance the information will be ignored. Instructions by the judge, objections by counsel, and statements made expose human nature—an infiltrated human nature where unfair prejudice can be exacerbated, dominating 403's protections.

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9 FED. R. EVID. 403.
10 Old Chief v. United States, 519 U.S. 172, 180 (1997).
11 *Id.* at 182–83.
12 *Id.* at 180 (quoting FED. R. EVID. 403).
13 *See, e.g.,* TENN. R. EVID. 403; ILL. R. EVID. 403.
14 *Old Chief*, 519 U.S. at 181.
15 *Id.*

II. THE ATTEMPT TO "UNRING THE BELL"

A. A Time to Kill

A Time to Kill (1996),[16] written by John Grisham and Akiva Goldsmith and directed by Joel Schumacher, shows a loving father, Carl Lee Hailey, charged with the murder of two white men after his daughter suffered a rape and beating by the two, which took place in Mississippi.[17] Prejudice in the film exists with Hailey on trial, surrounding his race but also within the judicial system as a whole—throughout the trial, prejudice remains within the courtroom through the statements and questions by both the defense counsel and prosecution.[18]

A Time to Kill occurs in a town in Mississippi, leading the protective rule to be derived from the Mississippi Rules of Evidence (MRE), which mirrors FRE 403.[19] MRE 403 states, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[20]

1. "Objection"

According to Cornell Law School's Legal Information Institute, objections raised by parties (defense or prosecution) are essential for ensuring fairness in legal proceedings.[21] They permit the court to (1) Allow evidence, (2) Disallow evidence, or (3) Cure a potential defect having occurred in proceedings.[22] Objections occur at the instance in question after either party raises a potential defect or error.[23] Properly objecting is crucial because failing to object in many cases precludes the party from asserting the issue to an appellate court.[24] However, the question remains: Will the objection by either party amplify the subject, statement, or question being

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16 A TIME TO KILL, *supra* note 3.

17 *A Time to Kill: Plot,* IMDB, https://www.imdb.com/title/tt0117913/plotsummary/ (last visited Oct. 22, 2025).

18 *See id.*

19 FED. R. EVID. 403.

20 MISS. R. EVID. 403.

21 *Objection*, CORN. L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/objection (last visited Oct. 22, 2025).

22 *Id.*

23 *See id.*

24 *See id.*

objected to? Furthermore, in fulfilling their protective function in the court of law, what ensures the fairness to result from such an action?

In *Berger v. United States*,[25] the defendant was indicted for conspiracy to commit counterfeiting.[26] The appellate court reviewed the prosecution's prejudicial actions (statements and questions) and the defense counsel's objections throughout the trial.[27] The objections sustained by the trial court judge pertained specifically to the prosecution's insinuations, questions, and even misstatements, which the trial judge instructed the jury to disregard.[28] The court concluded that the prosecutor's misconduct was not slight nor confined to a single occurrence.[29] Instead, the *Berger* court stated that the misconduct was "pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."[30]

As the court noted in *Berger*, "It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken."[31] But could judicial actions, such as objections, unintentionally amplify such evil influence, even when intended to protect an individual?

The concept of Spotlight Attention, coined by Kanwisher and Driver (1992), remains applicable to situations inside and outside the courtroom.[32] It refers to a figurative "spotlight" that focuses attention on a specific area, thereby enhancing detection and awareness of events within that focus.[33] In the courtroom, a "spotlight" exists when counsel raises an objection, thereby instantaneously interrupting the proceedings. The objection acts as a "spotlight," inadvertently drawing more attention to the objected-to testimony.[34] This interruption, coupled with a jury instruction to disregard the testimony, may potentially enhance the jurors' memory and attention to (1) the objection and (2) the testimony leading to the latter.[35]

In *A Time to Kill*, defense attorney Brigance repeatedly objected to prosecutor Buckley's line of questioning regarding what constituted a "fair" sentence for the defendant.[36] The prosecutor asked for the defendant's "fair"

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25 Berger v. United States, 295 U.S. 78, 79 (1935).
26 *Id.* at 79–80.
27 *Id.* at 85.
28 *Id.*
29 *Id.* at 89.
30 *Id.*
31 *Id.* at 85.
32 *See generally* Molly J. Walker Wilson, Objecting to Objections: The Paradoxical Consequences of Courtroom Interruptions 19 (Jan. 2004) (Ph.D. dissertation, University of Virginia) (ProQuest).
33 *See id.*
34 *See id.*
35 *See id.*
36 *See A Time to Kill: Plot, supra* note 17.

sentence ideation after questioning whether two men should be released after conviction in 10 years for the kidnapping, rape, and/or hanging of a child.[37]

> Prosecutor [Buckley]: "Well, what do you think should happen to them?" "What would be a fair sentence?"[38]
>
> Defense Attorney [Brigance]: "Objection, your Honor."[39]
>
> Prosecutor [Buckley]: "Do you think they deserved to die, Mr. Hailey?" "Answer the question."[40]
>
> Defense Attorney [Brigance]: "Your Honor."[41]
>
> Prosecutor [Buckley]: "Answer the question."[42]
>
> Judge: "Mr. Buckley…"[43]
>
> Defense Attorney [Brigance]: "Carl Lee, don't answer that question."[44]
>
> Prosecutor [Buckley]: "Did they deserve to die?!"[45]
>
> Defendant: "Yes, they deserved to die, and I hope they burn in hell."[46]

The ability of a judge to allow and disallow information is only as great as each juror's ability to disregard such. Similar to the prosecutor in *Berger,* the prosecution in *A Time to Kill* also conducted actions that were perceived to have a similar, pronounced, persistent, and cumulative effect on the trial. In the film, the jury's attention, as probable in *Berger*, shifted and likely remained directed toward the spotlight's beam, which shone on one thing: the highly prejudicial line of questioning that had no probative value.[47] In both scenarios, the objections functioned as procedural and legal safeguards. They also functioned as a recollection tool—the spotlight's beam on the objections and testimony caused the objections to remain implanted within

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37 *See id.*
38 A TIME TO KILL, *supra* note 3.
39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*
47 *See A Time to Kill: Plot, supra* note 17.

the juror[s].[48] Despite the court's attempt to lessen the impact, the prosecution achieved its ultimate goal—to have a profound effect on the jury. Such influence could not be removed by what the *Berger* court characterized as "mild judicial action."[49] As a result, the jury is left with a prominent statement by the defendant: "I hope they burn in hell."[50]

2. "Don't Answer That Question"

FRE 103(d)'s Preventing the Jury from Hearing Inadmissible Evidence[51] coincides with the overarching purpose of FRE 403. Many state provisions echo this goal[52] and provide similar safeguards against prejudicial impact. FRE 103(d) states: "To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means."[53]

These means are subjective and entail the traditional "do not answer that question" followed by the curative instruction, "the jury will disregard." However, nothing guarantees the questioned individual will adhere to the directive from a judge not to render a response, especially after being questioned by either the defendant or the plaintiff's counsel. Nor can one be certain the jury will follow the judge's instruction to "disregard."

In a brief review of *Berger*, the court concluded that pronounced and persistent misconduct that has a probable cumulative effect upon the jury cannot be disregarded as inconsequential.[54]

The psychological concept of Reactance Theory, proposed by Jack W. Brehm, outlines how a person experiences psychological reactance when their behavioral freedom is threatened or removed.[55] Reactance manifests through resistance, anxiety, distress, and a coinciding desire to restore the threatened or lost freedom.[56] In the courtroom, Reactance Theory plays a role when jurors view judicial instructions as limiting their deliberations. *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis* states, "to the degree jurors see a judge's admonition as constraining their deliberations, reactance may be aroused."[57]

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48 *See id.*

49 Berger v. United States, 295 U.S. 78, 85 (1935).

50 A TIME TO KILL, *supra* note 3.

51 FED. R. EVID. 103(d).

52 FED. R. EVID. 403.

53 FED. R. EVID. 103(d).

54 *Berger*, 295 U.S. at 89.

55 *Reactance Theory*, AM. PSYCH. ASS'N (Apr. 19, 2018), https://dictionary.apa.org/reactance-theory.

56 *Id.*

57 Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, L. HUM. BEHAV. 469, 488 (Aug. 2006).

In *A Time to Kill*, Defense Attorney Brigance questioned Deputy Looney, an officer struck by a stray bullet from the Defendant Carl Lee's gun when the defendant shot at the two individuals accused of raping his daughter.[58] On the witness stand, Looney testified Lee should not face punishment for accidentally shooting him (Looney), arguing he did not blame Lee for his actions after what the two individuals did to Lee's daughter: They had raped her.[59] This testimony prompted questions and answers, followed by objections; the judge then delivered an instruction to the witness after the prosecution's objections.[60] From then on, the testimonial battle ensued:

Defense Attorney [Brigance]: "Your Honor, I believe Deputy Looney… has earned the right to speak here, today."[61]

Judge: "Overruled." "Continue."[62]

Defense Attorney [Brigance]: "Go ahead, Dwayne."[63]

Witness: "I got a little girl." "Somebody rapes her, he's a dead dog." "I'll blow him away, just like Carl Lee did."[64]

Prosecutor [Buckley]: "Objection, Your Honor!"[65]

Defense Attorney [Brigance]: "Do you think the jury should convict Carl Lee Hailey?"[66]

Judge: "Don't answer that question, Deputy."[67]

Witness: "He's a hero." "You turn him loose."[68]

Judge: "Jury will disregard."[69]

Witness: "You turn him loose!"[70]

Prosecutor [Buckley]: "Your Honor, you silence that witness!"[71]

Witness: "Turn him loose!"[72]

The *Berger* court's characterization shifts here with the defense's conduct now having the probable cumulative effect upon the jury rather than the behavior of the prosecution—Defense attorney Brigance was interrupted

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58 A TIME TO KILL, *supra* note 3.
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*

and objected to, yet the defense held steadfast in their questioning; pronounced and persistent, ensuring the defense's words and those of the witness resonated with the jury despite the prejudicial impact. The interruptions and instructions from the judge only amplified the prejudicial effect. (1) The witness was told not to answer the question, (2) the prosecution objected, and most importantly, (3) the jury was instructed to disregard it. Each of these actions restrained the trial flow as the *Berger* court's described "cumulative effect" remained consequential. The witness's ability to answer was ceased. At the same time, the defense attorney's questioning was stifled, and most importantly, the jurors' ability to listen to and process the testimony was limited. All three parties suffered the same restraint through the judge's instructions.

With this, Brehm's Reactance Theory takes effect, as the jury's additional restraint and loss of juror freedom leave them desiring what they consider to be part of their official duties as jurors.[73] The jury's reactance in *A Time to Kill* was clearly aroused by their potentially threatened thoughts and subsequent deliberations, only wanting to restore the threatened or lost freedom—the freedom to contemplate Carl Lee's own freedom.

B. Philadelphia

The next scenario involves the film *Philadelphia* (1993),[74] written by Ron Nyswaner and directed by Jonathan Demme. The story centers on a Senior Associate, Andrew Beckett (Tom Hanks), who is discreetly homosexual and suffering from AIDS.[75] When fired from the firm after the discovery of a small lesion on Beckett's neck, Beckett sought a lawsuit against the firm.[76] The firm's pretextual reason for dismissal, that Beckett almost missed a complaint deadline in a high-profile case, did not prevail in court.[77] Joe Miller (Denzel Washington), Beckett's homophobic counsel, assisted Beckett in this legal victory.[78] Regardless of the victory, the trial showcased many instances of highly prejudicial information, statements, and questions, which, despite their highly homophobic nature, were nonetheless heard by the jury.

The scene set in *Philadelphia* underscores the protection governed under Pennsylvania Rules of Evidence (Pa. R.E.), which states: "The court

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73 *Reactance Theory*, *supra* note 55.

74 PHILADELPHIA, *supra* note 4.

75 *Philadelphia: Plot*, IMDB, https://www.imdb.com/title/tt0107818/plotsummary/?ref_=tt_stry_pl#synopsis (last visited Nov. 10, 2025).

76 *See id.*

77 *See id.*

78 *See id.*

may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[79]

1. "Withdrawn, Your Honor"

According to Cornell Law School's Legal Information Institute, attorneys' objections must precede a judge's ruling: "If the judge sustains the objection, this means that the judge agrees with the objection and disallows the question, testimony, or evidence" but "If the judge overrules the objection, this means that the judge disagrees with the objection and allows the question, testimony, or evidence."[80] In either case, the judge may issue a limiting instruction to the jury to mitigate any potential prejudice.[81]

In *Draper v. Airco, Inc.*,[82] a wrongful death suit and survival action had been filed by the wife of an electrician, Robert Draper, against Airco, Inc.[83] The jury returned a verdict in favor of the plaintiff against all three defendants, on a finding of negligence.[84] On appeal, the prominent argument the defendants raised pertained to the trial court's refusal to grant a new trial, claiming that plaintiff's counsel's improper remarks during the closing arguments constituted a reversible error.[85] The court held although the trial judge exercises broad discretion in determining prejudicial impact warranting a new trial, in this case, the plaintiff's counsel's statement far exceeded the bounds of propriety, which compelled the circuit court to reverse.[86] The court stated, "Jurors must ultimately base their judgment on the evidence presented and the rational inferences therefrom.[87] Thus, there must be limits to pleas of pure passion and restraints against blatant appeals to bias and prejudice. These bounds of conduct are defined by the Code of Professional Responsibility and the case law."[88] Regardless of the limiting instruction present in the trial court, such a curative instruction was made a

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79 PA. R. EVID. 403.

80 *Objection*, *supra* note 21.

81 *Limiting Instructions*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/limiting_instructions (last visited Nov. 10, 2025).

82 Draper v. Airco, Inc., 580 F.2d 91, 93 (3d Cir. 1978).

83 *Id.*

84 *Id.* at 94.

85 *Id.*

86 *Id.*

87 *Id.* at 95.

88 *Id.*

day after the occurrence, thereby lacking sufficient sufficiency in removing the prejudicial probability.[89]

Curative instructions can be effective in both criminal and civil cases, but they are not always sufficient to achieve a just outcome. In *Draper*, the court recognized that the timing and circumstances of the curative instruction played a critical role in its effectiveness.[90] In some situations, such as in *Draper*, a quick withdrawal of a question or a hasty statement may not arguably be enough to mitigate substantive prejudice from the jury's mind.[91] Instead, such interruptions often heighten jurors' attention to the very issue they were meant to ignore—the jury is left desiring more.[92]

The Zeigarnik Effect (1927), introduced by Russian psychologist Bluma Zeigarnik, remains relevant in the psychology field. Bluma's research, supervised by Gestalt theorist Kurt Lewin,[93] led to the recognition that task interruption leads to greater focus and memory on that individual task.[94] With the human task left unresolved due to the interruption, the individual is left with uneasiness and frustration, as their task remains incomplete. Theorist Lewin's studies show that 83% of participants, when faced with an interruption, returned to the interrupted task rather than move on to the next.[95] Wilson's research in *Objections to Objections: The Paradoxical Consequences of Courtroom Interruptions* acknowledges that although the research lacks a definite connection to occurrences within the courtroom, the culmination of the Zeigarnik Effect and other prominent research, such as the aforementioned theories here, provides adequate support: "An increase in attention creates a stronger memory for the object of the attention"[96] when considered in the context of interruptions.[97]

Considering this, the increase in attention occurs at the time of objection, sometimes then not to cease even with a curative instruction, as shown in *Draper*, and especially not to cease when the prejudicial statement or question is simply withdrawn.

In the film *Philadelphia*, Defense Attorney Belinda questioned Beckett on the witness stand, focusing on his homosexuality and personal life.[98] During cross-examination, Belinda used leading questions to reemphasize

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89 *Id.* at 96–97.
90 *Id.*
91 *Id.* at 95.
92 *Id.*
93 *See* Charlotte Nickerson, *Zeigarnik Effect Examples in Psychology*, SIMPLYPSYCH. (Apr. 19, 2025), https://www.simplypsychology.org/zeigarnik-effect.html.
94 *See* Walker Wilson, *supra* note 32, at 11–12.
95 *See id.*
96 *See id.* at 12.
97 *Id.*
98 PHILADELPHIA, *supra* note 4.

Beckett's previous testimony, all the while ensuring that she added a prejudicial slant.[99] Belinda intended to reinforce her own narrative of Beckett's statements, ensuring the jury heard the details she desired to promote.[100] Such a desire existed regardless of its effect on the jury and also, regardless of Belinda's knowledge as to the questions' impropriety.

> Defense Attorney [Belinda]: "Isn't it true you have spent your life pretending to be something you're not, so much so that the art of concealment and dishonesty has become second nature to you?!"[101]
>
> Plaintiff Counsel [Joe]: "Objection."[102]
>
> Defense Attorney [Belinda]: "I'll withdraw it…"[103]

The prejudicial impact took effect in *Draper* the moment the plaintiff's counsel made the remarks. The same was true for the defense counsel in *Philadelphia*. In *Draper*, the trial court recognized the need for a curative instruction, but it was not strong enough to tame the potential prejudicial impact.[104] Unlike *Draper*, the defense counsel in *Philadelphia* did not give time for the curative instruction, but instead, after immediate objection, withdrew the question, interrupting the thoughts of 12 individuals focused on the task at hand, but even more importantly, focused on the prejudicial question regarding Beckett's honesty.[105] The film reflects the realities faced by many defendants, and it remains arguable whether the jury's interruption through withdrawal, objection, or curative instruction truly disrupts their train of thought.[106] As shown through the Zeigarnik effect, these are likely to result in greater memory and focus on the interrupted task, rather than being truly set aside.

C. Anatomy of a Murder

The final film this Article considers is *Anatomy of a Murder*. [107] *Anatomy of a Murder* (1959), written by Wendell Mayes and Michigan

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99 *Id.*
100 *Id.*
101 RON NYSWANER, PHILADELPHIA (1992), https://imsdb.com/scripts/Philadelphia.html.
102 *Id.*
103 *Id.*
104 PHILADELPHIA, *supra* note 4.
105 *Id.*
106 *Id.*
107 ANATOMY OF A MURDER, *supra* note 5.

Supreme Court Justice John D. Voelker, and directed by Otto Preminger,[108] centers around Army Lieutenant Frederick Manion (Ben Gazzara), engulfed in a court battle to determine whether he is guilty or innocent of murdering Barney Quill. The prosecution argued the alleged crime resulted from Quill's raping of the Lieutenant's wife.[109] In defense, the Lieutenant's counsel argued insanity.[110] The insanity defense prevailed,[111] but like the other trials in this paper, prejudicial evidence still made its way into the jury's consideration.[112]

Much like *A Time to Kill* and *Philadelphia*, *Anatomy of a Murder* illustrates the importance of protections governed under the plot's state Rules of Evidence. Michigan Rule of Evidence 403 states: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[113]

1. "The Jury Will Disregard..."

"A drop of ink cannot be removed from a glass of milk."[114] This metaphoric statement captures this fundamental human instinct: Once something is heard, it is difficult to erase from memory, particularly in a courtroom. The instruction to disregard certain information often only reinforces it in the juror's mind, similar to how one cannot remove ink from milk. Once the mind has processed the information, it remains ingrained. The drop of ink resembles the thoughts that will forever exist in the jurors' brains.

In *Bruton v. United States*,[115] a non-testifying co-defendant's confession implicated the defendant as an alleged accomplice in a robbery.[116] After the appellate court affirmation, on appeal to the Supreme Court, the Supreme Court reversed on grounds that the introduction of the out-of-court statement of the accomplice against the defendant violated the defendant's Sixth Amendment[117] right to cross-examine witnesses against him, even with the limiting instruction directed toward the jury, to disregard.[118] The court

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108 Lee Pfeiffer, *Anatomy of a Murder: film by Preminger [1959]*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Anatomy-of-a-Murder (last visited Nov. 16, 2025).

109 *Anatomy of a Murder: Plot*, IMDB, https://www.imdb.com/title/tt0052561/plotsummary/?ref_=tt_stry_pl (last visited Nov. 23, 2025).

110 *Id.*

111 *Id.*

112 *Id.*

113 MICH. R. EVID. 403.

114 Virgin Islands v. Toto, 529 F.2d 278, 283 (3d Cir. 1976).

115 Bruton v. United States, 391 U.S. 123, 124 (1968).

116 *Id.* at 123–24.

117 *Id.* at 126, 136; *see also* U.S. CONST. amend. VI.

118 *Bruton*, 391 U.S. at 126.

held, "It is not unreasonable to conclude that in many such cases, the jury can and will follow the trial judge's instructions to disregard such information."[119] Regardless, the court concluded that the possibility of the jury not abiding by such an instruction renders too great a risk, with matching consequences for the defendant—in such a case, there remains the limitations of a jury, both human and practical, which must not be ignored.[120]

The resulting prejudicial impact then remains left at the mercy of a limiting instruction to which the court recognized: "Limiting instructions to the jury may not, in fact, erase the prejudice.[121]

This phenomenon exists today, well-supported by psychological theory. Daniel Wegner's Ironic Process Theory (1994)[122] speaks to the ineffectiveness of limiting instructions.[123] Wegner's theory introduced two processes required to achieve one's intended mental state: (1) Operating system processes involve information searching consistent with one's intended mental state while suppressing information inconsistent with such.[124] (2) Monitoring system processes protect against inconsistent information processing, ensuring the success of operating system processes.[125] Here lies the theory: "Although jurors may try to ignore information when they are instructed to do so by the court, their operating system is largely impeded due to the large amount of information presented in a trial. Accordingly, the monitoring process is the only one to function; therefore, jurors focus on information that should be ignored and may more likely consider evidence that they should disregard when making decisions."[126]

Analyzed in a different but similar respect, Wegner's research determined that when one tries to block out or ignore a thought, two events occur: One part of the human mind ignores what is intended to be ignored, while the other part of the brain "checks in" on the thought, seemingly ensuring the thought remains absent from their mind.[127] But in doing this, the individual inadvertently and ironically brings the forbidden thought to mind.[128] With this, the Ironic Process Theory prevails.

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119 *Id.* at 135.
120 *See id.*
121 *Id.* at 132.
122 Lea Winerman, *Suppressing the 'White Bears'*, 42 AM. PSYCH. ASSOC. 44, 44 (2011), https://www.apa.org/monitor/2011/10/unwanted-thoughts [https://perma.cc/AM6H-TY33].
123 *See generally* Kayo Matsuo & Yuji Itoh, *The Effects of Limiting Instructions About Emotional Evidence Depend on Need for Cognition*, 24 PSYCHIATRY, PSYCH. & L. 516 (2017).
124 *Id.* at 518.
125 *Id.*
126 *Id.*
127 Winerman, *supra* note 122.
128 *Id.*

In *Anatomy of a Murder*, defense counsel for Lieutenant Peterson questioned a witness about his examinations, which were useful only to the prosecution.[129] The state objected to this line of questioning.[130] It was clear the line of questioning could be considered argumentative, as argued by the state.[131] The state's objection was followed by a reprimand from the judge.[132] Still, regardless, it was clear through the dialogue between Defense Attorney Biegler and Defendant Peterson that the reprimand and subsequent jury instruction remained frivolous.

> Judge: "Mr. Biegler, you're aware that the question is highly improper."[133]
>
> Defense Attorney [Biegler]: "I'll withdraw the question and apologize, Your Honor."[134]
>
> Judge: "Question and answer will be stricken and jury will disregard."[135]
>
> Defendant [Lieutenant Peterson]: "How can a jury disregard something they've already heard?"[136]
>
> Defense Attorney [Biegler]: "They can't Lieutenant… They can't."[137]

Whether an instruction occurs at the end of the trial, like that in *Bruton,* or the instruction occurs during the trial, like the scene from *Anatomy of a Murder*, both situations lead to the same problem. The curative instruction remains mute after either counsel's presentation of a statement or question is outweighed in probative value by prejudicial impact. Human instinct, coupled with psychological theory, validates a jury's inability to ignore information when instructed to and instead, focus even more attention on what the judge attempts to forbid. In both *Bruton* and *Anatomy of a Murder*, and other cases within the legal system, Wegner's Ironic Process Theory prevails, regardless of the legal outcome.

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129 ANATOMY OF A MURDER, *supra* note 4.
130 *Id.*
131 *Id.*
132 *Id.*
133 WENDELL MAYES, ANATOMY OF A MURDER (1959), https://www.dailyscript.com/scripts/anatomy_of_a_murder.pdf.
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*

III. SUGGESTIVE REMEDIES

A. Enhanced Jury Education

Enhanced jury education could take form as mandatory pre-trial workshops. Following voir dire, a single day could be devoted to an educational class, occurring within the confines of the court, taught by psychologists with legal expertise. Jurors would learn about their cognitive biases and the importance of following evidence-based deliberations rather than notions formed based on improperly introduced evidence, considered prejudicial.

Enhanced jury education would most effectively present itself in scenarios where Wegner's Ironic Process Theory[138] occurs. The aforementioned operating system and monitoring system processes, when not acting together, result in the intrusion and processing of intentionally ignored information. Jurors' operating system process lapses allow for "mental contamination." Contamination or "to contaminate,"[139] as defined by Random House Dictionary (1968),[140] means "to render impure or unsuitable by contact or mixture with something unclean, bad, etc." Further, "mental contamination"[141] means "the process whereby a person has an unwanted [judgment, emotion, or behavior] because of mental processing that is unconscious or uncontrollable."[142] As already proven by Wegner's theory, self-corrective measures by juror[s] are not enough. The brain's split functioning, where one side still checks in on what the judge has instructed to disregard, only further implants the prejudicial information within the jurors' brains, bolstering the need for third-party corrective measures.[143] The unconscious and uncontrollable mental processing resulting in contamination within juror[s] can correct itself via assistance provided by the judicial system: enhanced jury education. [See Figure 1. The process of mental contamination and mental correction.][144] Without proper assistance and

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138 Winerman, *supra* note 122.

139 Timothy D. Wilson & Nancy Brekke., *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCH. BULL. 117, 117 (1994).

140 *Contamination*, RANDOM HOUSE WEBSTER'S DICTIONARY (1968).

141 Walker Wilson, *supra* note 32, at 12.

142 Walker Wilson, *supra* note 32, at 12. We should note that we are using the term contamination differently than Rozin's use of the similar terms contagion and to contaminate (Rozin, 1990; Rozin & Nemeroff, 1990). Rozin has focused on people's primitive beliefs about contagion between physical objects such as the belief that when two objects come into contact, the properties of one object are transferred to the other object. In contrast, we are concerned with the extent to which people's thoughts, feelings, and beliefs are contaminated by unconscious or uncontrollable mental processes. *Id*.

143 *Id.*

144 Wilson & Brekke., *supra* note 139, at 117.

realization of such unconscious mental processes, jurors will likely not understand or remain aware of the mental contamination driving their thoughts and feelings, which then impact decisions in deliberations. The difficulty of detecting mental contamination lies in people's limited access to their mental processes.[145] Even more so, with jurors lacking the awareness of their mental processes allowing the intrusion of what a judge has instructed to ignore, such a lack creates great difficulty in correction.[146]

Rather than correction on the part of individual jurors, the judicial system can provide educational interventions directly targeted at preventing mental processing which result in cognitive biases, especially when coupled with an explicit instruction from a judge. Research has demonstrated that teaching inferential rules, such as the law of large numbers, improves judgment accuracy.[147] Similarly, explicitly teaching jurors about common biases could mitigate their influence. The biases at issue involve any within the courtroom. Targeted, interactive simulations, occurring post-voir dire when conducted for a full day, will move the judicial system in the right direction. Wegner's Ironic Process Theory slowly can be eradicated from the courtroom, and the instructions from the workshop will prevail alongside any judges' [curative] instruction within the courtroom, to no longer be disregarded.

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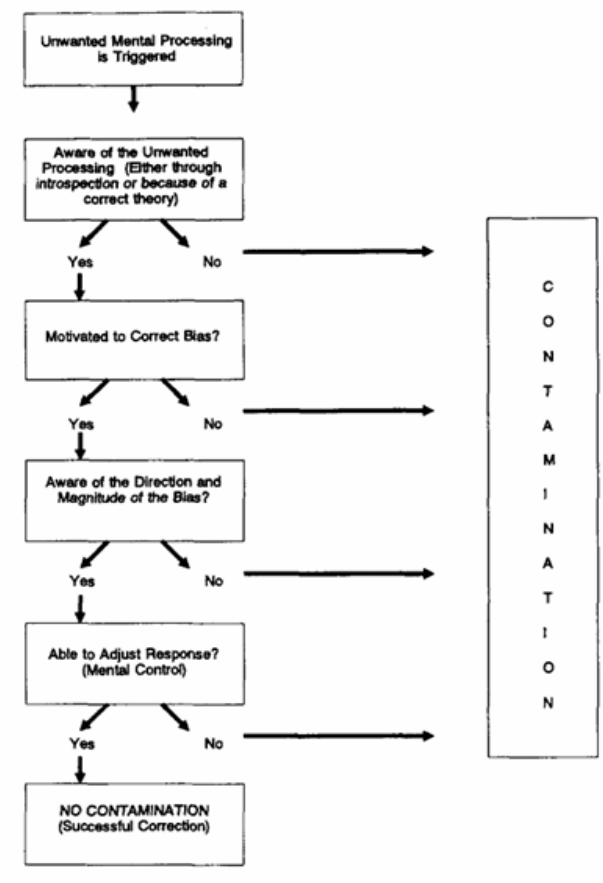
145 Walker Wilson, *supra* note 32, at 130.
146 *Id.* at 117.
147 *Id.* at 118.



The program would incorporate quick simulations to provide jurors with real-time feelings which could be experienced during the trial, then providing strategies for combating their feelings, incidentally taking on the role of deliberations.

B. Pre-Trial Intervention

Pre-trial intervention could involve a more thorough analysis of pre-trial motions, such as motions in limine, to ensure the exclusion of high-risk evidence entirely. In addition to counsels' arguments and preceding a pre-trial ruling, expert review would require an independent review by panels of psychologists and legal experts to review the evidence for prejudicial risks before the trial commences. The highly prejudicial risk evidence then would remain excluded via effective motion in limine filings and grants.

Motion in limine exists as a tool within the legal system, where counsel files a pre-trial motion seeking the "exclusion of specific evidence or arguments from being presented during a trial."[148] The court seeks to prevent the introduction of evidence which could unduly hinder a jury's decision-making process or the fair administration of justice.[149] Specifically, the court seeks to address with this motion any evidence considered "potentially prejudicial" or even "irrelevant," in addition to the already mentioned, "inadmissible."[150] This should occur before or at the start of trial, where attorneys seek to prevent an unfair administration of justice through unfair legal practices or prejudicing the jury.[151]

The two major differences between an objection at trial and a motion in limine are timing and effectiveness.[152] Objections, usually made at trial, allow for a jury to hear both the objection as well as the substance causing the objection.[153] For direct witness examination and cross-examination, when asked a question on the stand, the jury hears both the question and the witness's answer before the judge voices a ruling.[154]

> "Though the court may sustain an objection and order the jury to forget or ignore what they just heard, it is a fact of human cognition that jurors cannot completely erase that memory from their minds. When the evidence is particularly inflammatory, the imprint left behind can cause serious damage to jurors' ability to reach a fair conclusion."[155]

Kanwisher and Driver's Spotlight Attention Theory[156] clearly exposes the dangers of objections and subsequent rulings. No matter what the judge may rule, the spotlight has already focused the jury's attention on the substance objected to due to counsel's objection. Motions in limine could eliminate the prevalence of the spotlight theory at trial. No longer would the jury gain exposure to counsel's objections and a subsequent ruling — instead, a ruling would exist before (or at the start of) trial, thereby preventing prejudicing the jury through evidence exposure which surely lacks the probative value when weighed against the prejudicial impact. Expert

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148 *Motion in Limine*, CORN. L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/motion_in_limine (last visited Oct. 22, 2025).

149 *Objection*, *supra* note 21.

150 *Id.*

151 R. Davis, *The Intent and Purpose of a Motion for Limine*, BARKAN RSCH., https://barkanresearch.com/motion-for-limine/ (last visited Oct. 22, 2025).

152 *See* Dani Alexis Ryskamp, *Motions in Limine: The Complete Guide*, EXPERT INST., https://dev.expertinstitute.com/resources/insights/motions-in-limine-the-complete-guide/ (last visited Oct. 22, 2025).

153 *Id.*

154 *Id.*

155 *Id.*

156 Walker Wilson, *supra* note 32, at 19.

psychologists would bolster the validity of judges' decisions as they would offer insight into the human psyche and how the evidence, if not excluded via the proposed motion in limine, would negatively impact the jury: A high risk of prejudicial impact is likely to lead the experts conducting the independent reviews to support one decision by the judge: motion granted.

With this, pre-trial intervention, taking the form of increased use of pre-trial motions and expert review of evidence, especially the motion in limine, would serve as a vital cure for evidence that creates a prejudicial impact and any such offerings by counsel in trial.

C. Post-Trial Juror Reviews

Post-trial reviews would offer jurors optional reflection sections to assess their mental processes regarding the evidence and instructions presented throughout the trial. This opportunity for jurors to participate in interviews allows for reflection and provides valuable insights into the legal system, helping to ensure judicial fairness and protection.[157] Post-trial juror reviews would specifically analyze jurors' mindsets and thought patterns that had occurred during trial and any emotions attached to their experience, which potentially played a role in the decision they cast.[158]

Post-trial reviews can take the form of interview sessions conducted by firms offering unbiased services, who then can deliver the results with the permission of the jurors to counsel on both sides of the aisle. Services offered by a consulting firm, Courtroom Logic,[159] advertises that post-trial interviews can typically provide insight such as "analysis of how jurors perceived key evidentiary issues, specific witnesses, trial themes, graphics, and overall courtroom dynamic."[160] Additionally, post-trial interviews can yield insight and "information related to which evidence jurors relied upon when answering critical verdict form questions."[161]

According to the American Bar Association (ABA),[162] post-trial juror interviews, which can take the form of the National Law Review's "best practices for post-trial interviews,"[163] yield helpful information, allowing

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157 Julie Feller, *Post-Trial Juror Interviews: Best Practices*, U.S. LEGAL SUPPORT (Apr. 23, 2025), https://www.uslegalsupport.com/blog/post-trial-juror-interviews/.

158 *Post-Trial Interviews*, COURTROOM LOGIC CONSULTING, https://courtroomlogic.com/post-trial-interviews/ (last visited Oct. 22, 2025).

159 COURTROOM LOGIC CONSULTING, https://courtroomlogic.com/ (last visited Oct. 22, 2025).

160 *Post-Trial Interviews*, *supra* note 158.

161 COURTROOM LOGIC CONSULTING, *supra* note 159.

162 A.B.A., https://www.americanbar.org/ (last visited Oct. 22, 2025).

163 Alexa Hiley, *Best Practices for Post-Trial Interviews*, NAT'L L. REV. (Sep. 5, 2024), https://natlawreview.com/article/best-practices-post-trial-interviews#google_vignette.

counsel to determine "what went right or wrong."[164] Hiley's best practices for post-trial interviews are outlined below:

1. "Research the Rules"[165]
2. "Secure Permission"[166]
3. "Consider Contact Methods"[167]
4. "Do Not Harass Jurors"[168]
5. "Be Flexible with Scheduling"[169]
6. "Never Pressure a Juror to Talk"[170]
7. "Give Them a Reason to Engage"[171]
8. "Record (with Permission)"[172]
9. "Establish Rapport"[173]
10. "When in Doubt, Delegate"[174]
11. "Be Prepared Yet Flexible"[175]
12. "Take Your Time, but Be Mindful of Theirs"[176]

The freedom and power of the individual juror, potentially compromised during trial, can be restored at this point. The juror can attribute the prejudicial evidence to misaction by counsel, the judge, or the jury. Their actions as a free-thinking juror, which were potentially threatened, are recouped during a post-trial review.

With this, post-trial reviews would directly combat Brehm's Reactance Theory.[177] These processes would exclude the threatened feelings of limitation or anxiety that transpire with reactance theory after a judge's instructions.[178] No longer would jurors suffer limitations by a judge, but instead, their feedback and initially intended free thinking would exist without burden. Of course, the judge's actions are not the only risk to the

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164 Edd L. Peyton & Escarlet Escobar, *What Do Jurors Think? Using Post-Trial Jury Interviews to Find What Is Important in Trial*, A.B.A. (Aug. 23, 2018), https://www.americanbar.org/groups/litigation/resources/newsletters/diversity-inclusion/using-post-trial-jury-interviews-find-what-important-trial/.

165 *See* Hiley, *supra* note 163; *see also* ANATOMY OF A MURDER, *supra* note 5.

166 *See* Hiley, *supra* note 163; *see also* ANATOMY OF A MURDER, *supra* note 5.

167 *See* Hiley, *supra* note 163; *see also* ANATOMY OF A MURDER, *supra* note 5.

168 *See* Hiley, *supra* note 163; *see also* ANATOMY OF A MURDER, *supra* note 5.

169 *See* Hiley, *supra* note 163; *see also* ANATOMY OF A MURDER, *supra* note 5.

170 *See* Hiley, *supra* note 163; *see also* ANATOMY OF A MURDER, *supra* note 5.

171 *See* Hiley, *supra* note 163; *see also* ANATOMY OF A MURDER, *supra* note 5.

172 *See* Hiley, *supra* note 163; *see also* ANATOMY OF A MURDER, *supra* note 5.

173 *See* Hiley, *supra* note 163; *see also* ANATOMY OF A MURDER, *supra* note 5.

174 *See* Hiley, *supra* note 163; *see also* ANATOMY OF A MURDER, *supra* note 5.

175 *See* Hiley, *supra* note 163; *see also* ANATOMY OF A MURDER, *supra* note 5.

176 *See* Hiley, *supra* note 163; *see also* ANATOMY OF A MURDER, *supra* note 5.

177 *See Reactance Theory*, *supra* note 55.

178 *See id.*

juror's free-thinking, the attorneys can also cause such harm – The inhibition of fair and impartial deliberations thereby existing. Any interruption of the juror's free-thinking burdens them; Lewin's Zeigarnik theory showed this. Counsel's interruptions, whether by objection or an action to withdraw a statement or question, coupled with a judge's instruction to disregard the prejudicial evidence, combine to harm the juror.

No admonition by a judge or interruptions by counsel exist at this point, leaving only the jury member and their mind: a free-thinking, unburdened review of the trial to determine what went right or wrong.

CONCLUSION

Objections, witness instructions, self-initiated motions by counsel, and jury instructions collectively serve as safeguards for the justice system, encompassing both civil and criminal proceedings. The greatest enemy within the courtroom is not legal knowledge, strategy, or prejudicial impact, but instead remains the individual themselves — the juror[s] themselves. Psychological phenomena and theories explain the human abilities and inability to dismiss prejudicial information, especially when instructed. However, the theories weigh heavily on tendencies and consequential inabilities. Regardless of the legal safeguards in place, the control of one's psyche remains limited. The justice system can only improve, ensuring courts' recognition of human psychology and, even more so, human nature.

THE FALL OF CHEVRON: WHAT IT MEANS FOR IRS AUTHORITY AND TAX LAW

Reagan Honn*

INTRODUCTION

Imagine you run a small freelance business from your home. After reading Internal Revenue Service (IRS) guidance, you reasonably conclude that you qualify for the home office deduction. You rely on that interpretation, claim the deduction, and adjust your finances accordingly. But years later, a federal court rules—contrary to the IRS's longstanding guidance—that the deduction does not apply to situations like yours. Even though you followed the agency's advice in good faith, the court's decision retroactively invalidates your deduction, leaving you on the hook for back taxes, interest, and penalties.

For decades, courts have deferred to agencies like the IRS when interpreting ambiguous statutes, ensuring and facilitating consistency in tax administration.[1] This principle, known as *Chevron* deference, allowed agencies to clarify legal uncertainties without constant judicial interference.[2] But now, with the U.S. Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, *Chevron* is gone, leaving courts as the ultimate arbiters of statutory meaning.[3] What does this mean for taxpayers, tax professionals, and the IRS itself? This Note examines the implications of this shift, particularly in tax law, where statutory ambiguity is sometimes more common than clarity, and it explores potential solutions for navigating the complexities of a post-*Chevron* tax landscape.

First, the discussion begins with a historical overview of the *Chevron* doctrine, examining its origins, legal rationale, and foundational role in administrative law. By tracing the evolution of the doctrine, this section highlights how courts have traditionally balanced agency expertise with judicial oversight.

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1 Eli Nachmany, *Deference to Agency Expertise in Statutory Interpretation*, 31 GEO. MASON L. REV. 587, 588 (2024) ("Courts have long assumed that an agency's expertise is relevant to these agency statutory interpretations.").

2 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

3 Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

Second, the analysis turns to the decline of *Chevron* deference, focusing on key cases that signaled a shift away from the doctrine and culminated in the U.S. Supreme Court's decision to overturn *Chevron* in *Loper Bright Enterprises v. Raimondo*. This section explores how judicial skepticism toward agency authority and the emergence of alternative interpretive frameworks contributed to *Chevron's* demise.

Third, the Note examines the consequences of *Chevron's* disappearance for the administration of tax law. Without the protective umbrella of *Chevron* deference, the IRS faces new challenges in interpreting and enforcing complex tax statutes. This section considers how courts may now scrutinize agency interpretations more rigorously, potentially leading to increased litigation and regulatory uncertainty.

Fourth, the discussion turns to potential solutions for navigating this new legal landscape. Legislative action, judicial clarification, and alternative deference doctrines could provide pathways to stability in tax law interpretation. By evaluating these options, this section considers how policymakers and courts might recalibrate the balance between agency authority and judicial oversight. Ultimately, this Note argues that the erosion of *Chevron* deference represents more than a doctrinal shift; it fundamentally alters the dynamics of regulatory governance. In the absence of explicit congressional guidance, courts must now assume a greater role in interpreting ambiguous tax statutes, raising essential questions about consistency, efficiency, and the future of administrative law.

I. THE RISE AND ROLE OF *CHEVRON*: A FOUNDATION OF ADMINISTRATIVE LAW

A. The *Chevron* Doctrine's Origins and Historical Context

The *Chevron* decision arose from environmental regulatory tensions during the 1970s and early 1980s.[4] This period was marked by a significant expansion of federal regulatory oversight, particularly in environmental law, as the U.S. grappled with growing concerns over pollution and the balance between environmental protections and industrial growth.[5]

Before the rise of the modern administrative state in the twentieth century, federal regulatory authority was comparatively limited in scope.[6] In

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4 Chevron, 467 U.S. at 840–42.

5 *See* Phil Wisman, *EPA History (1970-1985)*, EPA (Nov. 1985), https://www.epa.gov/archive/epa/aboutepa/epa-history-1970-1985.html.

6 *See* Nicholas K. Tabor, Katherine E. Di Lucido & Jeffery Y. Zhang, *A Brief History of the U.S. Regulatory Perimeter* (Bd. Governors Fed. Rsrv. Sys., Fin. & Econ. Discussion Ser. No. 2021-051,

the nineteenth and early twentieth centuries, regulatory oversight primarily focused on interstate commerce, financial stability, and public health issues.[7] Agencies such as the Interstate Commerce Commission, created in the late 1880s, and the Federal Trade Commission (FTC), established in the early 1900s, operated under a narrower mandate than later administrative agencies.[8] Their primary function was to regulate monopolistic practices, ensure fair competition, and address concerns about railroad rates and corporate abuse.[9] The judiciary played a more prominent role in interpreting federal statutes, as courts at the time viewed statutory interpretation as a core judicial function rather than one requiring specialized agency expertise.[10] Unlike later eras, where agencies were given deference by the courts for their subject-matter knowledge, courts in this period applied their independent judgment in resolving statutory ambiguities.[11]

The expansion of federal regulatory power accelerated during the New Deal era of the 1930s, when President Franklin Roosevelt established a host of new administrative agencies designed to stabilize the economy, regulate industries, and provide social welfare programs.[12] Congress granted agencies such as the Securities and Exchange Commission (SEC), the National Labor Relations Board, and the Social Security Administration broad authority to implement legislative mandates.[13] Despite this growth, courts remained cautious in deferring to agency interpretations of statutes, wary that unchecked administrative power could undermine the constitutional separation of powers and expand executive authority beyond legislative intent.[14] Judicial review of agency action remained a key safeguard against perceived administrative overreach, with courts requiring agencies to justify their interpretations within a relatively rigid legal framework.[15] This judicial skepticism foreshadowed the ongoing debate over the proper scope of agency

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2021), https://www.federalreserve.gov/econres/feds/files/2021051pap.pdf[https://perma.cc/T7QH-NBPH].

7 *See id.*

8 *See id.*

9 *See id.*

10 *See id.*

11 *See id.*

12 Randal Rust, *The New Deal*, AM. HIST. CENT., https://www.americanhistorycentral.com/entries/new-deal [https://perma.cc/V6PD-5B89] (last visited Mar. 3, 2025).

13 *Id.*

14 *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 910 (2017).

15 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (explaining that under the APA, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made").

authority—a debate that continues today, particularly in light of the U.S. Supreme Court's recent treatment of *Chevron* deference.[16]

By the mid-twentieth century, particularly in the postwar period, the federal government assumed an increasingly active role in addressing issues of public health and safety.[17] Landmark legislation such as the Food, Drug, and Cosmetic Act of the late 1930s and the Federal Communications Act of the early 1930s reflected growing congressional reliance on expert agencies to implement complex regulatory schemes.[18] However, it was not until the environmental movement gained momentum in the 1960s and early 1970s that administrative agencies were tasked with regulating substantial aspects of the American economy in response to social and environmental concerns.[19]

The Clean Air Act Amendments of 1970 and subsequent amendments in 1977 were pivotal legislative actions that increased the federal government's role in air pollution control.[20] These amendments required the Environmental Protection Agency (EPA) to enforce new, stringent air quality standards.[21] A key component of this regulatory regime involved regulating "stationary area sources" of pollution, which referred to factories, power plants, and other fixed facilities emitting pollutants into the air.[22]

By the late 1970s, however, the United States was facing an economic recession, and a growing political movement emerged to reduce the financial burden of stringent regulatory oversight on industries.[23] Many businesses and conservative policymakers argued that environmental regulations were hindering economic growth and the country's global competitiveness.[24]

At the heart of *Chevron* was the EPA's "bubble concept," a regulatory innovation introduced in its 1981 rules that provided a more flexible way to

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16 Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 982 (1992).

17 ROBERT I. FIELD, HEALTH CARE REGULATION IN AMERICA: COMPLEXITY, CONFRONTATION, AND COMPROMISE (2006).

18 Susan Dudley, *A Brief History of Regulation and Deregulation*, REGUL. REV. (Mar. 11, 2019), https://www.theregreview.org/2019/03/11/dudley-brief-history-regulation-deregulation/ [https://perma.cc/KXG8-5W2S].

19 Samuel P. Hays, *The Environmental Movement*, 25 J. FOREST HIST. 219 (1981); Wisman, *supra* note 5.

20 Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.

21 EPA, THE CLEAN AIR ACT IN A NUTSHELL: HOW IT WORKS (2013), www.epa.gov/sites /default/files/2015-05/documents/caa_nutshell.pdf.

22 RICHARD K. LATTANZIO, CONG. RSCH. SERV., RL30853, CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS (2022).

23 *See* Michael Bryan, *The Great Inflation*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-inflation [https://perma.cc/59FR-WCMC].

24 Michael E. Kraft, *U.S. Environmental Policy and Politics: From the 1960s to the 1990s*, 12 J. POL'Y HIST. 17 (2000).

control emissions from stationary sources.[25] This concept treated an entire plant or facility with multiple emissions points as a single "bubble," allowing companies to manage emissions more holistically.[26] Under this approach, a plant could install new pollution-emitting equipment without needing additional permits if the total emissions for the entire plant did not exceed specified limits.[27] This regulatory shift was intended to support economic growth by allowing companies some leeway to upgrade facilities without being hindered by complex permitting processes.[28] The Reagan Administration, which had a strong deregulatory agenda, supported this approach, seeing it as a way to reduce federal intervention in business operations.[29]

Environmental advocacy groups, led by the Natural Resources Defense Council (NRDC), challenged the EPA's bubble concept in their lawsuit against Chevron U.S.A, Inc.[30] They argued that by treating multiple pollution sources as a single unit, the bubble concept allowed companies to sidestep more stringent regulatory requirements.[31] This collective approach, they claimed, threatened to undermine the Clean Air Act's core objective of reducing emissions in nonattainment areas—regions that failed to meet national air quality standards.[32] The D.C. Circuit Court of Appeals ruled in favor of the NRDC, holding that the EPA's interpretation was inconsistent with the statutory language and objectives of the Clean Air Act.[33]

Chevron reached the U.S. Supreme Court amid this tension between regulatory flexibility and environmental protection.[34] The case's outcome was pivotal, as it would determine the scope of agency discretion in interpreting ambiguous statutory terms—a question at the heart of many

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25 Chevron, 467 U.S.at 840–41; Press Release, EPA, Statement on the U.S. Supreme Court's Ruling of June 25th on EPA's "Bubble" Policy to Control Air Pollution (June 26, 1984), https://www.epa.gov/archive/epa/aboutepa/statement-us-supreme-courts-ruling-june-25th-epas-bubble-policy-control-air-pollution.html [hereinafter Statement on Bubble Policy Ruling].

26 Statement on Bubble Policy Ruling, *supra* note 25.

27 *Id.*

28 Ellen M. Saideman, *An Overview of the Bubble Concept*, 8 COLUM. J. ENV'T L. 137, 138 (1982).

29 Katie Twiss, *EPA Under Attack: Legacies of Deregulation by Reagan, Bush, and Trump*, ENV'T SYNTHESIS & COMMC'N (May 9, 2021), https://blogs.wellesley.edu/es39901/2021/05/09/epa-under-attack-legacies-of-deregulation-by-reagan-bush-and-trump [https://perma.cc/2TBH-FNCK].

30 Chevron, 467 U.S. 837.

31 *Id.* at 840–41; Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 723 (D.C. Cir. 1982), *rev'd sub nom.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

32 Chevron, 467 U.S. at 840–41; Nat. Res. Def. Council, Inc., 685 F.2d at 723.

33 Nat. Res. Def. Council, Inc., 685 F.2d at 726.

34 *See* Michael Burger & Cynthia Hanawalt, *The Major Questions Doctrine is a Fundamental Threat to Environmental Protection. Should Congress Respond?*, COLUM. L. SCH.: CLIMATE L. BLOG (Oct. 19, 2023), https://blogs.law.columbia.edu/climatechange/2023/10/19/the-major-questions-doctrine-is-a-fundamental-threat-to-environmental-protection-should-congress-respond [https://perma.cc/CFS7-3GWH].

federal regulatory programs.[35] The U.S. Supreme Court's majority opinion, delivered by Justice John Paul Stevens, framed the case as one concerning judicial deference to agency expertise.[36] The Court recognized that Congress often legislates broadly, expecting agencies to use their specialized expertise to interpret statutory gaps or ambiguities.[37] The Court upheld the regulations and crafted the now-famous "two-step" test, instructing courts to defer to an agency's reasonable interpretation when a statute is ambiguous and when Congress has not directly addressed the issue at hand.[38]

The decision in *Chevron* established a precedent that federal courts should defer to agency interpretations of ambiguous statutes, provided they are reasonable.[39] The ruling marked a profound shift, effectively granting agencies like the EPA substantial authority to interpret and implement complex statutes, and it fundamentally shaped the modern administrative state.[40] This judicial deference became a cornerstone of administrative law, deferring to agency expertise and allowing for more adaptive and pragmatic regulatory implementations across various sectors.[41]

Chevron thus served as a judicial endorsement of regulatory agencies' power, assuming Congress intended agencies to fill in the gaps in complex statutory schemes.[42] The decision's rationale relied on the agencies' expertise, efficiency, and understanding of policy implications that, according to the Court, were better suited to dynamic regulatory needs than rigid judicial interpretations.[43]

B. The *Chevron* Two-Step Test

Though now entirely overturned by *Loper Bright*, the *Chevron* doctrine played a central role in how courts reviewed federal agency interpretations of statutes for nearly forty years.[44] *Chevron* provided a two-step framework

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35 *See* Eli Nachmany, *Deference to Agency Expertise in Statutory Interpretation*, 31 GEO. MASON L. REV. 587, 588 (2024).

36 Chevron, 467 U.S. at 843–44.

37 *Id.* at 844–45.

38 *Id.* at 842–43.

39 *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (applying *Chevron* deference to the Federal Communications Commission's interpretation of the Communications Act); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) (discussing the application of *Chevron* deference in the context of the Food and Drug Administration's authority).

40 Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 839–40 (2001).

41 Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191–92 (2006).

42 Merrill & Hickman, *supra* note 40, at 839–40.

43 Sunstein, *supra* note 41, at 191–92.

44 Isaiah McKinney, *From Justice Stevens' Papers—Justice Stevens Crafted the* Chevron *Two-Step Test in an Afternoon*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 28, 2024), https://www.

for judicial deference to agency rulemaking.[45] First, courts would determine whether Congress had directly addressed the precise issue in the statute.[46] If Congress's intent was clear, that interpretation had to be followed, and neither the agency nor the court had the authority to adopt a different view.[47] If, however, the statute was ambiguous or silent, courts would proceed to the second step, deferring to the agency's interpretation as long as it was reasonable.[48] The rationale behind this deference was that agencies, with their technical expertise, were often better suited than courts to fill in statutory gaps, particularly in complex regulatory areas such as environmental protection, healthcare, and tax administration.[49]

The *Chevron* doctrine was designed to balance congressional intent with agency expertise, allowing for the consistent application of statutes while granting agencies flexibility to adapt regulations to changing circumstances.[50] Over time, however, it became a contentious issue in administrative law.[51] Supporters of *Chevron* argued that it promoted efficiency and stability in governance, ensuring that regulatory agencies, rather than courts, could make policy decisions within their delegated authority.[52] Critics contended that the doctrine granted agencies excessive power, providing unelected bureaucrats the ability to expand their authority beyond what Congress intended.[53] This concern became particularly pronounced as agencies used *Chevron* deference to justify broad regulatory interpretations, raising concerns that the executive branch was encroaching on legislative and judicial functions.[54]

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yalejreg.com/nc/from-justice-stevens-papers-justice-stevens-crafted-the-chevron-two-step-test-in-an-afternoon-by-isaiah-mckinney [https://perma.cc/225T-4P7Z].

45 *Id.*

46 Chevron, 467 U.S. at 842–43; INS v. Cardoza-Fonseca, 480 U.S. 421, 448–49 (1987) (analyzing Step One application).

47 Chevron, 467 U.S. at 842–43 ("[I]f the intent of Congress is clear, that is the end of the matter.").

48 *Id.* at 843.

49 Michael R. Blumenthal et al., *The End of* Chevron *Deference: What Does It Mean, and What Comes Next?*, ABA (Aug. 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-august/end-chevron-deference-what-does-it-mean-what-comes-next [https://perma.cc/Q6CP-65FM].

50 *Id.* (stating that the end of the Chevron deference "will result in inconsistent application of regulations throughout the country").

51 *See* McKinney, *supra* note 44 (stating *Chevron* is "both the most influential and most controversial case in administrative law").

52 *See* Blumenthal et al., *supra* note 49.

53 Nowell D. Bamberger et al., *After* Chevron*: What the Supreme Court's* Loper Bright *Decision Changed and What It Didn't*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 18, 2024), https://corpgov.law.harvard.edu/2024/07/18/after-chevron-what-the-supreme-courts-loper-bright-decision-changed-and-what-it-didnt [https://perma.cc/YR93-WJZ9].

54 Jim Chester, *Supreme Court's Decision Marks the End of* Chevron *Deference*, KLEMCHUK LLP IDEATE BLOG: LAW (Aug. 29, 2024), https://www.klemchuk.com/ideate/recent-scotus-decision-chevron-doctrine [https://perma.cc/7JEB-YQ2L].

In *Loper Bright v. Raimondo*, the U.S. Supreme Court overturned *Chevron*, marking a fundamental shift in administrative law.[55] Under this new framework, courts are now required to independently interpret statutes without deferring to agency interpretations, even in cases where statutory language is ambiguous.[56] The case itself involved a challenge to a federal regulation requiring fishermen to pay the salaries of onboard government monitors—a policy upheld by lower courts under *Chevron* deference. Still, it was ultimately struck down after the Court rejected the deference framework.[57] This decision transfers power away from the executive branch and back to the judiciary, requiring courts to resolve statutory questions rather than relying on agency expertise.[58] While some view this as a necessary correction that restores judicial authority and limits agency overreach, others warn that it will lead to inconsistent judicial interpretations as different courts may reach conflicting conclusions on the same statutory provisions.[59]

The consequences of overturning *Chevron* are far-reaching.[60] In complex fields such as tax law and financial regulation, the ruling is expected to trigger a wave of legal challenges to existing regulations, forcing agencies to be more explicit in how they craft new rules.[61] Without *Chevron* deference, agencies may face greater difficulty defending their policies in court, potentially leading to increased uncertainty in regulatory enforcement.[62] Ultimately, the demise of *Chevron* represents one of the most significant changes in administrative law in decades, reshaping the balance of power between the executive, legislative, and judicial branches and fundamentally altering how federal regulations are interpreted and applied moving forward.[63]

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55 Jory Heckman, *Agencies 'Knew This Was Coming.' What Does — and Doesn't — Change After Supreme Court's* Chevron *Ruling*, FED. NEWS NETWORK (July 8, 2024), https://federalnews network.com/agency-oversight/2024/07/agencies-knew-this-was-coming-what-does-and-doesnt-change-after-supreme-courts-chevron-ruling [https://perma.cc/43GZ-7AA7].

56 Bamberger et al., *supra* note 53.

57 *See* Loper Bright, 603 U.S. at 375–76 (explaining the National Marine Fisheries Service rule requiring fishermen to fund onboard monitors and rejecting Chevron deference as a basis for upholding the regulation).

58 Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1874–75 (2015).

59 *Id.*

60 Chester, *supra* note 54.

61 Heckman, *supra* note 55.

62 *Id.*

63 Bamberger et al., *supra* note 53.

C. Justifications for *Chevron* Deference in Tax Law

Chevron deference has long been justified by the notion that administrative agencies, staffed by experts, possess subject-matter expertise that generalist courts typically lack.[64] *Chevron* deference was particularly well-suited to tax law, as the IRS engages in highly technical rulemaking that courts are ill-equipped to navigate.[65] Tax law is a vast and intricate system, filled with statutory ambiguities, cross-referenced provisions, and complex economic implications.[66] While the U.S. Tax Court and a few other tribunals have subject-matter expertise, most federal judges serve on generalist courts and lack specialized training in tax law.[67] By contrast, the IRS brings deep institutional knowledge to its interpretations, enabling it to navigate the technical complexity of the tax code and maintain consistency across its many interconnected provisions.[68] The U.S. Supreme Court in *Chevron* recognized that deference to agencies was particularly justified in areas requiring specialized knowledge, as agencies are better positioned than courts to resolve ambiguities, implement policy goals, and maintain consistency in regulatory interpretation.[69]

In tax regulation, agency expertise is not only beneficial but essential.[70] The IRS administers a tax system that affects nearly every aspect of economic life, from corporate structures and investment vehicles to international taxation and compliance enforcement.[71] Interpreting tax statutes

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64 VALERIE C. BRANNON & JARED P. COLE, CONG. RSCH. SERV., R44954, *CHEVRON* DEFERENCE: A PRIMER 7 (2017) (explaining that one of the leading justifications for deferring to agencies under Chevron is the recognition that agencies possess subject-matter expertise that generalist courts typically lack).

65 Sarah B. Lawsky, *Tax Law and Flexible Formalizations*, 2024 U. CHI. L. REV. ONLINE 1, 1, 4–5, 8 (supporting the idea that tax law is replete with complex, technical provisions that require specialized knowledge to interpret and apply).

66 Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1541 (2006) (explaining that tax law is highly technical and complex, and the IRS possesses expertise that courts lack).

67 Michelle Levin & Carneil Wilson, *After* Chevron*: Uniform Tax Law Interpretation Not Guaranteed*, LAW360 (July 9, 2024), https://www.law360.com/articles/1855492/after-chevron-uniform-tax-law-interpretation-not-guaranteed (on file with Southern Illinois University Law Journal) ("While the Tax Court is well suited to interpreting IRS rules in a uniform manner — with or without *Chevron* — decisions in district courts may have more variability.").

68 Chevron, 467 U.S. at 865 ("Judges are not experts in the field, and are not part of either political branch of the Government.").

69 *Id.* at 865–66 ("When a challenge to an agency construction of a statutory provision . . . really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.").

70 Lawsky, *supra* note 65, at 1, 4–5, 8 (supporting the idea that tax law is replete with complex, technical provisions that require specialized knowledge to interpret and apply).

71 Hickman, *supra* note 66, at 1541 ("Uniformity in tax law is essential for taxpayers to have predictable interpretations of IRS regulations across different jurisdictions.").

requires an understanding of complex financial instruments, accounting principles, and economic policy—subjects that fall outside the traditional purview of the judiciary.[72] Courts operating without the benefit of continuous engagement in tax administration would struggle to apply tax statutes with the same level of precision as the IRS.[73] *Chevron* deference allowed the IRS to fill gaps in tax legislation, applying statutory provisions in a manner more consistent with broader tax policy and economic realities.[74]

Moreover, tax regulations sometimes involve explicit delegations of interpretive authority from Congress to the IRS.[75] Unlike other regulatory fields, where deference may rest on an implied delegation of authority, tax law can include express statutory grants that allow the IRS to issue regulations carrying the force of law.[76] This formal delegation distinguishes some tax regulations from other agency interpretations, reinforcing their legitimacy as authoritative legal rules rather than mere policy preferences.[77] By granting deference to tax regulations promulgated under congressional authorization, *Chevron* provided a clear framework for courts to uphold the IRS's rulemaking authority, ensuring stability and predictability in tax administration.[78]

Beyond expertise and congressional delegation, *Chevron* deference played a critical role in promoting uniformity in tax law.[79] Predictability is paramount in taxation, as businesses and individuals rely on consistent regulatory guidance to structure transactions and ensure compliance.[80] Without deference to IRS interpretations, courts in different jurisdictions

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72 *Id.* (arguing that uniformity in tax law is essential for taxpayers to have predictable interpretations of IRS regulations across different jurisdictions).

73 Merrill & Hickman, *supra* note 40, at 836 (arguing that *Chevron* promotes uniformity and predictability in the administration of federal law).

74 Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983) (asserting that uniformity in the interpretation of federal law is a central goal of the judicial system).

75 Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 476–77 (1979) (explaining that the Internal Revenue Code explicitly authorizes the Commissioner of Internal Revenue to "prescribe all needful rules and regulations").

76 *See, e.g.*, I.R.C. § 7805(a) ("Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, *the Secretary shall prescribe all needful rules and regulations for the enforcement of this title*, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.") (emphasis added).

77 Chevron, 467 U.S. at 843–44 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.").

78 Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 57–58 (2011) (holding that general authority tax regulations "warrant Chevron deference").

79 Merrill & Hickman, *supra* note 40, at 836 (arguing that *Chevron* promotes uniformity and predictability in the administration of federal law).

80 Hickman, *supra* note 66, at 1541 (arguing that uniformity in tax law is essential for taxpayers to have predictable interpretations of IRS regulations across different jurisdictions).

could reach conflicting conclusions on the same statutory provisions, creating uncertainty and potential disparities in tax enforcement.[81] *Chevron* mitigated this risk by enabling the IRS to issue regulations and guidance with the expectation that its reasonable interpretations would be upheld, reducing litigation and fostering nationwide consistency in tax law.[82]

By overturning *Chevron*, the U.S. Supreme Court has removed this presumption of deference, forcing courts to assess the meaning of ambiguous tax statutes independently.[83] This shift introduces uncertainty into tax administration, as courts may now interpret tax provisions differently across jurisdictions, leading to inconsistent enforcement and increased litigation.[84] The loss of *Chevron* deference raises significant questions about the future of tax rulemaking, as the IRS may need to adjust its approach to regulatory guidance, relying more heavily on explicit statutory mandates or more detailed legislative drafting to ensure judicial acceptance of its interpretations.[85]

II. THE DECLINE OF DEFERENCE: UNPACKING *CHEVRON'S* DEMISE

The U.S. Supreme Court's decision in *Loper Bright* to overturn *Chevron* deference was not an abrupt shift but the culmination of a steady retreat from judicial deference to agency interpretations. This section examines how that erosion unfolded and its implications for the IRS. First, courts gradually narrowed *Chevron's* reach, placing stricter procedural requirements to apply deference and limiting agency authority in cases involving significant economic or political issues. This shift, seen in cases like *Mead*[86] and *King*,[87] signaled increasing judicial skepticism toward broad agency discretion.

Second, these restrictions had direct consequences for tax law, as courts invoked *Chevron* Step One more frequently to assert that statutes were unambiguous, thereby bypassing deference and striking down IRS regulations at a higher rate. As judicial scrutiny intensified, taxpayers became

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81 Monaghan, *supra* note 74, at 6 (asserting that uniformity in the interpretation of federal law is a central goal of the judicial system).

82 Sunstein, *supra* note 41, at 191 (arguing that *Chevron* simplifies judicial review by establishing a clear framework for courts to follow).

83 Bamberger et al., *supra* note 53.

84 Hickman, *supra* note 66, at 1541 (explaining that tax law is highly technical and complex, and the IRS possesses expertise that courts lack).

85 Kelley R. Taylor, *Supreme Court Strikes Down* Chevron: *What It Means for the IRS*, KIPLINGER (June 28, 2024), https://www.kiplinger.com/taxes/supreme-court-strikes-down-chevron [https://perma.cc/TR8C-6LB4] (asserting that courts will no longer defer to the IRS's interpretation of ambiguous tax statutes, which could lead to more frequent invalidation of IRS rules).

86 United States v. Mead Corp., 533 U.S. 218 (2001).

87 King v. Burwell, 576 U.S. 473 (2015).

more willing to challenge IRS interpretations, further weakening the agency's ability to enforce tax laws with confidence.

Finally, the IRS now faces a transformed legal landscape in which its regulatory authority is no longer presumed to be absolute. Without *Chevron*, the agency must adapt by strengthening its legal justifications, engaging more directly with Congress to secure more explicit statutory language, and relying on alternative doctrines, such as *Skidmore*,[88] to maintain influence in tax law interpretation.

A. The Shrinking Scope of *Chevron*: From Broad Deference to Judicial Skepticism

For decades, *Chevron* deference allowed agencies like the IRS to interpret ambiguous statutes with confidence, knowing that courts would defer as long as their interpretation was reasonable.[89] However, even before *Loper Bright* formally overturned *Chevron*, courts had already begun limiting its application.[90] This shift was not abrupt but rather the product of a steady judicial retreat from deference, particularly in cases where agency interpretations had significant economic or political consequences.[91]

One of the first key developments came in *United States v. Mead Corp.*, where the U.S. Supreme Court ruled that *Chevron* deference would apply only when an agency acted with the "force of law" through formal rulemaking or adjudication.[92] While *Mead* did not immediately threaten IRS regulations, because the IRS promulgates rules under statutory authority, it signaled a growing concern that not all agency interpretations warranted deference.[93] This decision compelled courts to engage in a more nuanced analysis before granting *Chevron* deference, requiring agencies to justify not

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88 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

89 Chevron, 467 U.S. at 844 ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.").

90 Connor P. Schratz, Michigan v. EPA *and the Erosion of* Chevron *Deference*, 68 ME. L. REV. 381, 382 (2016) ("Over the past three decades, the Supreme Court has gradually narrowed the scope of Chevron deference, limiting its application in various contexts.").

91 Alyssa Greenstein, *The EPA in the Age of* Chevron *Deference Ambiguity and Decline*, 36 GEO. ENV'T L. REV. 269, 274 (2024) ("The Supreme Court has increasingly emphasized the need for clear statutory language, thereby limiting the applicability of Chevron deference.").

92 *See* Mead Corp., 533 U.S. at 229 (holding that Chevron deference applies when "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"); 5 U.S.C. § 551(7) (defining "adjudication" as "agency process for the formulation of an order").

93 Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1445 (2005) ("*Mead* has introduced significant uncertainty into the doctrine of judicial deference, raising the bar for agencies to receive *Chevron* deference.").

only the reasonableness of their interpretation but also their procedural authority to issue binding regulations.[94]

A more significant turning point came with *King v. Burwell*, where the U.S. Supreme Court explicitly refused to defer to the IRS's interpretation of a provision in the Affordable Care Act concerning health insurance subsidies.[95] The Court invoked what would later become known as the "major questions doctrine,"[96] holding that agencies should not receive deference on issues of "deep economic and political significance" unless Congress had clearly delegated such authority.[97] While *King* did not arise from traditional tax administration, the Court's reluctance to defer to the IRS on such an important issue sent a strong message that deference would not be assumed when agency actions had a widespread economic impact.[98]

Beyond these decisions, the broader judicial trend was one of increasing skepticism toward the power of agencies.[99] Courts became more willing to find statutory clarity at Step One of *Chevron*, thereby preempting the need for deference at Step Two.[100] This allowed judges to retain interpretive control rather than deferring to agencies.[101] In tax law, this shift was particularly impactful, as courts began striking down IRS regulations at a higher rate by concluding that the tax code was unambiguous on key

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94 Mead Corp., 533 U.S. at 229 ("Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.").

95 King, 576 U.S. at 485–86.

96 Kevin Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH J. ENV'T & ADMIN. L. 445, 447 (2016) ("The major questions doctrine serves as an exception to Chevron deference, applied when the agency's interpretation involves a question of deep economic and political significance.").

97 *See* Sharmila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 270–71 (2022) (explaining how King introduced the major questions doctrine by declining to defer to the IRS on a question of "deep economic and political significance").

98 King, 576 U.S. at 486 ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.").

99 KATE R. BOWERS & DANIEL J. SHEFFNER, CONG. RSCH. SERV., LSB10745, THE SUPREME COURT'S "MAJOR QUESTIONS" DOCTRINE: BACKGROUND AND RECENT APPLICATIONS (May 17, 2022), https://www.congress.gov/crs_external_products/LSB/PDF/LSB10745/LSB10745.1.pdf [https://perma.cc/C5FT-WKBU] ("The Supreme Court has signaled its heightened interest in applying the major questions doctrine to the review of agency actions.").

100 BRANNON & COLE, *supra* note 64, at 8 ("Courts have increasingly resolved cases at step one by finding clear meaning in statutory language, thereby precluding the need to defer to agency interpretations."); *see, e.g.*, West Virginia v. EPA, 597 U.S. 697 (2022).

101 BRANNON & COLE, *supra* note 64, at 9 ("By resolving more cases at step one, courts have limited the applicability of *Chevron* deference, maintaining greater judicial control over statutory interpretation.").

issues.[102] The IRS, once able to rely on *Chevron* to defend its rulemaking, now faced a far more challenging legal landscape.[103]

This narrowing of *Chevron* deference laid the groundwork for *Loper Bright*, which did not introduce a radical change so much as it formalized the steady judicial shift away from deference.[104] The IRS and other agencies had already been adapting to a world where courts were less willing to defer, requiring more careful statutory interpretations and a stronger emphasis on procedural justification.[105]

B. The Impact of *Chevron's* Decline on Tax Law and IRS Authority

As courts increasingly restricted Chevron deference, the IRS may have faced mounting challenges in defending its regulatory interpretations.[106] Tax law is deeply complex, with statutes often containing broad language designed to account for evolving financial practices.[107] Historically, *Chevron* allowed the IRS to fill statutory gaps, promoting consistent enforcement and reducing the likelihood of prolonged litigation.[108] However, with courts shifting away from deference, tax regulations could come under greater

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102 *See* Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 53 (2015) (insisting that the "plain text" of the tax code is unambiguous on critical issues, challengers to IRS regulations have persuaded courts to interpret statutory provisions de novo rather than defer to agency interpretations).

103 In the wake of *Loper Bright*, courts have made clear that they will no longer automatically defer to the agency's interpretations, meaning that the IRS must now defend its regulations based on independent statutory construction rather than by invoking *Chevron*'s safe harbor. *See* Jennifer Breen, Matthew D. Schnall & James G. Steele, Loper Bright *Upends Judicial Deference: Implications for the IRS, Treasury, and Taxpayers*, MORGAN, LEWIS & BOCKIUS LLP (July 2, 2024), https://www.morganlewis.com/pubs/2024/07/loper-bright-upends-judicial-deference-implications-for-the-irs-treasury-and-taxpayers [https://perma.cc/K9HB-G6MD].

104 Isaiah McKinney, *At the Supreme Court,* Chevron *Deference Has Morphed into the Application of Tools of Construction*, YALE J. ON REG.: NOTICE & COMMENT (Jan. 9, 2023), https://www.yalejreg.com/nc/chevron-deference-morphed/ [https://perma.cc/7YCU-Q992] ("In the past seven terms, the Supreme Court has found statutory language to be ambiguous in only 10% of *Chevron* cases, indicating a heightened emphasis on Step One.").

105 Levin & Wilson, *supra* note 67 (explaining how the IRS and other agencies were already modifying their approaches in anticipation of courts' reduced willingness to defer to agency interpretations).

106 Kevin Spencer, *The "Major Questions Doctrine": Another Tool to Challenge Tax Regulations?*, NAT'L L. REV. (July 1, 2022), https://www.natlawreview.com/article/major-questions-doctrine-another-tool-to-challenge-tax-regulations [https://perma.cc/B33R-2YVP] ("The application of the major questions doctrine to tax regulations means that the IRS may face increased judicial scrutiny, especially when interpreting statutes involving significant economic or political issues.").

107 Levin & Wilson, *supra* note 67 (discussing the complexity of tax law, particularly how statutory language sometimes deviates from its plain meaning).

108 *See* Breen, Schnall & Steele, *supra* note 103.

scrutiny, leading to heightened legal uncertainty and a wave of challenges to IRS rulemaking.[109]

Courts increasingly resolved cases by asserting statutory clarity early in their analysis, effectively bypassing deference to agency interpretations.[110] This shift was particularly evident in cases involving controversial tax regulations. In *Mann Construction, Inc. v. United States*,[111] the Sixth Circuit struck down an IRS reporting requirement for certain tax avoidance transactions, holding that the IRS had improperly bypassed formal rulemaking procedures under the Administrative Procedure Act (APA).[112] Without *Chevron's* protective shield, the IRS's interpretation was scrutinized more rigorously, and the court found that the agency lacked the necessary authority to impose the reporting requirement.[113]

Similarly, in *Altera Corp. v. Commissioner*,[114] the Ninth Circuit upheld an IRS regulation requiring related corporations to include stock-based compensation costs in their transfer pricing agreements.[115] While this decision ultimately favored the IRS, it demonstrated how *Chevron's* decline had changed the landscape—litigants were increasingly challenging IRS regulations on procedural and substantive grounds, and courts were more willing to question whether the agency had exceeded its authority.[116]

This heightened scrutiny extended beyond litigation and into the broader framework of tax compliance.[117] Taxpayers and practitioners, who had once been cautious about challenging IRS guidance, became emboldened to dispute regulations they viewed as overreaching.[118] Areas of tax law that had previously benefited from clear administrative guidance—such as digital

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109 Kat Lucero, *Direct Hit on Tax Regs Unlikely If Justices Ditch* Chevron, LAW360 (2024), https://www.law360.com/tax-authority/articles/1809807 (on file with Southern Illinois University Law Journal) (discussing how discarding *Chevron* could trigger a rise in lawsuits against IRS rulemaking).

110 Breen, Schnall & Steele, *supra* note 103 (recognizing that courts increasingly turned to statutory canons to resolve ambiguities at Step One).

111 Mann Constr., Inc. v. United States, 27 F.4th 1138 (6th Cir. 2022).

112 *Id.* at 1148 ("Because the IRS's process for issuing Notice 2007-83 did not satisfy the notice-and-comment procedures for promulgating legislative rules under the APA, we must set it aside.").

113 *Id.* at 1146 ("But the agency's reference to its apparent rules of process, without more, does not show that Congress exempted Notice 2007-83 from notice-and-comment rulemaking.").

114 Altera Corp. & Subsidiaries v. Comm'r, 926 F.3d 1061 (9th Cir. 2019).

115 *Id.* at 1087 ("Given the long history of the application of other methods, and the text and legislative history of the Tax Reform Act of 1984, Treasury's understanding of its power to use methodologies other than a pure transactional comparability analysis was reasonable, and we defer to its interpretation under *Chevron*.").

116 Courts were increasingly inclined to scrutinize not only the substantive merits of agency rulemaking but also the procedural underpinnings of those rules, demanding clear statutory justification rather than default deference. Levin & Wilson, *supra* note 67.

117 *Id.* (analyzing the shift whereby courts now independently assess statutory clarity rather than deferring to agency interpretations merely based on reasonableness).

118 *Id.*

asset taxation, foreign tax credit regulations, and conservation easement deductions—became legal battlegrounds as courts asserted greater interpretive control.[119]

The decline of *Chevron* also placed new constraints on the IRS's ability to issue timely and practical guidance.[120] In a post-*Chevron* world, the agency can no longer assume that its interpretations will be upheld so long as they are reasonable.[121] Instead, it must anticipate stricter judicial review, forcing the IRS to draft regulations with greater precision and provide more extensive legal justification.[122] This shift not only slows the regulatory process but also increases the risk that new guidance will be struck down, creating gaps in tax enforcement and compliance.[123]

As courts continued to assert their dominance in tax law interpretation, it became clear that the IRS needed to adapt to a legal environment in which judicial scrutiny, rather than agency discretion, shaped the contours of tax administration.[124] This transition set the stage for *Loper Bright*, removing Chevron deference entirely and formalizing the judiciary's role as the primary arbiter of statutory meaning in tax disputes.[125]

III. GOVERNMENT AT A CROSSROADS: NAVIGATING TAX LAW WITHOUT *CHEVRON*

The U.S. Supreme Court's decision to overturn *Chevron* marks a turning point for the IRS, as it fundamentally alters the IRS’s authority to interpret and enforce tax laws. First, *Chevron* provided the IRS with a legal framework that shielded its regulatory interpretations from frequent judicial challenges, promoting consistency in tax administration and allowing the agency to fill statutory gaps. Without this protection, the IRS now faces heightened judicial scrutiny, a potential increase in taxpayer litigation, and greater uncertainty in enforcing complex tax laws.

Second, courts have already begun taking a more active role in statutory interpretation, frequently rejecting IRS regulations that would have previously been upheld under *Chevron*. This shift has resulted in fragmented legal interpretations, making compliance more challenging for taxpayers and undermining regulatory predictability.

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119 *Id.*

120 *Id.*

121 *Id.*

122 Breen, Schnall & Steele, *supra* note 103 (explaining how the new judicial stance requires agencies to buttress their rulemaking with robust statutory analysis and detailed justifications).

123 *Id.*

124 Levin & Wilson, *supra* note 67 (discussing how heightened judicial review has compelled the IRS to modify its rulemaking process by relying less on agency discretion).

125 Breen, Schnall & Steele, *supra* note 103 (explaining how the Loper Bright decision eliminated automatic deference, thereby cementing the courts' authority in interpreting tax statutes).

Third, the loss of deference complicates the IRS's ability to issue timely and practical guidance, as the agency must now anticipate stricter judicial review and craft regulations with more extensive legal justification.

Finally, these developments highlight a broader challenge for tax administration: with courts assuming primary interpretive authority, the IRS may need to rethink its approach to rulemaking, engage more directly with Congress to ensure more precise statutory drafting, and explore alternative legal frameworks to support its regulatory authority.

A. Chevron's Influence on Tax Regulations and Other Interpretations

Uncertainty in tax law creates opportunities for aggressive taxpayer positions, thereby increasing complexity and inequities within the tax system.[126] When statutory provisions are ambiguous, businesses and individuals may adopt more aggressive tax planning strategies, exploiting interpretive gaps to minimize liabilities.[127] This not only complicates tax administration but also forces the IRS to expend significant resources challenging these positions, often resulting in prolonged litigation and inconsistent outcomes.[128] The *Chevron* doctrine helped mitigate this uncertainty by providing a structured framework for judicial deference to agency interpretations, thereby reinforcing the IRS's ability to interpret and apply tax statutes effectively.[129]

The IRS has historically relied on *Chevron* deference to validate its interpretative decisions in tax disputes, particularly when evaluating ambiguous statutory language.[130] By relying on *Chevron*, the IRS could justify its regulatory interpretations and defend its rulemaking against legal

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126 Levin & Wilson, *supra* note 67 (discussing the increased variability in judicial interpretation post-Chevron and its impact on tax law).

127 Herbert I. Lazerow, *Sourcing Income from Issuing Guarantees*, TAX NOTES (Sep. 16, 2024), https://www.taxnotes.com/special-reports/sourcing/sourcing-income-issuing-guarantees/2024/09/13/7l5kz (on file with Southern Illinois University Law Journal) (examining how multinational corporations use tax law ambiguities to engage in interest stripping and strategic tax planning).

128 Levin & Wilson, *supra* note 67 (explaining the burden on the IRS due to increased litigation and inconsistent judicial rulings).

129 Chevron, 467 U.S. at 842–44.

130 *See, e.g.*, Mayo, 562 U.S. at 53–58 (applying *Chevron* deference to uphold a Treasury regulation interpreting the term "student" under I.R.C. § 3121(b)(10)); Cmty. Health Sys., Inc. v. United States, 970 F.3d 1364, 1370–71 (Fed. Cir. 2020) (discussing ambiguity in the tax code's definition of "hospital"); Altera Corp. & Subsidiaries v. Comm'r, 926 F.3d 1061, 1075 (9th Cir. 2019) (holding that Treasury regulations interpreting cost-sharing arrangements under I.R.C. § 482 were entitled to *Chevron* deference).

challenges, promoting consistency in tax administration.[131] This reliance was explicitly affirmed in cases like *Mayo Foundation for Medical Education and Research v. United States*,[132] where the U.S. Supreme Court held that tax regulations are entitled to the same level of deference as rules promulgated by other federal agencies.[133] The Court's decision in *Mayo* reinforced the notion that Treasury regulations issued under general rulemaking authority should be evaluated using *Chevron's* two-step framework, further entrenching the IRS's ability to fill statutory gaps.[134]

Such reliance on *Chevron* allowed the IRS to efficiently implement and enforce complex tax codes, particularly in areas where Congress had drafted broad or imprecise statutory language, such as determining what qualifies as a business expense, defining taxable foreign income for multinational corporations, or clarifying deductions for conservation easements.[135] Given the highly technical nature of taxpayers' economic activities, which often involve intricate financial transactions and then evolve in response to changes in economic conditions and frequent legislative amendments, agency expertise could play a crucial role in promoting uniform and fair application of statutory provisions.[136] *Chevron* deference reduced uncertainty for both the IRS and taxpayers.[137]

Additionally, *Chevron's* protection helped shield the government from excessive tax litigation by discouraging taxpayers and courts from second-guessing IRS interpretations unless they were unreasonable.[138] This was

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131 Mayo, 562 U.S. at 56 ("[T]he Department issued the full-time employee rule only after notice-and-comment procedures . . . a consideration identified in our precedents as a 'significant' sign that a rule merits Chevron deference.").

132 *Id.*

133 *Id.* at 55 ("We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations.").

134 *Id.* at 57–58 ("[T]he full-time employee rule easily satisfies the second step of *Chevron*, which asks whether the Department's rule is a "reasonable interpretation" of the enacted text. . . . [T]he Department certainly did not act irrationally in concluding that these doctors . . . are the kind of workers that Congress intended to both contribute to and benefit from the Social Security system.").

135 Hickman, *supra* note 66, at 1545 ("[T]he Supreme Court was quite clear that it considered general authority Treasury regulations elaborating ambiguous or undefined statutory terms to be interpretative in nature and entitled to less deference than specific authority Treasury regulations.").

136 Leandra Lederman, *The Fight over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 669 (2012) ("[L]imiting the scope of appellate review would be appropriate (otherwise, the disparity in expertise produced under current law would continue).").

137 Kristin E. Hickman & Matthew D. Krueger, *In Search of the "Modern"* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1241 (2007) ("*Chevron*'s framework has afforded the IRS a measure of certainty in its interpretative decisions, as courts are more likely to uphold agency interpretations under this deferential standard.").

138 Avery Auton, Chevron *Deference on Trial: Evaluating the Potential Impacts on Judicial Deference to Treasury Regulations*, 92 U. CIN. L. REV. (2024), https://uclawreview.org/2024/05/01/chevron-deference-on-trial-evaluating-the-potential-impacts-on-judicial-deference-to-treasury-regulations/ [https://perma.cc/XGR2-BZUQ] ("[T]he subjectivity . . . may lead to inconsistent court

particularly important in tax law, where interpretations have a significant impact on revenue collection, taxpayer compliance, and economic behavior on a broad scale.[139] Without *Chevron*, the government now faces a heightened risk of aggressive taxpayer positions on filed tax returns, an increase in litigation, regulatory uncertainty, and challenges in tax enforcement.[140] As courts assume a more dominant role in interpreting tax statutes, the IRS might try to adapt by issuing more detailed guidance, seeking more explicit legislative mandates from Congress, and reconsidering its approach to rulemaking in a post-*Chevron* era, although the IRS may already be doing everything it can in these areas.[141]

B. Consequences of *Chevron's* Decline for Tax Law

During the decline of *Chevron* deference, courts increasingly relied on Step One of the doctrine to limit agency discretion, moving away from the more deferential framework of Step Two.[142] This shift significantly impacted tax law, as courts could take a more active role in interpreting ambiguous statutes rather than deferring to IRS regulations.[143] As judges could place greater emphasis on determining whether Congress had spoken directly to an issue, they were more likely to find statutory clarity and bypass the need to

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interpretations of IRC code sections, leaving taxpayers and businesses with less certainty in relying on the Treasury regulations and court interpretations of the IRC.").

139 *Id.* ("With large tax consequences at issue, a lack of uniformity in interpretation of Treasury regulations can lead to confusion for taxpayers, especially businesses.").

140 Michael Desmond & Nicole Butze, *IRS Should Brace for More Taxpayer Lawsuits With* Chevron*'s Death*, BLOOMBERG TAX (July 1, 2024), https://news.bloombergtax.com/tax-insights-and-commentary/irs-should-brace-for-more-taxpayer-lawsuits-with-chevrons-death (on file with Southern Illinois University Law Journal) ("What may change, however, is taxpayers' appetite for challenging regulations that require an unfavorable reporting position, knowing those regulations will now be held to a 'best interpretation' standard.").

141 Joseph K. Fabbi*, Future of IRS Authority in Question After Supreme Court Overturns* Chevron *Doctrine*, DINSMORE & SHOHL LLP (July 2, 2024), https://www.dinsmore.com/publications/future-of-irs-authority-in-question-after-supreme-court-overturns-chevron-doctrine/ ("The fallout is not clear yet, but in theory, the ruling pulls the rug out of the IRS's rulemaking authority and returns the power either to the federal courts to interpret the law, or to Congress to write and pass tax sections to the Internal Revenue Code that have clearer language.").

142 Richard Rubin, *Big Companies Get Boost in Tax Disputes*, WALL ST. J. (July 15, 2024), https://www.wsj.com/us-news/law/big-companies-get-boost-in-tax-disputes-dc597a94 (on file with Southern Illinois University Law Journal) ("The Supreme Court's new limits on federal agencies' regulatory powers are rippling through the tax system, and they are poised to tilt some disputes against the government and toward large companies.").

143 John Kruzel & Andrew Chung, *US Supreme Court Curbs Federal Agency Powers, Overturning 1984 Precedent*, REUTERS (June 28, 2024), https://www.reuters.com/legal/us-supreme-court-curbs-federal-agency-powers-overturning-1984-precedent-2024-06-28 [https://perma.cc/M5YX-8K69] ("Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority.").

evaluate the reasonableness of IRS interpretations under Step Two.[144] This trend heightened judicial scrutiny of tax regulations, particularly in complex areas like transfer pricing, partnership allocations, and conservation easements.[145]

In practical terms, increased judicial oversight has led to real-world consequences for businesses and taxpayers.[146] For instance, in transfer pricing, the loss of deference has raised the specter of inconsistent interpretations of intercompany pricing rules, forcing multinational companies to incur higher compliance costs and face greater litigation risks. These factors can ultimately translate into higher prices for consumers.[147] In the realm of partnership allocations, the narrowing of regulatory guidance has introduced uncertainty into how profits and losses are apportioned among partners, potentially disrupting business planning and impacting cash flow.[148] Similarly, in conservation easements, rolling back longstanding tax incentives has undermined the financial benefits that landowners previously relied on to offset the costs of preserving environmentally sensitive lands, thereby jeopardizing conservation efforts.[149]

As *Chevron* deference eroded, courts began overturning IRS interpretations at a higher rate, finding that many agency regulations failed at Step One.[150] This shift was evident in cases where courts engaged in a strict textual analysis to determine congressional intent, often concluding that

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144 Ryan King, *Supreme Court Smashes Power of the Administrative State in Historic* Chevron *Case*, N. Y. POST (June 28, 2024), https://nypost.com/2024/06/28/us-news/supreme-court-scraps-chevron-precedent-striping-federal-regulators-of-power (on file with Southern Illinois University Law Journal) ("The ruling significantly diminishes the power of federal regulators, impacting sectors such as . . . healthcare by allowing courts greater leeway to interpret laws independently.").

145 Gabriel Rubin, *Corporate America Revels in Supreme Court Windfall*, REUTERS (July 23, 2024), https://perma.cc/8SGD-https://www.reuters.com/breakingviews/corporate-america-revels-supreme-court-windfall-2024-07-23 (on file with Southern Illinois University Law Journal) ("*Loper Bright* . . . issued a fatal blow to the doctrine known as 'Chevron deference.' . . . The transfer of power to judges from regulators was an explicit goal.").

146 *See* Levin & Wilson, *supra* note 67.

147 *See* Altera Corp. v. Comm'r, 926 F.3d 1061, 1080–81 (9th Cir. 2019) (upholding IRS regulations requiring cost-sharing agreements in transfer pricing, even though they departed from past agency practice, demonstrating the variability in judicial interpretation).

148 *See* Container Corp. v. Comm'r, 134 T.C. 122, 141 (2010) (ruling that income from a parent company's guarantee of a subsidiary's loan should be sourced similarly to personal services income, illustrating the uncertainty in partnership and corporate tax allocation).

149 *See* Oakbrook Land Holdings, LLC v. Comm'r, 28 F.4th 700, 722 (6th Cir. 2022) (upholding Treasury regulations on conservation easements, but the regulation's validity was later questioned after *Chevron*'s demise, potentially undermining tax benefits for landowners).

150 Kasey Pittman et al., *Supreme Court Overturns* Chevron *Decision – Implications for Government Regulations Going Forward*, BAKERTILLY (July 11, 2024), https://www.bakertilly.com/insights/supreme-court-overturns-*Chevron*-decision [https://perma.cc/629J-BGJF] ("This landmark decision by the U.S. Supreme Court marks a significant shift in the landscape of federal regulatory power, especially affecting the future of tax law and IRS regulations.").

statutes were unambiguous and that the IRS had exceeded its interpretive authority.[151] In cases such as *Mann Construction*, courts rejected IRS guidance that had long relied on *Chevron's* protective shield, emphasizing that the agency could not impose regulatory burdens without explicit statutory authorization.[152] This trend discouraged courts from reaching Step Two, where agencies historically enjoyed more interpretive flexibility.[153]

The decline of *Chevron* also complicated tax compliance and increased the likelihood of litigation. Without the presumption that IRS interpretations would be upheld under Step Two, taxpayers became more willing to challenge regulations, leading to a rise in disputes over issues such as digital asset taxation, foreign tax credit calculations, and supervisory approvals under Section 6751.[154] Courts, now more focused on textual clarity, reached conflicting conclusions in different jurisdictions, contributing to legal uncertainty and making it more difficult for taxpayers and practitioners to rely on IRS guidance with confidence.[155]

Theoretically, this era of diminished deference placed the IRS in a more defensive position, requiring it to craft regulations to survive strict judicial scrutiny at Step One.[156] Arguably, the agency had to place greater emphasis on demonstrating it was following the statute in its rulemaking process, which may have resulted in narrower and more cautious regulations.[157] This shift may have slowed the agency's ability to respond to emerging tax issues, as it could no longer rely on the broad discretion once afforded under Step

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151 Rubin, *supra* note 142 ("The Supreme Court's decision limits how much deference courts give to agencies' attempts to address ambiguous laws.").

152 Mann Constr., 27 F.4th at 1144 ("Before an agency may regulate without the protections of the notice-and-comment process, it must show that Congress 'expressly' carved out the exception.").

153 Kasey Pittman et al., *supra* note 150 ("For more than four decades, the Chevron doctrine has dictated how courts defer to federal agencies' interpretations of ambiguous laws.").

154 Michael Desmond & Nicole Butze, *IRS Should Brace for More Taxpayer Lawsuits With* Chevron*'s Death*, BLOOMBERG TAX (July 1, 2024), https://perma.cc/VQ9L-ZVXZ ("The Supreme Court's decision to overturn *Chevron* deference exposes the IRS to increased litigation risks, as taxpayers may be more inclined to challenge the agency's interpretations of tax laws."); *see, e.g.*, Chai v. Comm'r, 851 F.3d 190, 221–22 (2d Cir. 2017) (holding that § 6751(b) requires written supervisory approval before the issuance of a notice of deficiency).

155 Andrew Leahey, Chevron *Doctrine's Demise Would Mean Big Changes for Tax Law*, BLOOMBERG TAX (June 28, 2024), https://news.bloombergtax.com/tax-insights-and-commentary/chevron-doctrines-demise-would-mean-big-changes-for-tax-law (on file with Southern Illinois University Law Journal) ("Without the deferential standard, courts would no longer be bound to uphold IRS regulations as authoritative interpretations of ambiguous statutes.").

156 Levin & Wilson, *supra* note 67 (discussing how the decline in *Chevron* deference forces the IRS into a defensive posture by demanding that its rulemaking survive rigorous Step One scrutiny of statutory clarity).

157 Breen, Schnall & Steele, *supra* note 103 (explaining that, with diminished deference, the IRS must now provide robust statutory justification in its rulemaking, often leading to more narrowly tailored and cautious regulations).

Two.[158] Instead, the IRS had to engage in more extensive legal justification for its interpretations, which increased administrative burdens and delayed the issuance of critical guidance.[159]

The decline of *Chevron* also exposed the judiciary's limitations in handling highly technical tax statutes. Tax law can be complex and often requires deep expertise in accounting, finance, and economic policy, areas in which courts have traditionally relied on agency expertise.[160] As judges took a more textualist approach under Step One, they sometimes applied rigid statutory interpretations that failed to account for the complexities of tax administration.[161] Without the deference *Chevron* once provided, courts struggled to establish consistent legal principles, resulting in unpredictable outcomes and a fragmented application of tax law.[162]

Finally, when courts increasingly invalidated IRS regulations under Step One, the burden of tax law clarity shifted back to Congress.[163] With agencies no longer enjoying broad interpretive discretion, ambiguities in the tax code require more explicit legislative resolution.[164] However, given the slow pace of congressional action, this shift potentially leaves gaps in

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158 Paul Williams, Chevron*'s Fall Likely to Surface in State Tax Cases, Pro Says*, LAW360 (Aug. 22, 2024), https://www.law360.com/tax-authority/articles/1869877/chevron-s-fall-likely-to-surface-in-state-tax-cases-pro-says (on file with Southern Illinois University Law Journal) (discussing concerns that textualist judicial interpretations in tax cases may fail to capture the nuances of tax administration).

159 *See* David van den Berg, *Top Federal Tax Cases of 2024: Midyear Report*, LAW360 (July 2, 2024), https://www.law360.com/tax-authority/articles/1849277/top-federal-tax-cases-of-2024-midyear-report (on file with Southern Illinois University Law Journal) (highlighting the challenges courts face in maintaining consistency in tax law following the end of *Chevron* deference).

160 Leahey, *supra* note 155 ("At its most abstract, *Chevron* gives federal agencies the ability to interpret ambiguous laws, and affords those interpretations a fair amount of deference.").

161 Michael J. Semes, *What's* Certain *in State Tax Litigation: Unpredictable Outcomes*, BLOOMBERG TAX (Jan. 24, 2022), https://news.bloombergtax.com/tax-insights-and-commentary/whats-certain-in-state-tax-litigation-unpredictable-outcomes (on file with Southern Illinois University Law Journal) (comparing cases using the same rule of interpretation where the outcomes differed, highlighting how rigid approaches can yield inconsistent results).

162 Levin & Wilson, *supra* note 67 ("With the elimination of *Chevron* deference, courts are now able to interpret statutes independently. Judges will need to delve deeper into legislative history, context, the plain meaning of statutory text and the many canons of statutory interpretation."); *see, e.g.*, Thor Power Tool Co. v. Comm'r, 439 U.S. 522 (1979) (statutory interpretation led to an outcome that was unfavorable to the taxpayer, highlighting the potential for unpredictable results when courts do not defer to agency expertise).

163 Nancy C. Staudt, René Lindstädt & Jason O'Connor, *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954–2005*, 82 N.Y.U. L. REV. 1340, 1342 (2007) ("[L]egislators are often quite supportive of Supreme Court opinions and frequently codify case outcomes, thereby cementing judicial views into new legislation.").

164 Levin & Wilson, *supra* note 67 ("[A] post-Chevron [sic] world forces taxpayers to go to Congress when a tax provision, as passed, is not working. The IRS' limited ability to clarify or assist through the regulatory process may cause the IRS to forego that process altogether and shift that responsibility to the courts.").

regulatory guidance, creating further uncertainty for taxpayers and complicating enforcement for the IRS.[165]

Ultimately, the decline of *Chevron* deference may reshape tax law by curtailing the IRS's interpretive authority, increasing judicial scrutiny, and leading to greater uncertainty in tax compliance.[166] While this period stopped short of eliminating *Chevron*, it set the stage for its eventual overturning in *Loper Bright*, reinforcing the judiciary's primary role in statutory interpretation and signaling the end of agency-driven tax law development.[167]

C. The Practical Challenges for the Government Post-*Chevron*

The IRS's ability to clarify and enforce ambiguous tax laws faces significant strain without the deference once provided by *Chevron*.[168] Historically, courts recognized the IRS's expertise in interpreting highly technical tax statutes, granting it considerable discretion to fill gaps where congressional intent was unclear.[169] With *Chevron's* removal, that discretion is significantly curtailed, placing a greater burden on Congress to draft tax laws with precision and leaving less room for the IRS to interpret unclear provisions in a manner that provides necessary guidance to sophisticated

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165 Politico Staff, *The Supreme Court Unspools Washington's Big Business - and Puts New Strain on Congress*, POLITICO (June 28, 2024), https://www.politico.com/news/2024/06/28/supreme-court-chevron-biden-presidents-00165234 (explaining that the ruling transfers the responsibility of detailed legislative clarification back to Congress, potentially causing institutional gridlock as Congress struggles to address complex and evolving issues).

166 Kat Lucero, *IRS Faces Rulemaking Pressure Following* Chevron*'s Demise*, LAW360 (July 1, 2024), https://www.law360.com/tax-authority/articles/1853258/irs-faces-rulemaking-pressure-following-chevron-s-demise (on file with Southern Illinois University Law Journal) (discussing the impact of increased judicial scrutiny on IRS rulemaking following the decline of Chevron deference).

167 Varu Chilakamarri, Tre Holloway & Michael Scanlon, *3 Ways Agencies Will Keep Making Law After* Chevron, LAW360 (July 2, 2024), https://www.law360.com/articles/1854559/3-ways-agencies-will-keep-making-law-after-chevron (on file with Southern Illinois University Law Journal) (explaining how *Loper Bright* ultimately overturned *Chevron*, cementing the judiciary's primary role in statutory interpretation and diminishing agency authority).

168 *See* Lucero, *supra* note 166 (noting that the IRS will face increased challenges in enforcing tax laws without the benefit of *Chevron* deference); *see also* Breen, Schnall & Steele, *supra* note 103 (exploring the strain on IRS enforcement post-*Chevron*).

169 Levin & Wilson, *supra* note 67 (discussing how courts historically relied on IRS expertise for interpreting complex tax statutes); Hoffer & Walker, *supra* note 102 (analyzing how the Supreme Court's approach to tax law has evolved, particularly regarding agency deference).

taxpayers.[170] This shift complicates the IRS's ability to administer and enforce tax laws efficiently.[171]

One of the most immediate consequences of this change may be the IRS's diminished ability to respond to emerging tax issues.[172] Tax law frequently evolves to address new economic realities, such as digital assets,[173] gig economy income,[174] and international economic innovations.[175] In the past, the IRS could use its regulatory authority to clarify ambiguities in these areas, knowing that courts would likely defer to its reasonable interpretations.[176] Now that courts are applying independent judgment to statutory ambiguities, the IRS may approach rulemaking with greater caution.[177] This change could hinder the agency's ability to issue timely and enforceable regulations on pressing issues like cryptocurrency taxation, climate-focused tax incentives, and evolving corporate structures.[178] The agency may hesitate to introduce new rules without explicit statutory backing, potentially leaving taxpayers without clear compliance pathways.[179]

Furthermore, in some situations, the IRS may choose to skip the procedural burden of issuing regulations under the APA and instead use more

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170 Edward Froelich, *After* Chevron*: Delegation of Authority and Tax Regulators*, LAW360 (Aug. 5, 2024), https://www.law360.com/articles/1866092/after-chevron-delegation-of-authority-and-tax-regulators (on file with Southern Illinois University Law Journal) (explaining how the removal of *Chevron* shifts the burden to Congress to draft clearer tax laws and limits IRS interpretive authority); Staudt, Lindstädt & O'Connor, *supra* note 163, at 1342–46 (discussing Congress's historical role in responding to judicial tax rulings).

171 Van den Berg, *supra* note 159 (highlighting how Loper Bright increases regulatory uncertainty, making tax enforcement more difficult for the IRS).

172 Breen, Schnall & Steele, *supra* note 103 (analyzing the IRS's reduced flexibility in addressing emerging tax challenges post-*Chevron*).

173 *Digital assets*, IRS (last updated Feb 3, 2026) https://www.irs.gov/filing/digital-assets [https://perma.cc/6CC3-T48M] ("The tax definition of a digital asset is any digital representation of value recorded on a cryptographically secured, distributed ledger (blockchain) or similar technology.").

174 *Gig Economy Tax Center*, IRS (July 8, 2025), https://www.irs.gov/businesses/gig-economy-tax-center [https://perma.cc/5XNE-LTVH] ("The gig economy—also called sharing economy or access economy—is activity where people earn income providing on-demand work, services or goods. Often, it's through a digital platform like an app or website.").

175 Staudt, Lindstädt & O'Connor, *supra* note 163, at 1397 (describing how tax law has evolved in response to economic changes).

176 Levin & Wilson, *supra* note 67 (noting how *Chevron* deference previously allowed the IRS to interpret ambiguities efficiently).

177 Froelich, *supra* note 170 (explaining why the IRS must be more cautious in rulemaking due to increased judicial scrutiny).

178 Lucero, *supra* note 109 (exploring concerns about delays in IRS guidance on cryptocurrency and climate tax incentives).

179 *See* van den Berg, *supra* note 159 (highlighting the risk that the IRS may refrain from issuing regulations without clear statutory authority); *see also* Dudley, *supra* note 18 (exploring the long-term effects of judicial constraints on agency rulemaking).

revenue rulings and other informed guidance.[180] The notice-and-comment process, which agencies must follow to issue formal regulations, is already time-consuming and resource-intensive.[181] Without *Chevron*, courts may demand even more rigorous justifications for new IRS regulations, scrutinizing them for consistency with congressional intent rather than simply assessing their reasonableness.[182] This heightened standard could lead to prolonged delays in issuing critical tax guidance, leaving taxpayers and businesses in legal limbo as they await clarification on key provisions of the tax code. Alternatively, the IRS may choose to provide more revenue rulings.[183]

Sub-regulatory guidance, such as revenue rulings, notices, and procedural regulations, has always faced heightened judicial skepticism.[184] These forms of guidance have traditionally allowed the IRS to respond quickly to interpretive questions without undergoing the whole rulemaking process.[185] Without *Chevron*, courts may be even more suspicious and reject these interpretations unless they align closely with the plain text of the statute or other established methods of statutory construction.[186] This judicial attitude of suspicion toward the IRS may encourage taxpayers to be more aggressive on their tax returns, creating greater uncertainty for all taxpayers, especially in areas where guidance is essential for compliance, such as deductions, credits, and reporting requirements.[187]

Another significant challenge involves enforcing retroactive tax rules.[188] *Chevron* previously played a key role in supporting the IRS's authority to apply regulations retroactively, particularly in cases where

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180 Froelich, *supra* note 170 (explaining how the IRS faces heightened procedural challenges after *Chevron*'s demise).

181 Staudt, Lindstädt & O'Connor, *supra* note 163, at 1397 (analyzing Congress's role in tax regulation and the procedural constraints agencies face under the APA).

182 Kristin Oglesby, *Granting* Chevron *Deference to IRS Revenue Rulings: The "Charitable" Thing to Do*, 78 LA. L. REV. 631, 637 (2018) (analyzing past reliance on *Chevron* in tax administration).

183 David Hansen, *Tax Court Rejects Bid to Change Ruling Post*-Chevron, LAW360 (Aug. 29, 2024), https://www.law360.com/tax-authority/articles/1874571/tax-court-rejects-bid-to-change-ruling-post-chevron (on file with Southern Illinois University Law Journal) (highlighting how courts are increasingly skeptical of IRS regulations, creating uncertainty for taxpayers).

184 Breen, Schnall & Steele, *supra* note 103 (analyzing the post-*Chevron* legal risks associated with sub-regulatory tax guidance).

185 Oglesby, *supra* note 182, at 641 (exploring how IRS revenue rulings historically benefited from judicial deference).

186 *See* Staudt, Lindstädt & O'Connor, *supra* note 163, at 1397 (discussing judicial oversight of tax guidance and statutory interpretation).

187 Hansen, *supra* note 183 (illustrating how courts are scrutinizing sub-regulatory guidance more aggressively).

188 James M. Puckett, *Embracing the Queen of Hearts: Deference to Retroactive Tax Rules*, 40 FLA. ST. U. L. REV. 349, 366–74 (2013) (analyzing how *Chevron* previously upheld the IRS's authority to apply retroactive tax regulations).

statutory ambiguities justified such action.[189] Without judicial deference, courts may be more likely to strike down IRS efforts to enforce tax rules retroactively, leading to potential revenue losses and undermining the IRS's ability to deter aggressive tax planning strategies.[190] This shift could encourage more litigation from taxpayers seeking to challenge IRS enforcement actions because retroactive rules exceed the agency's authority.[191]

The post-*Chevron* landscape places the government at a critical juncture. While the increased judicial scrutiny of IRS regulations fosters accountability and promotes adherence to congressional intent, it also risks destabilizing tax administration by introducing greater legal uncertainty.[192] The IRS must now navigate a regulatory environment in which its interpretations are more vulnerable to legal challenges, requiring it to adapt its rulemaking strategies to withstand rigorous judicial review or rely on more sub-regulatory guidance.[193]

IV. CHARTING A NEW COURSE: SOLUTIONS FOR A POST-*CHEVRON* ERA

The absence of *Chevron* deference forces courts, agencies, and lawmakers to reconsider the balance of interpretive authority in administrative law. First, courts must develop alternative frameworks for reviewing agency decisions that acknowledge the expertise of agencies like the IRS while maintaining judicial independence. Approaches such as *Skidmore* deference, which evaluates the persuasiveness of an agency's interpretation rather than deferring outright, may offer a more flexible and balanced model.[194]

Second, the IRS must navigate this new legal landscape by enhancing transparency and accountability in its rulemaking process. Strengthening public participation, improving data disclosure, and ensuring thorough justifications for regulatory decisions will be critical in maintaining the agency's credibility and effectiveness.

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189 *Id.*

190 Breen, Schnall & Steele, *supra* note 103 (examining the IRS's reduced ability to enforce tax rules retroactively).

191 Hansen, *supra* note 183 (analyzing how recent court decisions reflect skepticism toward IRS regulatory authority).

192 Lucero, *supra* note 166 (discussing the IRS's new regulatory challenges following the loss of *Chevron* deference).

193 Froelich, *supra* note 170 (discussing how the IRS must refine its rulemaking strategies to align with stricter judicial review).

194 Skidmore, 323 U.S. at 140.

Third, legislative clarity is now more critical than ever, as Congress must draft tax laws with greater precision to reduce reliance on administrative interpretation and prevent legal uncertainty.

Finally, this shift presents an opportunity to recalibrate the broader regulatory framework governing tax law, ensuring that agencies, courts, and lawmakers collaborate to create a more stable and predictable tax system that aligns with evolving judicial expectations and economic realities.

A. Recalibrating Judicial Review of Agency Decisions

In the absence of *Chevron* deference, courts and policymakers should consider alternative frameworks that respect both agency expertise and the independence of the judiciary.[195] A purely textualist approach risks disregarding the specialized knowledge agencies bring to complex regulatory matters, while unchecked deference could undermine judicial oversight.[196] The challenge, then, is to develop standards that allow agencies like the IRS to contribute their expertise while ensuring that courts retain their role as the ultimate arbiters of statutory meaning.[197] One such alternative is *Skidmore* deference, a judicial doctrine derived from *Skidmore v. Swift & Co.*,[198] which offers a potential middle-ground solution.[199]

Although not discussed in *Chevron* itself, *Skidmore* gained renewed relevance in later cases such as *Mead*, which clarified that when agency interpretations do not carry the force of law, courts may still afford them respect based on their thoroughness, reasoning, and consistency.[200] By adopting nuanced approaches that assess the quality, consistency, and

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195 *Id.* (analyzing potential frameworks for maintaining agency expertise while respecting judicial authority).

196 Hoffer & Walker, *supra* note 102, at 48–50 (analyzing the judicial shift toward textualism and its implications for agency expertise).

197 *See* Dudley, *supra* note 18 (exploring alternative administrative law frameworks); *see also* Kat Lucero, Chevron *Ruling No Sea Change for Tax Court, Judge Says*, LAW360 (June 28, 2024), https://www.law360.com/tax-authority/articles/1852881/chevron-ruling-no-sea-change-for-tax-court-judge-says (on file with Southern Illinois University Law Journal) (discussing the potential for Skidmore as a guiding principle in judicial review).

198 *See generally* Skidmore v. Swift & Co., 323 U.S. 134 (1944).

199 Kelly Walker, *Revisiting* Skidmore *Deference After* Loper Bright, J. ACCT. (Dec. 1, 2024), https://www.journalofaccountancy.com/issues/2024/dec/revisiting-skidmore-deference-after-loper-bright [https://perma.cc/96MU-R298] (analyzing the effectiveness of *Skidmore* as a judicial tool in the absence of *Chevron*).

200 *See* Skidmore, 323 U.S. at 140 (stating that agency interpretations are entitled to respect to the extent they have the "power to persuade"); *see also* Mead Corp., 533 U.S. at 234–35 (clarifying that when *Chevron* deference does not apply, agency interpretations may still merit respect under *Skidmore*).

transparency of agency interpretations, courts can promote a balanced system that fosters predictability and accountability in tax law administration.[201]

Skidmore has gained renewed significance and provides a more flexible standard of judicial review.[202] Unlike *Chevron*, which required courts to defer to reasonable agency interpretations of ambiguous statutes, Skidmore deference offers a balanced approach by allowing courts to consider the persuasiveness of agency interpretations rather than granting them binding authority.[203] Factors such as consistency, thoroughness, and reasoning guide judicial evaluations.[204] For the IRS, this standard provides an opportunity to retain influence through well-reasoned and carefully documented regulations.[205]

Mead serves as a critical case in understanding when and how courts apply *Skidmore* deference, rather than the more substantial *Chevron* deference, to agency interpretations.[206] The case involved the U.S. Customs Service's tariff classification rulings, which assigned specific tariff rates to certain imported goods.[207] Mead Corp. challenged the classification, arguing that the agency's decision was inconsistent and lacked formal rulemaking procedures.[208] The U.S. Supreme Court ultimately held that the classification rulings did not warrant *Chevron* deference because they were not issued through a formal process, such as notice-and-comment rulemaking.[209]

However, rather than dismissing the agency's interpretation outright, the Court applied *Skidmore* deference, assessing the persuasiveness of the Customs Service's interpretation based on factors such as thoroughness,

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201 *See* van den Berg, *supra* note 159 (highlighting emerging judicial approaches to reviewing IRS regulations post-*Chevron*).

202 Loper Bright, 603 U.S. at 388 ("[T]he 'interpretations and opinions' of the relevant agency, 'made in pursuance of official duty' and 'based upon . . . specialized experience,' 'constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance,' even on legal questions." (quoting Skidmore, 323 U.S. at 139–40).

203 Walker, *supra* note 199 (discussing the application of Skidmore deference following the overruling of *Chevron* in *Loper Bright*).

204 Auton, *supra* note 138 (analyzing how Skidmore deference considers factors like consistency and thoroughness in agency interpretations).

205 Kristin E. Hickman, *Are IRS Revenue Rulings Eligible for* Chevron *Review?*, REGUL. REV. (Nov. 25, 2013), https://www.theregreview.org/2013/11/25/25-hickman-irs-revenue-rulings [https://perma.cc/JP5Y-DR64] (exploring the applicability of *Skidmore* deference to IRS revenue rulings).

206 Mead Corp., 533 U.S. at 226–27 (clarifying the distinction between *Chevron* and *Skidmore* deference).

207 *Id.* at 221–22 (describing how the U.S. Customs Service classified Mead's day planners under a particular tariff).

208 *Id.* at 224–25 (noting that *Mead* challenged the classification as inconsistent and lacking formal rulemaking procedures).

209 *Id.* at 226–27 (holding that tariff classification rulings are not subject to *Chevron* deference because they do not carry the force of law).

consistency, and reasoning.[210] The Court emphasized that even when an agency's interpretation does not carry the force of law, it may still be given weight if it demonstrates expertise and well-reasoned analysis.[211] This decision reinforced the idea that agency interpretations, while no longer automatically binding, can still influence judicial outcomes when they are sufficiently persuasive.[212]

For the IRS, *Mead* illustrates the path forward in a post-*Chevron* landscape.[213] While IRS regulations and guidance, such as revenue rulings and notices, may no longer receive automatic judicial deference, courts may still consider them under *Skidmore* if they reflect careful legal reasoning and align with prior interpretations.[214] This means the IRS must focus on producing well-reasoned, consistent, and logically sound guidance to maintain judicial influence.[215]

Skidmore's flexibility allows courts to engage meaningfully with IRS interpretations, particularly in cases where the agency provides detailed guidance in ambiguous or evolving areas of tax law.[216] These areas may include complex and rapidly changing issues such as cryptocurrency taxation, digital transactions, the treatment of gig economy income, and cross-border tax compliance.[217] Because tax laws often lag behind technological and economic developments, the IRS frequently issues guidance to clarify its interpretation of existing statutes and regulations in these emerging areas.[218]

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210 *Id.* at 234–35 (applying *Skidmore* deference and evaluating the agency's reasoning, consistency, and persuasiveness).

211 *Id.* at 235 (explaining that even non-binding agency interpretations may warrant judicial respect based on their reasoning and expertise).

212 Skidmore, 323 U.S. at 140 (establishing that agency interpretations, while not controlling, are entitled to respect based on their thoroughness and validity).

213 Walker, *supra* note 199 (discussing the implications of the *Mead* decision for IRS guidance and the necessity for the IRS to adapt its practices in a post-*Chevron* era).

214 *See* Mead Corp., 533 U.S. at 235 (holding that agency interpretations lacking the force of law may still receive *Skidmore* deference based on their persuasiveness); *see also* Skidmore, 323 U.S. at 140 (establishing that the weight of an agency's judgment depends on its thoroughness, consistency, and reasoning).

215 Walker, *supra* note 199 (emphasizing the importance for the IRS to produce well-reasoned and consistent guidance to maintain judicial influence under *Skidmore* deference).

216 *See, e.g.*, Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (applying *Skidmore* deference to an agency's informal interpretation when it lacks the force of law).

217 *See, e.g.*, I.R.S. Notice 2014-21, 2014-16 I.R.B. 938 (providing guidance on the tax treatment of virtual currencies); *Gig Economy Tax Center*, *supra* note 174 (providing guidance on tax obligations for gig economy workers); *Digital Assets*, *supra* note 173 (providing guidance on tax obligations for digital asset transactions).

218 *See, e.g.*, 2014-16 I.R.B. 938 (providing guidance on the tax treatment of virtual currencies); *Gig Economy Tax Center*, *supra* note 174 (providing guidance on tax obligations for gig economy workers); *Digital Assets*, *supra* note 173 (providing guidance on tax obligations for digital asset transactions).

To this end, IRS sub-regulatory tools, such as revenue rulings, revenue procedures, and notices, serve as critical tools for interpreting tax law.[219] Revenue rulings are official IRS pronouncements that apply the law to a particular factual situation, providing guidance for taxpayers in similar circumstances.[220] Revenue procedures outline IRS practices and procedures for tax administration, often explaining how taxpayers can comply with reporting or filing requirements.[221] Notices are public statements that provide timely guidance on new tax issues, sometimes serving as a precursor to formal regulations.[222] These informal tools, which do not involve public notice and comment, help the IRS communicate its position on complex tax matters without engaging in lengthy rulemaking processes.[223] Under *Skidmore*, courts may give weight to these forms of guidance if they are well-reasoned, consistently applied, and supported by thorough legal and economic analysis.[224] This is particularly important in areas where the statutory text is silent or ambiguous, allowing the IRS to fill interpretative gaps with practical solutions.[225]

For example, in the realm of cryptocurrency taxation, the IRS has issued multiple notices and revenue rulings to clarify how digital assets should be treated for tax purposes.[226] Given the evolving nature of cryptocurrency markets and the absence of explicit statutory provisions, the IRS's interpretations carry weight if they are backed by strong economic analysis, historical legislative intent, and cross-border regulatory comparisons.[227] The agency could strengthen its position under *Skidmore* by incorporating data on market behaviors, referencing international tax norms, and drawing connections to existing tax principles governing property transactions.[228] By

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219 *See Understanding IRS guidance – A Brief Primer*, IRS (May 29, 2025), https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer [https://perma.cc/7Q4R-PCSF].

220 *Id.*

221 *Id.*

222 *Id.*

223 *Id.*

224 Skidmore, 323 U.S. at 140 (holding that the weight of an agency's judgment depends on its thoroughness, consistency, and reasoning).

225 *Id.* (emphasizing that agency interpretations can guide courts when statutory text is silent or ambiguous).

226 *See, e.g.*, I.R.S. Notice 2014-21, 2014-16 I.R.B. 938 (providing guidance on the tax treatment of virtual currencies); *Digital Assets*, *supra* note 173 (listing various IRS notices and revenue rulings related to digital assets).

227 *See* McDermott Will & Schulte, *The Legal Effect of IRS Pronouncements on Virtual Currency*, JDSUPRA (June 3, 2020), https://www.jdsupra.com/legalnews/the-legal-effect-of-irs-pronouncements-25516 [https://perma.cc/H8L3-9MGZ] (discussing the importance of economic analysis and legislative intent in IRS guidance on virtual currencies).

228 *See United States – IRS Guidance on Taxation of Cryptocurrency*, KPMG (Oct. 18, 2019), https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2019/10/fa19-159.pdf [https://perma.cc/MRP5-83PY] (suggesting that aligning IRS guidance with international tax norms and existing tax principles can enhance its persuasiveness).

doing so, the IRS would demonstrate its technical expertise and administrative consistency, making its interpretations more likely to be accepted by courts.[229]

Similarly, in transfer pricing disputes, where multinational corporations allocate income and expenses across jurisdictions, IRS guidance can gain judicial acceptance if it is supported by a clear methodology, economic justification, and a track record of consistent enforcement.[230] Transfer pricing rules require multinational companies to set prices for transactions between their related entities as if the parties were unrelated and negotiating independently.[231] The IRS's success in litigating these cases depends on its ability to persuasively demonstrate why its approach aligns with the underlying statutory framework, economic principles, and international standards like the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines.[232] If the agency provides well-documented reasoning and applies its approach uniformly across cases, courts should be more likely to give its interpretations deference under *Skidmore*.[233]

Ultimately, *Skidmore* provides an avenue for the IRS to earn judicial acceptance based on the quality of its arguments rather than through automatic deference. This heightens the importance of the agency's ability to issue well-supported and logically sound interpretations, especially in areas where tax law lags behind economic and technological developments.[234] By crafting guidance that is both analytically rigorous and practically applicable, the IRS can maintain influence in the courts, even as *Chevron* deference fades.

B. A Return to Tax Exceptionalism

While *Skidmore* deference allows courts to weigh the persuasiveness of an agency's statutory interpretation, another potential avenue for maintaining

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229 *See* McDermott Will & Schulte, *supra* note 227 (noting that well-reasoned and consistent IRS interpretations are more likely to be upheld under *Skidmore* deference).

230 *See, e.g.*, I.R.C. § 482.

231 *See id.* (authorizing the IRS to allocate income and deductions among related entities to ensure that transactions are conducted at arm's length).

232 *See, e.g.,* ORG. FOR ECON. COOP. & DEV., OECD TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS (Jan. 20, 2022), https://www.oecd.org/content/dam/oecd/en/publications/reports/2022/01/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2022_57104b3a/0e655865-en.pdf [https://perma.cc/H3U3-LS5F] (providing international standards for transfer pricing).

233 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that the weight of an agency's judgment depends on its thoroughness, consistency, and reasoning).

234 *See* Walker, *supra* note 199 (discussing the importance of well-reasoned IRS guidance in the absence of *Chevron* deference).

agency influence is a return to tax exceptionalism. The concept of tax exceptionalism refers to the idea that tax law, due to its complexity, unique statutory structure, and revenue-generating function, should be treated differently from other areas of administrative law.[235] In the wake of *Loper Bright*, tax exceptionalism offers a potential framework for preserving some level of deference to IRS regulations.[236] This approach argues that because tax administration involves intricate financial systems, constant statutory amendments, and the need for uniform enforcement, courts should recognize the IRS's expertise in interpreting tax laws, even without formal *Chevron* deference.[237]

One key justification for tax exceptionalism is the highly technical nature of tax statutes.[238] Most courts, as generalist institutions, lack the expertise required to interpret these highly technical provisions accurately.[239] While other agencies also deal with complex regulatory frameworks, the IRS operates within a statutory scheme that often requires precise numerical and economic calculations, rather than broad policy judgments.[240] The agency's role is not only to implement tax policy but also to ensure that its interpretations align with a cohesive statutory system where changes in one provision can ripple across the entire tax code.[241] Given this structural complexity, IRS guidance may provide necessary clarity and continuity, making some level of judicial deference essential for consistency and predictability.[242] Without it, courts may struggle to maintain uniform tax

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235 *See* Hickman, *supra* note 66, at 1545 (arguing that IRS guidance is essential for consistency and predictability in tax administration due to the complexity of the tax code).

236 *See* Alex Heaton, *Long Live Tax Exceptionalism? - The Impact of* Loper Bright *I.R.C. § 7805*, 113 KY. L.J. ONLINE (Oct. 20, 2024), https://www.kentuckylawjournal.org/blog/long-live-tax-exceptionalism-the-impact-of-loper-bright-irc-7805 [https://perma.cc/N4A2-JFK2] (exploring how the *Loper Bright* decision may revive discussions on tax exceptionalism).

237 *See* Tim Shaw, *Tax Pros Discuss Impact of* Loper Bright *on IRS Regs*, THOMSON REUTERS TAX & ACCT. NEWS (July 29, 2024), https://tax.thomsonreuters.com/news/tax-pros-discuss-impact-of-loper-bright-on-irs-regs/ (discussing the potential implications of the *Loper Bright* decision on IRS regulatory authority and the concept of tax exceptionalism).

238 *See* Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 473–74 (2013) (discussing the complexity and technical nature of tax statutes as a basis for tax exceptionalism).

239 *See* Steve R. Johnson, *Reasoned Explanation and IRS Adjudication*, 63 DUKE L.J. 1771, 1778 (2014) (noting that generalist courts may lack the specialized expertise required for accurate interpretation of complex tax provisions).

240 *See* Lederman, *supra* note 136, at 650 (highlighting the IRS's need for precision in numerical and economic calculations within its statutory framework).

241 *See* Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?,* 63 DUKE L.J. 1897, 1905 (2014) (explaining the IRS's role in maintaining coherence within the tax code and the systemic impact of changes in tax provisions).

242 *See* Hickman, *supra* note 66, at 1545 (arguing that IRS guidance is essential for consistency and predictability in tax administration due to the complexity of the tax code).

interpretations, leading to uncertainty for taxpayers and potential revenue shortfalls for the government.[243]

Additionally, the IRS's role in revenue collection and fiscal policy distinguishes it from other regulatory agencies.[244] Unlike environmental or labor agencies, which primarily regulate private conduct, the IRS is responsible for administering statutes that directly fund government operations, making it central to national economic stability.[245] Tax administration requires a high degree of predictability, as both the government and taxpayers rely on consistent interpretations of tax law to make financial decisions.[246] Abrupt judicial reversals of IRS interpretations could not only increase litigation but also disrupt revenue collection, creating fiscal uncertainty and undermining public confidence in the tax system.[247]

While the U.S. Supreme Court in *Mayo* declined to recognize tax exceptionalism, earlier cases have treated tax law as distinct in specific contexts.[248] For instance, in *Flint v. Stone Tracy Co.*,[249] the Court upheld a federal tax on corporate income, emphasizing the unique nature of taxation and the government's broad authority in this domain.[250] Similarly, in *Gregory v. Helvering*,[251] the Court applied the "substance over form"[252] doctrine, highlighting the distinct principles governing tax law to prevent tax

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243 *See* Steve R. Johnson, *The Rise and Fall of* Chevron *in Tax: From the Early Days to King and Beyond*, 2015 PEPP. L. REV. 19, 22 (2015) (discussing potential challenges in maintaining uniform tax interpretation without judicial deference to IRS guidance).

244 *See The Agency, Its Mission and Statutory Authority*, IRS (May 29, 2025), https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority [https://perma.cc/ZNT8-QCY5] (noting that the IRS collected almost $4.7 trillion in revenue in fiscal year 2023, underscoring its central role in funding government operations).

245 *See* Plunkett Cooney, *How the Reversal of* Chevron *Will Impact the IRS*, DBUSINESS MAG. (Sep. 9, 2024), https://www.dbusiness.com/sponsor-content/how-the-reversal-of-chevron-will-impact-the-irs [https://perma.cc/C4N6-TL9U] (discussing the unique position of the IRS in administering statutes that fund government operations and its centrality to economic stability).

246 *See IRS Oversight Organizations*, IRS (Sep. 13, 2025), https://www.irs.gov/about-irs/irs-oversight-organizations [https://perma.cc/ZVP3-QGDU] (highlighting the importance of consistent tax administration for both government and taxpayers).

247 *See* Lawrence Hill, Shannen W. Coffin & Nick Sutter, *Supreme Court Opens the Doors to Federal Court Challenges to Treasury and IRS Regulations*, STEPTOE LLP (July 15, 2024), https://www.steptoe.com/en/news-publications/supreme-court-opens-the-doors-to-federal-court-challenges-to-treasury-and-irs-regulations.html [https://perma.cc/RQ56-KMT4] (exploring how judicial reversals of IRS interpretations could increase litigation and disrupt revenue collection).

248 Mayo, 562 U.S. at 55 ("We are not inclined to carve out an approach to administrative review good for tax law only.").

249 Flint v. Stone Tracy Co., 220 U.S. 107 (1911).

250 *Id.* at 145–47 (upholding a corporate excise tax as a constitutional exercise of Congress's taxing power and recognizing the distinctive nature of tax in economic regulation).

251 Gregory v. Helvering, 293 U.S. 465 (1935).

252 *See, e.g.*, Estate of Weinert v. Comm'r, 294 F.2d 750, 755 (5th Cir. 1961) (noting the substance-over-form doctrine provides that the tax consequences of a transaction are determined by its underlying substance rather than its legal form).

avoidance schemes.[253] These cases suggest that, historically, the judiciary has occasionally acknowledged the unique characteristics of tax law, even if it has not explicitly endorsed a broad doctrine of tax exceptionalism.

In light of these considerations, revisiting tax exceptionalism offers a pragmatic path forward in a post-*Chevron* world. While courts must retain their role as final interpreters of the law, recognizing the technical complexity and fiscal importance of tax administration could justify a more context-sensitive form of deference to the IRS. This need not mean a wholesale return to the *Chevron* regime, but rather a judicial posture that accords respectful weight to IRS interpretations where warranted, particularly when consistency and expertise are essential to preserving the coherence and functionality of the tax system. In the absence of a formal deference doctrine, a tailored approach grounded in the realities of tax law may offer a middle course between judicial supremacy and administrative paralysis.

C. Enhancing Agency Accountability and Transparency

The need for clear, precise legislation is paramount in mitigating reliance on agency deference.[254] If Congress drafted tax statutes with unambiguous language, it would significantly reduce the interpretive burden on agencies and the courts.[255] This is particularly important in areas prone to rapid evolution, such as cryptocurrency taxation or international profit allocation.[256] For example, clear statutory definitions of digital assets and explicit rules on reporting requirements could eliminate the need for extensive interpretive regulations by the IRS. Similarly, legislative precision in transfer pricing provisions could preempt disputes over what constitutes an "arm's length" standard under Section 482.[257] When Congress provides clear statutory mandates, the IRS can focus on enforcement rather than

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253 Gregory, 293 U.S. at 469–70 ("The whole undertaking, though conducted according to the [corporate forms prescribed by statute], was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else.").

254 Loper Bright, 603 U.S. at 404–05 (emphasizing that courts must now exercise independent judgment in interpreting statutes and rejecting the presumption that ambiguity implies congressional delegation).

255 *See* Levin & Wilson, *supra* note 67 (observing that clearer legislative drafting can help reduce the judicial and administrative burden in tax interpretation).

256 *See id.*

257 *See* Treas. Reg. § 1.482-1(b)(1) (2003) ("The standard to be applied in every case is that of a taxpayer dealing at arm's length with an uncontrolled taxpayer."); *see also* Altera Corp. v. Comm'r, 926 F.3d 1061, 1067 (9th Cir. 2019) (upholding Treasury's cost-sharing regulations under *Chevron* deference, despite objections to the lack of comparable arm's-length data).

interpretation, fostering greater consistency and predictability in the application of tax laws.[258]

Legislative clarity benefits both the IRS and taxpayers by fostering a more consistent and efficient tax system.[259] For the IRS, it reduces the need for regulatory interventions, allowing the agency to allocate resources toward enforcement and taxpayer assistance rather than litigation.[260] Precise statutes also reduce the risk of courts overturning IRS guidance, as judicial review would focus on clear legislative intent rather than conflicting interpretations of the guidance.[261] For taxpayers, clarity in the law minimizes compliance costs and uncertainty, ensuring that individuals and businesses can accurately plan their tax strategies.[262] Legislative efforts targeting contemporary challenges—such as Global Intangible Low-Taxed Income (GILTI)[263] rules or the taxation of decentralized finance (DeFi) transactions—could serve as models for drafting statutes that align with modern economic realities.[264] These efforts would benefit the IRS and reinforce the stability and reliability of the broader tax system.

Expanding notice-and-comment procedures fosters greater public engagement in the IRS's rulemaking process by creating more opportunities for meaningful stakeholder input on complex tax regulations.[265] This expansion can take several practical forms, such as extending comment periods, hosting public hearings or virtual roundtables, translating notices

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258 Loper Bright, 603 U.S. at 414 (noting that without *Chevron*, agencies must rely on statutory clarity and cannot assume deference for policy-laden interpretations).

259 *See id.* at 404–05 (emphasizing that judicial interpretation must rest on statutory clarity, not presumed delegations).

260 *See* Levin & Wilson, *supra* note 67 (noting that clear statutes reduce the need for complex IRS regulations and allow the agency to redirect its focus to enforcement).

261 *See* Loper Bright, 603 U.S. at 391–92 ("The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It [APA] specifies that courts, not agencies, will decide '*all* relevant questions of law' . . . even those involving ambiguous laws.") (alteration in original) (quoting 5 U.S.C. § 706).

262 *See* Levin & Wilson, *supra* note 67 (observing that the lack of clarity in tax law increases taxpayer risk and compliance burdens).

263 Joseph Johns, *GILTI Tax Treatment by State, 2024*, TAX FOUND. (Oct. 15, 2024), https://taxfoundation.org/data/all/state/gilti-state-tax [https://perma.cc/FPW7-HJBS] ("GILTI is meant to ensure that, regardless of where a US company does business in the world, its foreign subsidiaries pay at least a minimum rate of income tax, if not to other countries, then to the United States.").

264 *See* I.R.C. §§ 951A, 964; *see also* STAFF OF JOINT COMM. ON TAX'N, EXAMINING THE TAXATION OF DIGITAL ASSETS, JCX-44-25 (2025) (highlighting the complexity of DeFi and cross-border digital assets under current tax statutes).

265 *See* 5 U.S.C. § 553(c) (2020) (requiring agencies to give interested persons an opportunity to participate in rulemaking through submission of data, views, or arguments); Levin & Wilson, *supra* note 67 (arguing that in the post-*Chevron* era, agencies must place greater emphasis on robust notice-and-comment rulemaking to strengthen regulatory validity).

into plain language for non-specialist audiences, and more proactively publicizing proposed rules through targeted outreach to affected industries and advocacy groups.[266] Robust public commentary in such contexts can alert the IRS to unintended consequences, administrative inefficiencies, or disparities in taxpayer access and understanding—enabling the agency to refine its guidance before it takes effect. [267] These measures are significant in emerging areas like digital asset taxation, where technical complexity and rapid innovation can obscure real-world compliance burdens.[268]

However, broader participation also presents challenges, including straining agency resources to process a high volume of comments, dilution of substantive feedback by politically motivated or boilerplate submissions.[269] Despite these difficulties, enhancing transparency and inclusivity in the regulatory process can improve both the legitimacy and functionality of IRS regulations, ultimately resulting in tax guidance that is more workable, equitable, and resilient to legal challenge.[270]

In addition to encouraging greater public participation, the IRS could disclose the data, assumptions, and methodologies underpinning its regulations to foster greater trust and accountability.[271] A significant critique of IRS rulemaking has been the opacity surrounding how specific tax policies are developed and justified.[272] While most agencies must adhere to the APA's formal rulemaking procedures, including a public comment period, the IRS has historically argued that many of its guidance documents, such as revenue rulings, revenue procedures, and notices, are interpretative rules rather than

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266 Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1378–79 (2011) (describing procedural tools to broaden participation).

267 Levin & Wilson, *supra* note 67 (noting that improved transparency and outreach can reinforce public trust and reduce post-promulgation litigation risks under the APA).

268 *See, e.g.*, I.R.S. Notice 2023-34, 2023-19 I.R.B. 837 (soliciting public comments on digital asset information reporting under the Infrastructure Investment and Jobs Act); *see also* STAFF OF JOINT COMM. ON TAX'N, *supra* at 265, at 10–11 (noting stakeholder concerns about definitional clarity and compliance burdens).

269 Michael Herz, *Mass Comments' Opportunity Costs*, REGUL. REV. (Dec. 21, 2021), https://www.theregreview.org/2021/12/21/herz-mass-comments-costs [https://perma.cc/35Q9-CLBE] (describing challenges of managing mass participation).

270 NAT'L TAXPAYER ADVOC., 2022 ANNUAL REPORT TO CONGRESS 121–22 (Jan. 2023) (suggesting that well-publicized and inclusive comment opportunities enhance taxpayer confidence in the fairness and clarity of tax rules).

271 Cary Coglianese, Gabriel Scheffler & Daniel Walters, *Unrules*, 73 STAN. L. REV. 885, 917–20 (2021) (arguing that greater disclosure of regulatory inputs, including models and assumptions, strengthens agency legitimacy and public trust).

272 Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1736–38 (2007) (noting longstanding criticisms of the Treasury and IRS for lack of transparency in issuing sub-regulatory guidance).

legislative rules, thereby exempting them from APA constraints.[273] Greater adherence to APA-like transparency measures, such as enhanced public input and detailed explanations of policy changes, could help the IRS bolster the legitimacy of its regulatory actions and reduce legal challenges.[274] Public access to the agency's economic models, empirical studies, and legal analyses would allow for more informed debate and reduce skepticism about regulatory motives.[275]

Another critical step in enhancing accountability is reducing the IRS's reliance on interpretive discretion through more explicit legislative directives.[276] Because taxpayers engage in complex economic transactions, tax law is inherently complex.[277] Congress can minimize ambiguity by drafting statutes with more precise definitions and explicit guidelines.[278] For example, provisions addressing technical matters such as partnership allocations, environmental tax credits, and foreign tax compliance should include detailed criteria that reduce the need for administrative interpretations.[279] By proactively revising statutory language to clarify known ambiguities, such as by defining key terms, resolving cross-references, and specifying the scope of delegated authority, Congress can reduce interpretive uncertainty before disputes arise.[280] Doing so enables the IRS to administer tax laws more effectively and minimizes the need to rely

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273 *See, e.g.*, 5 U.S.C. § 553(b)(A) (2020) (exempting "interpretative rules, general statements of policy, or rules of agency organization" from notice-and-comment requirements); *see also* Hickman, *supra* note 272, at 1738–42 (describing how the IRS frequently classifies substantive tax guidance as interpretative to avoid APA procedures).

274 Levin & Wilson, *supra* note 67 (arguing that transparency and record-building will be critical to agency success under post-*Chevron* judicial scrutiny).

275 Coglianese, Scheffler & Walters, *supra* note 271, at 926–28 (explaining how public access to agency models and empirical bases promotes informed policy discussion and deters perceptions of regulatory bias).

276 *See* Loper Bright, 603 U.S.at 414 (emphasizing that ambiguities in statutory text no longer entitle agencies to deference and that courts must independently determine legal meaning); *see also* Levin & Wilson, *supra* note 67 (noting that legislative clarity is now essential to preserving regulatory stability).

277 *See* Mayo, 562 U.S. at 55 (acknowledging the "immense complexity" of the tax system and the necessity of sophisticated administration).

278 Levin & Wilson, *supra* note 67 (advocating for more explicit statutory drafting to reduce the interpretive burden on agencies post-*Chevron*).

279 *See, e.g.*, NAT'L TAXPAYER ADVOC., NATIONAL TAXPAYER ADVOCATE 2022 PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION (n.d.), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/01/ARC21_PurpleBook_07_StrengthTPR_50.pdf [https://perma.cc/39WR-3J6E] (advocating for Congress to clarify ambiguous tax provisions to prevent disputes and enhance compliance).

280 *See* Devon Bodoh et al., *Clear as Mud* – Chevron *Irreverence and Tax Law*, WEIL TAX BLOG (July 1, 2024), https://tax.weil.com/insights/clear-as-mud-chevron-irreverence-and-tax-law [https://perma.cc/8UG3-MEHG] (discussing the implications of the Supreme Court's decision to overrule *Chevron* and the resulting increased importance of clear legislative drafting).

on judicial doctrines such as *Chevron* that formerly upheld agency interpretations in the face of ambiguity.[281]

In addition to legislative clarity, statutory precision is crucial in minimizing the need for administrative rulemaking and reducing litigation risks.[282] Vague or undefined terms, such as "economic substance," "qualified income," and "substantial business purpose," have historically led to protracted legal battles over their meaning.[283] Establishing more precise definitions in tax statutes would streamline enforcement efforts, improve taxpayer compliance, and decrease the number of court challenges.[284] This shift would also provide greater predictability for businesses and individuals navigating the tax system.[285]

Ultimately, as the IRS adapts to a post-*Chevron* regulatory landscape, enhancing transparency, legislative precision, and stakeholder engagement may be essential in maintaining both its authority and the integrity of tax law enforcement. These reforms not only support judicial scrutiny but also create a more predictable and equitable tax system for all stakeholders. This approach, in which the IRS issues regulations and receives public comments, seems preferable to a system in which the IRS issues revenue rulings.

CONCLUSION

The end of *Chevron* deference marks a turning point in administrative law, but its impact on tax law is particularly immediate. Tax law is uniquely complex, with broad statutory language designed to accommodate evolving financial practices—a reality that justifies "tax exceptionalism." Without *Chevron*, courts will now determine the meaning of ambiguous tax provisions without deferring to IRS expertise, increasing the risk of inconsistent judicial interpretations, prolonged litigation, and regulatory uncertainty.

To navigate this post-*Chevron* era, tax administration must quickly adapt to alternative standards of judicial review, such as *Skidmore* deference.

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281 Loper Bright, 603 U.S. at 407–08 (rejecting *Chevron*'s presumption of delegated interpretive authority and restoring the primacy of clear statutory language).

282 *Id.* at 407–08 (noting that courts, not agencies, now bear the responsibility for resolving statutory ambiguities, making precision in legislative drafting increasingly important).

283 *See* United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 488–90 (2012) (plurality opinion) (illustrating how ambiguities in statutory language related to time limits on tax assessments led to disagreement among courts and within the IRS); *see also* David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 869–71 (1999) (critiquing open-ended standards like "economic substance" for introducing uncertainty and enabling inconsistent enforcement).

284 *See* Levin & Wilson, *supra* note 67 (arguing that statutory specificity can reduce the administrative and judicial burden of interpreting ambiguous tax provisions).

285 *See* Daniel Shaviro, *Disclosure and Civil Penalty Rules in the U.S. Legal Response to Corporate Tax Shelters*, 56 SMU L. REV. 75, 98–99 (2003) (explaining how clearer statutory rules promote ex ante predictability and reduce ex post disputes in tax compliance and enforcement).

Unlike *Chevron's* blanket deference, *Skidmore* requires courts to weigh an agency's reasoning based on its persuasiveness, consistency, and expertise. This shift underscores the need for the IRS to strengthen the quality and transparency of its regulatory interpretations, ensuring that its guidance is well-documented, empirically supported, and responsive to stakeholder concerns.

At the same time, legislative reforms are critical to reducing ambiguity in tax statutes and limiting the need for judicial interpretation altogether. The exceptional complexity of tax law demands more explicit statutory language to prevent conflicting court decisions that could destabilize tax enforcement. Congress must prioritize refining provisions that have historically led to interpretive disputes to provide greater certainty for both taxpayers and regulators.

Finally, enhancing agency accountability and transparency must be a central component of any reform effort. With courts no longer deferring to IRS interpretations as a matter of course, the agency could benefit from improving its rulemaking processes through expanded notice-and-comment procedures, greater stakeholder engagement, and more precise explanations of its positions. A more participatory regulatory process will not only bolster the credibility of IRS guidance in judicial review but also reduce taxpayer confusion and compliance burdens.

At stake is more than just the efficiency of tax administration; the integrity and predictability of the U.S. tax system are at risk. If legislative and administrative reforms fail to keep pace with judicial developments, tax enforcement will become fragmented, taxpayer burdens will rise, and regulatory uncertainty will stifle economic activity. Now is the moment for lawmakers, courts, and the IRS to proactively reshape the future of tax law—before inaction leads to irreversible consequences.

"FAITH AS A SHIELD": CHALLENGING RELIGIOUS EXEMPTIONS TO CHILD WELFARE STATUTES IN RESPONSE TO INSTITUTIONAL CHILD ABUSE

Shailey Mussey

INTRODUCTION

> When I was 16 years old, I was ripped from my bed in the middle of the night and transported across state lines to the first of four youth residential treatment facilities. These programs promised healing, growth, and support, but instead did not allow me to speak, move freely, or even look out a window for two years. I was forced-fed *[sic]* medications and sexually abused by the staff. I was violently restrained and dragged down hallways, stripped naked and thrown into solitary confinement.[1]

This was the testimony of Paris Hilton when she appeared at the House Committee on Ways and Means hearing on institutional child abuse in residential youth treatment facilities.[2] Since her documentary and accompanying memoir were released in 2020 and 2023, respectively, Paris Hilton has worked tirelessly to try to tighten up regulations for centers like the one she suffered in as a teen.[3] Her story is not unique; in recent years, survivors have shared their stories in order to demonstrate the atrocities committed in facilities that are collectively known as the Troubled Teen

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* I would like to express my deepest gratitude to my mom and my husband for their unwavering support throughout this process. Thank you for your patience during my hyper-focused, intense writing sessions, for encouraging me through moments of doubt and tears, and for thoughtfully reading what must have felt like endless drafts. I am also deeply grateful to my faculty advisor, Brandy Johnson, whose encouragement and invaluable feedback made this paper possible. I dedicate this paper to my staff and the incredible kids of Royal Family Kids of Macoupin and Montgomery County. For the past ten years, each summer has reminded me that healing from trauma begins with making moments matter. It is that lesson that inspired me to pursue this work—and to strive to make my legal education matter as well.

1 *Strengthening Child Welfare and Protecting America's Children: Hearing Before the H. Comm. On Ways and Means*, 118th Cong. 23–24 (2024) (statement of Paris Hilton, lived-experience advocate and CEO of 11:11 media).

2 *Id.*

3 *See generally* PARIS HILTON, PARIS HILTON: THE MEMOIR (2023); *see also* PARIS HILTON, *This is Paris: The Real Story of Paris Hilton* (YouTube, Sep. 13, 2020), https://www.youtube.com/watch?v=wOg0TY1jG3w [https://perma.cc/2WZ8-Z4VH].

Industry (TTI).[4] As a result of increased attention from the public, news outlets, government organizations, and non-governmental work groups have investigated the how, why, when, and where behind the industry.[5] As a whole, there is no one-size-fits-all format for TTI programs, and as a result, they operate under considerably different circumstances. However, one relatively common characteristic of such programs is that they are somehow related to or associated with religious groups or churches.[6]

Historically, churches have been at the forefront of social movements that have made widespread changes for social ills such as poverty, racism, and civil rights. The child protection and mental health treatment industry is no different.[7] Some states exempt organizations that operate under the label of religious private schools or other associated religious entities from compliance with otherwise mandatory child safety regulations, including staff training, punishments, staff ratios, educational standards, and health and safety protections.[8] Many TTI programs are known for taking advantage of the lack of oversight.[9] In theory, this allows religious organizations to fill a much-needed gap for at-risk youth. In practice, the lack of mandatory regulation creates an accountability crisis, meaning compliance with child safety and welfare almost entirely depends on the extent to which the organization deems it to be in its interest.[10]

This Note will first explore TTI's profound impact on children and teens who are victims of it.[11] Part two will explore the historical background for and the modern applications of religious exemption laws in the child welfare industry and how they operate as a shield for abusive programs.[12]

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4 *See* Yasmin Younis, *Institutionalized Child Abuse: The Troubled Teen Industry*, 74 ST. LOUIS U. L. J. ONLINE 1, 2–3 (2021), https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1071&context=lawjournalonline.

5 *See* Maia Szalavitz, *Investigative Report Reveals Some Religious Reform Schools Are Havens for Child Abuse*, TIME (Nov. 13, 2012), https://healthland.time.com/2012/11/13/investigative-report-reveals-some-religious-reform-schools-are-havens-for-child-abuse/[https://perma.cc/7ZJNUC98]; *see also* Elyse Wyatt, *Manipulating Parents, Exploiting Children: The Need for Government Oversight of Private Youth Facilities*, 33 B.U. PUB. INT. L. J. 103, 105 (2024).

6 *See generally* Wyatt, *supra* note 5, at 111.

7 Michael Lipka, *Are Churches Key to Solving Social Problems? Fewer Americans Now Think So,* PEW RSCH. CTR. (July 18, 2016), https://www.pewresearch.org/short-reads/2016/07/18/are-churches-key-to-solving-social-problems-fewer-americans-now-think-so/#:~:text=By%20Michael%20Lipka,"some"%20in%20this%20way [https://perma.cc/598B-HUJ3].

8 *See* Szalavitz, *supra* note 5; *see also* Wyatt, *supra* note 5, at 111.

9 *See* Younis, *supra* note 4, at 4.

10 *See generally,* Wyatt, *supra* note 5, at 111.

11 *See generally* Szalavitz, *supra* note 5.

12 *See generally id.*

Finally, part three will offer a proposal to change both federal and state laws in order to close the religious loophole.[13]

I. THE TROUBLED TEEN INDUSTRY AND THE PERILS OF UNDER-REGULATION

The term "Troubled Teen Industry" recently appeared in the news and has been coined to describe the industry that encompasses a variety of settings and formats for programs but, in general, includes programs such as boot camps, wilderness therapy programs, residential treatment centers, and conversion therapy centers.[14] The industry exists worldwide and is estimated to profit over a billion dollars annually.[15] The exact number of kids impacted and the specific number and location of facilities are challenging to determine, primarily because the federal government has yet to define what it does or does not include in the industry's definition.[16] Without a universal definition, an exact count is hard to acquire.[17] However, some estimates find that the industry impacts 50,000 kids annually,[18] who can spend anywhere from months to years confined to the program.[19]

A. Abuse in the Troubled Teen Industry

Victim testimonies from social media sources like TikTok, news outlets, investigative journalism, and documentaries have shown that time spent in the industry is far from ideal.[20] Stories have come to light showing widespread physical abuse,[21] mental abuse,[22] and manipulation of the parents

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13 *See generally* Stop Institutional Child Abuse Act, Pub. L. No. 118-194, 138 Stat. 2664 (Dec. 23, 2024); *see also* MO. ANN. STAT. §§ 210.1253–1286 (West 2025).

14 Younis, *supra* note 4, at 2.

15 Wyatt, *supra* note 5, at 105.

16 Morgan Rubino, *More Than Troubling: The Alarming Absence of 'Troubled Teen Industry' Regulation and Proposals for Reform*, 50 J. LEGIS. 429, 440 (2024).

17 Wyatt, *supra* note 5, at 106.

18 Kenneth Rosen, *The Trouble with the 'Troubled Teen' Label and the Behavioral Modification Industry Behind it*, BUS. INSIDER (Feb. 20, 2021, at 09:51 CT), https://www.businessinsider.com/trouble-with-troubled-teen-label-and-behavioral-modification-industry-2021-2.

19 *See* Younis, *supra* note 4, at 3 (2021); *see also* Wyatt, *supra* note 5, at 106.

20 NAT'L DISABILITY RTS. NETWORK, DESPERATION WITHOUT DIGNITY: CONDITION OF CHILDREN PLACED IN FOR PROFIT RESIDENTIAL FACILITIES 7–8 (Oct. 2021).

21 *See* Younis, *supra* note 4, at 6; *see also* Heather Mooney, *Activists, State Authorities and Lawsuits Filed by Survivors are Putting Pressure on the 'Troubled Teens' Industry to Change its Ways*, WAYNE ST. U. COLL. LIBERAL ARTS & SCIS. (Mar. 30, 2021), https://clas.wayne.edu/news/activists-state-authorities-and-lawsuits-filed-by-survivors-are-putting-pressure-on-the-troubled-teens-industry-to-change-its-ways-56213; *see also* Szalavitz, *supra* note 5; *see also* Wyatt, *supra* note 5, at 123.

22 *See* Rosen, *supra* note 18.

and the public.[23] This section will provide an overview of the kinds of abusive tactics the industry employs in its practices.

The Disability Rights Network's Desperation Without Dignity report describes the use of physical abuse in residential treatment facilities (RTF) as a method for punishment or a control tactic.[24] Tactics specifically used in institutions are similar to the typical ways physical abuse against children appears from their parents (hitting, punching, kicking, biting, etc.), but also takes the form of dragging children (likely into a secluded room), throwing children against walls, or slamming them into the floor.[25] This abuse can also take the form of student-on-student or child-on-child violence, meaning fighting or otherwise inflicting injury on the children, sometimes at the direction of center staff.[26] Danielle Bregoli, also known as rapper Bhad Bhabie, disclosed her experience at Turn-About-Ranch.[27] She appeared on the Dr. Phil show on an episode titled, "I Want to Give Up My Car-Stealing, Knife-Wielding, Twerking 13-Year-Old Daughter Who Tried to Frame Me for a Crime."[28] After her viral "Catch me outside, how about that"[29] moment, her mother and grandmother, at the recommendation of Dr. Phil, forcefully took her by "transporters" in the middle of the night to Turn-About-Ranch, where she experienced abuse and neglect.[30] Turn-About-Ranch has since faced a lawsuit from other students alleging sexual abuse and torture.[31]

Even if the staff is not the one inflicting violence, they fail to intervene when they see it, which is just as harmful. A 2018 report on Lakeside Girls Academy in Florida revealed that the state was concerned about "frightening indifference" to a child's pain.[32] Just as concerning is that children entering the industry begin to experience harm before arriving at the facility. A popular method for delivering non-compliant teens to programs is the use of

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23 *See id.*

24 NAT'L DISABILITY RTS. NETWORK, *supra* note 20, at 25.

25 *Id.*

26 *Id.*; *see also* THE PROGRAM: CONS, CULTS, AND KIDNAPPING: *Where the F**k am I?* (Netflix, released 2024) [hereinafter *Where the F**k am I?*].

27 DR. PHIL: *I Want to Give Up My Car-Stealing, Knife-Wielding, Twerking 13-Year-Old Daughter Who Tried to Frame Me for a Crime* (Roku Channel, aired Sep. 14, 2016).

28 *Id.*

29 While on the Dr. Phil show Danielle famously responded to Dr. Phil and the audience laughing at some of her statements made with the phrase "catch me outside how bout that". The clip went viral spurring memes, tweets, and even songs. Madison Kircher, *A Brief History of 'Cash me outside, Hobow Dah?,* N.Y. MAG. (Feb. 2, 2017), https://nymag.com/intelligencer/2017/02/what-is-cash-me-outside-howbow-dat-meme-from-dr-phil.html.

30 BHAD BHABIE, *Breaking Code Silence – Turn About Ranch abuse Dr. Phil | Danielle Bregoli*, at 1:15 (YouTube, Mar. 19, 2021), https://www.youtube.com/watch?v=GteqbsYGv1I.

31 *See generally* Verney v. Turn About Ranch, Inc., 2012 WL 4924864 (D. Utah 2012); *see also* Mooney, *supra* note 21.

32 Curtis Gilbert & Lauren Dake, '*Youth were abused here'*, APM REP., (Sep. 28, 2020), https://www.apmreports.org/story/2020/09/28/for-profit-sequel-facilities-children-abused.

"transportation services."[33] Transportation services often surprise teens in the middle of the night, handcuff or zip-tie them, confine them to windowless vehicles, and then escort them to the chosen facility.[34]

Many camps and programs, especially those advertising themselves as wilderness camps or nature programs, utilize child labor to punish children or save money on their operating costs—examples of this range from working on farm-like labor tasks to ranch-style work conditions.[35] Furthermore, some programs operate with boot camp-like structures, using "hard work" to transform them into what the program deems to be productive citizens.[36] The use of labor or physical exertion does not automatically rise to the level of abuse.[37] The problem comes when it goes too far.[38] This was the case for the boys at Gateway Boys Academy in Florida.[39] After a teen, Leham Samson, almost died at Gateway Boys from dehydration and over-exertion, the Tampa Bay Times revealed a long history of forcing boys to perform military-like calisthenics, often to the point of grave injury or illness.[40]

Mental abuse is just as impactful as physical; institutions use humiliation, name-calling, destruction of self-worth, limiting communication with peers and family as a punishment or reward, and convincing kids that they are unwanted to control, punish, and "correct" children in programs.[41] TTI programs utilize mental abuse to shame and manipulate children and teens into "a full, complete loss of any self-identity."[42] The effect of such practices resulted in participants "becoming submissive" and convinced that the only way they could succeed was by doing everything the program told

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33 *See* Younis, *supra* note 4, at 6.

34 Mooney, *supra* note 21.

35 Rosen, *supra* note 18.

36 Daniel Villarreal, *Bhad Bhabie Details being Forced to Stay Awake for Days After Being Sent to Turn-About Ranch by Dr. Phil,* NEWSWEEK (Mar. 19, 2021, 8:19 PM), https://www.newsweek.com/bhad-bhabie-details-being-forced-stay-awake-days-after-being-sent-turn-about-ranch-dr-phil-1577539.

37 *See* Szalavitz, *supra* note 5.

38 *See id.*

39 *See id.*

40 *See* Alexandra Zayas, *On the Brink of Death,* TAMPA BAY TIMES (Oct. 28, 2012), https://www.floridaschildrenfirst.org/religious-exemption-at-some-florida-childrens-homes-shields-prying-eyes/.

41 *See generally* Rosen, *supra* note 18; *see also* NAT'L DISABILITY RIGHTS NETWORK, *supra* note 20, at 28.

42 *See* Jamie Mater, *The Troubled Teen Industry and Its Effects: An Oral History,* 2022 U. N.H INQUIRY J., https://www.unh.edu/inquiryjournal/blog/2022/04/troubled-teen-industry-its-effects-oral-history.

them to do, including humiliating and shaming their peers who did not comply or showed emotion.[43]

Beyond actively degrading teens, programs have also engaged in mental abuse by leveraging the ability to communicate with peers and families to force compliance.[44] Communication prohibitions come in two forms: (1) prohibition on communication with outsiders and (2) prohibition on communication with other students.[45] Virtually every report from these facilities has revealed some form of prohibition or control over communication.[46] Julia Scheeres, author of *Jesus Land,* a memoir discussing her experience in one of these facilities, described 24/7 communication monitoring to ensure kids do not complain about the facility.[47] Former students from facilities in Florida reported that they had no way to report abuse, and they could be denied access to communication for virtually any reason.[48] The Federal Trade Commission discovered and subsequently warned parents that when enrolling their children in the program, they should ask whether they are allowed to communicate with their child because many programs "prohibit, monitor, or otherwise restrict written and verbal communication."[49] Beyond merely controlling communication outside, programs often use communication as a reward or punishment for students who do not follow the rules or to acclimate students to the facilities upon arrival.[50] Trinity Teen reportedly used forced silence as a punishment for sometimes weeks at a time.[51] Ivy Ridge "welcomed" students to the facility

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43 *See id.* ("Trinity teen used humiliating tasks such as chaining girls to animals or each other or forcing the girls to carry chairs on their heads as a tactic for control and abuse."); *see also* Ken Suarez, *Former Students of Lakeland Girls School Come Forward to Describe Conditions at Facility Where Girl Died*, FOX 13 TAMPA BAY (June 30, 2021, at 09:04 ET), https://www.fox13news.com/news/former-students-of-lakeland-girls-school-come-forward-to-describe-conditions-at-facility-where-girl-died.

44 Lakeland Girls Academy often used shunning as a punishment; girls who were shunned were supposed to be entirely ignored by the other students; they went as far as to mark these students by forcing them to wear neon vests or different colored shirts (depending on if they were on the property or off location). *See* Suarez, *supra* note 43.

45 *See* Szalavitz, *supra* note 5.

46 *See, e.g.*, *id.*

47 *See id.*

48 *See Religious Exemptions at Some Florida Children's Homes Shields Prying Eyes,* TAMPA BAY TIMES (May 15, 2013), https://www.floridaschildrenfirst.org/religious-exemption-at-some-florida-childrens-homes-shields-prying-eyes/ [hereinafter *Religious Exemptions*].

49 *See* Wyatt, *supra* note 5, at 123 (citing FED. TRADE COMM'N, CONSIDERING A PRIVATE RESIDENTIAL TREATMENT PROGRAM FOR A TROUBLED TEEN? QUESTIONS FOR PARENTS AND GUARDIANS TO ASK (July 2008), https://files.eric.ed.gov/fulltext/ED505060.pdf).

50 *See* Rosen, *supra* note 18.

51 *See id.*

by informing them they were not allowed to talk to other students until they earned enough points.[52]

The advertised goal of TTI programs is to help teens and families combat challenging issues such as mental health conditions, self-harm, criminal or delinquent behavior, rebellion, etc.[53] However, these programs rarely, if ever, provide comprehensive, effective treatment for any of these issues.[54] Many survivors have reported that the "therapy" or "treatment" the program provided was substandard at best and abusive at worst.[55] Reports have ranged from staff being untrained on therapeutic treatments, psychotropic medication being misused or overused, victim blaming, accusing participants of fabricating child abuse, and dehumanizing teens to shame them.[56] The results are not surprising; studies have found that victims who attended these programs found no benefit or suffered long-lasting harm from their experiences.[57] One victim who attended what she referred to as a "religious reform school" in Florida explained that in her experience, "most of us [attendees of the troubled teen industry] came out of that school worse than when we went in."[58] Furthermore, victims explain that they face long-term consequences such as PTSD, anxiety, depression, relationship issues, and other life-altering side effects.[59] Julia Scheeres expressed that "Living in an atmosphere of constant fear 24/7 is anything but therapeutic. Many of us alumni have struggled with fallout—depression, substance abuse, failed relationships, despondency, and anger issues. And most of us have nightmares about being back there, decades later."[60]

B. Structure of the Troubled Teen Industry

Not every program aimed at intervention for troubled teens is an abhorrent center. Still, the industry's structure limits accountability, posing

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52 Ivy Ridge had a point system where students could earn points by demonstrating behaviors the programs desired and doing tasks which the program staff told them. Points then earned them privileges like the right to work at the school or the ability to punish those who had less points. *See generally Where the F**k am I?*, *supra* note 26.

53 Younis, *supra* note 4, at 4; *see also* Rosen, *supra* note 18 (finding that the systems in the troubled teen industry claim to be "a solution for teens who've fallen into trouble, struggled with depression or anxiety, or have exhibited erratic behavior their parents might call 'out of control'").

54 NAT'L DISABILITY RTS. NETWORK, *supra* note 20, at 28.

55 Mater, *supra* note 42.

56 *Id.*

57 Mooney, *supra* note 21 (finding that 1/3 of individuals who reported attending a program reported the program as harmful).

58 Szalavitz, *supra* note 5.

59 *See id.*

60 *Id.*

an inevitable risk for centers to become havens of abuse.[61] The primary issue that creates several off-branching matters is the absence of a single universal federal definition of the types of facilities the industry encompasses.[62] The lack of denotational clarity enables the industry to mislead the public with little to no consequences because there is no clear standard they are supposed to meet and no apparent authority to which they must submit.[63] This leads programs to label themselves as various things that may or may not have regulatory authority. The public, who is none the wiser, then believes that if a program describes itself as a specific thing, a religious school, for example, it must be subject to the same standards as other entities within that same category, which is not always true.[64] It is common practice for facilities that are forced to shut down or are sanctioned to close down and reopen at another location or in another state, further worsening the situation.[65] A facility in Florida openly admitted to this when they stated that they would be closing down and looking into continuing at another location following public backlash after the death of a teen girl.[66]

The practice of self-labeling also makes it virtually impossible for a law to effectively regulate because once the Legislature establishes a law, a facility could circumvent the rules by simply calling itself something that is outside the purview of that law.[67] One report stated that the Department of Health and Human Services (HHS), the Department of Justice (DOJ), and the Department of Education could "regulate *some* RTFs in *some* respects, such as through DOJ supervision of state juvenile justice systems. But by and large, RTFs often fall outside of these categorical spheres of oversight."[68] States can further frustrate regulation through laws that categorically exempt specific categories of facilities from oversight. The following section of this Note will address one specific type of category exclusion, those based on religious status.

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61 *See id.*

62 *See* Evelyn Tsisin, *The Troubled Teen Industry's Troubling Lack of Oversight,* THE REGUL. REV. (June 27, 2023), https://www.theregreview.org/2023/06/27/tsisin-the-troubled-teen-industrys-troubling-lack-of-oversight/.

63 *See id.*

64 *See id.*

65 *See* Gary White, '*A Huge Relief': Lakeland Girls Academy Closes, Drew Scrutiny for Teen's Death in 2020*, YAHOO NEWS (Feb. 20, 2023, at 08:56 CT), https://www.yahoo.com/news/huge-relief-lakeland-girls-academy-145636519.html.

66 *See id.* (quoting the director of human resources for Adult and Teen Challenge Southeast—the person who oversaw Lakeland at the time of Naomi's death—who stated that the Lakeland's decision to close was voluntarily and that they would reopen somewhere else within Florida).

67 *See generally* Tsisin, *supra* note 62.

68 *Id.*

II. RELIGIOUS EXEMPTIONS IN CHILD WELFARE LAWS

Every state is mandated to have an entity charged with investigating and preventing child abuse and neglect.[69] However, each state individually decides which organizations to include within its regulatory authority.[70] Often, the TTI circumvents the laws by marketing programs as existing outside the purview of a specific state's laws.[71] For example, instead of stating that they are a psychiatric care center subject to substantial regulation, they may label themselves as a wilderness camp, which is not subject to the same regulation. Several states make this process easier by allowing specific organizations or types of centers to operate unregulated or under their own oversight through exemptions.[72] One typical example of this is an exemption for facilities that are either religiously based or sponsored.[73] As it is essential first to understand how the exemptions later discussed in this note came to be, this part will discuss the history behind religious exemptions in child welfare laws[74] and how states apply them in the context of TTI today.[75]

A. History of Religious Exemptions in Child Abuse Laws

"Religion and Child Abuse, Perfect Together" was the title of Donald Capps' presidential address for the Society for the Scientific Study of Religion.[76] While his statement may seem like a contradiction due to many individuals associating religion with moral guidance and human welfare, his statement emphasizes the potential of religious beliefs to "foster, encourage, and justify abusive behavior."[77] Religious families and organizations have used verses like "He who spares the rod hates his son, but he who loves him is diligent to discipline him"[78] and "Do not withhold discipline from a child; if you punish them with the rod, they will not die. Punish them with the rod and save them from death"[79] to justify discipline and problem-correcting

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69 42 U.S.C. § 5106a(b)(2)(B)(i) (2019).

70 *See generally* Aaron Loewenberg, *In Six States, Religious Child Care Centers Operate With Little to No Regulation,* NEW AM. (Apr. 15, 2016), https://www.newamerica.org/education-policy/edcentral/religiouscc/.

71 *See generally id.*

72 *See generally* Mooney, *supra* note 21.

73 Tsisin, *supra* note 62.

74 JANET HEIMLICH, BREAKING THEIR WILL: SHEDDING LIGHT ON RELIGIOUS CHILD MALTREATMENT 24 (2011).

75 Mooney, *supra* note 21.

76 Bette L. Bottoms et al., *Religion-Related Child Physical Abuse: Characteristics and Psychological Outcomes,* 8 J. AGGRESSION, MALTREATMENT & TRAUMA 87, 88 (2004).

77 *Id.*

78 *Proverbs* 13:24.

79 *Proverbs* 23:13–14.

behaviors that would otherwise be deemed physically and mentally abusive.[80]

In many circumstances, individuals have cited the belief that a child's misbehavior or other undesirable traits are the result of spiritual forces, and they must defeat the demon or force the demon out in order to save them from the devil or hell.[81] One reason for this is that religious organizations place themselves in a position of superiority in the moral hierarchy, which allows them to have a false sense of security that, since they are ordained by God, they have a greater ability to govern themselves and self-regulate their behavior.[82] The sense of an opportunity for harm is not entirely unknown by members; a study of nearly 650 members of a Christian Reformed Church found that a majority of members believe statements like "the church does little to prevent abuse," "Christians too often use the bible to justify abuse" and "Church leaders are not prepared to help members…who are victims of abuse".[83]

There is a long history of individuals using religious practices and traditions as justification to harm children.[84] In biblical times, the "Slaughter of Innocents" depicts a period where King Herod, the Great of Judea, ordered the execution of all male children under the age of two within the vicinity of Bethlehem.[85] Pre-Columbian cultures sacrificed children to Pagan gods; worshippers believed severe punishment was necessary to please the gods or expel spirits.[86] Pre-modern medical societies believed that demonic possession caused medical conditions such as epilepsy, and beating the devil out of the child would cure them.[87]

This is not to say that religion is inherently harmful. Studies have shown that religion can offer superb comfort to children during stress or conflict.[88] Others have shown that religious parents are less likely to be physically abusive and more likely to raise families that are resilient and harmonious.[89]

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80 Bottoms et al., *supra* note 76, at 88.

81 *Id.*

82 *See* Pamela Colloff, *Remember the Christian Alamo*, TX. MONTHLY (Dec. 2001), https://www.texasmonthly.com/news-politics/remember-the-christian-alamo/ (quoting Wiley Cameron, associated with the infamous Rebakah Home for Girls, who states that they resist efforts to force them to become licensed because "We believe that we have a mandate from God Himself," and "To take a license is to admit that there's someone above God.").

83 Ann W. Annis & Rodger R. Rice, *A survey of Abuse Prevalence in the Christian Reformed church,* 3 J. RELIGION & ABUSE 7 (2002).

84 *See generally* ALAN ROGERS, THE CHILD CASES: HOW AMERICA'S RELIGIOUS EXEMPTION LAWS HARM CHILDREN 1–10 (2014).

85 *Matthew* 2:16–18.

86 HEIMLICH, *supra* note 74, at 24.

87 *Id.*

88 *Id.*

89 Stephen Frosh, *Religious Influences on Parenting,* HANDBOOK PARENTING: THEORY & RSCH. FOR PRAC. 98, 105 (Masud Hoghughi & Nicholas Long eds., 2004).

Furthermore, religion provides a valuable coping strategy for children who are facing individual conflicts such as grief following the death of a loved one, mental health concerns such as depression and anxiety or hope in the face of illness.[90] Additionally, the same Bible that cautions parents against withholding discipline also declares that spilling the blood of innocent children is a grave sin.[91]

Furthermore, verses like Colossians 3:21 and Jeremiah 22:3 urge parents not to discourage their children or to do anything to harm them and call for all individuals to "do no wrong or violence to. . . the fatherless."[92] These verses seem to speak of an innate reverence for the innocence of children and the importance of protecting them, which places suspicion on the conclusion that religion at its heart is harmful. The problem comes when religion is used to justify those who seek to harm others. If regulatory agencies give a pass to organizations that claim a religious nexus, the opportunity to use religion as a shield is made infinitely easier. However, this is only made easier if the regulatory agencies give a pass to those who claim a religious nexus. This Note will next examine how religious exemptions for child welfare institutions and how companies abuse the religious label to exploit children.

During the 1800's, a couple belonging to the Peculiar People, a religious sect in Europe, were accused of refusing medical care for their infant daughter, who later died; they were one of the first to cite religious healing as an alternative to medical intervention.[93] New York faced a similar story in 1901 when a father opted to use spiritual healing for his infant daughter; he was found guilty of failing to provide for his child.[94] The Christian Science Church has been quite vocal about its right to follow the same beliefs of the Peculiar People, and many members have faced allegations of medical neglect after they opted to heal their children for everything from meningitis to diabetes through prayer.[95] The 1960's brought a new age for child welfare, led primarily by physicians instead of social

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90 Linda L. Barnes et al., *Spirituality, Religion, and Pediatrics: Intersecting Worlds of Healing*, 106 (Supp. 3) PEDIATRICS 899, 900 (2000), https://publications.aap.org/pediatrics/article-abstract/106/Supplement_3/899/65857/Spirituality-Religion-and-Pediatrics-Intersecting?redirectedFrom=fulltext.

91 *Proverbs* 13:24; *Proverbs* 6:16–17.

92 *Colossians* 3:21 ("Fathers, do not embitter your children, or they will become discouraged"); *see also Jeremiah* 22:3 ("This is what the Lord says: Do what is just and right. Rescue from the hand of the oppressor the one who has been robbed. Do no wrong or violence to the foreigner, the fatherless or the widow, and do not shed innocent blood in this place.").

93 ROGERS, *supra* note 84, at 10.

94 *Id.*

95 *Id.* at 7.

workers.[96] Pediatrics became an official medical specialty in 1950; with its creation, pediatricians were in the best position to advocate for all children's issues, including abuse and neglect.[97] In 1962, the American Journal of the American Medical Association published "The Battered Child," and with it, battered child syndrome as a result of abuse became a distinct clinical condition.[98] The increased attention by the medical community to child abuse led to the media following suit, and both scholarly journals and news media outlets published stories showing the brutality of child abuse.[99] Due to increased media and public attention, Congress passed the 1962 amendments to the Social Security Act, which required states to pledge to make child welfare services available statewide.[100] By 1967, every state had passed some form of mandatory reporting law requiring specific individuals, called mandated reporters, to report child abuse.[101]

B. Legal Landscape of Religion and Child Welfare Laws

When Congress passed The Child Abuse Prevention and Treatment Act of 1974 (CAPTA), it marked a significant effort to better centralize child protection in the U.S.[102] CAPTA did several important things. First, it established a national definition(s) for child abuse and neglect and required the federal government to begin collecting data on the prevalence.[103] Second, it authorized non-governmental agencies to take on "efforts to develop, operate, expand, enhance, and coordinate initiatives, programs, and activities to prevent child abuse and neglect."[104] Third, CAPTA provides grants to governments, public agencies, and nonprofit agencies to aid their efforts in preventing and treating child abuse and neglect[105] However; the law also contained two compromise provisions: (1) parents who were legitimately practicing their religious beliefs were exempt from being considered abusive or neglectful, and (2) in order to be eligible for federal child abuse prevention and treatment funds, states were required to add a treatment exemption to their child neglect and abuse laws.[106] Judicial interpretation of the religious

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96 *See generally* John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449 (2008).

97 ROGERS, *supra* note 84, at 13.

98 Henry Kempe et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS'N 17, 17–24 (1962).

99 ROGERS, *supra* note 84, at 13.

100 Myers, *supra* note 96, at 455.

101 ROGERS, *supra* note 84, at 12–13.

102 *See* Myers, *supra* note 96, at 457–58.

103 42 U.S.C. § 5101.

104 *Id.* § 5116.

105 *Id.* §§ 5106–5116.

106 ROGERS, *supra* note 84, at 12–13.

clause found that states that declined to provide a religious exemption would not be entitled to federal funding authorized under CAPTA.[107] States complied with this requirement through a spectrum of exemptions; the majority promulgated that treating a child through spiritual means alone would not constitute a CAPTA violation.[108]

Even before CAPTA, states were taking steps to ensure religious freedom for religious groups that desired to work within the child welfare industry. In 1968, Lester Roloff, a Texas preacher and operator of several "mission homes," opened his first home for girls, Rebekah Home for Girls.[109] Throughout the 1970's and 1980's, the Texas government fought for the closure of Roloff's homes due to his refusal to submit to state oversight and licensure.[110] In 1987, the state succeeded. Still, with the help of then-Governor George W. Bush, the Center was back up and operating in 1999 following a grueling legislative package that changed Texas law to allow church-run childcare institutions to opt out of state oversight and licensing requirements.[111] Under the new law, it would be up to private accreditation agencies to oversee faith-based Christian programs.[112]

After becoming President in 2001, George W. Bush began efforts to implement Texas's license exemption program at the federal level by establishing the White House Office of Faith-based and Community Initiatives.[113] States have continued to operate under religious exemptions, the most notable of which is Florida, which uses a similar accreditation system to Texas.[114] Even when institutions are supposedly subjected to oversight by "private accreditation" providers, the protection of children from abuse and neglect only goes as far as the private accreditation provider

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107 Gregory Engle, *Towards a New Lens of Analysis: The History and Future of Religious Exemptions to Child Neglect Statutes*, 14 RICH. J.L. & PUB. INT. 375, 377 (2010).

108 ROGERS, *supra* note 84, at 12.

109 Colloff, *supra* note 82.

110 *Id.*

111 *Id.*

112 TEX. FREEDOM NETWORK, THE TEXAS FAITH-BASED INITIATIVE AT FIVE YEARS: WARNING SIGNS AS PRESIDENT BUSH EXPANDS TEXAS-STYLE PROGRAM TO NATIONAL LEVEL 9 (2002), https://tfn.org/cms/assets/uploads/2015/11/TFN_CC_REPORT-FINAL.pdf.

113 Exec. Order No. 13,199, 3 C.F.R. 752 (2002).

114 *See* FLA STAT. ANN. § 402.316 (2025) (West) ("The provisions of ss. 402.301-402.319, except for the requirements regarding screening of child care personnel, shall not apply to a child care facility which is an integral part of church or parochial schools conducting regularly scheduled classes, courses of study, or educational programs accredited by, or by a member of, an organization which publishes and requires compliance with its standards for health, safety, and sanitation. However, such facilities shall meet minimum requirements of the applicable local governing body as to health, sanitation, and safety and shall meet the screening requirements pursuant to ss. 402.305 and 402.3055. Failure by a facility to comply with such screening requirements shall result in the loss of the facility's exemption from licensure.").

is willing to investigate, acknowledge, or otherwise regulate.[115] Frequently, regulation comes too late, and regulatory authorities only step in after tragedies like serious injury or death occur, or victims file lawsuits.[116]

C. Application to Troubled Teen Industry

A key hardship to regulating TTI programs is the fact that there is no one definition or characteristic that programs operate under. However, a good starting point is looking at private schools because many programs operate as "therapeutic boarding schools," which correlates to the overnight boarding-style environment many offer.[117] Looking at the legislative schemes for private school regulation also provides an additional incentive because many states allow self-identifying religious schools to operate under different standards.[118] Each state that allows an exemption for religious boarding schools has its own definition and requirements for what can be considered a "religious private school."[119] Most states allow entities to claim the religious private school designation with only a minimal amount of verification.[120] This could include a form or application to either the state or another accreditation entity. Alabama, for example, requires the school to get accreditation from one of six agencies, have a website that describes the school, and meet minimum requirements in school attendance, instructional days, and standardized tests.[121] Conversely, Alaska explicitly states that it has no accreditation requirements or standards for private schools and that compliance is entirely optional.[122] In practice, this allows TTI programs to receive all the benefits of religious private school status with no verification

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115 *See id.* (allowing religious programs to self-regulate and comply).

116 *See generally* Rachel Aviv, *The Shadow Penal System for Struggling Kids*, NEW YORKER (Oct. 11, 2021),https://www.newyorker.com/magazine/2021/10/18/the-shadow-penal-system-for-struggling-kids. *See also* Ken Suarez, *Lakeland School for Girls Closes Two Years After Student's Death; Parents Announce Planned Lawsuit*, FOX13 (Mar. 21, 2022, at 06:00 ET), https://www.fox13news.com/news/lakeland-school-for-girls-closes-two-years-after-students-death-parents announce-planned-lawsuit; Szalavitz, *supra* note 5; Sherman v. Trinity Teen Sols., Inc., 84 F.4th 1182 (10th Cir. 2023).

117 *See e.g., Therapeutic Boarding Schools v. Residential Treatment Center,* TURNBRIDGE, https://www.turnbridge.com/news-events/latest-articles/therapeutic-boarding-school-vs-treatment/ (last visited Oct. 23, 2025) (defining a "therapeutic boarding school" and describing this as industry terminology).

118 *Regulating Private Schools: What the Government Giveth, Can It Taketh Away?*, WAGENMAKER & OBERLY BLOG (Nov. 1, 2022*)*, https://www.wagenmakerlaw.com/blog/regulating-private-schools-what-government-giveth-can-it-taketh-away [hereinafter *Regulating Private Schools*].

119 OFF. OF INNOVATION & IMPROVEMENT, OFF. OF NON-PUBLIC EDUC., U.S. DEP'T OF EDUC., STATE REGULATION OF PRIVATE SCHOOLS (2009), https://www2.ed.gov/admins/comm/choice/regprivschl/regprivschl.pdf.

120 *Regulating Private Schools*, *supra* note 118.

121 ALA. CODE §§ 16-6D-4, -9 (2023).

122 ALASKA STAT. ANN. § 14.45.100 (West 2025).

of whether that status is appropriate or simply a case of misleading self-labeling.

Exemptions typically fall into one of three categories: (1) states that authorize religious private/boarding schools to operate without a license; (2) states that leave the licensing/accreditation process voluntary; or (3) states that outsource the licensing, accreditation, or regulation to an outside organization.[123] The most frequently used type of religious exemption abolishes any regulation over religious schools.[124] Alabama represents perhaps the broadest exemption.[125] The full-text states:

> The Legislature finds and declares all of the following:(1) That a parent or guardian in Alabama has a constitutional right to choose the type of K-12 education that is best for his or her child, whether public or nonpublic, religious or nonreligious, and including home-based education, (2) That many parents choose to home school or enroll their children in elementary and secondary nonpublic schools, including private, church, parochial, or religious schools, that are not subject to state regulation and do not receive state or federal funds. (3) That other than reporting on the enrollment of students, these nonpublic K-12 schools have been primarily exempt from state regulation and have only been required by state law to report the enrollment of students.(4) That there is no national or state constitutional mandate that the government provide, license, or regulate nonpublic education, including private, church, parochial, and religious schools, or home-schooled students. (5) That regulation by the state, including the State Department of Education, the State Board of Education, or the State Superintendent of Education, of any school with a religious affiliation would be an unconstitutional burden on religious activities in direct violation of the Alabama Religious Freedom Amendment and the First Amendment to the United States Constitution; and further that the State of Alabama has no compelling interest to burden by license or regulation nonpublic schools, which include private, church, parochial, and religious schools offering educational instruction in grades K-12, as well as home-based schools and home-schooled students.[126]

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123 *See generally* Mooney, *supra* note 21.

124 *See generally* ALA. CODE § 16-1-11.1 (2025). *See also* § 14.45.100; *Private Schools,* IDAHO DEP'T OF EDUC., https://www.sde.idaho.gov/about-us/departments/school-choice/private-schools/ (last visited Oct. 28, 2025).

125 § 16-1-11.1.

126 *Id.*

This statute represents what many believe to be the essence of religious laws—protecting religious freedom[127]—but it has the causative effect of barring any regulation of private schools.[128]

Alaska and Idaho also have statutes with broad exemptions, but they do not specifically attribute it to religion as Alabama did.[129] Alaska does not require private religious schools to comply with regulations, including those concerning school discipline, student restraint, use of seclusion, and crisis intervention training.[130] Idaho, on the other hand, explicitly states that both for-profit and nonprofit private schools are outside the public education system, and, as a result, the Idaho Department of Education does not regulate any aspect of private schooling.[131] These are perhaps the most dangerous because, while there is a chance of regulation in those states that allow voluntary compliance or outsource it, states that do not require anything at all have no chance of knowing what is happening within the centers run by companies.

Kentucky and Kansas both have regulatory schemes that allow voluntary compliance for religious institutions. Voluntary compliance allows schools and programs to choose between complying with licensure/accreditation or opting not to.[132] Kentucky states that "[a]ny private, parochial, or church school may voluntarily comply with curriculum, certification, and textbook standards established by the Kentucky Board of Education and be certified upon application to the Board by such schools."[133] Additionally, "the Kentucky Department of Education does not require non-public schools to be certified."[134]

The Kansas State Department of Education states that "private schools are not required" to participate in the state accreditation process.[135] While certification can be a massive benefit in the competitive world of accreditation, schools have financial and religious incentives not to participate since fewer rules allow schools to use inexpensive and less

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127 *See generally* Szalavitz, *supra* note 5. *See also* § 16-1-11.1.

128 Szalavitz, *supra* note 5; *see also* § 16-1-11.1.

129 *Compare* § 16-1-11.1, *with* § 14.45.100, *and Private Schools, supra* note 124.

130 § 14.45.100.

131 *Private Schools, supra* note 124.

132 *See generally Accreditation Criteria,* KAN. ST. DEP'T OF EDUC., https://www.ksde.gov/Agency/Division-of-Learning-Services/Accreditation-and-Design/AccreditationCriteria#MainContent Page (last visited Oct. 21, 2025). *See also* KY. REV. STAT. ANN. § 156.160 (West 2025).

133 § 156.160.

134 KY. DEP'T OF EDUC., NON-PUBLIC OR PRIVATE SCHOOL INFORMATION (2025), https://www.education.ky.gov/federal/fed/Documents/Kentucky%20Nonpublic%20Information%20Packet.pdf.

135 *See generally Accreditation Criteria, supra* note 132.

effective alternatives, hire fewer educators, have cheaper curricula that often fail to meet adequate education standards, etc.[136]

Outsourcing regulation usually occurs when, as a compromise with religious advocates, states allow religious schools to operate under an alternative committee or coalition.[137] Florida and Georgia both have regulatory schemes that enable religious childcare centers to operate under the regulation of an alternate regulator.[138] Georgia's statute provides for the following:

> A Center that is licensed by the Department may request an exemption from licensure if the Center's program is an integral part of an established religious congregation or religious school that conducts regularly scheduled classes, courses of study, or educational programs and is a member of, or accredited or certified by a state, regional, or national accrediting agency for religious, educational instruction or a state, regional, or national accrediting agency for educational instruction as recognized and approved by the Department if such accrediting entity uses standards that are substantially similar to those established by the Department[139]

Florida's law explicitly states that the Department of Education does not "regulate, control, approve, or accredit private educational institutions."[140] While Florida law makes it clear that the state does not officially endorse accrediting agencies for private school accreditation, many agencies try to represent themselves as the go-to accreditation agency.[141] One such entity is the Florida Association of Christian Child Caring Agencies, which claims to be "the authority in the state of Florida for Registering Christian Childcare Facilities for operation."[142] Lakeland Girl's Academy, where a teen girl died from an untreated medical condition, was a member of this organization.[143] It also reportedly has sole regulatory authority over other children's homes and maternity homes that faced allegations of abuse.[144] The extent to which

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136 THE PROGRAM: CONS, CULTS, AND KIDNAPPING: *Follow the Money* (Netflix, released 2024) [hereinafter *Follow the Money*].

137 *See generally* Wyatt, *supra* note 5, at 115.

138 *Religious Exempt from Licensure Accreditation,* FLA. COAL. OF CHRISTIAN PRIV. SCHS. ACCREDITATION, https://fccpsa.org/religious-exempt/ (last visited Oct. 21, 2025).

139 GA. COMP. R. & REGS. 591-1-1-.46 (2024).

140 FLA. STAT. § 1002.42(h) (2025).

141 *See generally Welcome to FACCCA,* FLA. ASS'N OF CHRISTIAN CHILD CARING AGENCIES, https://www.faccca.com (last visited Oct. 22, 2025*).*

142 *Welcome to FACCCA, supra* note 141.

143 White, *supra* note 65.

144 Laura Morel, *How Some Christian Group Homes Avoid Florida's Standards*, N.Y. TIMES (Jan. 24, 2025), https://www.nytimes.com/2025/01/24/us/christian-group-homes-florida.html.

the industry is actually regulated is only as effective as the regulator's interest in protecting children.

Most states are well-meaning; however, making accreditation or certification voluntary or nonexistent permits low standards of care and abusive tactics and is a gift to schools that prey on desperate parents who need affordable resources.[145] Statutorily, states are outsourcing regulations, but in reality, they are leaving the industry with no regulation at all.[146]

III. RECOMMENDATIONS

A. Recommended Federal Actions

The Stop Institutional Child Abuse Act (SICAA) was introduced by Senator Jeff Merkley (D-OR) in the U.S. Senate and by Representative Ro Khanna (D-CA-17) in the U.S. House of Representatives on April 27th, 2024.[147] The House bill was primarily ignored after its introduction; the Senate bill, however, was signed into law eight months later on December 23rd, 2024.[148]

SICAA required two essential courses of action. First, it requires the Department of Health and Human Services to collaborate with the National Academies of Sciences, Engineering, and Medicine to study the origins of abuse in TTI programs.[149] Second, the academies were then directed to make recommendations based on their findings.[150] The specific instructions are "the National Academies shall, not later than 3 years after the date of enactment of the Stop Institutional Child Abuse Act, and every 2 years thereafter for a period of 10 years, issue a report informed by the study conducted under such subsection."[151] The bill specified that the reports are to cover topics like the "nature, prevalence, severity, and scope of child abuse, neglect, and deaths in youth residential programs," federal and state funding sources, identification what kind of facilities are within TTI, where they are located, any applicable licensing standard or exemptions, the required standards of care for accreditation, and the investigation of existing barriers to getting funding sources for serving applicable youth in their community-

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145 *See generally Follow the Money, supra* note 136.

146 GA. COMP. R. & REGS. 591-1-1-.46 (2025); *see also* FLA. STAT. § 1002.42(h) (2025).

147 *See* Stop Institutional Child Abuse Act, Pub. L. No. 118-194, 138 Stat. 2664 (2024); H.R. 2955, 118th Cong. (2023).

148 *See* Stop Institutional Child Abuse Act.

149 *Id.* § 2(a).

150 *Id.*

151 *Id.* § 2(b).

based settings, risk assessment tools and recommendations related to the issue.[152]

While SICAA is a good first step, it is just a starting point. Although SICAA requires the academies to make recommendations, the law does not mandate any agency, department, or individual to implement said recommendations.[153] It is possible that Congress intended the Act to be a first step which would then trigger additional legislation; however, with no authority for the HHS to carry out either acting under the recommendations or to enact any further legislation, nothing is stopping the recommendations from becoming merely another governmental report that does not effectuate change as shown by the fact that Congress published supplemental reports in 2007 and 2022 but no further legislative action occurred until 2024."[154] Congress published reports in 2007 and 2022, but there was no legislative action for two more years.[155] This is not to say SICAA is not a significant victory for the victims; it just does not go nearly far enough to prevent anything or reduce incidences of child abuse. A comprehensive federal law is needed to address four primary areas of concern: (1) lack of consistent definition of the Troubled Teen Industry, (2) lack of minimum safety standards, (3) the inability of victims to get redress for their harms, and (4) the ability of programs to use religious exemptions.

First, the federal government must create a central definition of the Troubled Teen Industry.[156] This definition would have to encompass the wide range of formats under which TTI programs operate, including wilderness camps, boot camps, wilderness therapy programs, residential treatment centers, boarding schools, and conversion therapy centers.[157] A good starting point would be finding that the industry includes all group care settings that retain guardianship or custodial rights over a minor child and any group care setting that will maintain physical custody of a minor for longer than fourteen days. These two clauses would encompass both programs that require parents to relinquish their custodial rights as a condition of enrollment and programs that do not acquire such rights but retain custody for longer than on a temporary, short-term basis. While the proposed clauses would include camps and programs that last for an extended period but are not part of TTI, the risk of harm to minors outweighs any burden placed on those entities. Furthermore, there is a strong indication that any program that has

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152 *Id.*

153 *Id.* § 2.

154 *Id.* § 2(b).

155 *See generally* S. COMM. ON FIN., 118TH CONG., WAREHOUSES OF NEGLECT: HOW TAXPAYERS ARE FUNDING SYSTEMIC ABUSE IN YOUTH RESIDENTIAL TREATMENT FACILITIES (Comm. Rep. 2024).

156 Stop Institutional Child Abuse Act § 2(e).

157 Younis, *supra* note 4, at 2.

consecutive custody of a child for longer than two weeks should be subjected to regulation regardless.

Second, the law must outline minimum standards for fundamental rights that every minor should receive while in group care facilities.[158] Breaking Code Silence, a survivor-run nonprofit, has outlined a need for what it refers to as a Congregate Care Bill of Rights.[159] It proposes that every youth placed in congregate care should have the right to physical well-being,[160]social and emotional well-being. It further proposed that every youth should be provided with all their essential needs,[161] access to appropriate treatment,[162] and freedom from "abusive, humiliating, degrading, or traumatizing treatment by staff or other youth."[163]

Third, the law must provide a redress method when centers violate minors' or parental rights. Currently, when individuals are injured, the only opportunity for redress is through the civil court system. The current remedy is inadequate because the ability to successfully pursue civil suits is limited in various circumstances, including institutions using parental consent as a defense[164] and regulatory limitations that immunize such facilities to such an extent that it is impossible for state agencies to take action against them.[165] Using a federal statute to create an individual right of action for youth injured by the practices of the Troubled Teen Industry to provide restitution for victims and deter companies from acting abusively in the future.

Finally, to address the religious exemption loophole from the origin, CAPTA should be amended to add a condition that requires states to abolish any religious exemption to child welfare to be eligible for federal funding.

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158 *The Youth In Care Bill Of Rights*, BREAKING CODE SILENCE, https://www.breakingcode silence.org/acca/ (last visited Feb. 27, 2025).

159 *Id.*

160 *Id.* Physical well-being means freedom from abuse and neglect including "all forms of physical, psychological, and sexual abuse, neglect, exploitation, financial exploitation, and excessive medication; the right to be free from institutional abuse and neglect; freedom from aversive behavioral interventions; freedom from physical, mechanical, and chemical restraint or seclusion; protection against unreasonable search and seizure, including the use of strip searches or cavity searches as a means of punishment." *Id.*

161 *Id.* Emotional and Social well-being includes "prohibition of long periods of forced silence; restriction of communication with staff, caregivers, child protective services, law enforcement, or advocates; sufficient educational and life skills imparted onto them; and reasonable daily access to the outdoors." *Id.*

162 *Id.* According to Breaking Code Silence, appropriate treatments necessitate treatment that is individualized, culturally competent, trauma-informed, and supportive of personal liberty and development. *Id.*

163 This aspect would include the ability of youth to report incidents of harm and abuse and access to advocacy and protection services. *Id.*

164 Wyatt, *supra* note 5, at 118 (finding that programs are protected from lawsuits for abuse because they often require some relinquishment of parental rights, which means parents essentially "consented" to the treatment on their child's behalf).

165 *Id.*

The federal government has the authority to place conditions on CAPTA funding as they already have various requirements that states must meet to receive grants under the law.[166] Congress could amend the law to include a condition that any state that receives funding must apply child welfare laws universally and that no religious exemptions exist.

B. Recommended State-level Action

As discussed previously, several states currently give broad discretion to religious schools, daycares, and residential treatment facilities to operate without formal oversight instead of allowing them to operate according to their own rules.[167] In recent years, states, including Missouri, have undertaken efforts to close gaps.[168] On July 14th, 2021, the Governor of Missouri signed House Bill 560 (Senate Bill 557) into law.[169] The law, which is commonly known as the "Residential Care Facility Notification Act," created a mandate that all residential care facilities, regardless of license status, have to (1) register with the state; (2) provide unrestricted access to the children's parents or guardians; (3) provide adequate food, shelter, clothing, and medical care; (4) comply with fire, safety, and health inspections; and (5) conduct background checks on all employees, volunteers, managers, officers, contractors, or anyone with access to children to undergo background checks. [170]

Missouri's efforts represent a good first step towards meaningful change, particularly concerning its treatment of the religious exemption. In Section 210.1271 of the Residential Care Facility Notification Act, Missouri went further than the SICAA.[171] When the Department of Social Services finds that the residential care facility does not comply with the law, Section 210.1271 permits it to seek injunctive relief, including removing the children.[172] Even though the statute does not explicitly prohibit child abuse in the facilities, the Department could seek the injunctive relief described in

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166 CASEY FAMILY PROGRAMS, THE CHILD ABUSE PREVENTION AND TREATMENT ACT 8 (May 2019), https://www.casey.org/media/CAPTA-Paper_web.pdf (stating that states must have state plans in place to address mandatory reporting, screening, and procedures for addressing and tracking child abuse, and requirements for background checks in child welfare settings, along with requiring data collection of child abuse and panels for reviewing child welfare practices and policies).

167 Amy Harris, *Religious Day Cares Get Freedom From Oversight, with Tragic Results*, REVEAL (Apr. 12, 2016), https://revealnews.org/article/religious-day-cares-operate-with-little-oversight-and-accountability/.

168 Press Release, Mo. Dep't of Soc. Servs., House Bill 557 Improves Safety of Children and Youth (July 19, 2021), https://dss.mo.gov/press/07-19-2021-hb557.htm.

169 *Id.*

170 MO. ANN. STAT. §§ 210.1250–1286 (West 2025).

171 *Id.* § 210.1271.

172 *Id.*

Section 210.1271 for a variety of reasons, including "an immediate health or safety concern for the children." [173] While subjective, it allows courts to investigate cases of alleged abuse. The language, however, is unclear whether this would include the type of mental, emotional, and psychological neglect and abuse often reported from these facilities.[174]

Missouri's new legislation and the newly passed SICAA offer a valuable jumping-off point for future legislation. Nevertheless, the most effective legislation that all entities should aspire to is federal legislation that covers any entity that has care, custody, and control of minor children, including residential treatment. Additionally, it needs to include the fact-finding and data collection that SICCA currently requires, along with the regulation, registration, and enforcement mechanism through injunctive relief contained in the Missouri Statute. Finally, no statute will survive unless the public and legislators actively commit to the goal of ensuring the safety of children who have been, are, and will be victims of institutional child abuse.

CONCLUSION

Samson Leham – Gateway Christian Military Academy, Florida;[175] Hannah Archuleta –Turn-About Ranch, Utah;[176] Naomi Wood – Lakeland Girls Academy, Florida;[177] Danielle Bregoli – Turn-About Ranch, Utah;[178] Emma Burris – Lakeland Girls Academy, Florida.[179] These are just five of the millions of children who have been and are currently being victimized by religious child abuse institutions.[180] The situation seems bleak, but change is possible. Federal and state governments can lessen or completely eradicate the circumstances that facilitate the types of abuse discussed in this note by updating laws to mandate universal compliance with child protection laws without exception for religious affiliation or status and dedicating child protection resources to investigate, prevent, and prosecute abusive

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173 *Id.*

174 *Id.* § 210.1271 (1)(4).

175 *Religious Exemptions, supra* note 48.

176 Jessica Schreifels, *Woman Says She Was Punished at Turn-About Ranch After Reporting a Sexual Assault*, THE SALT LAKE TRIBUNE (Feb. 26, 2021, at 09:58), https://www.sltrib.com/news/2021/02/24/woman-says-she-was/.

177 Gary White, *Faith-based Lakeland Girls Academy Draws Scrutiny After Teen's Death*, THE LEDGER (Apr. 6, 2022, at 13:11 ET), https://www.theledger.com/story/news/local/2021/07/03/faith-based-lakeland-girls-academy-draws-scrutiny-after-teens-death/7823815002/.

178 BHAD BHABIE, *supra* note 30.

179 Aviv, *supra* note 116.

180 *See generally* Younis, *supra* note 4.

facilities.[181] As stated by Senator Jeff Merkley, "institutional care, without oversight, all too often becomes institutional abuse,… "[r]eforming our residential care system would improve the lives of thousands of children across our country, and it merits our urgent attention."[182] The senator is correct: this issue is widespread and urgent, leaving a lasting impact on the millions of victims subjected to it; thus, regulation is not merely a suggestion but a necessity.[183] Comprehensive federal legislation will provide much-needed assurance for families that they will have access to safe care and help save millions of vulnerable minors from being subjected to further abuse in the name of treatment. Suppose all religious entities are subject to the same level of regulation to prevent child abuse. In that case, it will only facilitate more confidence in religious programs because families will have the assurance that their children are getting all the benefits of religion without the risk of imposters who merely aim to cause harm.

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[181] *See generally* Stop Institutional Child Abuse Act, Pub. L. No. 118-194, § 2(b), 138 Stat. 2664 (2024); *see also* MO. ANN. STAT. §§ 210.1253–1286 (West 2025).

[182] Press Release, Off. of Congressman Ro Khanna, Khanna, Merkley, Cornyn, Tuberville, and Carter Introduce Bipartisan Legislation to End Children's Abuse in Residential Treatment Centers (Apr. 27, 2023), https://khanna.house.gov/media/press-releases/khanna-merkley-cornyn-tuberville-and-carter-introduce-bipartisan-legislation.

HELD HOSTAGE BY HIGH PRICES: HOW THE PHARMACY SYSTEM MAKES YOU PAY MORE

Riley Harris*

INTRODUCTION

In January 2025, a Wisconsin family made headlines when they filed a lawsuit against a major pharmacy benefit manager (PBM) chain, OptumRx Inc., following the tragic and preventable death of their son.[1] The case—*Schmidtknecht v. OptumRx Inc.*—shines an unflinching light on the fatal consequences of current opaque PBM practices.[2] The family's ordeal is marked by allegations that OptumRx engaged in excessive pricing practices.[3]

The case tells the tragic story of 22-year-old Cole Schmidtknecht, who died as a direct result of these alleged excessive pricing practices.[4] *Schmidtknecht* forces lawmakers to confront a brutal reality: Lifesaving medication has become a luxury for many Americans, and the consequences are fatal.[5] Cole, who had struggled with chronic asthma since he was a baby, depended on *Advair Diskus*, an inhaler he used twice a day to keep his

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* Riley Harris is a law student at Southern Illinois University Simmons Law School and a member of the Southern Illinois University Law Journal. Her Note reflects her passion for advancing equitable access to healthcare through legal and regulatory reform, informed by her academic career at St. Louis College of Pharmacy. Before law school, Riley worked as a pharmacy technician, where she learned how common it is for patients to be unable to afford the medications they need to live. Riley watched as technicians and pharmacists tried their best to find workarounds for their patients, yet policy prohibited them from suggesting more affordable options; their hands were tied. These experiences shaped her decision to pursue a legal career, driven by a commitment to advocating for policies and regulations that improve medication access and affordability. Riley expresses sincere gratitude to her family and friends, especially her mother, father, and brother, for their unwavering support throughout her law school career. She is also deeply appreciative of the 2024–2025 Law Journal staff for their guidance in developing this Note, as well as the 2025–2026 staff for their careful editing and contributions to its publication. Lastly, she extends her gratitude to pharmacists for their dedication to serving patients, even in the face of regulatory constraints. She hopes to continue advocating for others across all fields of law and beyond.

1 Venessa Kjeldsen, *Wisconsin Family Files Federal Lawsuit Against Pharmacy Chain and PBM Over Son's Death*, WMTV (Jan. 27, 2025), https://www.wmtv15news.com/2025/01/27/wisconsin-family-files-federal-lawsuit-against-pharmacy-chain-pbm-over-sons-death/ [https://perma.cc/NDL5-HP5G].

2 Schmidtknecht v. OptumRx Inc., No. 1:25-cv-00093 (E.D. Wis. filed Jan. 21, 2025).

3 Kjeldsen, *supra* note 1.

4 Jennifer Rodriquez, *Man's Asthma Inhaler Cost Went From $66 to $539, Then He Died, Wisconsin Lawsuit Says*, KAN. CITY STAR (Jan. 28, 2025), https://www.kansascity.com/news/nation-world/national/article299308004.html [https://perma.cc/E943-KXQ4].

5 Kjeldsen, *supra* note 1.

airways open so that he could breathe.[6] The medication that once cost Cole a manageable $66.86 under his employer-provided health insurance, the United Health-OptumRx Plan, suddenly spiked in price without warning.[7] On January 10, 2024, a routine visit to a Walgreens pharmacy in Appleton, Wisconsin, became a nightmare.[8] Cole was abruptly informed that his medication, once affordable, now retailed for an astronomical $539.19 under his UnitedHealth-OptumRx plan.[9] With no 30-day notice provided, as Wisconsin law requires,[10] and no viable alternatives offered, Cole was left with an impossible choice: pay exorbitant costs or go without the preventative care his condition so desperately needed.[11]

The impact of the medication re-pricing by the PBM, OptumRx, was immediate and devastating.[12] Cole was unable to pay the new exorbitant price and over the next several days, Cole's struggle to breathe intensified.[13] Without access to his daily inhaler, he was forced to rely solely on a rescue inhaler, a temporary solution not meant for long-term use, causing his condition to worsen dramatically.[14] On January 15, 2024, the effects of going without his medication culminated in a severe asthma attack.[15] Cole's roommate was forced to rush him to the hospital, but Cole became unresponsive and pulseless during transport.[16] Tragically, Cole was pronounced comatose upon arrival at the hospital.[17] By January 21, with his hopes of recovery fading, Cole's family made the unbearable decision to take him off life support.[18]

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6 Rodriquez, *supra* note 4; GLAXOSMITHKLINE LLC, ADVAIR DISKUS: PRESCRIBING INFORMATION (June 2023), https://gskpro.com/content/dam/global/hcpportal/en_US/Prescribing_Information/Advair_Diskus/pdf/ADVAIR-DISKUS-PI-PIL-IFU.PDF (on file with SIU Law Journal).

7 Rodriquez, *supra* note 4.

8 *Id.*

9 *Id.*

10 WIS. STAT. § 632.861(4)(a) ("A pharmacy benefit manager acting on behalf of a disability insurance policy or self-insured health plan shall provide to an enrollee advanced written notice of a formulary change that removes a prescription drug from the formulary of the policy or plan or that reassigns a prescription drug to a benefit tier for the policy or plan that has a higher deductible, copayment, or coinsurance. The advanced written notice of a formulary change under this paragraph shall be provided no fewer than 30 days before the expected date of the removal or reassignment . . . ."); *Pharmacy Benefit Management*, OPTUM, https://business.optum.com/en/pharmacy-benefit-management.html (on file with SIU Law Journal) (last visited Mar. 30, 2026) (identifying as a PBM, OptumRx administers prescription benefits for health plans fitting the statute category of a PBM for a disability insurance policy or a self-insured health plan).

11 Rodriquez, *supra* note 4.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

This heart-wrenching story is now at the center of a federal lawsuit in Wisconsin and is more than just a legal battle.[19] Instead, *Schmidtknecht* is a profound indictment of a healthcare system where bureaucratic indifference and profit-driven policies can decide who lives and who dies.[20] Cole's story resonates deeply with many Americans who struggle to afford the medications they need, highlighting the human cost behind soaring drug prices and opaque PBM practices.[21] His family's grief and their courageous fight for accountability serve as a powerful call to action: No one should have to choose between paying rent and securing the medication that could save their life.[22] By sharing Cole's experience, the legislature is reminded that behind every statistic are real lives that are irrevocably altered or tragically lost when profit eclipses care.[23]

Unfortunately, this case is not an isolated incident; it encapsulates a broader crisis in healthcare where profit-driven strategies and limited oversight conspire to endanger patient lives and burden the healthcare system.[24] This narrative is a plea for change, urging the legislature to scrutinize and reform PBM practices that, in too many cases, have turned essential healthcare into a perilous gamble with human life.[25]

This Note will focus on the existence of an oligopoly regulating the PBM market, the implications of a current lack of regulations governing PBM operations, the contractual clauses employed by PMBs against pharmacies, such as gag clauses, and how these factors negatively impact pricing, access to drugs, and overall market efficiency for patients.[26]

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19 Kjeldsen, *supra* note 1.

20 *See, e.g.*, Schmidtknecht v. OptumRx Inc., No. 1:25-cv-00093 (E.D. Wis. filed Jan. 21, 2025).

21 Grace Sparks et al., *Public Opinion on Prescription Drugs and Their Prices*, KFF (Oct. 4, 2024), https://www.kff.org/health-costs/poll-finding/public-opinion-on-prescription-drugs-and-their-prices/ (on file with SIU law journal).

22 Rodriquez, *supra* note 4.

23 Kjeldsen, *supra* note 1.

24 Sparks et al., *supra* note 21.

25 The following reports and articles show that PBMs practices can increase patients' out-of-pocket costs and impede access to essential medicines; in turn, cost-driven nonadherence (skipping doses or rationing) is associated with serious harm, including. Cole Schmidtknecht's case alleges that very sequence. *See* OFF. POL'Y PLAN., FED. TRADE COMM'N, PHARMACY BENEFIT MANAGERS: THE POWERFUL MIDDLEMEN INFLATING DRUG COSTS AND SQUEEZING MAIN STREET PHARMACIES: INTERIM STAFF REPORT (July 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/pharmacy-benefit-managers-staff-report.pdf (on file with SIU Law Journal); HUM. RTS. WATCH, "IF I'M OUT OF INSULIN, I'M GOING TO DIE": UNITED STATES' LACK OF REGULATION FUELS CRISIS OF UNAFFORDABLE INSULIN (2022), https://www.hrw.org/sites/default/files/media_2022/04/us_insulin0422_web.pdf (on file with SIU Law Journal); *see also* Kjeldsen, *supra* note 1.

26 *See generally* Luke Halpern, *FTC Report Acknowledges Impact Pharmacy Benefit Managers Have on Cost, Accessibility of Prescription Drugs*, PHARMACY TIMES (July 9, 2024), https://www.pharmacytimes.com/view/ftc-report-details-impact-pharmacy-benefit-managers-have-on-cost-accessibility-of-prescription-drugs [https://web.archive.org/web/20251105203348/ht

At the heart of this issue is the enormous influence PBMs wield over drug pricing and patient access to medication.[27] PBMs, owned by insurance companies, act as middlemen between insurers, pharmacies, and drug manufacturers.[28] But rather than ensuring patient affordability, current PBM practices often result in inflated prices and diminished access to necessary medications for consumers.[29] For example, contractual provisions may require pharmacies to return a portion of their reimbursements if drug prices fall below a certain threshold.[30] Further, "Gag clauses" can restrict pharmacies from disclosing cheaper out-of-pocket options to consumers.[31] These tactics drive up costs, undermine transparency, and erode the trust of consumers and healthcare providers alike.[32]

Beyond the immediate human tragedy seen in the *Schmidtknecht* case, the ripple effects of these practices are widespread.[33] Consumers find themselves trapped in a system where the actual cost of medications is hidden, leaving many without access to lifesaving drugs or the financial means to secure them at the pharmacy counter.[34] Meanwhile, pharmacies are forced to operate under unfavorable terms that compromise their ability to serve the community effectively.[35] The lack of robust federal or state regulation exacerbates these issues. It allows PBMs to continue operating in a legal gray area that stifles competition, affordable drug pricing, and equal distribution.[36]

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tps://www.pharmacytimes.com/view/ftc-report-details-impact-pharmacy-benefit-managers-have-on-cost-accessibility-of-prescription-drugs].

27 *See generally* PBM ACCOUNTABILITY PROJECT, UNDERSTANDING THE EVOLVING BUSINESS MODELS & REVENUE OF PHARMACY BENEFIT MANAGERS (2021), https://www.pbmaccountability.org/_files/ugd/b11210_264612f6b98e47b3a8502054f66bb2a1.pdf?index=true (on file with SIU Law Journal).

28 Mark Meador, *Squeezing the Middleman: Ending Underhanded Dealing in the Pharmacy Benefit Management Industry Through Regulation*, 20 ANNALS HEALTH L. 77, 77 (2011).

29 *Id.*

30 Brook Getachew et al., *Follow the Pill: Understanding the Prescription Drug Supply Chain*, AVALERE HEALTH (May 20, 2020), https://avalere.com/insights/follow-the-pill-understanding-the-prescription-drug-supply-chain (on file with SIU Law Journal).

31 *Id.*

32 *See generally* PBM ACCOUNTABILITY PROJECT, *supra* note 27.

33 Grace Sparks et al., *supra* note 21.

34 *See* Halpern, *supra* note 26.

35 *See NCPA to CMS: A Third of Independent Pharmacies Won't Carry Drugs in the Negotiated Price Program, and 60 Percent More are Considering Dropping Out*, NAT'L CMTY. PHARMACISTS ASS'N (Jan. 27, 2025), https://ncpa.org/newsroom/news-releases/2025/01/27/ncpa-cms-third-independent-pharmacies-wont-carry-drugs-negotiated (on file with SIU Law Journal) [hereinafter *NCPA to CMS*].

36 *See generally* Brian Nowosielski, *Independent Pharmacies Continue to Face Financial Hardships as the Clock Ticks on PBM Reform*, 2 TOTAL PHARMACY J. (Mar. 7, 2024), https://www.drugtopics.com/view/independent-pharmacies-continue-to-face-financial-hardships-as-clock-ticks-on-pbm-reform [https://web.archive.org/web/20250731063854/https://www.drug

This discussion will delve into these intertwined issues by exploring the power dynamics within the PBM market, the regulatory void that enables such practices, the structure of the pharmaceutical supply chain, and the strategies PBMs employ to maintain their oligopolistic control.[37] By examining broader market trends and statistics, this note aims to show how the practices of PBMs ultimately harm patients and pharmacists—both in terms of drug costs and overall access to care.[38] The analysis aims to highlight the immediate consequences of these practices and to propose a more accountable and transparent system that prioritizes patient welfare over profit margins.[39]

I. MARKET STRUCTURE AND PHARMACY BENEFIT MANAGER OLIGOPOLY

A. Overview of the PBM Market

PBMs were initially created in the 1960s to serve as middlemen between drug manufacturers, insurance companies, and pharmacies to help manage prescription drug benefits and reduce costs for consumers and health plans.[40] PBMs are third-party companies that function as intermediaries between insurance providers and pharmaceutical manufacturers.[41] PBMs create formularies, negotiate rebates[41] with manufacturers, process claims, build pharmacy networks, review drug utilization, and manage mail-order specialty pharmacies.[42] PBMs manage drug formularies, which are the lists of prescription medications that insurance plans agree to cover. PBMs also

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topics.com/view/independent-pharmacies-continue-to-face-financial-hardships-as-clock-ticks-on-pbm-reform]; *see* Halpern, *supra* note 26.

37 *See generally* PBM ACCOUNTABILITY PROJECT, *supra* note 27; *see* Getachew et al., *supra* note 30.

38 *See, e.g.*, Becky Briesacher & Ron Corey, *Patient Satisfaction With Pharmaceutical Services at Independent and Chain Pharmacies*, 54 AM. J. HEALTH-SYS. PHARMACY 531–36 (1997).

39 Meador, *supra* note 28, at 77.

40 *See*, *e.g.*, PBM ACCOUNTABILITY PROJECT, *supra* note 27; *see also* Katie Ginder-Vogel, *The Evolution and Future of Pharmacy Benefits Managers*, UNIV. WIS.-MADISON SCH. PHARMACY (Mar. 13, 2024), https://pharmacy.wisc.edu/2024/03/13/the-evolution-and-future-of-pharmacy-benefits-managers/ (on file with SIU Law Journal).

41 Steve M. Lieberman, Paul Ginsburg & Erin Trish, *Sharing Drug Rebates with Medicare Pat D Patients: Why and How*, USC LEONARD D. SCHAEFFER INST. PUB. POL'Y & GOV'T SERV. (Sep. 15, 2020), https://schaeffer.usc.edu/research/sharing-drug-rebates-with-medicare-part-d-patients-why-and-how (on file with SIU Law Journal) ("Rebates are discounts paid by drug manufacturers after a prescription is dispenses to insurers [and] pharmacy benefit managers (PBMs) . . . .").

41 *Id.*

42 *See* Ginder-Vogel, *supra* note 40; *see* Nicole Rapfogel, *5 Things To Know About Pharmacy Benefit Managers*, CAP (Mar. 13, 2024), https://www.americanprogress.org/article/5-things-to-know-about-pharmacy-benefit-managers [https://web.archive.org/web/20251105202003/https://www.americanprogress.org/article/5-things-to-know-about-pharmacy-benefit-managers].

determine which pharmacies will be included in their insurance companies' networks, significantly influencing a pharmacy's ability to make money based on access to patients using major health insurance plans.[43] PBMs have actively participated in the United States pharmacy supply chain for several years.[44] However, there has been a push to regulate PBMs' activity to make their market participation more transparent for consumers and pharmacies.[45] This is because the PBM market's lack of fair competition has increased patients' costs and made it harder for independent pharmacies to turn a profit.[46]

According to a National Community Pharmacists Association report, 96.5% of independent pharmacists believe that PBM and Medicare Part D reimbursement rates threaten their business's survival, and 30.3% are considering closing their doors in 2025, potentially depriving communities of essential services.[47] Many independent pharmacies struggle to remain in business because they can afford to stock only medications with high reimbursement rates, even if that is not what patients need.[48] Stocking medications with low reimbursement rates leads to significant financial losses and forces independent pharmacies to reduce the medications they can provide.[49]

Inadvertently, "not everyone wants to get rid of PBMs."[50] Instead, legislators and policymakers are advocating for more transparency, reflecting a desire to keep PBMs around and potentially reducing the final costs patients face for medications.[51] Specifically, legislators and policymakers are pushing for increased transparency because opaque PBM practices, such as undisclosed rebates and fee structures, have been shown to cause drug cost inflation.[52] In 2023, bipartisan proposals were introduced in Congress that, if passed, would require PBMs to disclose their pricing mechanisms.[53]

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43 *See* Ginder-Vogel, *supra* note 40.

44 *See* Thomas A. Hemphill, *The Troubles with Pharmacy Benefit Managers*, 40 REGULATION 14, 14 (2017).

45 *See id.*

46 *See* Loren Adler & Benedic Ippolito, *Procompetitive Health Care Reform Options for a Divided Congress*, BROOKINGS (2023), https://www.brookings.edu/articles/procompetitive-health-care-reform-options-for-a-divided-congress/ (on file with SIU Law Journal).

47 *See NCPA to CMS, supra* note 35.

48 *See id.*

49 *See id.*

50 Interview with Mitchell Harris, Dr. of Pharmacy Candidate at St. Louis Coll. Pharmacy, in Collinsville, Ill. (Nov. 3, 2024); *see*, *e.g.*, PBM ACCOUNTABILITY PROJECT, *supra* note 27.

51 Interview with Mitchell Harris, *supra* note 51; *see*, *e.g.*, PBM ACCOUNTABILITY PROJECT, *supra* note 27.

52 Ahmed Aboulenein, *Explainer: Why are US Pharmacy Benefit Managers Under Fire?*, REUTERS (Sep. 20, 2024), https://www.reuters.com/legal/litigation/why-are-us-pharmacy-benefit-managers-under-fire-2024-09-20/ (on file with SIU Law Journal).

53 *Id.*

Healthcare advocates argue that the proposed legislation would not only facilitate fairer negotiations but also help ensure savings are passed on to independent pharmacies and patients, thereby improving the healthcare system.[54]

B. What Are the Benefits of Keeping PBMs

When PBMs operate ethically and within their intended purpose, they are powerful advocates that help reduce prescription drug costs for patients and healthcare providers.[55] Research shows that around 93% of organizations that use PBMs in their practice, including commercial insurers, self-funded employer plans, labor unions, Medicare Part D programs, federal and state employee plans, and managed Medicaid programs, report saving on medication costs.[56] For example, an employer's pharmaceutical expenses are reduced tenfold for every dollar spent on PBM services.[57]

When operating ethically, PBMs serve as a critical barrier between escalating medication costs and patients.[58] If PBMs ensure that negotiated discounts are shared directly with patients or the pharmacies dispensing the medications, prescription drugs become more affordable at check-out.[59] This PBM function helps reduce confusion and frustration at the pharmacy counter for all parties involved by ensuring patients get the medications they need at the right time and at the expected cost.[60] By improving access to necessary treatments by easing the financial burden on consumers, PBMs ultimately support better patient health outcomes.[61]

PBMs also play a central role in coordinating care across different parts of the healthcare system.[62] PBMs perform this function by leveraging data and technology to facilitate communication between patients, providers, and insurers. For example, tools such as real-time prescription benefit systems enable prescribers to view a medication's coverage status and out-of-pocket

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54 *Id.*

55 *See, e.g.*, *Patient Care*, PHARM. CARE MGMT. ASS'N, https://www.pcmanet.org/patient-care/ (on file with SIU Law Journal).

56 *See* CTR. FOR INS. POL'Y & RSCH. LIBR., NAT'L ASS'N INS. COMM'RS, REGULATOR INSIGHT: PHARMACY BENEFIT MANAGERS (2023), https://content.naic.org/sites/default/files/cipr-report-ri-pbm.pdf (on file with SIU Law Journal).

57 *See, e.g.*, *The Value of PBMs*, PHARM. CARE MGMT. ASS'N, https://www.pcmanet.org/value-of-pbms/ (on file with SIU Law Journal); *see* Rapfogel, *supra* note 43.

58 *See Patient Care*, *supra* note 56; *see also The Value of PBMs*, *supra* note 58; *see also* Rapfogel, *supra* note 43.

59 *See Patient Care*, *supra* note 56; *see also The Value of PBMs*, *supra* note 58; *see also* Rapfogel, *supra* note 43.

60 *See Patient Care*, *supra* note 56.

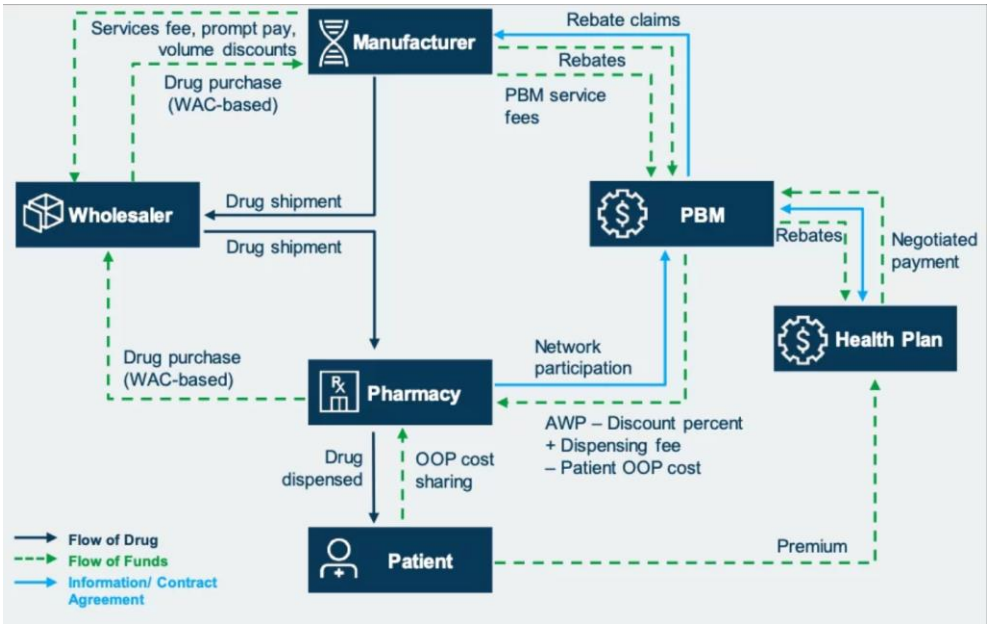
61 *See The Value of PBMs*, *supra* note 58; *see also* Rapfogel, *supra* note 43.

62 *See The Value of PBMs*, *supra* note 58; *see also* Rapfogel, *supra* note 43.

cost in real time.[63] This helps ensure that patients receive treatment options that are both effective and financially manageable.[64]

C. The Pharmacy Supply Chain

Figure 1. Pharmaceutical Supply Chain Infographic



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Six primary entities are involved in pharmaceutical drug sales: drug manufacturers, wholesalers, pharmacies, pharmacy services administrative organizations (PSAOs), PBMs, and Health Insurance plans.[66] The pharmaceutical supply chain begins with drug manufacturers who produce, manage, and distribute medications from manufacturing facilities to wholesalers or directly to pharmacies.[67] After production, the drug manufacturer will partner with the wholesaler of their choice.[68] The

63 *See The Value of PBMs*, *supra* note 58; *see also* Rapfogel, *supra* note 43.
64 *See Patient Care*, *supra* note 56; *see also* Rapfogel, *supra* note 43.
65 Getachew et al., *supra* note 30.
66 *Id.*
67 *Id.*
68 *Id.*

manufacturer sets a base price for the drug, and wholesalers engage in negotiations to secure discounts while establishing governing contracts.[69]

After the wholesalers purchase the medication from the manufacturer, the next step is distribution.[70] Wholesalers sell pharmaceuticals to hospitals, nursing homes, chain pharmacies, independent pharmacies, and other medical facilities that distribute medication to patients.[71] Pharmacies purchase the drugs their customers need from wholesalers or manufacturers directly.[72] Pharmacies typically benefit from purchasing medications through wholesalers, as the price they pay is adjusted based on the price the wholesaler paid, any purchase discounts the wholesaler negotiated with the manufacturer, and is often influenced by the purchase volume.[73] Additionally, pharmacies can join group purchasing organizations (GPOs) to negotiate favorable pricing with wholesalers.[74] To recap, manufacturers make the drug, wholesalers buy it in bulk, and wholesalers distribute the medication to pharmacies for a price.[75]

For example, consider Jardiance, a commonly prescribed medication for Type 2 diabetes.[76] The manufacturer, Boehringer Ingelheim, sets an initial Wholesale Acquisition Cost (WAC) of approximately $570 for a 30-day supply of Jardiance.[77] Once wholesalers purchase Jardiance, they may negotiate a slight discount from Boehringer Ingelheim, but the price remains relatively close to the WAC.[78] By the time it reaches the pharmacy, Jardiance has undergone several price adjustments.[79]

PBMs directly negotiate rebate rates with the drug manufacturer based on a percentage of the drug's going price.[80] The negotiated reimbursement rate is generally calculated by adding the average wholesale price of the medication and a standard dispensing fee, and then subtracting any cost to the patient collected by the pharmacy,[81] Like the contracts between drug manufacturers and wholesalers, rebates for PBMs may also be based on the

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69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 *How Does Pharmacy Reimbursement Work?*, PHARM. CARE MGMT. ASS'N (Oct. 2023), https://www.pcmanet.org/wp-content/uploads/2023/10/Utilization-Management-Explainer_FINAL.pdf.
75 *Id.*
76 *Jardiance*, GOODRX, https://www.goodrx.com/jardiance (on file with SIU Law Journal) (last visited Mar. 3, 2025).
77 *Id*.
78 Getachew et al., *supra* note 30.
79 *See id.*
80 *Id.*
81 *Id.*

value or volume of medication purchased from manufacturers.[82] The manufacturer will then pay rebates to the PBM if certain predetermined thresholds for purchased medications are met.[83]

In our example, PBMs negotiate rebates with Boehringer Ingelheim based on the sales volume of Jardiance and its placement on insurance formularies.[84] When Jardiance is positioned in a preferred tier on an insurance plan, the manufacturer offers a rebate that effectively reduces the PBM's net cost.[85] However, it is important to note that these rebates often do not reach the pharmacy or the patient directly.[86] Instead, PBMs retain a substantial portion of the rebates, contributing to the gap between the list price and what patients pay at the pharmacy counter.[87]

Pharmacies enter contracts with PBMs to be included within specific insurance policies, known as the "pharmacy network."[88] Pharmacy networks consist of pharmacies that have agreed to sell prescription drugs and provide pharmacy services to members of specified health insurance plans under defined terms and conditions.[89] These terms and conditions will include provisions such as a "network access feedback" provision, which requires the pharmacy to pay money to the PBM and impacts the independent pharmacy's profits.[90] These fees, often overlooked, can add to pharmacies' financial burden, affecting their ability to provide quality care.[91]

If a pharmacy is not in a PBM's network, it cannot obtain reimbursement from health plans associated with the PBM; it loses the ability to receive reimbursement from those plans, which means that patients covered by those insurers are unlikely to choose that pharmacy.[92] For independent pharmacies, losing access to patients linked to one or more PBMs could jeopardize their existence.[93]

Pharmacies under contract with PBMs must also submit reimbursement claims at the rate negotiated with the PBM.[94] PBMs submit rebate claims to

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82 *Id.*

83 *Id.*

84 Elaine Silvestrini, *Boehringer Ingelheim*, DRUGWATCH, (Aug. 18, 2025), https://www.drugwatch.com/manufacturers/boehringer-ingelheim (on file with SIU Law Journal); *see also* Getachew et al., *supra* note 30.

85 Getachew et al., *supra* note 30; *see also* Silvestrini, *supra* note 85.

86 Getachew et al., *supra* note 30.

87 *See id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 Hayden E. Klein, *GoodRx, PBMs Hit by Price Fixing Lawsuits*, AM. J. MANAGED CARE (Nov. 5, 2024), https://www.ajmc.com/view/goodrx-pbms-hit-by-price-fixing-lawsuits [https://perma.cc/686L-JCLG].

93 *Id.*

94 Getachew et al., *supra* note 30.

manufacturers for retrospective rebate payments based on the amount of drugs the pharmacy purchases.[95] Essentially, the more drugs the pharmacy sells, the more claims the PBMs can submit to the manufacturer.[96] This is because PBMs negotiate rebates with drug manufacturers for insurance companies and then pass along a portion of those rebates to the insurance companies, creating a positive feedback loop.[97] The amount of rebates passed on to the insurance company by PBMs varies under their contract terms.[98]

For Jardiance, this means that while the manufacturer provides rebates, the reimbursement rates that pharmacies receive may not always match what they pay to insurers.[99] Independent pharmacies, in particular, often face lower reimbursements from PBMs, which can result in profit margins that fall below the actual cost they paid for Jardiance.[100] This gap can create a financial burden for smaller pharmacies, leading them to either absorb the loss or direct patients towards alternatives.[101]

Then the patient purchases their medicine from a pharmacy, using their insurance to cover some or all of the cost.[102] When pharmacies sell a prescription to a customer, that customer may be required to pay "out-of-pocket" (OOP) for their medicine.[103] In this case, OOP refers to patients using their own money rather than another source, such as their insurance company, to pay for their prescription.[104] Sometimes, there is an OOP maximum that limits how much of a patient's money they will have to use during the insurance plan year.[105] Alternatively, patients without health insurance often have to pay the full listed price for their medicine.[106]

When patients have to use their insurance plan to help cover prescription costs, this is called cost sharing.[107] Cost sharing can manifest as

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95 *Id.*

96 *Id.*

97 *See generally id.*

98 *Id.*

99 *Id.*; *see also Jardiance*, *supra* note 77.

100 *See generally* Halpern, *supra* note 26; *see also FTC Sues Prescription Drug Middlemen for Artificially Inflating Insulin Drug Prices*, FED. TRADE COMM'N (Sep. 20, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-sues-prescription-drug-middlemen-artificially-inflating-insulin-drug-prices [https://web.archive.org/web/20251105172005/https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-sues-prescription-drug-middlemen-artificially-inflating-insulin-drug-prices].

101 ADAM J. FEIN, THE 2024 ECONOMIC REPORT ON U.S. PHARMACIES AND PHARMACY BENEFIT MANAGERS (Drug Channels Inst. 2024), https://drugchannelsinstitute.com/files/2024-PharmacyPBM-DCI-Overview.pdf (on file with SIU Law Journal).

102 Getachew et al., *supra* note 30.

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

a required copayment from the customer to the pharmacy, as required by their insurance provider.[108] The price charged to the customer will depend on several factors, such as the drug's list price and the patient's health plan benefit structure as determined by the insurance company.[109] Cost-sharing assistance programs are available to help offset prescription drug costs.[110] However, these programs are not always available, and patients do not always qualify.[111]

With Jardiance, insured patients typically pay a copay that ranges from $10 to $50, depending on their specific insurance plan's formulary.[112] In contrast, uninsured patients face the full retail price, which exceeds $600 per month.[113] To alleviate this burden, Boehringer Ingelheim has launched a marketing initiative, the "Jardiance Savings Card," to deliver Jardiance at a reduced price to those who need it.[114] The implementation of a savings card brings to light the broader issue of medication affordability, illustrating how various supply chain components, from the manufacturer's pricing strategies to the negotiations led by PBMs, ultimately influence the pricing seen by pharmacies and patients alike.[115]

D. Concentration of Market Power

Monopolization is defined as the act or process of monopolizing any part of interstate or foreign commerce by intentionally controlling prices or destroying competition in the relevant market, participating in any predatory or anticompetitive conduct, and creating a "dangerous probability" that a monopoly will be established in the relevant market.[116] A monopoly is a market structure in which one company has complete control over the supply of a specific product or service, thereby removing any competition.[117] This control empowers the company to determine pricing and production levels

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108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Jardiance*, *supra* note 77.

113 *Id.*

114 *Jardiance: Sign Up for Savings*, BOEHRINGER INGELHEIM, https://patient.boehringer-ingelheim.com/us/products/jardiance/type-2-diabetes/savings (last visited Nov. 8, 2025) (on file with SIU Law Journal).

115 *See generally* Bradley J. Kitlowski & Jacob M. Adams, *PBMs Under Intensifying Scrutiny from Regulatory Agencies and Legislative Bodies*, BUCHANAN (July 23, 2024), https://www.bipc.com/pbms-under-intensifying-scrutiny-from-regulatory-agencies-and-legislative-bodies (on file with SIU Law Journal).

116 *Monopolization*, BLACK'S LAW DICTIONARY (12th ed. 2024).

117 Adam Hays, *Understanding Monopoly: Its Types, Market Impact, and Regulatory Measures*, INVESTOPEDIA (Sep. 26, 2025), https://www.investopedia.com/terms/m/monopoly.asp (on file with SIU Law Journal).

without regard for other competitors.[118] A typical illustration of a monopoly is the United States Postal Service (USPS), which holds sole authority to deliver first-class mail within the U.S.[119]

By contrast, an oligopoly is a market structure in which a limited number of companies jointly control the market.[120] An oligopoly is formed when a few large sellers dominate or control an entire market by setting high prices and keeping output as low as possible.[121] These companies possess significant market influence, enabling them to affect pricing and production levels.[122] The mass media sector in the United States is an example of an oligopoly, with a handful of major companies dominating most media channels.[123]

The main difference between a monopoly and an oligopoly is that in a monopoly, a single economic entity controls market conditions for a particular product or service, whereas in an oligopoly, a few economic entities do so.[124] Monopolies and oligopolies represent forms of market control, but the main difference lies in the number of entities that control the market.[125] A monopoly consists of a single entity, while an oligopoly consists of multiple entities.[126] This distinction affects various market dynamics, such as pricing, consumer choice, and barriers to entry for other companies.[127]

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118 *Id.*

119 Tyrah Diaz & Susan Fenner, *Pure Monopoly Overview, Characteristics & Examples*, STUDY.COM (Nov. 21, 2023), https://study.com/learn/lesson/pure-monopoly-concept-examples-what-is-pure-monopoly.html (on file with SIU Law Journal).

120 The Investopedia Team, *Understanding Oligopolies: Market Structure, Characteristics, and Examples*, INVESTOPEDIA (Oct. 7, 2025), https://www.investopedia.com/terms/o/oligopoly.asp (on file with SIU Law Journal).

121 *See Oligopoly*, BLACK'S LAW DICTIONARY (12th ed. 2024); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 38–39 (2000).

> One reason for the difficulty in describing and delimiting oligopoly power is the large number of variables that confront any theorist building an oligopoly model. Pure monopoly is akin to a single player game, such as solitaire, but the oligopoly model may be more like a multihand poker game . . . . Unlike poker, where for any hand one player will win all of the money bet, the players in an oligopolistic market can actually increase the returns that all of them receive through disciplined pricing. *Id.*

122 The Investopedia Team, *supra* note 121.

123 Matt Banschback, *The Media Oligopoly: How a Handful of Companies Control Nearly All of the Media in the U.S.*, WHITTIER MISCELLANY (Dec. 26, 2020), https://wfswhittier.net/3037/sci-tech/the-media-oligopoly-how-a-handful-of-companies-control-nearly-all-of-the-media-in-the-u-s/ (on file with SIU Law Journal).

124 *See Monopoly*, BLACK'S LAW DICTIONARY (12th ed. 2024).

125 Mary Hall, *Monopoly vs. Oligopoly: What's the Difference?*, INVESTOPEDIA (Dec. 5, 2024), https://www.investopedia.com/ask/answers/121514/what-are-major-differences-between-monopoly-and-oligopoly.asp (on file with SIU Law Journal).

126 *Id.*

127 *Id.*

Today, PBMs operate in an oligopolistic industry.[128] This is exemplified by the highly concentrated PBM market, where three companies dominated 79% of the sector during 2022.[129] Out of that 79% CVS Health's CVS Caremark controlled 33%, Cigna's Express Scripts accounted for 24%, and UnitedHealth Group's OptumRx held 22% of the market.[130] Other significant players in terms of market share included Humana Pharmacy Solutions at 8%, Prime Therapeutics at 5%, and MedImpact Healthcare Systems at 4%. Collectively, these six companies regulated 96% of the PBM market.[131] The current oligopolistic industry and market concentration in the pharmaceutical sector give PMBs significant market power, enabling those same three companies to influence drug pricing and act as unofficial market regulators.[132]

E. Economic Implications of Oligopoly

Typically, market regulators are established by the government or other organizations that oversee a particular market, giving them the authority to determine whether to investigate fraudulent activity and whom to investigate.[133] Market regulators also have a duty to set standards for efficiency and transparency to ensure that consumers and other market participants are dealt with honestly and fairly within a particular market.[134]

Without officially appointed market regulators, there is a significantly greater risk of unfair competition and manipulation, particularly when top-performing companies assume these regulatory roles without any checks or balances in place.[135] For instance, the oligopolistic nature of the current regulations governing PBMs, or lack thereof, "creates an inability to allow other companies to grow in the market."[136] Currently, limited competition in the PBM business directly affects overall market efficiency for prescription medications.[137]

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128 PBM ACCOUNTABILITY PROJECT, *supra* note 27.

129 Aboulenein, *supra* note 53.

130 *Id.*

131 *Id.*

132 PBM ACCOUNTABILITY PROJECT, *supra* note 27.

133 Michael Schmidt, *Financial Regulators: Who They Are and What They Do*, INVESTOPEDIA (May 20, 2025), https://www.investopedia.com/articles/economics/09/financial-regulatory-body.asp (on file with SIU Law Journal).

134 *Id.*

135 Debbie Carlson, *Financial Regulators: The Market Police*, BRITANNICA MONEY, https://www.britannica.com/money/financial-market-regulators (on file with SIU Law Journal) (last visited Nov. 20, 2025).

136 Interview with Mitchell Harris, *supra* note 51; *see generally* FEIN, *supra* note 102.

137 Nowosielski, *supra* note 36; *see* Halpern, *supra* note 26.

F. Potential Antitrust Concerns

House Republicans have launched an investigation into CVS Caremark over potential antitrust violations.[138] Antitrust law is designed to protect trade and commerce from restraints, monopolies, price-fixing, and price discrimination.[139] Federal antitrust law states that monopolization is a federal offense consisting of two elements.[140] The first is the power to fix prices and exclude competition in the relevant market.[141] The second element is the "willful acquisition or maintenance" of that power.[142] Thus, the investigation into CVS's alleged unfair use of its market position to impact competition and consumer costs could have significant legal implications.[143] Furthermore, the inquiry could lead to broader scrutiny of large healthcare players that influence drug prices and medication access, potentially changing the industry's competitive landscape.[144] The lack of transparency in PBM operations enables PBMs to increase their profits at the expense of patients and insurance companies by charging them a hidden, inflated price.[145]

Beginning in 2024 and continuing into 2025, PBMs working with CVS, UnitedHealth, and Cigna have come under scrutiny from Donald Trump and lawmakers early in the president's second term in office.[146] Specifically, CVS is being called out for its role in driving up prescription drug costs.[147] CVS Health and other large companies in the healthcare industry are facing increasing pressure to justify their practices as lawmakers push for reform to reduce healthcare costs.[148]

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138 Nathaniel Weixel, *House Republicans Launch Investigation into CVS Caremark for Potential Antitrust Violations*, THE HILL (Dec. 12, 2024), https://thehill.com/policy/healthcare/5037786-house-republicans-launch-investigation-into-cvs-caremark-for-potential-antitrust-violations/ (on file with SIU Law Journal).

139 *Antitrust Law*, BLACK'S LAW DICTIONARY (12th ed. 2024).

140 *See* United States v. Grinnell Corp., 384 U.S. 563 (1966).

141 *See id.*

142 *See id.*

143 Weixel, *supra* note 139.

144 *Id.*

145 *See generally* PBM ACCOUNTABILITY PROJECT, *supra* note 27.

146 Erika Fry, *Trump Has Promised to 'Knock Out' Pharmacy Benefit Managers. How the Drug Middlemen Became a $557 Billion Industry that its Customers Love to Jate*, FORTUNE (Jan. 21, 2025), https://fortune.com/2025/01/21/pharmacy-benefit-managers-trump-cvs-cigna-unitedhealth/ (on file with SIU Law Journal); *see also* John Tozzi, *CVS, UnitedHealth, Cigna Shares Sink Following Trump's PBM Remark*, MOD. HEALTHCARE (Dec. 16, 2024), https://www.modernhealthcare.com/politics-policy/cvs-unitedhealth-cigna-shares-pbms-donald-trump-middlemen (on file with SIU Law Journal).

147 Tozzi, *supra* note 147.

148 *Id.*

CVS Health Corporation subsequently agreed to pay $2 million for allegedly violating the Civil Monetary Penalties Law.[149] The *Civil Monetary Penalties Law* (CMPL) is a federal statute that authorizes the Department of Health and Human Services (HHS) to impose monetary penalties, assessments, and exclusions against individuals or entities that engage in certain prohibited activities.[150] These activities include presenting false or fraudulent claims to federal healthcare programs like Medicare or Medicaid, offering or receiving improper kickbacks, and violating program requirements.[151] The CMPL is a key tool for enforcing healthcare program integrity and ensuring compliance with federal laws to protect public funds.[152] The Office of Inspector General (OIG) reported that CVS improperly rejected, denied, or reduced pharmacy payments for dual-eligible beneficiaries (covered by both Medicaid and other federal health programs such as the Veterans Affairs program) through its pharmacy benefit management services.[153] The payment resolves allegations tied to claims filed under multiple federal programs.[154]

The concentration of market power in the PBM industry, controlled by companies like CVS, UnitedHealth, and Cigna, significantly impacts the competitiveness of the healthcare sector.[155] CVS Health's market practices in pharmacy management operations have been shown to have harmful effects on public health system consumers.[156] CVS's actions also reveal the broader systemic issue of corporate power in healthcare, where the lack of competition leads to higher consumer costs and exacerbates the inequality in access to medications.[157]

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149 *CVS Health Corporation Agreed to Pay $2 Million for Allegedly Violating the Civil Monetary Penalties Law by Improperly Rejecting, Denying, or Reducing Claims for Dual Eligible Federal Health Care Program Beneficiaries*, U.S. DEP'T OF HEALTH & HUM. SERVS.: OFF. OF INSPECTOR GEN. (Dec. 22, 2016), https://oig.hhs.gov/fraud/enforcement/cvs-health-corporation-agreed-to-pay-2-million-for-allegedly-violating-the-civil-monetary-penalties-law-by-improperly-rejecting-denying-or-reducing-claims-for-dual-eligible-federal-health-care-program-beneficiaries/ (on file with SIU Law Journal).

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 CVS Health, *CVS Health Corporation Announces Early Results of Maximum Tender Offer and Election of Early Settlement*, PR NEWSWIRE (Dec. 16, 2024), https://www.prnewswire.com/news-releases/cvs-health-corporation-announces-early-results-of-maximum-tender-offer-and-election-of-early-settlement-302331962.html (on file with SIU Law Journal).

156 James Chen, *Debt Tender Offer: Definition, Types, Rules, and Example*, INVESTOPEDIA (Aug. 3, 2022), https://www.investopedia.com/terms/d/debt-tender-offer.asp (on file with SIU Law Journal).

157 *Id.*

Ultimately, the push for new legislation is aimed at achieving cost reductions for the average consumer by requiring PBMs to cooperate with drug manufacturers, retail pharmacies, and insurance companies so discounts are fairly passed along the supply chain.[158] Additionally, the proposed legislation aims to encourage healthy competition among all entities in the pharmaceutical supply chain to procure lower drug prices at every step, allowing patients to pay less when they pick up their medication at the pharmacy.[159] The results of legislative and regulatory efforts will hopefully provide the greatest health benefits to patients who need medications.[160]

II. IMPACT ON INDEPENDENT PHARMACIES

A. Vertical Integration & PBM Role

A vertically integrated company is traditionally formed through a merger between businesses operating at different levels within the same distribution chain for a particular product or service, such as between a manufacturer and a retailer.[161] The Federal Trade Commission (FTC) has identified vertical integration within the PBM industry as a direct factor influencing anti-competitive pricing and reduced medication access for consumers.[162] Vertical integration allowed the top three PBMs to process 5.28 billion of the approximately 6.6 billion prescriptions dispensed by pharmacies in the United States in 2023 alone.[163] This is because the market power acquired through vertical integration enables PBMs to force customers to use pharmacies that contract with the same PBMs.[164]

By successfully utilizing the vertical integration strategy, top-performing PBMs have expanded their control to encompass multiple stages of the pharmaceutical supply chain, including the composition of insurance companies' purchase plans, which patients use to pay for their medications.[165] Thus, vertical integration harms independent pharmacies because PBMs often deprioritize them in favor of large retail chains, thereby harming consumers by limiting the number of pharmacies available for purchasing medications.[166] The FTC is investigating PBMs for their current

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158 Hemphill, *supra* note 45, at 14.
159 *Id.*
160 *Id.*
161 *See Merger*, BLACK'S LAW DICTIONARY (12th ed. 2024).
162 Kitlowski & Adams, *supra* note 116.
163 *Id.*
164 *Id.*
165 *See generally* Nowosielski, *supra* note 36; *see also* Halpern, *supra* note 26.
166 Kitlowski & Adams, *supra* note 116.

practices, which have raised serious concerns about affordability and fair access to medication.[167]

In 2024, the FTC filed a lawsuit against the three largest PBMs for artificially inflating insulin prices.[168] The FTC alleges that Caremark, Express Scripts, and Optum created a broken rebate system that inflated insulin prices to boost PBM profits at the expense of vulnerable patients.[169] Insulin is a hormone essential for regulating blood sugar (glucose) levels.[170] Without insulin, individuals can experience severe complications, including diabetic ketoacidosis (DKA), nerve damage, kidney failure, vision loss, heart disease, and even death.[171] Access to affordable insulin is vital for over 38 million Americans living with diabetes, which accounts for roughly one in ten people in the United States.[172] Without reliable access to insulin, individuals face heightened risks of severe health issues, including kidney failure, vision loss, and death.[173]

In 1999, an insulin prescription cost approximately $21; by 2017, the same prescription cost around $274.[174] By 2019, one out of every four insulin patients could not afford their medication, showing how a rebate-driven system prioritizes profits over patient care.[175] PBMs favor the rebate system because it allows them to negotiate substantial discounts for themselves from drug manufacturers in exchange for placing their drugs on preferred formulary tiers.[176] Further, the FTC charges that even when lower list-price insulins became available to patients, PBMs systemically excluded cheaper brands in favor of high-list-price, highly rebated insulin products.[177] This business strategy has impaired patients' access to affordable insulin, enabling PBMs to profit while patients are left to pay higher out-of-pocket costs for insulin medication.[178]

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167 *See* Halpern, *supra* note 26.

168 *FTC Sues Prescription Drug Middlemen for Artificially Inflating Insulin Drug Prices, supra* note 101.

169 *Id.*

170 Mayo Clinic Staff, *Diabetes Treatment: Using Insulin to Manage Blood Sugar*, MAYO CLINIC (Aug. 4, 2023), https://www.mayoclinic.org/diseases-conditions/diabetes/in-depth/diabetes-treatment/art-20044084 [https://web.archive.org/web/20251105171451/https://www.mayoclinic.org/diseases-conditions/diabetes/in-depth/diabetes-treatment/art-20044084].

171 *Id.*

172 *Type 2 Diabetes*, CTR. FOR DISEASE CONTROL & PREVENTION (May 15, 2024), https://www.cdc.gov/diabetes/about/about-type-2-diabetes.html (on file with SIU Law Journal).

173 Mayo Clinic Staff, *supra* note 171; *Type 2 Diabetes*, *supra* note 173.

174 *FTC Sues Prescription Drug Middlemen for Artificially Inflating Insulin Drug Prices*, *supra* note 101.

175 *Id.*

176 Rapfogel, *supra* note 43.

177 *FTC Sues Prescription Drug Middlemen for Artificially Inflating Insulin Drug Prices, supra* note 101.

178 *Id.*

PBM practices also severely disadvantage independent pharmacies; unlike large chain pharmacies, which can negotiate with PBMs for better reimbursement rates and higher list prices to secure the larger rebates and fees necessary to compete for formulary access.[179] This is necessary for independent pharmacies to provide the larger rebates and fees needed to compete for formulary access.[180] For instance, while chain pharmacies can offset costs through high-volume sales, independent pharmacies frequently face difficulties when reimbursement rates fall below their wholesale costs.[181]

The FTC's administrative action aims to end the exploitative behaviors of the "Big Three PBMs" and represents a significant move toward fixing a flawed system.[182] The proposed reform could affect more than just the insulin market and promote healthy competition to lower consumer drug prices overall.[183] Tackling these pricing disparities and ensuring equitable reimbursement practices is vital for supporting independent pharmacies and ensuring patients have access to affordable, high-quality care.[184]

The lack of federal or state regulation in the pharmaceutical market allows PBMs to control both pricing and access by managing insurance networks and patient plans.[185] As a result, PBMs can effectively steer patients to purchase drugs through endorsed pharmacies to increase their profits.[186] These pricing practices limit the opportunities for other PBM companies to gain a foothold in the industry, virtually eliminating competition.[187] The intentional restriction of market growth limits independent pharmacies' potential to profit from selling medications, and this is how the oligopoly continues to regulate market conditions.[188]

B. Reimbursement Rates

PBMs operate with financial incentives closely linked to a drug's list price, also called the wholesale acquisition cost.[189] The PBMs revenue primarily comes from drug reimbursement rates and fees calculated as a

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179 *Id.*
180 *Id.*
181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.*
185 *See generally* Nowosielski, *supra* note 36; *see* Halpern, *supra* note 26.
186 *See generally* Nowosielski, *supra* note 36; *see* Halpern, *supra* note 26.
187 *See generally* Nowosielski, *supra* note 36; *see* Halpern, *supra* note 26.
188 *See generally* Nowosielski, *supra* note 36; *see* Halpern, *supra* note 26.
189 *FTC Sues Prescription Drug Middlemen for Artificially Inflating Insulin Drug Prices*, *supra* note 101.

percentage of these list prices.[190] As a result, products with higher list prices yield more significant rebates and fees for the PBMs.[191] PBMs' clients are payers, such as employers, labor unions, and health insurers.[192] Payers contract with PBMs for services that include securing placement on drug formularies, which list prescription medications covered by specific health insurance plans.[193] Securing formulary coverage is essential for pharmacies to reach patients with commercial health insurance effectively.[194] This system often disadvantages independent pharmacies, as they frequently do not receive formulary coverage and are offered significantly lower reimbursement rates than preferred larger chain pharmacies.[195]

For example, employees who use their employer-provided health insurance and fill a prescription are typically limited to drugs listed in the formulary.[196] These drugs are often chosen not for their medical efficacy, but for their ability to generate the highest financial returns.[197] PBMs negotiate bulk discounts with manufacturers, enabling payers to reimburse pharmacies at a low rate while collecting premiums from insured clients.[198] However, pharmacies may charge a customer a higher price for these drugs, as formulary placement often removes direct-to-consumer discounts.[199] For example, as insulin list prices rise, the PBMs collect rebates that, in principle, should significantly reduce the cost of insulin drugs for patients at the pharmacy counter.[200] Instead, PBMs keep hundreds of millions of dollars in rebates and fees each year.[201] This system ensures that payers spend less on claims while maximizing rebates and negotiating savings with PBMs and manufacturers, even if patients may not receive the most clinically appropriate medication.[202]

Additionally, certain vulnerable patients, including those with deductibles and coinsurance, often end up paying the unrebated list price, which is typically higher, leaving them without the benefits of rebates at the

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190 *Id.*
191 *Id.*
192 *Id.*
193 *Id.*
194 *See generally* Halpern, *supra* note 26.
195 *See generally id.*; *FTC Sues Prescription Drug Middlemen for Artificially Inflating Insulin Drug Prices, supra* note 101.
196 *FTC Sues Prescription Drug Middlemen for Artificially Inflating Insulin Drug Prices, supra* note 101.
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.*

point of sale.[203] This practice can result in patients paying more out of pocket for their medications than commercial payers do.[204] While PBMs collect substantial rebates that should lower patient costs at the pharmacy counter, they often retain hundreds of millions of dollars in these rebates and fees each year rather than passing the savings on to consumers.[205]

C. Decline of Independent Pharmacies & the Rise of Corporate Chains

According to the American Pharmacists Association, a pharmacy must be owned by an individual or a small private group to be considered independent.[206] A Chain pharmacy is defined as corporate-owned, with multiple locations and a large nationwide presence.[207] Chain or retail pharmacies differ significantly from independent pharmacies in that they must adhere to corporate policy.[208] Corporations often monitor the number of prescriptions being filled at a particular location if their profit is lower than that of other locations, and may push them to increase productivity.[209] This practice highlights the primary goal of the retail and chain pharmacy corporations: to push their pharmacies into filling as many prescriptions as possible using the least amount of employees to maximize profit.[210] Unfortunately, this business model turns patients who need medical treatment into data points within the corporation's system, resulting in rushed service and impersonal care.[211]

Retail chain pharmacies account for a third of all stores in the United States and generate about a third of all prescription revenue.[212] Each retail chain location reportedly dispenses around 138,000 prescriptions per year.[213]Additionally, CVS and Walgreens acquired 5,000 pharmacy locations from 2010 to 2021, including CVS's purchase of 1,700 Target pharmacies

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203 *Id.*

204 *Id.*

205 *Id.*

206 Amie M. Ashcraft et al., *The [Underutilized] Power of Independent Pharmacies to Promote Public Health in Rural Communities: A Call to Action*, 62 J. AM. PHARMACISTS ASS'N 38, 41 (2022).

207 Micheal Comber, *Independent Pharmacy vs. Chain Pharmacy: What's the Difference?*, FLA. MED. CLINIC ORLANDO HEALTH (Feb. 16, 2023), https://www.floridamedicalclinic.com/blog/independent-pharmacy-vs-chain-pharmacy [https://perma.cc/TP6J-9BTN].

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.*

212 Alok Ladsariya et al., *Meeting Changing Consumer Needs: The US Retail Pharmacy of the Future*, MCKINSEY & CO. (Mar. 17, 2023), https://www.mckinsey.com/industries/healthcare/our-insights/meeting-changing-consumer-needs-the-us-retail-pharmacy-of-the-future (on file with SIU Law Journal).

213 *Id.*

and Walgreens's purchase of 1,900 Rite Aid pharmacies.[214] Independent pharmacies are harmed while chain pharmacies continue to grow.[215] The number of independent pharmacies has dropped by 50 percent since 1980.[216] In 2000, only 20,000 independent pharmacies remained in operation.[217]

The decline of independent pharmacies disproportionately affects communities with unmet pharmaceutical needs, particularly in rural and low-income areas, where large retail chains often choose not to establish locations due to lower profit margins.[218] Independent pharmacies are better equipped to treat patients with lifelong conditions because they can form deeper relationships with patients, resulting in personalized services.[219] However, independent pharmacies are being edged out by chain pharmacies, leaving consumers with fewer options for personalized patient care normally provided by independent community pharmacies.[220]

Three independent pharmacies have filed class action lawsuits against GoodRx Holdings and several significant PBMs.[221] The lawsuits include *Keaveny Drug, Inc. v. GoodRx, Inc.*,[222] *Community Care Pharmacy, LLC v. GoodRx, Inc.*,[223] and *Old Baltimore Pike Apothecary, Inc. v. GoodRX Holdings, Inc*.[224] Community Care Pharmacy's lawsuit targets only GoodRx; the other two lawsuits name the same defendants as outlined in Community Care's case: GoodRx Holdings, CVS Caremark, Express Scripts, MedImpact Healthcare Systems, and Navitus Health Solutions.[225] The lawsuits claim that PBMs engage in anti-competitive practices by sharing real-time data and strategically allocating transactions.[226]

At the start of 2024, GoodRx partnered with four PBMs to launch the "Integrated Savings Program."[227] This initiative allows GoodRx to integrate its software and real-time pricing data from competing PBMs into these PBMs' systems.[228] Now, whenever a pharmacy submits a reimbursement

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214 *Id.*
215 *Id.*
216 *Id.*
217 *Id.*
218 *See* America Rafanelli, *Pharmacy Closures More Likely to Affect Low-Income, Minority Neighborhoods. Here's Why.*, DIRECT RELIEF (Dec. 22, 2021), https://www.directrelief.org/2021/12/pharmacy-closures-more-likely-to-affect-low-income-minority-neighborhoods-heres-why/ (on file with SIU Law Journal); Ladsariya et al., *supra* note 213.
219 Ladsariya et al., *supra* note 213.
220 *Id.*
221 Klein, *supra* note 93.
222 *Id.*
223 *Id.*
224 *Id.*
225 *Id.*
226 *Id.*
227 *Id.*
228 *Id.*

request, the GoodRx algorithm evaluates prices from different competitors and automatically sets the pharmacy's payout at the lowest available rate.[229] The lawsuits claim that the current practices of PBMs amount to illegal price fixing, supported by proprietary algorithms that share anti-competitive pricing information.[230] The three lawsuits filed by independent pharmacies seek to hold PBMs responsible for alleged price-fixing and for stifling competition.[231]

III. IMPACT ON PATIENTS

A. Increased Drug Prices

The limited competition in the PBM market results in higher drug prices for patients.[232] This is because PBMs can block access to cheaper, generic drugs through their influence over market regulation.[233] Consequently, smaller pharmacies will earn less revenue from selling the same drug as retail chain pharmacies do because the PBM they contract with prefers corporate-run pharmacies thus granting corporate-run pharmacies a greater discount on the drug.[234] Additionally, exploitative PBM contracts that independent pharmacies are forced to accept for lack of other options shrink their profit margins.[235] This results in patients who utilize small pharmacies having to pay more for their medications than those who have access to large retail pharmacies.[236] These factors combined cause small pharmacies that serve underserved areas to close, disproportionately affecting patients who lack access to retail pharmacies[237] Specifically, the lack of fair competition within the pharmaceutical market limits the patient's choice of which pharmacies they would prefer to use. Furthermore, it reduces financial accessibility to medications for many consumers.[238]

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229 *Id.*
230 *Id.*
231 *Id.*
232 Halpern, *supra* note 26.
233 *Id.*
234 *See generally id.*
235 FEIN, *supra* note 102.
236 *Id.*
237 *Id.*
238 *Id.*

B. Restricted Access to Medications

Independent pharmacies have been shown to play a critical role in providing access to medications in rural and low-income areas.[239] Chain pharmacies and clinics are scarce where the population is smaller, as they yield lower profit margins when compared to highly populated areas.[240] Oftentimes, small, privately owned pharmacies are the only accessible healthcare providers in rural areas and minority communities.[241]

Independent pharmacies have already proven their value in public health, particularly with their COVID-19 vaccination efforts.[242] For example, West Virginia decided to rely solely on independent pharmacies to distribute the COVID-19 vaccine during the pandemic, opting out of the Federal Pharmacy Program with CVS and Walgreens.[243] This decision was a success, and independent pharmacies proved they could efficiently deliver public health services by using their existing infrastructure and community ties, which large corporate-owned stores do not have.[244] This is because independent pharmacies have a strong local presence, making them ideal for addressing community health needs.[245] With more support and collaboration among policymakers, healthcare providers, and pharmacists, relying more on local independent pharmacies could significantly improve access to essential services, especially in underserved rural and low-income areas.[246]

However, not only are patients in rural and minority communities being disproportionately affected by current PBM practices, but so are patients with chronic or complex conditions, like those fighting cancer.[247] Data shows that cancer patients are paying ten times more than the average patient for brand medications per year.[248] These patients pay the list price for their medications, while the PBMs pay a lower price for the same drug.[249] Due to these higher prices, chronically ill patients have to use manufacturer copay

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239 Ashcraft et al., *supra* note 207, at 41.
240 *Id.* at 39.
241 *Id.*; Rafanelli, *supra* note 219.
242 Ashcraft et al., *supra* note 207, at 40.
243 *Id.*
244 *Id.*
245 *Id.*
246 *Id.* at 241; Rafanelli, *supra* note 219.
247 Priscilla VanderVeer, *Insurer and PBM Tactics Are Shifting Higher Costs to Patients With Chronic and Complex Conditions*, PHRMA (Mar. 2, 2023), https://phrma.org/Blog/Insurer-and-PBM-tactics-are-shifting-higher-costs-to-patients-with-chronic-and-complex-conditions (on file with SIU Law Journal); Ashcraft et al., *supra* note 207, at 39–40; Rafanelli, *supra* note 219.
248 VanderVeer, *supra* note 248.
249 *Id.*

assistance programs, which are implemented by the manufacturers of the drug to help make medication more affordable.[250]

Many insurers and PBMs have introduced programs that prevent patients from utilizing manufacturer discounts to afford life-saving medications.[251] These initiatives do not permit copay assistance to contribute toward a patient's out-of-pocket expenses, forcing individuals to either pay a higher list price or abandon treatment entirely.[252] PBMs employ these tactics to maximize their profits, delaying the point at which they begin covering the costs of expensive medications.[253]

If health insurers and their PBMs do not pay the full list price for medications, patients should not be required to pay the full price either.[254] If PBMs were truly acting as middlemen, they would pass along the lower prices they negotiated to patients instead of pocketing that money for themselves.[255] Patients need policies to protect their access to copay assistance programs from health insurers and PBM influence.[256] By prohibiting PBMs from limiting copay assistance, chronically ill patients would regain access to life-saving medications at a lower cost.[257]

From July 19th through August 1st, 2024, 2,592 American adults (age 18 or older) participated in the *Patient Experience Survey*, and the findings were alarming.[258] Four in ten Americans with insurance who are taking a prescription medication have experienced a reduction in access to the medications they need due to current PBM practices.[259] Additionally, 18% of insured Americans have fallen into medical debt due to the high out-of-pocket costs for their prescriptions.[260] The study also revealed that 90% of those surveyed support new legislation and policy change to limit abusive insurer and PBM practices, which are restricting access to medication for the average American.[261] Thus, new legislation should focus on limiting PBMs'

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250 *Id.*

251 *Id.*

252 Michelle Long, Meghan Salaga & Kaye Pestaina, *Copay Adjustment Programs: What Are They and What Do They Mean for Consumers?*, KFF (Oct. 24, 2024), https://www.kff.org/report-section/copay-adjustment-programs-what-are-they-and-what-do-they-mean-for-consumers-issue-brief (on file with SIU Law Journal).

253 *Id.*

254 VanderVeer, *supra* note 248.

255 *Id.*

256 *Id.*

257 *Id.*

258 Cynthia Hicks, *Americans Speak Out on Health Insurance Barriers and Need for Policy Change, According to the Latest Patient Experience Survey*, PHRMA (Oct. 28, 2024), https://phrma.org/Blog/Patient-Experience-Survey-Americans-speak-out-on-health-insurance-barriers-and-need-for-policy-change (on file with SIU Law Journal).

259 *Id.*

260 *Id.*

261 *Id.*

influence over drug pricing so that they must provide patients with lower out-of-pocket costs while forcing insurance plans to cover more medications without imposing a deductible, therefore creating greater access to drugs.[262]

C. Lack of Transparency

Gag clauses have prevented pharmacies from informing patients of cheaper options for their prescription medications.[263] Pharmacists know that patients can sometimes pay less for prescription drugs by choosing to forego using their insurance coverage.[264] This is because paying cash would cost the patient less than going through their insurance company and paying the co-pay.[265] However, pharmacists are not allowed to share this information with patients due to gag clauses added to contracts between pharmacies and PBMs.[266] PBMs act as market regulators between drug manufacturers, insurance companies, and retail drugstores and enforce these clauses, causing consumers to pay more for their medications.[267]

The lack of transparency of what goes on within the pharmacy supply chain conceals unnecessarily inflated consumer prices.[268] Thankfully, legislative changes made these clauses illegal in 2024, allowing for more transparent and cost-effective care.[269] However, eliminating gag clauses has not corrected the lack of transparency in the PBM business, which continues to impact the price of prescription medications for consumers.[270]

IV. LEGAL AND POLICY CONSIDERATIONS

A. Current Legislative & Regulatory Efforts

The *Patient Right to Know Drug Prices Act* was enacted in 2018 and restricts PBMs and insurance companies from prohibiting individual pharmacists from informing consumers of lower out-of-pocket costs for drugs.[271] Also in 2018, the *Know the Lowest Price Act* banned Medicare or

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262 *Id.*

263 Lisa L. Gill, *Trump Signs Bills Banning 'Gag Clauses,' Helping Consumers Save on Drugs*, CONSUMER REPS. (Oct. 10, 2018), https://www.consumerreports.org/drug-prices/trump-signs-bill-banning-gag-clauses-helping-consumers-save-on-drugs/ (on file with SIU Law Journal).

264 *Id.*

265 *Id.*

266 *Id.*

267 *See generally id.*

268 *See generally* Meador, *supra* note 28.

269 *See generally* Gill, *supra* note 264.

270 Meador, *supra* note 28, at 95.

271 Patient Right to Know Drug Prices Act of 2018, Pub. L. No. 115–263, 132 STAT. 3672 (codified at 21 U.S.C § 2).

Medicare Advantage from prohibiting pharmacies from informing patients of a lower price for their prescription, if the drug is cheaper without health insurance coverage.[272]

Introduced in 2023, the *Protecting Patients Against PBM Abuses Act* would limit how much Medicare PBMs can charge for their services as middlemen in the pharmaceutical market.[273] Specifically, this Act would require Medicare PBMs to be paid a flat service fee, regardless of the drug's selling price or rebates/discounts on the drug itself.[274] This benefits consumers on a fixed income, as the price of medications will be transparent and predictable, and the price of the drug will not be influenced by a PMB's fluctuating pay-off.[275]

Additionally, the act would prohibit Medicare PBMs from charging additional dispensing fees in addition to those already paid to the pharmacy.[276] Further, PBMs would have to report drug costs to Medicare to compare their list of approved drugs with similar drugs not on the list.[277] This way, the cost to the consumer is not influenced by an inflated medication price when billing their Medicare Plan.[278] The act would also prohibit PBMs from offering better prices or discounts to pharmacies that they own or are affiliated with.[279] In theory, this should make it harder for PBMs to favor their own pharmacies over independent pharmacies; benefiting patients who want to receive treatment from a local pharmacy with more personalized service.[280]

Also proposed in 2023, the *Pharmacy Benefit Manager Reform Act* states that PBMs must report annually how much money came directly from drug copayments paid by the drug manufacturer to the health insurance companies, a list of the specific drugs covered during that fiscal year, and the total amount the corresponding insurance company spent on prescription drugs that year.[281] Additionally, the bill prohibits PBMs from charging insurance companies more for a drug than they pay the pharmacy, thereby preventing PBMs from charging extra. This would help lower patient

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272 Know the Lowest Price Act of 2018, Pub. L. No. 115–262, 132 STAT. 3670 (codified at 42 U.S.C § 2).

273 Protecting Patients Against PBM Abuses Act, H.R.2880, 118th Cong. (as referred to the Subcomm. on Health of the H. Comm. on Ways & Means, Dec. 17, 2024).

274 *Id.*

275 *See generally id.*

276 *Id.*

277 *Id.*

278 *See generally id.*

279 *See generally id.*

280 *Id.*

281 Pharmacy Benefit Manager Reform Act, S. 1339, 118th Cong. (as reported by the S. Comm. on Health, Educ. Labor, & Pension, June 22, 2023).

costs.[282] PBMs would also be required to return rebates, fees, and any discounts they receive from working directly with drug manufacturers back to insurance companies, thereby lowering overall drug costs for patients and insurance companies, rather than PBMs pocketing the difference.[283]

The *Lower Costs, More Transparency Act*, approved by the House of Representatives in 2023, requires hospitals and insurers to openly share their prices, including any discounts or negotiated rates, with patients.[284] This federal legislation equips consumers with the data they need to make informed healthcare decisions.[285] Additionally, it mandates that PBMs disclose, on a semiannual basis, details on spending, rebates, and fees associated with covered medications directly to health plan sponsors.[286] To further enhance transparency, contracts between PBMs and employer-sponsored health plans must allow health plan fiduciaries to audit claims and cost information without facing unreasonable restrictions.[287] The legislation allocates funding to the Department of Health and Human Services, the Department of the Treasury, and the Department of Labor to ensure the effective implementation and enforcement of its provisions.[288]

B. Proposal

Comprehensive regulatory reform is required to address the systemic failures within the current PBM structure.[289] This proposal envisions a multi-pronged approach centered on transparency, consumer empowerment, and equitable treatment of pharmacies.[290] Notably, the suggested reforms are designed to avoid placing undue burdens on pharmacists or the broader medical field so that healthcare professionals can focus on their primary responsibility: providing quality patient care.[291]

First, pricing transparency must be mandated at every level of the pharmaceutical supply chain.[292] A consumer should be able to look up the price of any given medication at any time.[293] Patients deserve to see pricing information clearly displayed—verbally, digitally, and/or in writing—at each

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282 *Id.*
283 *Id.*
284 Lower Costs, More Transparency Act, H.R. 5378, 118th Cong. (as passed by House, Dec. 11, 2023).
285 *Id.*
286 *Id.*
287 *Id.*
288 *Id.*
289 Pharmacy Benefit Manager Transparency Act of 2023, S. 127, 118th Cong. (as reported by S. Comm. on Commerce, Sci., & Transp., Dec. 13, 2023).
290 *Id.*
291 *Id.*
292 *Id.*
293 *Id.*

pharmacy under consideration.[294] The current inability of consumers to access straightforward pricing data creates an opaque environment that enables PBMs to continue profiting from hidden fees and fluctuating markups.[295] This lack of transparency leaves patients vulnerable to price gouging and hinders their ability to make informed decisions about their healthcare.[296]

To ensure long-term transparency, the legislature should propose creating a public, centralized database listing all pharmaceutical drugs currently on the market.[297] This database should identify the drug manufacturer, the drug's pricing history from the time it entered the market to the present, which pharmacies are selling the drug, and all PBMs and health groups involved in its marketing and distribution.[298] The goal of this system is twofold: (1) to provide consumers, researchers, and regulators with a clear view of pricing dynamics over time and (2) to hold pharmaceutical companies and PBMs accountable by shedding light on how pricing decisions are made.[299] Ideally managed by the FTC, a federally operated website should be established to publish all currently available pharmaceutical discounts, allowing consumers to independently search for and utilize these cost-saving opportunities without being restricted to PBM-negotiated networks.[300]

For example, the *Pharmacy Benefit Manager Transparency Act*, introduced to the Senate in 2023, prohibits PBMs from charging a health insurance plan a different amount than the PBM reimburses the pharmacy.[301] The bill also prohibits PBMs from arbitrarily, unfairly, or deceptively increasing fees or lowering pharmacy reimbursements to offset changes to federally funded health plans and to retain larger profits. PBMs are not subject to these restrictions if they convey the full amount of any price concession or discount to the health plan and provide detailed information regarding costs, prices, reimbursements, fees, markups, discounts, and total payments received for their PBM services. Additionally, PBMs must submit an annual report to the FTC concerning payments received from health plans and fees assessed to pharmacies. The FTC and state attorneys general have the authority to enforce the legislation requirements.

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294 *Id.*
295 *Id.*
296 *Id.*
297 *Id.*
298 *Id.*
299 *Id.*
300 *Id.*
301 *Id.*

Second, all states should adopt statutes specifically governing PBM contracts in tandem with federal transparency mandates.[302] These statutes should set minimum standards for contract disclosures and ensure timely, standardized reimbursement to pharmacies.[303] By aligning state-level regulation with a national policy framework, lawmakers can close the jurisdictional loopholes that PBMs exploit to avoid accountability.[304]

For example, the Illinois statute governing PBM contracts, 215 ILCS 5/513b1, defines "pharmacy benefit manager" as an entity that processes prescription drug claims or manages drug benefits for health plans.[305] The statute requires PBMs to update their "maximum allowable cost" (MAC) pricing once every seven days to ensure pricing accurately reflects the latest market conditions.[306] Additionally, PBMs must maintain an appeals process that allows pharmacies to challenge reimbursement rates if they are paid less than the amount the pharmacy spends to acquire a drug.[307] If an appeal is upheld, the PBM adjusts the reimbursement rate and applies the change to all similarly situated pharmacies.[308] The statute also includes transparency provisions that require PBMs to disclose the rebate amounts they receive from drug manufacturers.[309] Specifically, it prohibits PBMs from preventing pharmacists from informing patients about lower-cost alternatives when their insurance co-pay exceeds the retail price of a medication.[310] Insured patients cannot be charged more at the point of sale than the lower cost-sharing amount or the drug's retail price.[311]

The statute also clearly states that PBMs cannot retaliate against pharmacists or pharmacies that report potential legal violations to government agencies, legislative bodies, or during legal proceedings.[312] Retaliation includes canceling, restricting, or refusing to renew pharmacy contracts in response to a pharmacy raising concerns.[313] This law promotes transparency, ensures fair reimbursement, and protects pharmacies and patients.[314]

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302 *Id.*
303 *Id.*
304 *Id.*
305 215 ILL. COMP. STAT. 5/513(b)(1).
306 *Id.*
307 *Id.*
308 *Id.*
309 *Id.*
310 *Id.*
311 *Id.*
312 *Id.*
313 *Id.*
314 *Id.*

The importance of these reforms becomes even clearer when viewed from the perspective of those on the frontlines of patient care.[315] As one pharmacist aptly stated:

> "As a pharmacist, I am proud to be considered the most accessible health professional in the community.[316] I enjoy seeing the same patients once a month, if not more.[317] I want this level of care and involvement in the community throughout my career and for future pharmacists.[318] The only way this is possible is for pharmacists to be paid fairly for the services they provide, at a level commiserate with the education I have earned.[319] With continued PBM reform and transparency, this dream can become my reality and the reality for pharmacists for generations to come."[320]

This testimony captures the human cost of PBM opacity and the urgent need for reform.[321] Fair reimbursement and operational transparency are not abstract policy goals—they are necessary conditions for sustaining the role of community pharmacies and ensuring equitable healthcare access.[322] When pharmacists are denied fair compensation and autonomy because of hidden PBM practices, the entire healthcare ecosystem suffers.[323]

Ultimately, these reforms aim to restore PBMs' original purpose: to manage prescription drug costs effectively and fairly.[324] They are carefully crafted to prevent imposing additional burdens on pharmacies or healthcare providers.[325] Rather than disrupt patient care or complicated medical workflows, these changes aim to streamline access to essential information and ensure that healthcare dollars are used responsibly.[326] By mandating transparency, establishing oversight mechanisms, and protecting independent pharmacies, the legislature can create a PBM system that operates with integrity and places patients—not profits—at the center of pharmaceutical care.[327]

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315 *See generally* Interview with Mitchell Harris, *supra* note 51.
316 *Id.*
317 *Id.*
318 *Id.*
319 *Id.*
320 *Id.*
321 *Id.*
322 *Id.*
323 *See generally* PBM ACCOUNTABILITY PROJECT, *supra* note 27.
324 *See generally id.*; *see also* Ginder-Vogel, *supra* note 40.
325 Ladsariya et al., *supra* note 213.
326 *Id.*
327 Sparks et al., *supra* note 21; Halpern, *supra* note 26.

CONCLUSION

In the United States, an untold number of patients and pharmacies are being held hostage by the pharmacy system and its unfair business practices.[328] PBMs have become highly influential in the pharmaceutical system and are under investigation for their questionable market practices.[329] PBMs have become an oligopoly, using contractual clauses and the absence of oversight to make money for themselves instead of lowering the cost of prescription drugs for their consumers.[330] Instead of using negotiations to secure lower drug prices for patients and pharmacies, PBMs have adopted an opaque system that allows them to manipulate drug costs at every point in the supply chain without disclosing the contractual provisions or reimbursement rates they impose.[331] Through these practices, PBMs can decrease competition, inflate prices, and diminish access to necessary medications without restriction.[332] Negative effects are being felt across the country as patients and pharmacies grapple with the rising costs of drugs and the inability to change the system.[333] Recently, the lack of transparency and regulation has come to the attention of the US government.[334]

In 2023, a slew of proposals were introduced in the 118th Congress to force PBMs to disclose pricing mechanisms.[335] In 2024, the FTC filed a lawsuit against the three largest PBMs for artificially inflating insulin prices, but so far, this has not been enough.[336] Patients continue to struggle with exorbitant prices and the resulting financial burden or inability to obtain their life-saving medications.[337] Independent pharmacies also suffer, as they are forced to close and abandon their communities and the patients who rely on them.[338] Thus, to fix the problems created by the PBM's current practices, pricing transparency must be mandated at every level of the pharmaceutical supply chain,[339] and all states should adopt statutes to govern PBM contracts in tandem with federal transparency mandates.[340]

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328 Weixel, *supra* note 139.
329 Halpern, *supra* note 26.
330 PBM ACCOUNTABILITY PROJECT, *supra* note 26.
331 Kitlowski & Adams, *supra* note 116.
332 Halpern, *supra* note 26.
333 *Id.*
334 Fry, *supra* note 147; Tozzi, *supra* note 147.
335 Dorthula H. Powell-Woodson et al., *Proposed State and Federal PBM Legislation: Is There Reason for Action Now?*, WILEY (May 1, 2024), https://www.wiley.law/alert-Proposed-State-and-Federal-PBM-Legislation-Is-There-Reason-for-Action-Now (on file with SIU Law Journal).
336 Kitlowski & Adams, *supra* note 116; *FTC Sues Prescription Drug Middlemen for Artificially Inflating Insulin Drug Prices, supra* note 101.
337 Hicks, *supra* note 259.
338 Ladsariya et al., *supra* note 213.
339 Pharmacy Benefit Manager Transparency Act of 2023, *supra* note 290.
340 *See generally* 15 ILL. COMP. STAT. 5/513(b)(1).

WHO WINS THE FIGHT TO PROTECT THE RIGHT OF PUBLICITY THROUGH § 512(C) OF THE DMCA?

Dillon W. Ruzich*

INTRODUCTION

A fraudulent online advertisement promoting a questionable intermittent keto routine is unlikely to convince Internet users to fall for the scam.[1] A celebrity-endorsed keto routine ad, however, might.[2] Although she frequently appears in the media, an unusual CNN article drew considerable attention to Joanna Gaines, co-owner of Magnolia and a *New York Times* bestselling author.[3] The article*, How Millions of Women are Melting Body Fat & Getting Ripped Thanks to Joanna Gaines And Her Intermittent Keto Routine* promoted a miracle weight-loss pill.[4] The CNN article likely came as a surprise to Ms. Gaines, as she probably did not recall endorsing any keto regimen.[5] That is because she did not. The CNN article was fake.[6]

Deceptive and false product endorsements, such as the fake CNN article, infringe upon the right of publicity and increasingly contribute to violations of this right on the Internet.[7] Unfortunately, there is no ideal way to challenge the misuse of the right to control one's online presence without

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* J.D. Candidate, Southern Illinois University Simmons Law School, 2026. Special thanks to Professor Zvi Rosen for his support in writing this Note, to Professor Thomas Reichert for his suggestions, and to Professor Brandy Johnson for her thoughts. Also, a huge thanks to those who have read too many drafts of this Note.

1 *See* Jordan Liles, *Joanna Gaines Never Endorsed Keto Gummies for Weight Loss*, SNOPES (May 26, 2023), https://www.snopes.com/fact-check/joanna-gaines-keto-weight-loss-gummies-scam/; *see also* Rudy Mawer, *A Detailed Beginner's Guide to The Ketogenic Diet*, HEALTHLINE (Nov. 7, 2023) ("The ketogenic diet involves consuming a very low amount of carbohydrates and replacing them with fat to help your body burn fat energy. Health benefits can include weight loss and lowering your risk for certain diseases.").

2 *See* Liles, *supra* note 1.

3 *Id.*; *see About,* MAGNOLIA, https://magnolia.com/about/ (last visited Feb. 12, 2025) (explaining that Joanna Gaines, along with her husband Chip, are co-founders of Magnolia, a successful lifestyle brand based in Waco, Texas, that is comprised of retail stores, a real estate firm, recipes, a quarterly lifestyle print magazine, and more).

4 Liles, *supra* note 1.

5 *See generally Id.*

6 *Id.*

7 *See e.g.,* JOANNA GAINES GUMMIES, https://sites.google.com/view/joanna-gaines-gummies/ (last visited Nov. 8, 2025).

resorting to litigation in state court.[8] For many, however, recourse through the judicial system is impractical.[9]

Similar to the fake CNN article, another website promoting fraudulent keto "Joanna Gaines Gummies" exploited Ms. Gaines' name, image, and likeness for commercial gain without her consent.[10] The fake gummy website infringed upon her right of publicity and, like many others, Ms. Gaines sought to avoid litigation by submitting an online removal request to Google pursuant to § 512(c) of the Digital Millennium Copyright Act (DMCA).[11] While submitting a takedown request may remedy right of publicity violations, using the DMCA for this purpose misapplies the statute and leaves victims liable for misrepresenting copyright infringement, as § 512(c) pertains solely to valid copyrights.[12]

Although the notice-and-takedown system in § 512(c) once effectively eliminated the distribution of copyrighted materials, the U.S. Copyright Office recently conceded that it has become overly burdensome.[13] Perhaps contributing to the ineffectiveness of the notice-and-takedown system is the increasing misapplication of § 512(c) for the right of publicity.[14] Yet Congress has not alleviated the strain on § 512(c) by extending federal protection to this right.[15]

Congress's reluctance to codify anything related to the right of publicity results in the intersection of the right of publicity and copyright law through an unfavorable distortion of § 512(c).[16] Submitting a § 512(c) take-down request is Ms. Gaines' sole recourse, except for costly litigation in state court.[17] While a lawsuit may seem fitting for someone of Ms. Gaines' stature,

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8 *See generally* 17 U.S.C. § 512(c) (2025); *see also* Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, A.B.A. (Sep. 16, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/.

9 *See generally* 512(c); *see also* Roesler & Hutchinson, *supra* note 8.

10 JOANNA GAINES GUMMIES, *supra* note 7.

11 *See DMCA (Copyright) Complaint to Google*, LUMEN (Feb. 6, 2023), https://lumendatabase.org/notices/30615609?access_token=wXF1JwhGUdv; *see also* § 512(c).

12 § 512(f).

13 U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 37 (2020), https://www.copyright.gov/policy/section512/section-512-full-report.pdf (citing Ass'n of Am. Publishers, Comments Submitted in Response to U.S. Copyright Off.'s Dec. 31, 2015, Notice of Inquiry at 5 (Apr. 1, 2016)).

14 *See Id.* (internal quotation marks omitted).

15 Roesler & Hutchinson, *supra* note 8.

16 *See e.g.,* ISE Ent. Corp. v. Longarzo, 2018 U.S. Dist. LEXIS 208921, at *22 (C.D. Cal. Dec. 11, 2018) (holding that the DMCA is applicable only to copyrights and not "the right of publicity" and that a takedown request regarding the unauthorized use of likeness is invalid).

17 *See generally DMCA (Copyright) Complaint to Google*, *supra* note 11.

would the average American pursue legal action for misappropriation?[18] Probably not.

The purpose of this Note is not to dramatize Joanna Gaines' experience with take-down requests, but rather to bring attention to an unaddressed gap in existing legislation: the absence of a practical, publicly accessible, and legally acceptable way to protect the right of publicity online.[19] This Note will begin by discussing the basics of U.S. copyright law, the historical background of the development of § 512(c) of the DMCA, and the common law right of publicity. It will then provide an analysis of the issues faced today when fighting to protect the right of publicity on the Internet.

Finally, after exploring toleration of the current misapplication of § 512(c), the potential for a congressional amendment to the DMCA, and incorporation of the right of publicity into the proposed NO FAKES Act, this Note recommends that online service providers implement a private right of publicity framework to provide immediate and effective relief for right of publicity violations on the Internet.[20]

I. COPYRIGHT, CONGRESS, & THE PASSING OF THE DMCA

Long gone are the days of copyright infringement solely through the physical distribution of works of authorship.[21] Copyright infringement now occurs with merely a simple screenshot on a cellphone or effortless posts on social media platforms.[22] Following the acceleration and development of technology during the 1990s came an unparalleled new world: the Internet.[23] With the Internet, the average consumer became instantly capable of illegally distributing copyrighted materials online "at a pace limited only by download speeds."[24] But it was not always this way.[25]

A. An Overview of Copyright Before the Internet

The evolution of U.S. copyright law reveals how increasingly easy it has become to infringe upon protected works. This historical context is

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18 *See generally* Roesler & Hutchinson, *supra* note 8.

19 *See generally* 17 U.S.C. § 512(c) (2025).

20 *See generally* Jennifer E. Rothman, *Reintroduced No FAKES Act still needs revision*, THE REGUL. REV. (Aug. 18, 2025), https://www.theregreview.org/2025/08/18/rothman-reintroduced-no-fakes-act-still-needs-revision/.

21 U.S. COPYRIGHT OFF., *supra* note 13, at 13–14.

22 *See id.*; *see* 17 U.S.C. § 106 (1), (3) (2024) (stating the copyright holder maintains the exclusive right to reproduce or distribute their copyrighted materials).

23 *See* U.S. COPYRIGHT OFF., *supra* note 13, at 13–14.

24 *Id.* at 14.

25 *Id.*

crucial to understanding the transformative impact of the Internet and the factors that ultimately led to the passage of the DMCA.[26]

Tracing back to the origins of U.S. copyright law, the Framers' forward-thinking led to the inclusion of the Promotion Clause in the United States Constitution.[27] This clause gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective writings and Discoveries."[28] The Promotion Clause is the foundation of copyright law in the United States.[29]

Under the powers granted by the Promotion Clause, Congress passed the first Copyright Act in 1790.[30] This Act, however, was far more limited than copyright law today, affording protection only to maps, charts (maps of water), and books.[31] The 1790 Act also required authors to comply with strict formalities.[32] Authors must register the title of their works, publish the registration in a newspaper, deposit a copy of their work with the local district court's clerk, and send another copy to the U.S. Secretary of State.[33]

Nevertheless, there have been substantial changes since 1790.[34] Over the next century, Congress progressively broadened the scope of copyright protection to encompass works beyond just maps and books.[35] Congress eventually declared that copyrightable subject matter includes all of an author's writings with the passage of the Copyright Act of 1909.[36]

The revised list of subject matter protected by the 1909 Act included new forms of media, such as motion pictures and sound recordings.[37] Despite these novel additions, the requirements for copyright protection remained identical to the 1790 Act: an author must publish or register their work to

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26 *See generally* 17 U.S.C. § 512 (2025).

27 U.S. CONST. art, I, § 8, cl. 8; *Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RSCH. LIBRS., https://www.arl.org/copyright-timeline/ (last visited Nov. 8, 2025); *The 18th Century*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_18th_century.html (last visited Nov. 8, 2025); *A Brief History of Copyright in the United States*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/ (last visited Nov. 8, 2025).

28 U.S. CONST. art, I, § 8, cl. 8; *Copyright Timeline: A History of Copyright in the United States*, *supra* note 27; *The 18th Century*, *supra* note 27.

29 U.S. CONST. art, I, § 8, cl. 8; *Copyright Timeline: A History of Copyright in the United States*, *supra* note 27; *The 18th Century*, *supra* note 27.

30 *A Brief History of Copyright in the United States*, *supra* note 27.

31 *Copyright Act of 1790*, U.S. COPYRIGHT OFF., https://copyright.gov/about/1790-copyright-act.html (last visited Nov. 8, 2025).

32 *Id.*

33 *Id.*; *Copyright Act of 1790*, BRITANNICA, https://www.britannica.com/topic/Copyright-Act-of-1790 (last visited Nov. 8, 2025).

34 *See generally A Brief History of Copyright in the United States*, *supra* note 27.

35 *1900–1950*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1900-1950.html (last visited Nov. 8, 2025).

36 *Id.*

37 *Id.*

receive copyright protection.[38] These stringent requirements for copyrightability began to erode, however, as the rest of the world gravitated towards abolishing any formalities for copyright protection.[39]

Congress again reassessed the existing copyright laws in response to broadcasting and other technological advances.[40] What followed was the passage of the Copyright Act of 1976, which comprehensively overhauled the 1790 Act and its amendments, including the 1909 Act, and fundamentally modified copyright law in the United States.[41] The Copyright Act of 1976, which remains the foundation of copyright law today, ushered in a profound transformation in copyright legislation.[42]

Notably, this Act refined Congress's list of copyrightable subject matter and expanded the duration of copyright protection.[43] The 1976 Act also finally abandoned the outdated formalities for protection as Congress adopted a simple fixation requirement for copyrightability.[44] Now, all works of authorship, published or unpublished, are protectable when recorded in a material form.[45]

Today, works of authorship are protected if they contain "a sufficient degree of originality" and are "fixed in a tangible medium of expression."[46] As explained by the United States Supreme Court in the 1991 case *Feist Publications, Inc. v. Rural Telephone Service Co.*, "the requisite level of

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38 *See generally id.*

39 *See generally id.*

40 *See generally 1950–2000,* U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1950-2000.html (last visited Nov. 6, 2025).

41 *Id.*

42 *Id.*

43 *Id.* ("The term of copyright protection for new works was greatly altered, from a term of years with a renewal period to the life of the author plus fifty years."). It was not until the Sonny Bono Copyright Term Extension Act where Congress extended the term of copyright to what it is today: the life of the author plus 70 years. *Id.*

44 *Id.* ("The 1976 act extended federal copyright protection to all works, both published and unpublished, once they are fixed in a tangible form.").

45 17 U.S.C. § 102(a) ("Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures or other audiovisual works; (7) sound recordings; and (8) architectural works."); *1950–2000, supra* note 40 ("The 1976 act extended federal copyright protection to all works, both published and unpublished, once they are fixed in a tangible form."); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

46 *Copyright Basics*, U.S. PATENT & TRADEMARK OFF., https://www.uspto.gov/ip-policy/copyright-policy/copyrightbasics#:~:text=While%20many%20people%20believe%20that,stated%20in%20the%20registration%20certificate. (last visited Nov. 6, 2025); *Feist Publ'ns, Inc.*, 499 U.S. at 345. There are now, of course, other requirements such as human authorship that has recently been addressed by the U.S. Copyright Office following the recent rise in artificial intelligence. U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE 2 (2025), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability Report.pdf.

creativity is extremely low."[47] With the Copyright Act of 1976, "even a slight amount will suffice."[48] Given today's minimal requirements for obtaining copyright protection, it is not surprising that the Internet quickly became a host for infringement, instability, and concern among copyright holders.[49]

B. Infringements in a Physical World

Before the rise of the Internet and the modern digital world, the physical constraints of reality restricted consumers' ability to reproduce and distribute copyrighted materials.[50] Infringements were limited to the physical distribution of media.[51] Consequently, the reproduction capabilities of average consumers were solely confined to recording songs on radio stations or producing copies of works in small quantities, as technological limitations imposed restrictions on the "scale and quality of both reproduction and distribution."[52] This was no longer the case in the 1990s.[53]

Inevitably, unprecedented threats to the protection of creative works emerged as the Internet developed.[54] Concerns grew that the Internet would enable the worldwide distribution of unauthorized, perfect digital copies of protected materials.[55] These apprehensions eventually materialized, and online service providers (OSPs) began questioning their liability for user infringement.[56]

C. Judicial Controversy and the Mess Left for Congress

A deterioration of copyright protection paralleled the development of the Internet, as traditional copyright laws proved insufficient to address online infringements.[57] In the early days of the Internet, consumers sharing

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47 *Feist Publ'ns, Inc.*, 499 U.S. at 345.

48 *Id.*

49 *See* Joel D. Matteson, *Unfair Misuse: How Section 512 of the DMCA Allows Abuse of the Copyright Fair Use Doctrine and How to Fix It*, 35 SANTA CLARA HIGH TECH. L. J. 1, 4 (2018).

50 U.S. COPYRIGHT OFF., *supra* note 13, at 13–14; *see* 17 U.S.C. § 106(1); § 106(3) (stating the copyright holder maintains the exclusive right to reproduce or distribute their copyrighted materials).

51 U.S. COPYRIGHT OFF., *supra* note 13, at 13.

52 *Id.* at 14.

53 *Id.* at 14.

54 *Id.* at 13.

55 *Id.* at 14.

56 *Id.* at 19; *see* Copyright Act of 1976, 17 U.S.C. § 102(a); *see* U.S. COPYRIGHT OFF., *supra* note 13, at 8; *Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System*, U.S. COPYRIGHT OFF., https://www.copyright.gov/512/ (last visited Nov. 6, 2025); 17 U.S.C. § 512(k)(1)(B).

57 Matteson, *supra* note 49, at 5.

copyrighted materials evaded accountability for infringing authors' rights.[58] Instead, courts forced liability onto the Internet service industry itself.[59]

A series of notable cases fueled tensions between OSP and user liability.[60] In some instances, the 1976 Copyright Act, now largely obsolete and inapplicable to the Internet, was haphazardly applied.[61] Despite OSPs' lack of intent to infringe, a literal application of the 1976 Act held them accountable for their users' conduct under the theory of direct liability.[62]

When applied to OSPs and the Internet, direct copyright infringement occurred upon any unauthorized copying, distribution, performance, or display of a copyrighted work of authorship on an OSP's digital platform.[63] Since direct infringement does not require a demonstration of intent to establish liability, courts held OSPs liable when copyrighted materials simply appeared on their websites.[64] Although OSPs did not intend to infringe authors' rights, applying strict liability principles was the most straightforward approach under existing copyright laws.[65]

Take the 1993 case *Playboy Enterprises v. Frena* as an example.[66] George Frena operated Techs Warehouse BBS, an online bulletin board service and OSP.[67] As with other online platforms, Frena's bulletin board subscribers could upload materials to the site.[68] Specific uploads, however, resulted in Frena facing legal action.[69] Playboy Enterprises filed suit against Frena after it found 170 of its adult images on his bulletin board.[70]

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58 *See* U.S. COPYRIGHT OFF., *supra* note 13, at 15 (asserting that the internet service industry was faced with liability for copyright infringements).

59 *Id*. at 8; *Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System*, *supra* note 56.

60 *See e.g.,* Playboy Enters. v. Frena, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993).

61 U.S. COPYRIGHT OFF., *supra* note 13, at 13–14; Eric Schlachter, *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM. & ENT. L. J. 87, 95 (1993) ("Ambiguities arise as old law is applied to new technologies. With the inherent ambiguities of cyberspace, the need to define its boundaries for legal purposes becomes even more critical.").

62 Benjamin H. Eisenberg, *A Speedbump on the Information Superhighway: Pushing Copyright Law into the Online Era: Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993)*, 92 FLA. HIST. Q. 337, 339 (2013).

63 *Types of Copyright Infringement: Direct, Contributory, and Vicarious Infringement Explained*, EMERSON THOMSON BENNETT (Jul. 17, 2024), https://www.etblaw.com/types-of-copyright-infringement/.

64 *See* Eisenberg, *supra* note 62, at 344.

65 *See Id.*

66 Playboy Enters. v. Frena, 839 F. Supp. 1552, 1554 (M.D. Fla. 1993).

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

The case was complicated, however, by Frena not uploading Playboy's images himself.[71] Instead, independent users of Frena's platform did.[72] Unsettlingly, the Middle District Court of Florida held that there was "irrefutable evidence of direct copyright infringement" despite users, and not Frena, uploading Playboy's photos.[73] Undeterred by Frena's removal of the pictures after gaining knowledge of the infringement, the court nevertheless found him directly liable.[74]

When applying inadequate copyright laws to online infringement, the court ruled against Frena because intent is not required for liability.[75] As the court stated, "[E]ven an innocent infringer is liable for infringement."[76] Strict adherence to this holding suggests that OSPs are liable for users' copyright infringement regardless of their lack of direct involvement in the infringing conduct.[77] Not all courts agreed with this holding.[78]

Other courts rejected a literal reading of the copyright laws.[79] In 1995, shortly after *Playboy Enterprises,* the court in *Religious Technology Center v. Netcom Online Communication Services, Inc.* rejected *Playboy Enterprises'* conclusions.[80] In contrast, this court held that volition remains a necessary element of copyright infringement and is absent when a third party, rather than the OSP, uses the platform to infringe.[81]

In *Religious Technology Center,* Scientology critic Dennis Erlich allegedly posted writings by L. Ron Hubbard, the founder of the Church of Scientology, to a Usenet newsgroup.[82] The owner of the copyrighted religious materials brought legal action against Erlich and Netcom for copyright infringement.[83] Netcom, the OSP that provided the Usenet group with Internet access, offered its services without monitoring the content uploaded by its users.[84] This case understandably raised concerns among other OSPs engaged in similar practices.[85]

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71 *Id.*
72 *Id.*
73 *Id.* at 1559.
74 U.S. COPYRIGHT OFF., *supra* note 13, at 15; *Playboy Enters.*, 839 F. Supp. at 1559.
75 *Playboy Enters.*, 839 F. Supp. at 1559.
76 *Id.*
77 *See Id.*
78 Religious. Tech. Ctr. v. Netcom On-Line Commc'n. Servs. Inc., 907 F. Supp. 1361, 1370 (N.D. Cal. 1995).
79 *Id.*; Eisenberg, *supra* note 62, at 339.
80 *Religious Tech. Ctr.*, 907 F. Supp. at 1370.
81 *Id.*
82 *Id.* at 1239; *see also Aurelija Andriekutė, What Is Usenet? And How Does It Work in 2025?,* NORDVPN (Jan. 3, 2024), https://nordvpn.com/blog/what-is-usenet (on file with SIU Law Journal) (describing Usenet as an online forum composed of "newsgroups").
83 *Religious Tech. Ctr.*, 923 F. Supp. at 1238.
84 *See Id.*
85 *See generally id.*

After determining that holding an OSP like Netcom directly liable for every infringing user post is unreasonable, the Northern District of California ultimately concluded that Netcom could still face contributory liability.[86] The court reasoned that although Netcom could monitor uploaded materials, the OSP disregarded the infringements and, through inaction, preserved copies of Hubbard's writings, thereby contributing to the infringement.[87] In the wake of such dramatically inconsistent rulings, it is unsurprising that OSPs such as America Online (AOL) and Yahoo! expressed serious concerns.[88] OSPs warned that denying immunity from liability would hinder the Internet's growth.[89]

D. The DMCA: A Temporary Fix

Intense congressional lobbying ensued leading up to 1998 during the World Intellectual Property Organization's (WIPO) Copyright Treaty process.[90] OSPs handed Congress a clear objective: grant broad federal immunity to OSPs for copyright infringements made by independent users.[91] In response to the widespread concern and judicial uncertainty, Congress passed the Digital Millennium Copyright Act (DMCA) in 1998.[92]

With the DMCA, Congress sought to enhance existing copyright laws while implementing new statutory measures to foster the development of the Internet and ensure its evolution into a "thriving electronic marketplace."[93] The DMCA's legislative history demonstrates Congress's intent to protect OSPs through safe harbors that shield them from liability and encourage cooperation between OSPs and copyright holders.[94] Congress's solution entailed enacting the three foundational sections of the DMCA: §§ 512, 1201, and 1202.[95]

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86 U.S. COPYRIGHT OFF., *supra* note 13, at 15.

87 Eisenberg, *supra* note 62, at 346–47.

88 *Religious Tech. Ctr.*, 923 F. Supp. at 1250; *see Section 230: An Overview*, CONGRESS.GOV, https://www.congress.gov/crs-product/R46751 (last visited Nov. 23, 2025).

89 *Religious Tech. Ctr.*, 923 F. Supp. at 1250; *see Section 230: An Overview*, *supra* note 88.

90 Hunter McGhee, *Reinterpreting Repeat Infringement in the Digital Millenium Copyright* Act, 25 VAND. J. ENT. & TECH. L. 483, 491 (2023); *see generally World Intellectual Property Organization*, U.S. PATENT & TRADEMARK OFF., https://www.uspto.gov/ip-policy/patent-policy/world intellectual-property-organization (last visited Sep. 21, 2025).

91 McGhee, *supra* note 90, at 491.

92 Eisenberg, *supra* note 62, at 348; Steve P. Calandrillo & Ewa A. Davison, *The Dangers of the Digital Millenium Copyright Act: Much Ado about Nothing?*, 50 WM. & MARY L. REV. 349, 354 (2008).

93 U.S. COPYRIGHT OFF., *supra* note 13, at 20.

94 *Id.* at 21.

95 *The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFF., https://www.copyright.gov/dmca/ (last visited Nov. 23, 2025).

1. The DMCA's § 512

Referred to as the safe harbor provisions and the notice-and-takedown system, § 512 establishes the statutory framework that enables copyright owners to remove infringing content.[96] The infamous notice-and-takedown system facilitates removal by allowing copyright holders to notify OSPs of infringing user-uploaded content.[97] If an OSP disables the content after receiving notice, § 512 shields the OSP from liability.[98]

Under the DMCA, immunity from infringement liability is granted only to OSPs that fall into one of the four categories outlined in the Act.[99] These are transitory digital network communications[100] included in § 512(a), services that engage in system caching[101] in § 512(b), those that store the information provided by users on their systems in § 512(c), and services that offer information location tools[102] as detailed in § 512(d).[103]

The safe harbor provisions in § 512(c) are arguably the most critical component of the DMCA.[104] The significance of § 512(c) lies in its applicability to any service that hosts user-generated content, such as social media platforms.[105] Examples of § 512(c) OSPs include YouTube, Facebook, and even Google Drive.[106]

2. The DMCA's § 1201

Congress enacted § 1201 of the DMCA to prevent circumvention of technological protection measures employed by copyright owners to limit access to their works on the Internet.[107] Under § 1201, federal law restrains

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96 *Id.*

97 *Id.*

98 *Id.* (This is, of course, if the OSPs meet certain conditions).

99 *See* 17 U.S.C. § 512(c) (2025).

100 *Online Copyright Infringement Liability Limitation Act*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/online_copyright_infringement_liability_limitation_act (last visited Nov. 23, 2025) (transitory digital network communications means the routing of user messages on the Internet).

101 *Caching Overview*, AWS, https://aws.amazon.com/caching/ (last visited Nov. 23, 2025) ("In computing, a cache is a high-speed data storage layer which stores a subset of data . . . so that future requests for that data are served up faster than is possible by accessing the data's primary storage location.").

102 *Online Copyright Infringement Liability Limitation Act*, *supra* note 100 (information location tools are online directories and search engines).

103 *See* § 512(a), (b), (c), (d).

104 *See* § 512(c).

105 *See id.*

106 BRIAN T. YEH, CONG. RSCH. SERV., R43436, SAFE HARBOR FOR ONLINE SERVICE PROVIDERS UNDER SECTION 512(C) OF THE DIGITAL MILLENNIUM COPYRIGHT ACT 4 (2014).

107 *The Digital Millennium Copyright Act*, *supra* note 95.

an Internet user from bypassing these protective measures.[108] This section of the DMCA also prohibits the distribution of circumvention technologies.[109]

3. The DCMA's § 1202

Additionally, § 1202 of the DMCA expressly prohibits the distribution of false copyright management information (CMI) to encourage or conceal online infringements.[110] Accordingly, CMI includes information such as the title of a copyrighted work or the name of the copyright owner.[111] Today, these three sections of the DMCA form the cornerstone of the modern copyright framework regulating Internet liability.[112]

E. The DMCA's Limitations

Despite the DMCA offering immediate relief to OSPs, as the Copyright Office put it, "[T]he Internet of today is not the Internet of 1998."[113] Since its inception as a legislative compromise, the DMCA has been heavily scrutinized by critics.[114] Unsurprisingly, the DMCA's faults remain prevalent twenty-seven years after Congress passed the Act.[115]

For example, opponents of the DMCA argue that the notice-and-takedown system under § 512(c) is nothing short of a chariot for stifling free speech.[116] Others say that the Internet's evolution has led to an overwhelmed and broken system.[117] Moreover, under § 512(g) of the Act, a frustrating game of "whack-a-mole" occurs when removed content, though infringing, is simply reinstated with a counter-notice from the OSP user.[118]

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108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.*
113 U.S. COPYRIGHT OFF., *supra* note 13, at 28.
114 Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution to a Twenty-First Century Problem*, CTR. FOR THE PROT. OF INTELL. PROP. (Dec. 2023), https://sls.gmu.edu/cpip/wp-content/uploads/sites/31/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf (on file with SIU Law Journal); R. Polk Wagner, *Reconsidering the DMCA*, 42 HOU. L. REV. 1108, 1108 (2006).
115 *Unintended Consequences: Fifteen Years under the DMCA*, ELEC. FRONTIER FOUND. (Mar. 2013), https://www.eff.org/pages/unintended-consequences-fifteen-years-under-dmca#:~:text=The%20DMCA%20Jeopardizes%20Fair%20Use,of%20movies%20they%20have%20purchase (on file with SIU Law Journal).
116 *See Id.*
117 U.S. COPYRIGHT OFF., *supra* note 13, at 30–31.
118 *Id.* at 33.

In numerous instances, OSPs fail to remove infringing materials from the Internet.[119] Despite the DMCA's protection guarantees, authors' rights to their work are often not secure online.[120] Yet, the DMCA's notice-and-takedown system in § 512(c) remains the only legislative framework restraining the unlawful distribution of copyrighted works of authorship on the Internet.[121]

II. BREAKING APART § 512(C) OF THE DMCA

Integral to this Note is the DMCA's notice-and-takedown system.[122] Codified at 17 U.S.C. § 512(c), the notice-and-takedown system grants safe harbor protections to OSPs by shielding them from liability for copyright infringement committed by independent users.[123] Upon notice, OSPs must take down infringing content.[124] Qualifying OSPs, however, evade liability only when they meet the following statutory requirements set out in the Act.[125]

A. The Designated Agent

The first requirement of an OSP under § 512(c) is to designate an agent responsible for receiving take-down requests.[126] Eligibility for the safe harbors rests on an OSP's ability to collect take-down requests from copyright holders through a designated agent.[127] To successfully designate an agent, an OSP must disclose the agent's identity and provide the copyright office with a description of how the public can contact the agent.[128] The Copyright Office then adds this information to its publicly available directory.[129] In 2016, the Copyright Office's paper registration process and

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119 *See Id.*
120 *See Id.*
121 *See* 17 U.S.C. § 512(c) (2025).
122 *Id.*
123 *Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System*, *supra* note 56; YEH, *supra* note 106, at 4.
124 § 512(c).
125 *Id.*
126 *Id.*
127 *Id.*
128 *DMCA Designated Agent Directory*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/dmca-directory/#:~:text=The%20Digital%20Millennium%20Copyright%20Act,Notifications%20of%20Claimed%20Infringement (last visited Nov. 06, 2025).
129 *Id.*

directory transitioned to a digital system.[130] As a result, OSPs must now register with the office using the new online system.[131]

B. Components of A Take-down Request

Formal notice by copyright holders must also comply with the statutory requirements in § 512(c).[132] Take-down notices are formal legal requests when they are written and submitted to an OSP's designated agent.[133] The Act requires copyright owners to sign the request and identify the infringed work.[134] Additionally, the take-down request must include the rights holder's contact information, a statement affirming that the use of the copyrighted material was unauthorized, and a declaration confirming the accuracy of the request.[135]

C. Actual Knowledge as a Requisite for Liability

Upon receiving a formal infringement notice from copyright holders through a designated agent, § 512(c) requires OSPs to remove or disable access to the infringing content promptly.[136] As explained by the Second Circuit Court of Appeals, "[R]eceipt of a take-down notice will . . . trigger an obligation to expeditiously remove the infringing material."[137] An OSP forfeits the safe harbor protections of § 512(c) if it has actual knowledge of infringing content and fails to take prompt action to remove or restrict access to the material.[138]

The Second Circuit affirmed in *Viacom International, Inc. v. YouTube, Inc*. that actual knowledge of infringing content precludes safe harbor protections and results in liability.[139] Viacom, an American media conglomerate, brought suit against YouTube for copyright infringement and sought damages of one billion dollars.[140] Viacom claimed that YouTube

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130 *Id.*
131 *Id.*
132 § 512(c)(3).
133 *DMCA Designated Agent Directory*, *supra* note 128.
134 § 512(c)(3).
135 *Id.*
136 § 512(c); Marc J. Randazza, *Lenz v. Universal: A Call to Reform Section 512(f) of the DMCA and to Strengthen Fair Use*, 18 VAND. J. ENT. & TECH. L. 743, 746 (2016); Viacom Int'l, Inc. v. YouTube, 676 F. 3d 25, 31 (2nd. Cir. 2012).
137 *See* § 512(c); Randazza, *supra* note 136, at 746; *Viacom Int'l, Inc.*, 676 F. 3d at 31.
138 § 512(c)(1)(A).
139 *Viacom Int'l, Inc.*, 675 F.3d at 33.
140 *Id.* at 28; Meg James, *YouTube prevails in huge copyright suit with Viacom*, L.A. TIMES (Apr. 18, 2024), https://www.latimes.com/entertainment/envelope/la-xpm-2013-apr-18-la-et-ct-youtube-prevails-copyright-suit-viacom-20130418-story.html (on file with SIU Law Journal).

wrongfully engaged in "public performance, display, and reproduction of their audiovisual works."[141] Among these works were Nickelodeon's "SpongeBob SquarePants" and Comedy Central's "The Daily Show with Jon Stewart."[142]

Viacom argued that YouTube knowingly and intentionally, through willful blindness, engaged in copyright infringement by allowing continued public access to its copyrighted media.[143] In defense, YouTube claimed that the DMCA imposes liability only when an OSP has actual knowledge of specific infringing uploads.[144] YouTube maintained that it lacked such knowledge and that mere general awareness of potential copyright infringement does not disqualify an OSP from safe harbor protection.[145]

The Second Circuit ultimately held that the applicability of the actual knowledge requirement in § 512(c) depends upon whether an OSP had actual or subjective knowledge of a specific copyright infringement.[146] As a result, the court remanded the case to the federal district court for further findings regarding YouTube's knowledge of the infringements.[147]

This decision meant that the Internet could take a breath of relief, as innovation and online freedom would continue to prevail.[148] By rejecting most of Viacom's arguments on appeal, the Second Circuit preserved the integrity of the Internet, as liability does not follow solely from limited knowledge.[149] Denial of immunity remains the consequence of an OSP's failure to take reasonable remedial measures upon a copyright owner's actual and adequate notice.[150]

Interestingly, the Second Circuit recently revisited this principle in *Capital Records, LLC v. Vimeo, LLC,* addressing liability for content moderation under § 512(c).[151] The court clarified that an OSP's content moderation efforts do not constitute sufficient control to justify exclusion from the DMCA's safe harbors.[152] This remains true unless these interactions

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141 *Viacom Int'l, Inc.*, 675 F.3d at 28.

142 James, *supra* note 140.

143 *Viacom Int'l, Inc.*, 675 F.3d at 34.

144 *Id.* at 29.

145 *Id.*

146 *Id.* at 33.

147 *Id.* at 42.

148 *See* Corynne Mcsherry, Viacom v. Google*: A Decision at Last, and It's Mostly Good (for the Internet and Innovation*, ELEC. FRONTIER FOUND. (Apr. 5, 2012), https://www.eff.org/deeplinks/2012/04/viacom-v-google-decision (on file With SIU Law Journal).

149 *Id.*; *Viacom Int'l, Inc.*, 675 F.3d at 30.

150 *Viacom Int'l, Inc.*, 675 F.3d at 30; 17 U.S.C. § 512(c) (2025).

151 Cap. Recs., LLC v. Vimeo, Inc., 125 F.4th 409, 428 (2nd Cir. 2025); Jeremy Goldman, *Second Circuit Clarifies When Content Moderation Risks DMCA Safe Harbor*, FRANKFURT KURNIT KLEIN + SELZ (Jan. 29, 2025), https://ipandmedialaw.fkks.com/post/102jxo0/second-circuit-clarifies-when-content-moderation-risks-dmca-safe-harbor (on file with SIU Law Journal).

152 *Id.*

amount to red flag knowledge and substantial control over the infringing content.[153] Nonetheless, to qualify for the DMCA's safe harbors and escape liability, OSPs must immediately remove the infringing material upon notice and fully comply with the Act's procedural requirements.[154]

III. THE SHORTCOMINGS OF THE RIGHT OF PUBLICITY

Unlike copyright law, the Founders did not incorporate the right of publicity into the United States Constitution.[155] Instead, courts developed the right through case law over the past several decades.[156] Broadly, the right of publicity protects an individual's name, image, and likeness from unauthorized commercial use.[157]

Defining the scope of the right of publicity has proven challenging and remains unsettled primarily due to the lack of uniformity across jurisdictions.[158] Since there is no federal statute governing this right, its application depends on state law and the fragmented legal landscape.[159] Some states offer robust statutory protections, including post-mortem rights lasting for decades, while others impose more limited recognition of the right, if any at all.[160]

With this context in mind, the historical development and evolution of the right of publicity provides a clear framework for why federal engagement, whether through action or deliberate inaction, could preserve and adapt the right to the evolving digital world.[161]

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153 *Id.*

154 *See* § 512(c); Randazza, *supra* note 136, at 746; *Viacom Int'l, Inc*., 676 F. 3d at 20.

155 *Personality Rights*, CASE W. RSRV. UNIV. SCH. OF L., https://lawresearchguides.cwru.edu /IP/personality-rights (on file with SIU Law Journal) (last visited Nov. 15, 2025).

156 *See Right of Publicity*, INT'L TRADEMARK ASS'N, https://www.inta.org/topics/right-of-publicity /#:~:text=Topic-,TOPIC,and/or%20likenesses%20as%20trademarks (on file with SIU Law Journal) (last visited Nov. 16, 2025) ("A majority of states do, however, recognize the right of publicity by statute and/or case law."); *see e.g.,* Haelen Lab'ys, Inc. v. Topps Chewing Gum, 202 F. 2d 866, 868 (2d Cir. 1953).

157 *Right of Publicity*, *supra* note 156.

158 *See* Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, A.B.A., https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/august2011/why_federal_right_publicity_statute_is_necessary_comm_law_28_2.authcheckdam.pdf (last visited Nov. 16, 2025) (on file with SIU law journal).

159 *See Id.*

160 *See Id.*

161 *See generally Id*

A. An Article and the Conception of the Right to Privacy

The modern right of publicity originated in Samuel Warren and Louis Brandeis's commentary on privacy.[162] In their influential 1890 Harvard Law Review article, *The Right to Privacy*, Warren and Brandeis argued that existing intellectual property laws were inadequate to safeguard the individual's right to be left alone.[163] They asserted that a distinct right to privacy was necessary to protect private citizens from unwanted publicity, intrusion, and economic exploitation.[164]

Although Warren and Brandeis' notions of the right to privacy laid the early foundations for the right of publicity, state legislatures and courts took nearly half a century to protect these interests.[165] The first instance of right of publicity legislation appeared in 1903, when New York became the first state to codify the right, albeit under the guise of the right to privacy.[166] New York's new statute emerged as a response to widespread outrage.[167]

A year before New York's law took effect, a case of first impression, *Roberson v. Rochester Folding Box Co.*, appeared on the New York Court of Appeals' docket.[168] In *Roberson*, defendant Franklin Mills Co., a flour mill, distributed 25,000 photographs of plaintiff Abigail Roberson, a minor child.[169] The defendant labeled Abigail as the "Flour of the Family."[170] Neither Abigail nor Abigail's mother consented to the use of the photographs in the defendant's advertising campaign.[171]

Unfortunately, the distribution of these photographs caused Abigail substantial distress.[172] Abigail's mother brought suit against the defendant for

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162 Kress Weisbord, *A Copyright Right of Publicity*, 84 FORDHAM L. REV. 2803, 2809 (2016).

163 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 218 (1890); Weisbord, *supra* note 162, at 2809.

164 Warren & Brandeis, *supra* note 163, at 196; Weisbord, *supra* note 162, at 2809.

165 Jonathan Faber, *A Brief History of the Right of Publicity (NIL)*, RIGHT OF PUBLICITY, https://rightofpublicity.com/brief-history-of-rop (on file with SIU Law Journal) (last visited Sep. 11, 2025).

166 *Id.*

167 *New York*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://rightofpublicityroadmap.com/state_page/new-york/#:~:text=New%20York%20recognizes%20a%20right,of%20a%20sexually%20explicit%20depictions.%E2%80%9D (on file with SIU Law Journal) (last visited Sep. 24, 2025).

168 *See* Edward H. Rosenthal & Barry Werbin, *A Historical Retrospective on New York's Right of Privacy Law: 115 Years of New York Court of Appeals Jurisprudence*, 29 NYSBA ENT., ARTS & SPORTS L. J. 35, 35 (2018) https://fkks.com/uploads/news/A_Historical_Retrospective_on_New_York's_Right_of_Publicity_Law_115_Years_of_New_York_Court_of_Appeals_Jurisprudence.pdf (on file with SIU Law Journal); Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 542 (N.Y. 1902).

169 *Roberson*, 171 N.Y. at 542.

170 Rosenthal & Werbin, *supra* note 168, at 35.

171 *Roberson*, 171 N.Y. at 542; Rosenthal & Werbin, *supra* note 168, at 35.

172 *See Roberson*, 171 N.Y. at 542.

publishing and circulating the pictures without their express authorization.[173] Despite the harrowing effects the defendant's campaign had on Abigail, the New York Court of Appeals nevertheless concluded that New York's common law did not recognize this cause of action.[174] The court, however, referred to the photographs as Abigail's "likenesses," a concept that lies at the heart of modern right of publicity.[175]

The *New York Times* then published a passionate opinion piece on the decision.[176] Titled *The Right of Privacy*, the *New York Time*s called the court's refusal to recognize Abigail's case a "savage and horrible practice" that did not align with the interests of a "civilized community."[177] Naturally, public outrage ensued.[178]

The New York State legislature quickly acted, and New York's statute was the first in the United States to prohibit using another person's name, image, and likeness for commercial endeavors without written consent.[179] New York's statute laid the foundations for the right of publicity in the United States.[180]

B. A Slow Start to the Right of Publicity

Courts throughout the United States continued to constrain the right to privacy.[181] Restrictions on the right to privacy, however, began to loosen with the Second Circuit Court of Appeals coining the phrase "right of publicity."[182] Although it would take fifty years for a court to apply New York's right of privacy statute, it played a key role in a pivotal 1953 case.[183]

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173 *Id.*

174 *Id.*; Rosenthal & Werbin, *supra* note 168, at 35.

175 *Roberson*, 171 N.Y. at 542.

176 *The Right of Privacy*, N.Y. TIMES (Aug. 23, 1902), https://www.nytimes.com/1902/08/23/archives/the-right-of-privacy.html (on file with SIU Law Journal); Rosenthal & Werbin, *supra* note 168, at 35.

177 *The Right of Privacy*, *supra* note 176; Rosenthal & Werbin, *supra* note 168, at 35.

178 Rosenthal & Werbin, *supra* note 168, at 35.

179 Faber, *supra* note 165; Rosenthal & Werbin, *supra* note 168, at 35.

180 Faber, *supra* note 165.

181 *See generally* Rosenthal & Werbin, *supra* note 168, at 35.

182 Haelen Lab'ys, Inc. v. Topps Chewing Gum, 202 F.2d 866, 868 (2d Cir. 1953); *see generally* Rosenthal & Werbin, *supra* note 168, at 35.

183 *Haelen Lab'ys, Inc.*, 202 F. 2d at 868; Rosenthal & Werbin, *supra* note 168, at 35 ("[I]t took 50 years for the first instance of the right of publicity nomenclature to be applied to the right of privacy under the Civil Rights Law, and it came with a 1953 Second Circuit decision involving chewing gum and baseball cards.").

In *Haelen Laboratories, Inc. v. Topps Chewing Gum*, the court wrestled with whether an individual has a property interest in their likeness.[184] Plaintiff Haelen Laboratories sold chewing gum and contracted with a baseball player for the exclusive right to use his photograph in a marketing campaign.[185] Despite this agreement, the baseball player signed a contract with the defendant Topps Chewing Gum that also allowed the use of his image.[186] Topps Chewing Gum argued that its agreement was valid, as the baseball player could not claim a right to his image.[187]

The court, however, rejected this argument.[188] Writing for the majority, Judge Jerome Frank delineated that although New York's privacy law did not apply, the right of publicity exists independently of the right to privacy.[189] This decision resulted in a novel proposition: Topps Chewing Gum could be held liable for circumventing Haelen Laboratories' agreement with the ball player.[190] *Halen Laboratories* marked the first recognition and application of the right of publicity by a court in the United States.[191]

C. Expanding the Right of Publicity

In addition to New York, several other states have since enacted legislation protecting an individual's right of publicity while also recognizing the right through case law.[192] California, for example, has been a leader in developing both the legislative and common law right of publicity.[193] California asserts in § 3344 of its code that "[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness in any manner" without prior consent is "liable for any damages sustained by the person or persons injured."[194] While the list of protectable characteristics provided in California's statute may seem exhaustive, legal action challenging the extent of protection afforded to an individual's likeness exposed its limitations.[195]

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184 *Haelen Lab'ys, Inc.*, 202 F. 2d at 867; J. Gordon Hylton, *Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelen Laboratories v. Topps Chewing Gum*, 12 MARQ. SPORTS L. REV. 273, 274 (2001).

185 *Haelen Lab'ys, Inc.*, 202 F. 2d at 867.

186 *Id.*

187 Rosenthal & Werbin, *supra* note 168, at 35; *Haelen Lab'ys, Inc.*, 202 F. 2d at 867.

188 Rosenthal & Werbin, *supra* note 168, at 35; *Haelen Lab'ys, Inc.*, 202 F. 2d at 868.

189 *Haelen Lab'ys, Inc.*, 202 F. 2d at 868.

190 *Id.*

191 Rosenthal & Werbin, *supra* note 168, at 35.

192 *Right of Publicity Statutes & Interactive Map*, RIGHT OF PUBLICITY, https://rightofpublicity.com/statutes (last visited Nov. 21, 2025).

193 CAL. CIV. CODE § 3344(a).

194 *Id.*

195 *See e.g.,* Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988).

In a pivotal 1988 case, *Midler v. Ford Motor Co.*, the Ninth Circuit Court of Appeals discovered that the imitation of a person's actual voice is not actionable under § 3344 of California's Code.[196] In *Midler*, renowned singer Bette Midler sued Ford Motor Company for the unauthorized use of her voice after she declined to sing in a commercial for Ford's new Mercury Sable.[197] However, Midler's claim faltered because Ford did not directly replicate her voice but instead hired another singer to imitate it.[198]

The court ultimately found that since Ford used another voice for the commercial, Midler had no claim under § 3344 of California's Code.[199] Yet, the court recognized that imitating a singer's voice for commercial profit is a tort under California's common law right of publicity.[200] Although a relatively narrow ruling, *Midler* expanded the right of publicity's applicability to vocal imitations.[201]

In addition to *Midler*, the 1993 case *White v. Samsung Electronics America, Inc.* also played a historical role in further defining the boundaries of the right.[202] In this case, Samsung ran an advertisement campaign to promote its electronics, depicting actress Vanna White, known for her long-time appearance as co-host of the show "Wheel of Fortune," as a robot.[203]

The advertisement implied that Samsung's products would still be around when a robot replaces Ms. White on the show.[204] Although the campaign's reference to her may seem insignificant, the court ruled that Ms. White could use the right of publicity to recover against Samsung.[205] By finding that Samsung's dressed-up robot misappropriated Ms. White's likeness, the court extended the right of publicity to include legal protections against merely evoking a "celebrity's image in the public's mind."[206]

Today, the right of publicity extends beyond celebrities and public figures like Joanna Gaines. It empowers every individual with a legally

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196 *Id.* at 463 (explaining that a person's actual voice, not an imitation, must be used for the Statute to be applied).

197 *Id.*; BETA MAX, *1986 Bette Midler Sound-Alike Mercury Sable Commercial*, (YouTube, Sep. 29, 2015), https://www.youtube.com/watch?v=hxShNrpdVRs.

198 *Midler*, 849 F. 2d at 463.

199 *Id.*

200 *Id.*

201 *Id.* ;Today, *Midler* stands as a precursor to the inevitable battle against artificial intelligence and the misappropriation of one's voice. *See, e.g.,* Maureen Dowd, *Scarlett Johansson's Statement About Her Interactions With Sam Altman*, N.Y. TIMES (May 20, 2024), https://www.nytimes.com/2024/05/20/technology/scarlett-johansson-openai-statement.html?unlocked_article_code=1.cE4.et Hm.kK087Cd-8n3b&smid=url-share (on file with SIU Law Journal).

202 White v. Samsung Elecs. Am., Inc. 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinksi, J. dissenting).

203 *Id.* at 1514.

204 *Id.*

205 *Id.* at 1518.

206 *Id.* at 1514.

recognized, exclusive right to control the commercial use of their identity.[207] In addition to one's name, image, and likeness, the right of publicity can, depending on the jurisdiction, also include personal attributes such as one's voice and essence, thanks to Ms. Midler and Ms. White.[208]

IV. IS IT DMCA MISUSE OR FIGHTING TO PROTECT THE RIGHT OF PUBLICITY?

Although a majority of states recognize the right of publicity in some form, there is simply no federal protection afforded to an individual's right of publicity.[209] Congress's failure to codify the right of publicity has left public figures, and increasingly ordinary individuals, vulnerable to the misappropriation of their names, images, and likenesses online without reliable legal remedies.[210]

A. The Issue: § 512(f) of the DMCA

The Lumen database, an independent research project of Harvard University's Berkman Klein Center for Internet and Society, compiles take-down requests submitted to OSPs.[211] On average, the database logs over 40,000 take-down notices per week.[212] As of 2021, Lumen recorded nearly 4.5 billion URLS associated with § 512(c) take-down requests.[213] When filtered for claims related to the right of publicity, the database yields thousands of results.[214]

This volume of activity demonstrates that Joanna Gaines is far from alone when using § 512(c) for purposes other than copyright enforcement.[215] Beyond the keto gummy advertisements that misused her likeness, Ms. Gaines' experience reflects a broader trend.[216] In the absence of a federal

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207 *See generally Right of Publicity*, *supra* note 156.

208 *See generally id.*; *see generally* Midler v. Ford Motor Co., 849 F.2 d 460, 463 (9th Cir. 1988); *see also White*, 989 F.2d at 1514.

209 *Right of Publicity*, *supra* note 156 ("In the United States, no federal statute or case law recognizes the right of publicity.").

210 *See generally Id.* ("In the United States, no federal statute or case law recognizes the right of publicity.").

211 *About Us*, LUMEN, https://lumendatabase.org/pages/about (on file with SIU Law Journal) (last visited Nov. 10, 2025).

212 *Id.*

213 *Id.* (It is important to note, however, that a notice on the Lumen database does not "indicate a judgement among these possibilities" nor that "the takedown request was (or was not) acted upon its recipient.").

214 *Right of Publicity*, LUMEN, https://lumendatabase.org/notices/search?term=Right+of+Publicity+&sort_by= (on file with SIU Law Journal) (last visited Nov. 10, 2025).

215 *Id.*

216 *See DMCA (Copyright) Complaint to Google*, *supra* note 11.

statutory framework designed to protect individuals' rights to their name, image, and likeness, Americans remain largely unprotected against online misappropriation of their right of publicity.[217]

A significant issue exists because every one of these take-down requests is subject to § 512(f) of the DMCA.[218] This section of the Act governs misrepresentations in § 512(c) notices.[219] Accordingly, § 512(f) prohibits anyone from knowingly misrepresenting a copyright infringement claim in a take-down request.[220] Despite liability for misrepresentation, victims of right of publicity violations increasingly submit take-down requests because the DMCA remains the only legislative mechanism for removing online content.[221]

B. Misuse of § 512(c) Beyond Celebrities

Like Joanna Gaines, independent creators, artists, and everyday individuals increasingly face ongoing battles to protect their names, images, and likenesses on the Internet.[222] For example, Daniel Khan, an independent artist who performs under the name "Young Slaus," submitted a take-down request on December 3, 2024.[223] In his notice, Mr. Khan explained that another artist had misappropriated his identity by adopting a stage name that was confusingly similar to his own, "Young Sloss." [224] By submitting the request, however, Khan exposed himself to potential liability under § 512(f) of the DMCA for misrepresenting a copyright claim.[225]

The Lumen database also recently documented the case of an unnamed rightsholder who discovered someone had uploaded her image to an adult website without her consent.[226] Despite repeated attempts to contact the site's owner directly, the image remained publicly accessible.[227] On November 17, 2024, she took matters into her own hands by submitting a take-down notice to Google and requested removal of the image.[228] Although it is unclear whether the rightsholder owns the image or whether a copyright infringement claim may be valid, she asserts that the unauthorized use of her image

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217 Roesler & Hutchinson, *supra* note 8.
218 17 U.S.C. § 512(f) (2025).
219 *Id.*
220 *Id.*
221 *See* § 512(c).
222 *See generally Right of Publicity*, *supra* note 214.
223 *DMCA (Copyright) Complaint to Google, supra* note 11.
224 *Id.*
225 *Id.*; § 512(f).
226 *DMCA (Copyright) Complaint to Google, supra* note 11.
227 *Id.*
228 *Id.*

violates her right of publicity.[229] While the unauthorized use of the rightsholder's photograph in such a context is deeply concerning, she nevertheless faces potential liability under § 512(f) for misrepresenting the claim as a right of publicity violation.[230]

With the absence of an effective system to curb the unauthorized online use of names, images, and likenesses, what other recourse besides § 512(c) does someone like Khan or the unnamed rights holder have to protect their right of publicity?[231]

C. A Costly Alternative in State Court

Aside from misapplying the DMCA, the only remaining option is to file a lawsuit in state court.[232] However, pursuing legal action through the justice system is prohibitively expensive.[233] The high costs of litigating these claims may deter individuals from pursuing right of publicity actions, effectively limiting meaningful enforcement.[234]

For example, in *Hinton et al. v. Completely Innocent LLC*, a seemingly straightforward claim related to the right of publicity resulted in strikingly high costs.[235] The defendants published the plaintiff's photographs without permission as promotional materials for their nightclub, and the court granted the plaintiff's Motion for Fees and Costs.[236] These costs shockingly amounted to $11,896.50 which, unfortunately, are on the lower end of these types of claims.[237]

In contrast, high-profile right of publicity cases can cost hundreds of thousands of dollars.[238] The case *Barry Tubb v. Paramount Pictures Corporation* involved a dispute over Tubb's appearance in the 2022 film *Top Gun: Maverick* and an alleged violation of his right of publicity.[239] The court's inclination to grant Paramount's Motion for Costs and Fees, though

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229 *Id.*

230 *Id.*

231 *See* 17 U.S.C. § 512(c) (2025).

232 *See generally Illinois Right of Publicity Law*, DIGIT. MEDIA LAW PROJECT (Jan. 20, 2025), https://www.dmlp.org/legal-guide/illinois-right-publicity-law (on file with SIU Law Journal).

233 *See, e.g.,* Order for Hinton et al. v. Completely Innocent LLC, No. CV-21-01019-PHX-SPL (Dist. Ct. Ariz. 2022), https://storage.courtlistener.com/recap/gov.uscourts.azd.1269238/gov.uscourts.azd.1269238.23.0.pdf (on file with SIU Law Journal).

234 *See, e.g., Id.*

235 *See, e.g., Id.*

236 *See Id.*

237 *See Id.*

238 *See, e.g.,* Tentative Ruling on Plaintiff's Motions for Tubb v. Paramount Pictures Corp., No. CV 24-1417-GW-BFMx (C. D. Cal. 2024), https://storage.courtlistener.com/recap/gov.uscourts.cacd.915678/gov.uscourts.cacd.915678.44.0.pdf (on file with SIU Law Journal).

239 *See, e.g., Id.*

with further supplemental briefing, resulted in Tubb potentially being on the hook for upwards of $250,000.00, as originally asked by the Defendant for attorney's fees and costs.[240] The remarkably high cost of pursuing a right of publicity action in state court may deter individuals from seeking to protect their names, images, and likenesses, leaving § 512(c) as the only accessible option.[241]

D. Misuse the System or File a Claim in State Court?

Those facing online violations of the right of publicity are left with a choice: misuse the DMCA's § 512(c) take-down process, thereby risking liability under § 512(f) for misrepresenting copyright infringement, or pursue costly and burdensome action in state court.[242] Which is the better option? They both leave Americans without a secure and safe solution to the growing problem of right of publicity misappropriations that frequently occur on the Internet.[243]

V. THE SOLUTION: AMENDING, INCORPORATING, LETTING IT SLIDE, OR PRIVATE ORDERING?

Although it is undeniable that the misuse of § 512(c) of the DMCA for right of publicity purposes has become increasingly common,[244] a straightforward resolution is for congress to amend the DMCA with integration of the right of publicity into applicable subject matter under § 512(c).[245] An amendment, however, may not be the most effective solution as modifying copyright law is far from straightforward.[246]

An alternative, and perhaps more pragmatic solution, would be to incorporate the right of publicity into the proposed Nurture Originals, Foster Art, and Keep Entertainment Safe ("NO FAKES") Act.[247] This new legislation, introduced in response to the growing concerns about artificial intelligence-generated digital impersonations, is already designed to address

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240 *See, e.g., Id.*

241 *See generally Id.*

242 *See, e.g., id.*; *see also* Roesler & Hutchinson, *supra* note 8.

243 *See* Maddie Rana & Jeff Landis, *Spike in Right of Publicity Cases Against Online Providers*, ZWILLGENBLOG (Dec. 2, 2021), https://www.zwillgen.com/privacy/spike-right-publicity-cases-online-providers/ (on file with SIU Law Journal) ("The last year has seen a rise in the number of complaints alleging misappropriation of likeness or right of publicity violations against media and technology companies.").

244 *See Right of Publicity*, *supra* note 214.

245 *See generally* 17 U.S.C. § 512(c) (2025).

246 *See generally Id.*

247 Chris Coons et al., *NO FAKES ACT one-pager*, COONS.SENATE.GOV, https://www.coons.senate.gov/imo/media/doc/no_fakes_act_one-pager.pdf (last visited Nov. 16, 2025).

the misuse of a person's likeness, voice, and identity on the Internet.[248] By codifying the right of publicity within the scope of the NO FAKES Act, Congress could finally protect this right and establish a legal framework similar to § 512(c).[249] Still, incorporation might not be necessary and could undermine First Amendment protections.[250]

Paradoxically, letting the misuse slide is a realistic solution since § 512(c) effectively reduces right of publicity infringement.[251] Inaction remains a solution, however, only until the first action is brought for DMCA misuse under § 512(f).[252] Therefore, the most pragmatic approach to fight against online infringement of the right of publicity may lie in private regulation through comprehensive additions to OSP terms of service and an OSP right of publicity take-down framework.

A. Hesitancy with Amending § 512(c) of the DMCA

Amending § 512(c) may seem like a straightforward and effective solution to the issue.[253] An amendment would address the misuse of the DMCA by clarifying that sending a take-down request for the right of publicity would no longer constitute a misapplication of § 512(c).[254] Additionally, these take-downs would not be subject to liability under § 512(f), and the barrier of state court expenses when safeguarding this right would become inconsequential.[255]

When amending § 512(c) of the DMCA, Congress could incorporate language explicitly acknowledging the right of publicity and formalizing it as a basis for holding an infringer liable.[256] The current statute reads as follows:

> [a] service provider shall not be liable for monetary relief . . . [or] injunctive relief or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider . . . .[257]

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248 *Id.*
249 *See generally Id.*
250 *See generally* Diana Wolf Torres, *The Copyright of You: Denmark's Radical Approach to AI and Identity*, DEEP LEARNING WITH THE WOLF (July 9, 2025), https://dianawolftorres.substack.com/p/the-copyright-of-you-denmarks-radical (on file with SIU Law Journal).
251 17 U.S.C. § 512(c) (2025).
252 17 U.S.C. § 512(f) (2025).
253 17 U.S.C. § 512(c) (2025).
254 *Id.*
255 *Id.*
256 *See generally Id.*
257 § 512(c)(1).

Congress could revise § 512(c) to state, for example, that "[a] service provider shall not be liable for monetary relief . . . for infringement of copyright *and the right of publicity* . . . ," thereby making misappropriation of the right of publicity actionable under the DMCA.[258] An amendment of this nature is a straightforward modification of § 512(c), which requires only a few additional words to the DMCA.[259] Nevertheless, it will guarantee an end to the relentless fight to protect the right of publicity on the Internet.[260]

This potential amendment, however, oversimplifies a much more intricate issue. Admittedly, copyright and the right of publicity are distinct legal concepts that should not be conflated within a single statutory framework.[261] For years, scholars have solidified the differences between a copyrightable work of authorship and a person's name, image, and likeness.[262] Even Melville Nimmer, who is a copyright expert and author of the renowned legal treatise *Nimmer on Copyright*, disagrees with the fusion of these two rights.[263]

Nimmer asserts that a persona is not actionable under copyright law because it is neither a written work nor contains authorship within the meaning of the Promotion Clause of the United States Constitution.[264] Case law across numerous jurisdictions also supports Nimmer's conclusion.[265] For instance, in *Downing v. Abercrombie & Fitch*, the Ninth Circuit Court of Appeals emphasized that both an individual's name and likeness do not qualify as a work of authorship under federal copyright law.[266] The Second Circuit Court of Appeals recently affirmed this principle in *Jackson v. Roberts*, where the court held that even stage names do not constitute works of authorship and are therefore not subject to copyright protection.[267]

Although, in theory, the statutory extension of the right of publicity to § 512(c) of the DMCA could be implemented with relative ease, doing so would risk undermining the well-established boundaries of copyright law that the United States courts have already carefully developed.[268]

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258 *See generally Id.*

259 § 512(c).

260 *See generally Id.*

261 *See, e.g.,* Downing v. Abercrombie & Fitch, 265 F.3d 994, 1004 (9th Cir. 2001).

262 *See, e.g.*, 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 8–10 (2013).

263 *Melville Nimmer*, IP HALL OF FAME, https://www.iphalloffame.com/melville_nimmer/ (on file with SIU Law Journal) (last visited Nov. 16, 2025); *see, e.g.*, NIMMER & NIMMER, *supra* note 262, at 8–10.

264 *Nimmer*, *supra* note 263; NIMMER & NIMMER, *supra* note 262, at 8–10.

265 *See, e.g., Downing*, 265 F.3d at 1004.

266 *Id.*; 17 U.S.C. § 102 (2025).

267 Jackson v. Roberts, 972 F.3d 25, 54 (2nd Cir. 2020).

268 *See, e.g., Downing*, 265 F.3d at 1004; *see also Jackson*, 972 F.3d at 54.

Consequently, amending § 512(c), while potentially effective, may not represent the most appropriate solution.[269]

B. Incorporation into the NO FAKES Act Overextends the Intended Scope

By directly targeting all misappropriations of names, images, and likenesses on the Internet, incorporating this right into the NO FAKES Act could address § 512(c) misuse without disrupting the DMCA or the foundations of copyright law.[270] Nevertheless, the scope of the NO FAKES Act remains narrowly defined.[271]

Initially introduced in 2024 and reintroduced in 2025, the NO FAKES Act is a bipartisan bill that safeguards the "voice and visual likeness" from unauthorized artificial intelligence and computer-generated recreations.[272] The Act imposes liability on individuals and entities that produce digital replications of others, such as deepfakes, or that provide platforms that facilitate the creation or dissemination of such content.[273] The Act also proposes a notice-and-takedown system based on § 512(c), but for artificial intelligence-generated replications of an individual's image and likeness.[274] Given its emphasis on artificial intelligence-generated content, the NO FAKES Act does not extend protection to the right of publicity.[275]

Other countries, however, have already taken substantial steps towards comprehensive protection for this right in the digital space.[276] In June of 2025, headlines announced that Denmark may become the first country in Europe to grant protection for a person's image and likeness.[277] Under the proposed legislation backed by Culture Minister Jakob Engel-Schmidt, an individual's face, voice, and body are treated as tangible and creative works,

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269 *See generally* 17 U.S.C. § 512(c) (2025).

270 The Act was introduced by Senators Chris Coons, Marshal Blackburn, Amy Klobuchar, and Thom Tillis, and Representatives Maria Salazar, Madeline Dean, Nathaniel Moran, Becca Balint, and Joe Morelle. *See* Coons et al., *supra* note 247; *see also Congresswoman Salazar Introduces the NO FAKES Act,* SALAZAR.HOUSE.GOV (Apr. 11, 2025), https://salazar.house.gov/media/press-releases/congresswoman-salazar-introduces-no-fakes-act-0 (on file with SIU Law Journal).

271 Coons et al., *supra* note 247.

272 *Id.*

273 *Id.*

274 Katharine Trendacosta & Corynne McSherry, *The NO FAKES Act Has Changed–and It's So Much Worse*, ELEC. FRONTIER FOUND. (June 23, 2025), https://www.eff.org/deeplinks/2025/06/no-fakes-act-has-changed-and-its-so-much-worse (on file with SIU Law Journal).

275 Coons et al., *supra* note 247; *see also Congresswoman Salazar Introduces the NO FAKES Act, supra* note 270.

276 *See, e.g.*, Torres, *supra* note 250.

277 *See generally id.*; *see generally* Miranda Bryant, *Denmark to Tackle Deepfakes By Giving People Copyright To Their Own Features*, THE GUARDIAN (June 27, 2025), https://www.theguardian.com/technology/2025/jun/27/deepfakes-denmark-copyright-law-artificial-intelligence (on file with SIU Law Journal).

which is comparable to works of authorship.[278] While equating the right of publicity with copyright law may be effective elsewhere, it likely remains an implausible solution for the United States.[279]

Unlike the United States, other countries do not have a strong First Amendment.[280] As currently written, the NO FAKES Act already faces intense criticism for stifling free speech and expression.[281] Leading arguments claim the NO FAKES Act is more aligned with establishing a censorship framework that undermines First Amendment protections than with preventing the misuse of digital likeness generated by artificial intelligence.[282] Broadening the scope of the NO FAKES Act to cover a wider range of expressive content is likely to exacerbate constitutional concerns rather than resolve them.[283] Accordingly, extending the NO FAKES Act to generally protect the right of publicity is likely to be an unviable solution.[284]

C. Letting It Slide

While it is an unsatisfying conclusion, allowing the current misuse of § 512(c) to persist may be a practical solution.[285] The author of this Note, admittedly, has been unable to identify a single case documenting a victim of online right of publicity misappropriation being sued or held liable under § 512(f) for wrongfully sending a take-down request.[286] The absence of case law or documentation addressing this issue suggests that misuse of § 512(c) may not be as significant a concern as this Note has portrayed it.[287]

Allowing the ongoing mischaracterization of federal copyright law may be advisable because it avoids disrupting the core principles of federal copyright law, preserves decades of established intellectual property common law, and protects the freedoms guaranteed by the First Amendment.[288] Although issuing take-down requests based on the right of publicity is technically unlawful, it is nevertheless effective since OSPs are legally obligated to comply. [289] Further, suppose the dreaded game of "whack-a-mole" ensues following reinstatement of the content under §

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278 Torres, *supra* note 250.
279 *See generally* Trendacosta & McSherry, *supra* note 274.
280 *See generally* U.S. CONST. amend. I.
281 *See, e.g.*, Trendacosta & McSherry, *supra* note 274.
282 *See, e.g.*, *Id.*
283 *See, e.g.*, *Id.*
284 *See, e.g.*, *Id.*
285 17 U.S.C. § 512(c) (2025).
286 §§ 512(c), (f).
287 § 512(c).
288 *See generally* NIMMER & NIMMER, *supra* note 262, at § 1.17[A]; Downing v. Abercrombie & Fitch, 265 F.3d 994, 1004 (9th Cir. 2001); U.S. CONST. amend. I.
289 § 512(c).

512(g)'s counter-notification process.[290] In that case, action in state court may be rightfully justified and should be pursued.[291]

While letting the misuse slide may seem like a practical approach for now, it remains a precarious solution and is vulnerable to collapse under increased legal scrutiny. This approach fails when someone finally decides to challenge a copyright misrepresentation in a take-down request under § 512(f).[292]

D. Private Ordering as a Pragmatic Path: A Framework for OSPs.

Although doing nothing and allowing the misuse to continue may temporarily resolve the issue, the real solution is neither legislative nor litigious. It is administrative, practical, and almost boringly modern: let the OSPs handle it themselves. The same intermediaries that enforced a copyright compliance machine under the DMCA can add another queue to their content moderation dashboards, such as a right of publicity take-down channel.[293] The remainder of this Note will encourage the development of an OSP-based mechanism for removing online content that infringes upon the right of publicity and will describe a potential framework for this system.

1. The Case for OSP Self-Governance

The implementation of right of publicity protections, through OSP terms of service, and a dedicated right of publicity take-down channel, similar to the DMCA, provides a straightforward way to safeguard publicity rights without disrupting doctrinal principles of copyright law, threatening the freedoms of the First Amendment, or calling for federal overreach by heavily restricting online content.[294]

While OSPs already include language in their terms of service that protects users' rights, these statements are too general and afford no direct remedy for right of publicity violations on OSP platforms.[295] For example, Meta's Terms of Service state that users may not use their products for purposes that infringe or violate "someone else's rights, including their

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290 § 512(g).

291 § 512(g).

292 *See generally* § 512(f).

293 *See generally* § 512.

294 *Nimmer, supra* note 263; NIMMER & NIMMER, *supra* note 262, at § 1.17[A]; *see, e.g.,* Downing v. Abercrombie & Fitch, 265 F.3d 994, 1004 (9th Cir. 2001); Trendacosta & McSherry, *supra* note 274.

295 *Facebook Terms of Service*, META (Jan. 1, 2025), https://www.facebook.com/terms/ (on file with SIU Law Journal).

intellectual property rights, unless an exception or limitation applies under applicable law."[296]

Apart from being broadly included in the language prohibiting the violation of "someone else's rights," the right of publicity does not explicitly appear within Meta's Terms of Service. Further, the right of publicity is neither traditionally regarded nor should be classified as an intellectual property right in the United States.[297]

This right of publicity take-down channel and an update to OSP terms of service would consolidate existing policing efforts through OSP terms of service policies, brand-safety standards, and Federal Trade Commission-inspired rules regarding deceptive endorsements into recognized and enforceable online protection for the right of publicity.[298] Therefore, the best solution likely lies in an institutional design, not a statutory revolution, that provides right of publicity victims with a standardized, lawful path to remove online content.

2. Crafting a Framework that is Narrow, Procedural, and Speech-Sensitive

A private-ordering solution must satisfy three foundational requirements. First, the take-down system must define a narrow, objective scope limited to the right of publicity. Given that the right of publicity varies by jurisdiction, this take-down system will need clear and uniform definitions of what constitutes the right of publicity and infringing conduct. These definitions must also draw a clear distinction between online expression protected by the First Amendment and conduct that wrongfully exploits another's name, image, and likeness for commercial gain.[299]

The system must also recognize procedural fairness and provide notice, counter-notice, and opportunities for appeals similar to § 512(c) of the DMCA.[300] Allowing an appeals process after removing online content is crucial to ensuring that established intellectual property defenses, such as

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296 *Id.*

297 *Id.*; NIMMER & NIMMER, *supra* note 262, at § 1.17[A]; *see, e.g., Downing*, 265 F.3d at 1004.

298 *See, e.g., Facebook Terms of Service*, *supra* note 295; *Federal Trade Commission Announces Final Rule Banning Fake Reviews and Testimonials*, FED. TRADE COMM'N (Aug. 14, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/08/federal-trade-commission-announces-final-rule-banning-fake-reviews-testimonials (on file with SIU Law Journal).

299 *See generally Online speech and the First Amendment: Ten Principles from the Supreme Court*, BRENNAN CTR., https://www.brennancenter.org/sites/default/files/analysis/First_Amendment_Principles_2019-FINAL_Interactive_O0JA9oV.pdf (last visited Nov. 8, 2025) (on file with SIU Law Journal).

300 *See, e.g.,* 17 U.S.C. § 512 (2025).

parody, commentary, and news reporting, remain protected.[301] Without a meaningful opportunity for review, the right of publicity take-down channel risks removing expressive or journalistic content that serves the public interest.[302] By enabling independent users to contest take-downs, the right of publicity take-down channel reinforces due process principles while maintaining a delicate balance between protecting the right of publicity and First Amendment freedoms.[303]

The right of publicity take-down system must also align with existing legal and regulatory frameworks, particularly the Federal Trade Commission's Endorsement Guides and the Lanham Act's prohibition of false association.[304] According to the Federal Trade Commission, endorsements must be "honest and not misleading."[305] Additionally, the Lanham Act imposes civil liability for false associations with goods or services, like the fake CNN article's use of Joanna Gaines' name, image, and likeness.[306] By complementing these fundamental principles of integrity with false association and endorsements, the right of publicity take-down channel would adhere to established legislative and regulatory frameworks while extending protections directly to the right of publicity on the Internet.[307]-

3. The Right of Publicity Take-Down Channel: From Complaint to Closure

The following proposal follows this blueprint and resembles an internal code of commercial ethics rather than a censorship mechanism. It describes a take-down pipeline that an OSP could realistically implement, model terms of service language to embed the take-down system, and a standardized form that claimants could complete. These three components of the right of publicity take-down channel illustrate a fully operational system that any major OSP could introduce today.

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301 *5 Best Defenses Against Copyright Infringement Claims*, TAULER SMITH LLP, https://www.taulersmith.com/5-best-defenses-against-copyright-infringement-claims/ (last visited Nov. 8, 2025) (on file with SIU Law Journal).

302 *Id.*

303 *See generally Online speech and the First Amendment: Ten Principles from the Supreme Court*, *supra* note 299.

304 *FTC's Endorsement Guides*: *What People Are Asking*, FED. TRADE COMM'N, https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking (last visited Nov. 8, 2025) (on file with SIU Law Journal); 15 U.S.C. § 1125(a) (2025).

305 *FTC's Endorsement Guides*: *What People Are Asking*, *supra* note 304.

306 § 1125(a).

307 *FTC's Endorsement Guides*: *What People Are Asking*, *supra* note 304; § 1125(a).

a. An Entry Point

The first component of the right of publicity take-down channel requires OSPs to include a conspicuous link within their legal help centers, enabling users to report content that infringes upon their right of publicity.[308] This link, possibly titled "Report Unauthorized Commercial Use of Name, Image, Likeness, or Voice," should be distinct from the existing DMCA § 512(c) take-down process since the right of publicity is not actionable under the DMCA's framework.[309] Establishing a separate reporting pathway ensures claims involving identity misuse are addressed appropriately without conflating them with copyright disputes, perhaps restoring efficiency to the DMCA.[310]

When users select the link to report a right of publicity violation, the page should include clear language explaining that this claim is separate from copyright infringement and has its own take-down process.[311] It should also provide a direct link to the § 512(c) copyright take-down page for users seeking to file a DMCA notice instead.[312] By introducing this novel link for right of publicity infringement submissions, users are no longer compelled to misrepresent their concerns as copyright infringements to obtain a viable remedy.[313]

b. A Model Right of Publicity Notice Form

After accessing the right of publicity take-down link and acknowledging the distinction between copyright and right of publicity claims, users must then complete a take-down request form verifying, to the best of their knowledge, that particular content infringes their right of publicity.[314] Implementing a user-submission form akin to Meta's for

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308 *See, e.g., Report copyright or trademark infringement*, META, https://www.meta.com/help/quest/338797151731710/?srsltid=AfmBOoo9nm5FZgQeCgTvdXgsiZ1_vzaZn_7sWqQFmG2jw7YtY9up8XQd (last visited Nov. 8, 2025) (on file with SIU Law Journal) (providing an example of a take-down informational page and submission link).

309 *Nimmer*, *supra* note 263; NIMMER & NIMMER, *supra* note 262, at § 1.17[A]; *see, e.g.,* Downing v. Abercrombie & Fitch, 265 F.3d 994, 1004 (9th Cir. 2001).

310 U.S. COPYRIGHT OFF., *supra* note 13, at 37 (citing Association of American Publishers, Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015, Notice of Inquiry at 5 (Apr. 1, 2016)).

311 17 U.S.C. § 512(c) (2025).

312 *Id.*

313 *Id.*

314 *See, e.g., Report copyright or trademark infringement*, *supra* note 308 (providing an example of a take-down informational page and submission link).

copyright infringement would be the best course of action, as it provides a straightforward and user-friendly process.[315]

Upon clicking the submission link, users should be directed to a page initiating the notice-and-takedown process.[316] This page should prompt users to identify the specific aspect of their right of publicity they believe has been infringed.[317] A drop-down menu should offer options for name, image, likeness, and voice, and allow users to select one or multiple categories if more than one element of their persona has been misused.[318]

After selecting the relevant option from the menu, the form should prompt users to provide essential contact information, including the user's name, mailing address, and email address.[319] The user should also supply details identifying the rights holder, specifying the nature of the right believed to be infringed, and the location where the infringement occurred.[320] Most importantly, the form should also require the submission of a direct link to the content that allegedly violates the user's right of publicity.[321]

Finally, the form should require users to provide a brief explanation of how the identified content infringes their right of publicity and to electronically sign a declaration statement.[322] This declaration should affirm that users have a good-faith belief that the reported use of their name, image, likeness, or voice violates the platform's terms of service, which should also prohibit the unauthorized commercial use of the right of publicity.[323]

c. The Designated Agent & First Review

Mirroring the DMCA's requirement that OSPs appoint an agent to handle § 512(c) take-down notices, the right of publicity take-down channel should also designate a similar agent, or even the same agent, to review and process these claims.[324] When determining whether to immediately remove content upon submission of a right of publicity take-down notice, the

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315 *Meta Quest, Meta AI App Discover Feed, and Meta AI Sources Intellectual Property Contact Form*, META, https://help.meta.com/requests/500431086333154 (last visited Nov. 4, 2025) (on file with SIU Law Journal).

316 *See, e.g., Report copyright or trademark infringement*, *supra* note 308.

317 *See, e.g., Meta Quest, Meta AI App Discover Feed, and Meta AI Sources Intellectual Property Contact Form*, *supra* note 315.

318 *See, e.g., id.*; *see generally* Midler v. Ford Motor Co., 849 F.2 d 460, 463 (9th Cir. 1988).

319 *Meta Quest, Meta AI App Discover Feed, and Meta AI Sources Intellectual Property Contact Form*, *supra* note 315 (referencing user contact information as part of intellectual property contact form).

320 *See, e.g., Id.*

321 *See, e.g., Id.*

322 *See, e.g., Id.* (requesting that users identify content the user wants to report. The form contains a declaration statement requesting that the user declare that the form is submitted in good faith.).

323 *See, e.g., Id.* (requesting that the user declare that the form is submitted in good faith).

324 *See generally* 17 U.S.C. § 512(c) (2025).

designated agent's initial question is binary: is the use of a name, image, likeness, or voice commercial in nature or evokes the claimant's persona in a way that implies endorsement or affiliation?

Commercial content would likely include call-to-action buttons such as "shop now" or "join today," price tags, affiliate codes, or links to external storefronts, as seen with the keto gummy website that used Joanna Gaine's name and likeness for profit.[325] If commercial intent is apparent, the designated agent should immediately remove the content from the OSP's platform.[326] By contrast, content that does not involve a commercial use lies beyond the scope of a right of publicity action and does not necessitate immediate removal.[327] Further, removal would also be warranted if the alleged content appears to include a false endorsement or affiliation.[328]

d. Counter-Notice

In accordance with the DMCA, after allegedly infringing content is removed from a platform, the accused uploader should receive a digital notice from the OSP that details the claim and links to a counter-notice form that can be submitted to the OSP.[329] In line with the DMCA's counter-notice framework, the process should permit the alleged infringer to formally contest the take-down by providing their contact information and a statement explaining why, in good faith, the content does not infringe upon any individual's right of publicity.[330]

The alleged infringer should also classify disputed content according to the affirmative defenses to the right of publicity, including the absence of commercial profit, non-commercial uses such as news reporting, public affairs, sports, or commentary, and uses made with the rights holder's consent.[331] Upon receiving a counter-notice, the designated agent may be obligated to restore the removed content for good reason.[332]

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325 JOANNA GAINES GUMMIES, *supra* note 7; *Right of Publicity*, *supra* note 156.

326 *Right of Publicity*, *supra* note 156.

327 *Id.*

328 *See generally Id.*

329 *See* § 512(g).

330 *See generally Id.*

331 Aaron Minc, *What is the Right of Publicity?*, MINC LAW (Oct. 26, 2025), https://www.minclaw.com/legal-resource-center/what-is-right-of-publicity/#:~:text=Defenses%20for%20the%20Right%20of,from%20one%20to%20three%20years (on file with SIU Law Journal).

332 *See* § 512(g).

e. Sanctions

To deter repeat infringers and fraudulent actors, OSPs should impose penalties on users who repeatedly violate others' right of publicity online.[333] Such sanctions should entail both the deletion of infringing material and the disabling of accounts that repeatedly exploit an individual's name, image, likeness, or voice for commercial purposes without authorization.[334]

Enforcing consequences for violations of the right of publicity is essential to maintaining the integrity of the right of publicity take-down channel.[335] These sanctions would discourage misuse of the right of publicity framework and exploitation of OSP platforms.[336]

The suspension or banning of accounts that repeatedly infringe also protects rights holders from ongoing harm, such as unauthorized commercial gain and reputational damage.[337] Consistent enforcement of these measures also reinforces user trust in OSPs, assuring individuals that their identities are respected and protected online.[338] By pairing content removal with account penalties, OSPs can more effectively prevent chronic infringers from abusing the system, reduce the administrative burden of repeated take-down requests, and create a safer and more reliable digital environment.[339]

4. Model Policy Language for OSP Terms of Service

To implement the right of publicity take-down channel, OSPs should amend their terms of service to incorporate this mechanism directly into the platform's governance framework.[340] An amendment could be simple, consisting of only a brief statement indicating that violations of the platform's right-of-publicity policy will result in sanctions.[341]

An OSP can define the right of publicity as "the unauthorized commercial use of a person's name, image, likeness, or voice," reflecting the established elements recognized under common law.[342] Additionally, the

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333 *See generally Repeated intellectual property infringement on Facebook*, FACEBOOK, https://www.facebook.com/help/350712395302528 (on file with SIU Law Journal) (last visited Oct. 26, 2025).

334 *See generally Right of Publicity*, *supra* note 156.

335 *See generally Repeated intellectual property infringement on Facebook*, *supra* note 333.

336 *See generally Restricting accounts*, META (Nov. 12, 2024), https://transparency.meta.com/enforcement/taking-action/restricting-accounts/ (on file with SIU Law Journal).

337 *See generally Right of Publicity*, *supra* note 156.

338 *See generally Restricting accounts*, *supra* note 336.

339 *See generally Id.*

340 *See, e.g., Terms of Service,* META (Jan. 1, 2025), https://www.facebook.com/terms/ (on file with SIU Law Journal).

341 *See, e.g., Id.*

342 *Right of Publicity*, *supra* note 156.

new right of publicity provision could simply prohibit users from infringing on this right.[343] These two additional terms would effectively and concisely incorporate the right of publicity into any terms of service.

For instance, this definition and right of publicity provision can be seamlessly integrated into Meta's Terms of Service. Meta's Terms of Service broadly protects against users' rights, and section 3.2(1) could state that users may not engage in conduct:

> "That infringes or violates someone else's rights, including their intellectual property rights (such as by infringing another's copyright or trademark, or distributing or selling counterfeit or pirated goods, *and their right of publicity or the unauthorized commercial use of a person's name, image, likeness, or voice),* unless an exception or limitation applies under applicable law.[344]

The inclusion of these provisions would integrate the right of publicity take-down channel directly into OSP platforms, finally offering adequate, realistic, and practical protection for the right of publicity on the Internet.

CONCLUSION

The rampant misuse of § 512(c) for the right of publicity does not require urgent intervention by Congress or the courts.[345] It does not even require reinterpreting established federal copyright law, common law, or First Amendment freedoms.[346] Instead, the solution likely lies in the good-faith private ordering of OSPs to regulate the right of publicity independent of federal coercion or incentives through the establishment of a right of publicity take-down channel. Such a framework would alleviate strain on the DMCA's § 512(c) notice-and-takedown system for copyright claims, avoid misrepresentation of liability under § 512(f), and effectively curb the unauthorized use of names, images, likenesses, and voices online.[347] So, who wins the fight to protect the right of publicity through § 512(c) of the DMCA?[348] For now, the answer is neither you nor me.

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343 *Id.*

344 *Terms of Service, supra* note 340.

345 17 U.S.C. § 512(g) (2025).

346 *Nimmer*, *supra* note 263; NIMMER & NIMMER, *supra* note 262, at 8–10; *see, e.g.,* Downing v. Abercrombie & Fitch, 265 F.3d 994, 1004 (9th Cir. 2001); *see, e.g.*, Trendacosta & McSherry, *supra* note 247.

347 §§ 512(c), (f).

348 § 512(c).